ALRC 80

Legal risk in international transactions

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Commission Reference: ALRC 80

The Australian Law Reform Commission was established by the *Law Reform Commission Act 1973*. Section 6 provides for the Commission to review, modernise and simplify the law. It started operation in 1975.

Terms of reference

CROSS BORDER CIVIL REMEDIES

Law Reform Commission Act 1973

1. I, MICHAEL LAVARCH, Attorney-General of Australia, HAVING REGARD TO:

- the need for a fair, efficient and effective legal system;
- concerns that have been raised about the effectiveness of remedies available to companies, firms and individuals, including shareholders and creditors, where assets are held or transferred outside Australia;
- the need for effective civil remedies for claims arising out of civil and commercial transactions that involve other countries as well as Australia;

REFER to the Law Reform Commission under the *Law Reform Commission Act 1973*:

(a) civil remedies available under Australian law for claims arising out of civil or commercial transactions that involve, or require enforcement in, other countries besides Australia,

(b) other civil remedies available for those types of transactions under multilateral and bilateral international instruments or arrangements to which Australia is or could be a party.

2. THE COMMISSION is to review and consider those remedies and report on the feasibility of the systematic development and reform of the law in relation to those remedies. That feasibility report shall include:

(a) a summary of what those remedies are,

(b) a summary of any significant difficulties that have been experienced in pursuing any of those remedies,

(c) a preliminary identification of areas in which there is an absence of appropriate remedies,

(d) a summary of existing initiatives within the Commonwealth Government to seek improved or additional remedies,

(e) a preliminary identification of any other or further initiatives that are necessary or desirable for that purpose, and the areas of Commonwealth Government in which those initiatives might be pursued having regard to existing responsibilities,

(f) an identification of the scope for the Commission to review and report further on the potential for improved or additional remedies, either separately or in conjunction with the areas of government identified under (e).

3. THE COMMISSION shall focus in its feasibility report on the following types of cases:

(a) debt recovery from an individual debtor where the debtor or the debtor's major assets are located (or believed to be located) outside Australia,

(b) corporate insolvency where the corporation has assets both within and outside Australia, and those in effective control of the corporation may be outside Australia,

(c) the misappropriation and transfer overseas of property of an institution or fund,

(d) breach of contract claims arising under a contract governed by Australian law where the debtor is located overseas,

(e) negligence or other tort claims arising from commercial transactions where the injury is suffered by an Australian resident but the tort occurs outside Australia, and

(f) breach of fiduciary or statutory duty where the duty is owed under Australian law but the breach occurs outside Australia.

4. THE COMMISSION shall also focus in its feasibility report on the implications of those types of cases where the overseas jurisdictions involved are one or more of:

(a) a low tax jurisdiction (taking the Cook Islands as an example),

(b) a jurisdiction with strict bank secrecy laws (taking Switzerland as an example),

(c) a jurisdiction with reciprocal enforcement of judgment arrangements with Australia,

(d) a jurisdiction without reciprocal enforcement of judgment arrangements with Australia,

(e) a jurisdiction without comparable corporate regulation (taking Vietnam as an example),

(f) a common law jurisdiction (taking California, USA as an example),

(g) a civil code jurisdiction (taking Germany as an example), and

(h) a mixed law jurisdiction (taking Indonesia as an example).

5. THE COMMISSION shall consider, among other matters:

(a) the impact of Australia's participation in international trade and international financial markets on the types of civil and commercial claims that may arise,

(b) the implications of electronic banking, clearing systems and international communications for the effectiveness of current remedies,

(c) the extra-territorial application of relevant Australian laws,

(d) jurisdictional limits, including issues relating to service of process and anticipatory injunctions, and

(e) the application of Commonwealth law in Australia's external territories.

6. THE COMMISSION shall not review procedures for confiscation of assets under the *Proceeds of Crime Act 1987* or the law relating to the collection of revenue.

7. THE COMMISSION shall, in performing its functions in relation to this reference, consult:

(a) the Attorney-General's Department and other relevant Commonwealth departments and agencies, including AUSTRAC

(b) Insolvency and Trustee Service, Australia and insolvency practitioners,

(c) Australian Bankers Association, International Banks and Securities Association, Australian Stock Exchange, Sydney Futures Exchange, Reserve Bank of Australia, Australian Securities Commission and others involved in the finance and securities markets,

(d) Austrade, Business Council of Australia, Chambers of Commerce and other associations of Australian exporters and importers,

(e) Law Council of Australia and legal practitioners, and

(f) international organisations responsible for, or with expertise in, the international instruments and arrangements referred to above, and others with relevant expertise in the jurisdictions referred to above.

8. THE COMMISSION shall have regard to previous Law Reform Commission or other reports relevant to this topic, and any government steps taken to implement them, including reports on:

(a) Foreign State Immunity (ALRC 24),

(b) Debt Recovery and Insolvency (ALRC 36),

(c) Service and Execution of Process (ALRC 40),

(d) General Insolvency Inquiry (ALRC 45),

(e) Choice of Law (ALRC 58).

9. IN MAKING its feasibility report the Commission shall also have regard to its function in accordance with section 6(1)(d) of the *Law Reform Commission Act 1973* to consider and present proposals for uniformity between the laws of the Territories and laws of the States.

10. THE COMMISSION is required to make its feasibility report by 30 June 1996.

Dated 19 July 1995

Michael Lavarch
Attorney-General

Overview

International commerce and law reform

This report is about the legal problems faced by Australian business in international commerce. It is a feasibility report assessing the scope for law reform in this area. The report focuses on civil remedies in international commerce and their implications for reform.

The feasibility of systematic reform

The Commission was asked in its terms of reference to review an aspect of Australian law not previously considered as a separate topic - the civil remedies available to Australian firms in international commercial transactions. The Commission was asked to review their effectiveness and report on whether it is feasible to systematically develop and reform the law in relation to those remedies.

The Commission's conclusion is that it is both feasible and necessary to do so.

Specific problems and legal risk

This conclusion reflects two considerations.

The first is the specific problems with civil remedies and related issues that were raised with the Commission during the inquiry. These highlight the need for reform across a broad range of procedural and substantive areas of law. In a number of cases the specific problems are caused by systemic failure.

The second consideration is the underlying legal risk in international transactions. It was evident from submissions and consultations that Australian firms face much more legal uncertainty and difficulty in their international transactions than they do in their domestic transactions.

This can only be effectively addressed through systematic reform. It needs work not only on civil remedies and litigation procedures but also on international agreements concerning substantive law principles and on non-legal solutions. Systematic reform is needed to get the balance right and to ensure that cross border legal issues are addressed promptly and effectively.

Specific reforms

A number of specific cross border legal issues were raised with the Commission by Australian firms trading and investing outside Australia, by lawyers, by government agencies and by others interested in Australia's international commerce.

Some of these issues concerned procedural difficulties in litigation, arbitration or insolvency administration. Australian firms have difficulty in initiating legal proceedings through service of process outside Australia, in obtaining evidence overseas and in getting it admitted in Australia, and in freezing assets pending a hearing.

Other issues concerned substantive law. In relation to finance law there are issues about international payments systems, the law on set off, tracing and restitution, bank confidentiality and privacy, and security interests in property outside Australia. There are also many legal issues concerning electronic commerce, including intellectual property, content regulation and liability, evidentiary and data security issues.

Some of the procedural issues can be addressed quickly with limited further consultation. The other issues will require more extensive analysis and consultation.

The specific reforms, or issues for reform, that need attention are set out in the summary of recommendations that follows this overview.

Legal risk in international transactions

Civil remedies and broader legal issues

Difficulties in obtaining effective civil remedies are part of a broader range of legal issues faced by Australian firms in their international transactions.

Some of these issues relate to the need for legal back up and certainty on commercial risks such as non-payment, difficulties in returning defective goods or in recovering property, and uncertainty in the rights and responsibilities of traders or investors in a market.

Other issues relate to direct legal risks, such as the impact of two or more differing legal systems on a particular business or transaction. This can result in complexity and uncertainty in regulatory requirements.

These issues need direct attention. They create costs and delay. They need to be reviewed and addressed as part of the government and business work supporting Australia's international trade and investment.

The work required

Some work is required on litigation and other formal dispute resolution mechanisms. It can be important to have litigation, arbitration or another dispute resolution mechanism available as an option for dealing with cross border risks. To make them a more viable option the procedural difficulties and barriers that bedevil them need ongoing attention and reform.

A greater part of the work should be focused on how the law can support cross border transactions when there is no dispute. Cross border disputes emerge and result in litigation only in the rare cases where a transaction has gone badly wrong and there is enough money at stake for the parties to seek redress through the courts. The law provides support for many more transactions through the rights and responsibilities set out in commercial laws and the government and private sector administrative systems required to apply those laws and ensure compliance.

To develop this support, further work is needed on the international agreements that set out the substantive principles and regulatory arrangements that are applied to international commerce. Looked at from an international perspective, the commercial laws supporting cross border transactions are patchy and incomplete. There is scope for further bilateral arrangements and some regional and other multilateral initiatives.

Work is also required on non-legal solutions. Even where the laws exist on the statute book, they are sometimes poorly implemented. The solution may be more resources for implementing existing laws or it may be outside the legal system altogether - for example, a new technology or commercial arrangement that removes the risk that previously the law was being asked to address.

Systematic reform

Business and government input

Systematic reform in this area will require a mix of business and government input. The priorities, timing and options considered should be driven by Australian business requirements and perspectives. However, since it is law reform it will be primarily government work. It will stretch across a number of portfolios, including the Attorney-General's Department, the Treasury and the Department of Foreign Affairs and Trade.

To obtain the right inputs and focus, the Commission recommends that an advisory committee should be established to put an agenda and particular recommendations for action to the government. This will be a key element in ensuring that cross border legal issues are addressed promptly and effectively and with the right priorities from an Australian business perspective. In this report this committee is called the International Commercial Law Advisory Committee.

The advisory committee should report to the Attorney General, the Treasurer and the Ministers for Foreign Affairs and Trade, jointly. It should be comprised entirely of business leaders and supported by a small, standing secretariat. It should have a three year term. For success to be achieved there must be understanding and empathy between government and Australian international business.

The benefits of systematic reform

Australian firms tend to put cross border legal issues into the too hard' basket. A number commented during the inquiry that they were pleasantly surprised that something was being done about them. A major benefit of systematic reform in this area is that it will bring these issues out of the too hard basket and provide an Australian business perspective on how to deal with them.

This is ongoing work of long term benefit. In general terms it will assist in reducing country and political risk and will have a bottom line impact through the greater opportunities and reduced transaction costs that result from reduced risk.

More specifically, systematic reform will help in identifying the Australian priorities for international legal work, the costs and benefits to Australian firms of particular options, and specific country risk programs. This will enable Australia's work on these issues to be more cost effective.

Timetable, costs and priorities

The further work recommended in this report can be divided for timing and priority purposes into five areas

- the International Commercial Law Advisory Committee
- short term cross border litigation reform
- long term cross border litigation reform
- finance law reform
- the electronic commerce safe haven project.

The advisory committee and the short term cross border litigation reform should have the highest priority.

The short term litigation reforms should be addressed immediately. They are essentially technical and will require only limited further consultation, primarily with legal practitioners and the courts. The costs should be low since the procedures for consulting on and implementing reforms of this kind are well established in the Attorney-General's Department.

The advisory committee should be established as soon as possible. It is the key element in developing the proper focus and priorities for systematic reform. The structure of the committee is intended to be similar to bodies such as ILSAC and CASAC and its annual costs can therefore be expected to be in the same range as the annual costs of those bodies.

The long term cross border litigation reforms, finance law reform and safe haven' project are each stand alone projects. They can each be budgeted as equivalent to an 18 month reference to the Australian Law Reform Commission. In terms of priority the Commission would rank them in the following order: first, the safe haven' project; second, the finance law reform; third, the long term cross border litigation reforms.

Ongoing work by the Commission

The terms of reference require the Commission to report on the scope for the Commission to review and report further on the matters addressed in this report.

The Commission is in a position to contribute to all of the further work set out above but suggests that the task to which it is best suited is the finance law reform. This will require an inquiry and report of the kind usually undertaken by the Commission. In relation to the other areas of work

- the advisory committee is by its nature a separate body bringing business experience and expertise directly to the federal government's work on cross border legal issues - it should therefore be established directly by the Attorney-General in consultation with the Treasurer and the Ministers for Foreign Affairs and Trade

- the short term and long term cross border litigation reforms will require consultation and inquiry of a kind ordinarily undertaken by the Attorney-General's Department

- the safe haven' project will involve a detailed examination of regulatory issues and practices, many of which will fall within the Treasurer's portfolio - it is suggested therefore that this should be undertaken by a working group established for that purpose jointly by the Attorney-General and the Treasurer.

These suggestions are reflected in the recommendations in this report.

The report

Chapter 1 of this report introduces the inquiry and its main conclusions and themes and outlines the Commission's methodology. The balance of the report is in two parts.

Part I sets out the Commission's findings and recommendations on improving Australian law on cross border civil remedies, including systematic reform directed more broadly at cross border risks.

Part II outlines Australian law and practice on cross border litigation and arbitration and gives an overview of relevant international agreements and arrangements. These chapters address the specific issues raised in sections 2 and 3 of the terms of reference and also provide background information to the comments in Part I.

Summary of recommendations

Topics

This report makes recommendations on four topics

- an International Commercial Law Advisory Committee
- cross border litigation reform
- finance law reform
- electronic commerce.

International Commercial Law Advisory Committee

Advisory committee

It is recommended that a business advisory committee should be established to advise the government on options, priorities and timing for reforms relating to cross border legal issues (***recommendation 1***).

Structure and staffing

The recommended structure and staffing of that committee are as follows

- the advisory committee should report to the Attorney-General, the Treasurer and the Ministers for Foreign Affairs and Trade, jointly (***recommendation 2***)
- the advisory committee should be comprised entirely of business leaders, with participants from each industry sector that is involved in Australia's international trade and investment (***recommendation 3***)
- the advisory committee should be supported by a small, standing secretariat (***recommendation 3***)
- the advisory committee should be reviewed by the Attorney-General after it has been in operation for three years to determine whether it should continue for any further period (***recommendation 4***).

Work program

The committee should be free to determine its own work program. Nonetheless it is recommended that it should prepare for government an agenda for reform to better facilitate the growth of Australian international business at lower legal risk and as part of its work the committee should report on certain specific issues, namely

- the priority to be given to the adoption in Australian law of UNCITRAL, Hague Conference, Unidroit and other conventions which have not yet been ratified, and to the international legal initiatives in which Australia is participating (***recommendation 5***)
- the procedures to be adopted by the federal government to ensure that Australia's international agreements are regularly reviewed and proposals for amendment are regularly considered (***recommendation 5***)
- any new international initiatives, including non-legal initiatives, which Australia should promote or in which Australia should participate to help address cross border legal issues (***recommendation 5***)

- the potential for direct judicial cooperation and communication between Australian and New Zealand courts on trans-Tasman insolvencies with a view to streamlining the administration of those insolvencies (***recommendation 7***)

- the potential for cross border legal risk to be reduced by regional law reform initiatives in the Asia Pacific region (***recommendation 8***).

As a related matter it is recommended that the Minister for Transport should review, as a matter of priority, whether Australia should ratify the *Convention on the International Recognition of Rights in Aircraft* (Geneva Convention 1948) (***recommendation 6***).

Cross border litigation reform

It is recommended that the Attorney-General should refer to his Department the issues and proposals for reform set out in the chapter on litigation, arbitration and insolvency (***recommendation 29***).

Short term reforms

It is recommended that the following *proposals* for reform should be circulated to the legal profession and the courts for discussion as soon as possible with the aim of forming a final view within six months (***recommendation 31***). Those proposals are that

- Australia should accede to the Hague Convention on Service Abroad (***recommendation 9***)

- rules of court should expressly authorise extraterritorial service of process for claims against a foreign defendant as a constructive trustee where the liability is alleged to arise out of acts which, viewed as a whole, have been substantially committed within the Australian jurisdiction (whether by the defendant or otherwise) (***recommendation 10***)

- there should be statutory clarification of the meaning of a choice of Australian law' or Australian courts' in a cross border contract (***recommendation 12***)

- the *Foreign Evidence Act 1994* should be amended to allow documentary evidence located outside Australia to be obtained through letters of request to foreign authorities where they are *not* part of a request for oral testimony (***recommendation 13***)

- there should be statutory clarification of the meaning of civil or commercial' in Australian legislation that authorises Australian courts to recognise and respond to foreign letters of request (***recommendation 16***)

- the *Foreign Evidence Act* should be amended to give the court a discretion to admit in any civil proceedings material that has been obtained by the Attorney-General or the ASC under mutual assistance arrangements and that may properly be released under those arrangements to a litigant in those civil proceedings (***recommendation 17***)

- the *Foreign Evidence Act 1994* or the *Evidence Act 1994* should be amended to provide for the admissibility of material obtained outside Australia under letters of request or other investigatory procedures provided for under the Bankruptcy Act or the Corporations Law (***recommendation 24***)

- amendments should be made to the International Arbitration Act to clarify the principles applying where the parties opt out of the UNCITRAL Model Law and any related technical issues (***recommendation 28***).

Long term reforms

It is recommended that the *issues* for reform should be considered in the context of more extensive consultation with the legal profession, the courts and the business community (including consultation with the advisory committee) (***recommendation 29***). Those issues are

- the potential for direct judicial cooperation between Australian and non-Australian courts where a dispute gives rise to overlapping jurisdiction, and the potential for statutory clarification of the rules relating to forum non conveniens (***recommendation 11***)

- the potential to supplement current evidence taking procedures under the *Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters* through bilateral arrangements (***recommendation 14***)

- whether statutory provisions are needed to clarify the judicial assistance available in Australian courts for foreign letters of request, and the capacity of foreign lawyers to conduct examinations of witnesses in Australia under the letter of request procedure (***recommendation 15***)

- how Australian law and court procedures should take account of bank secrecy and confidentiality requirements in disclosure orders and letters of request (***recommendation 18***)

- the potential for bilateral agreements or other international arrangements to extend the effectiveness outside Australia of Mareva injunctions, Anton Piller orders and other protective orders made by Australian courts (***recommendation 19***)

- whether the jurisdiction of Australian courts to grant Mareva injunctions should be extended in accordance with the principles set out in sections 24 and 25 of the *Civil Jurisdiction and Judgments Act 1993 (UK)* (***recommendation 20***)

- whether Australian courts should be given express powers to make orders restraining a defendant from leaving Australia where that is necessary to enable the proper conduct of civil proceedings against the defendant (***recommendation 21***)

- the practicality of Australia seeking to become a party to the Lugano Convention (***recommendation 22***)

- the basis on which arrangements for mutual assistance in bankruptcy and insolvency investigations could be extended and improved, considering in particular bilateral arrangements to supplement UNCITRAL's work on this topic (***recommendation 23***)

- the scope to change mutual assistance arrangements and memoranda of understanding with a view to streamlining procedures under which foreign government agencies may permit disclosure of relevant information to third party trustees in bankruptcy and liquidators (***recommendation 25***)

- whether the Corporations Law should be amended in relation to the extraterritorial operation of the voidable transaction provisions (***recommendation 27***).

Foreign judgments and insolvency

It is also recommended in relation to cross border litigation and related issues that the Attorney-General should give a high priority to Australia's participation in the UNCITRAL Working Group on Insolvency and the work of the Hague Conference on a multilateral convention on the recognition and enforcement of foreign judgments, and should continue Australia's bilateral negotiations on the recognition and enforcement of foreign judgments (***recommendations 22 and 26***).

Finance law reform

It is recommended that the Attorney-General should refer to the Australian Law Reform Commission Australia's laws and regulatory practices relating to cross border financial transactions with a view to reporting within two years on the priority areas for reform recommended in the chapter on finance and electronic commerce (***recommendation 30***).

It is recommended that under its finance law reference the ALRC should report on

- Australian law on netting and set off - netting should only be considered in relation to cross border transactions *not* covered by CASAC s recommendations on netting (***recommendation 31***)

- Australia's legal framework for payments systems and the potential for international cooperation on legal issues relating to payments systems (***recommendation 32***)

- Australian law on bank confidentiality and privacy, including recommendations on the application of privacy legislation to Australia's finance industry and the prospects for international consistency on bank confidentiality, privacy and related data security law issues (***recommendation 33***)

- the prospects for simplifying the doctrine of tracing in relation to claims made on banks and making the doctrine more internationally consistent, and improvements that can be made to Australia's law on restitution in relation to claims of undue enrichment made on banks (***recommendation 34***).

Electronic commerce

It is recommended that the Attorney-General should commission a comprehensive review of the legal implications of electronic commerce, including a review of the implications of electronic commerce for federal laws, uniformity of State and Territory laws and relevant international legal and non-legal options. The Commission notes that preparatory work on some parts of this review has already been commenced in the Attorney-General's Department (***recommendation 35***).

To provide quicker and more flexible legal support for particular electronic commerce opportunities, it is recommended that the Treasurer and the Attorney-General should jointly establish a working group to design and test a safe haven' model for the development of on-line electronic trading and investment facilities in Australia. The model would be supplementary to existing law reform and regulatory initiatives on electronic commerce. The project should be completed within 18 months (***recommendation 36***).

1. Introduction

This inquiry

The terms of reference

1.1 On 19 July 1995 the then federal Attorney-General, Michael Lavarch, asked the Commission to review the civil remedies available under Australian law and under multilateral or bilateral instruments or arrangements to which Australia was or could be a party. The Commission was asked to report on the feasibility of the systematic development and reform of the law in relation to those remedies. The terms of reference are set out at the front of this report.

The impetus for the inquiry

1.2 The inquiry arose out of concerns about the effectiveness of the legal remedies available when commercial transactions cross international borders. Attention had been drawn to cross border issues by a number of high profile insolvencies, including insolvencies relating to the interests of Alan Bond, Christopher Skase, Abraham Goldberg and Robert Maxwell.[1] At a broader level it was recognised that the growing involvement of the Australian economy in regional and international trade and investment was creating challenges that the Australian legal system, like all other national legal systems, was having difficulty meeting and that these difficulties would persist.

Feasibility study

1.3 In essence the Commission's inquiry has been a feasibility study. The Commission has reviewed an aspect of Australian law not previously considered as a separate topic and has been asked to report on the scope for law reform in this area. In doing this the Commission has sought to identify whether there is any need for law reform and, if so, how it might best be undertaken and what issues should be addressed as a matter of priority.

The Commission's findings and recommendations

Key findings

1.4 The key finding of the Commission's inquiry is that Australian firms are exposed to cross border legal problems that are costing them money and inhibiting business opportunities. These problems are set to increase in volume and significance with the growth in Australia's international trade and investment.

Direct and indirect risks

1.5 The cross border legal problems create two types of risk for Australian firms. The first is the risk of being involved in a dispute that involves the laws or courts of more than one country. These disputes are marked by intolerable levels of cost, complexity and delay. From an Australian business perspective they are a direct legal risk of doing business outside Australia.

1.6 The second risk is where the law fails to provide the support an Australian firm needs or expects in its international commercial transactions. This may be, for example, a failure to provide certainty of ownership or compensation for loss or a lack of facilities to order and process transactions, such as exchange trading rules. The failure may result from a lack of local laws or local enforcement or from complexities and gaps in the way the laws of different countries apply to the transaction.

The need for reform

1.7 These legal risks are not new but they are increasing in importance. Australian firms are coping with them currently through pricing or other arrangements but they are an impediment to business. They are a source of inefficiencies, delays and increased costs. In the Commission's view they can and should be

addressed through law reform, including both the reform of Australian laws and practices and reform at an international level through international agreements and other arrangements.

Beyond civil remedies

1.8 The inquiry was initiated by concerns about the difficulties in obtaining effective civil remedies. The issues raised with the Commission indicate that effective law reform needs to address not only cross border litigation and dispute resolution procedures but also the substantive laws and principles applied to international commercial transactions and the ways in which those principles are implemented. Procedures, the substance of the law, and implementation are all interrelated when assessing the effectiveness of civil remedies and options for dealing with legal risks.

International Commercial Law Advisory Committee

1.9 In the Commission's view law reform on this topic will require a mix of business and government input. The priorities, timing and options considered should be driven by Australian business requirements and perspectives. To achieve this the Commission recommends that an advisory committee of business leaders should be established to guide the government. The committee would have a particular brief to advise on the priorities for international negotiations and to identify a range of options for dealing with cross border legal issues, including non-legal solutions. The committee and its work are discussed further in chapters 2 and 3.

Litigation, finance law and electronic commerce

1.10 The Commission also recommends that priority be given to a review of several specific reforms raised during the inquiry. These reforms fall into four categories

- short term cross border litigation reforms that can be addressed immediately
- longer term cross border litigation reforms that will require more extensive consultation
- finance law reform
- an electronic commerce safe haven' project, designed to develop a different and quicker way of addressing cross border legal issues that require a rapid response.

The cross border litigation reforms are discussed in chapter 4. The finance law reform and safe haven project are discussed in chapter 5.

Aims and themes

An outline of factors shaping the report

1.11 During the inquiry a number of themes and guiding principles emerged. These are reflected in the specific issues and recommendations discussed in the report and are outlined briefly below. They are

- the need to adopt a commercial focus
- the need to put civil remedies in a broader legal context
- the need to look to local and bilateral solutions, not just multilateral conventions
- the need to respect sovereignty and to be cautious in giving laws extra territorial effect.

Commercial focus

1.12 The Commission has taken an Australian business perspective as its touchstone for this inquiry: what are the problems and exposures that Australian firms are facing in their cross border commercial

transactions? How can Australian law better support Australian firms in those transactions, either domestically or through international arrangements?

Box 1A

Alan Bond - overview of litigation[2]

In 1988 the Bond corporate group was at its zenith. Alan Bond's private company, Dallhold Investments, was the largest privately owned gold miner in the world with gold mines in the US and South America. As at 30 June 1988 Dallhold owned just over 50% of Bond Corporation. The main areas of Bond Corporation's corporate activity were brewing, international property, media, energy and property. Dallhold also had shareholdings in other companies through which it controlled large gold properties in Australia and the Queensland Greenvale Nickel joint venture.[3]

From late 1988 problems arose on a number of fronts. In December 1989 lenders to Bond Brewing appointed a receiver. In August 1991 Bond Corporation entered into a scheme of arrangement. The specific events which led to Alan Bond's bankruptcy related to a default on a personal guarantee supporting part of the corporate group's activities.

In 1990 companies associated with Alan Bond held an interest in the Greenvale Nickel joint venture. Alan Bond had guaranteed those companies' obligations to their financiers. On 20 March 1991 the financiers purported to serve a demand upon Bond as a guarantor requiring him to pay $US194 644 443.97 (the limit of his guarantee) in New York by 10 am New York time on 25 March 1991. Mr Bond did not pay any amount in response to this demand. As a result, a series of proceedings were instituted which culminated in Mr Bond's bankruptcy.

The financiers brought proceedings in the NSW Supreme Court for recovery of the amount claimed under the guarantee. Mr Bond responded with a series of technical defences which were rejected by the trial judge in September 1991. The financiers then served a bankruptcy notice based on the form of judgment obtained from the trial judge. Mr Bond appealed to the Court of Appeal. Although rejecting his appeal, it upheld a technical challenge to the form of the judgment pronounced by the trial judge. Mr Bond successfully took proceedings in the Federal Court to set aside the bankruptcy notice as technically deficient because the Court of Appeal had altered the form of judgment. A new bankruptcy notice was served. By April 1992 Mr Bond was made bankrupt by the Federal Court. His appeal failed. In February 1995 Mr Bond achieved a settlement with his creditors under which they accepted less than one cent in the dollar. Mr Bond's bankruptcy was annulled.

The steps and proceedings taken by Alan Bond's trustee in bankruptcy and others who seek to locate assets allegedly held by Mr Bond, particularly those said to be located overseas, are complex and are taking some time to pursue.

Mr Bond and his trustee in bankruptcy have litigated over his superannuation fund, permission granted to him to leave Australia, and the proper characterization of payments to him by family members.

His trustee in bankruptcy has sought the assistance of Australian and overseas courts and agencies in investigations in Switzerland, Jersey and elsewhere.

The Attorney-General has relied on the *Mutual Assistance in Criminal Matters Act 1987* (Cth) to support investigations by the Commonwealth DPP and AFP in Switzerland and Jersey. In February 1996 the Federal Court rejected Mr Bond's application to restrain those investigations.

1.13 The aim in doing this is to ensure that any legal work undertaken in this area has practical significance and that it is cost effective. A business perspective allows this to be assessed. This is important not only for the setting of priorities but also for implementation. A legal initiative that is of little practical significance or is not cost effective is less likely to be implemented.

1.14 The Australian business perspective also necessarily takes into account the commercial interests of trading and investment partners outside Australia. The aim is to develop legal support for cross border commercial transactions that is of mutual benefit to all parties involved. Anything less would not serve Australian business interests.

Civil remedies in context

1.15 When this business perspective is applied to civil remedies, it is apparent that they need to be examined in a broader legal context. At its heart the topic of cross border civil remedies deals with a narrow area of civil litigation - the particular orders available from a court for civil disputes that involve parties or events both within and outside Australia. But for Australian firms this is only an end point. It represents only one option for dealing with disputes and only part of the legal backdrop to commercial transactions.

1.16 It is an important end point because it has great practical significance. Civil remedies are where the law bites. They describe what can in practice be recovered, and what liabilities will in practice be imposed, if the parties refuse to compromise or settle and require the dispute to be finally resolved by the courts. For disputes which reach that level, and for negotiations over disputes that might do so, the civil remedies available are critical considerations.

1.17 Nonetheless few business disputes reach that level. For most business activities the law is more useful where it supports risk management. This helps in avoiding disputes and in creating business opportunities. It requires a focus on substantive laws - laws, for example, which limit the scope for damage from defaults in cross border transactions, such as the prudential safeguards applying to financial markets, and which create opportunities for increasing the speed and volume of trade, such as standard terms and conditions for routine international transactions.

Local solutions and international conventions

1.18 One of the aims of the inquiry is to identify what sort of initiatives should be given priority when dealing with cross border legal issues. Many of the initiatives to date have focused on the international harmonisation of laws through multilateral conventions or the adoption of model laws or standard terms. This is logical. Cross border legal risks and the exposures and lost opportunities they create are common to all firms trading or investing outside their own country, not just Australian firms. In general principle it is in the commercial interests of all countries to reduce these risks.

Box 1B

Christopher Skase - overview of bankruptcy

Christopher Skase became prominent through the Qintex group of companies. At its heyday the assets of the group included the Channel Seven television network and the Mirage chain of resorts. However in late 1989 the group was unable to pay its debts and, despite efforts to maintain the group, receivers were appointed in November 1989.[4]

Following the collapse of the Qintex group, Mr Skase left Australia for Europe in early 1990, returning on several occasions to contest court actions. He was also charged by the Australian Securities Commission (ASC) with offences for breach of directors' duties. The ASC sought court orders in May 1991 restraining Mr Skase from leaving Australia. However the Federal Court rejected the application imposing instead a condition that Mr Skase keep the ASC notified of his address and return when required by the courts.[5]

In June 1991 Mr Skase declared himself bankrupt with personal debts of approximately $160 million. Mr Skase's original trustee in bankruptcy agreed that he could leave Australia in return for an undertaking that he would return to his next creditors meeting in September 1991. While he was away a new trustee in bankruptcy was appointed who sought Mr Skase's return to Australia for examination.

Mr Skase refused to return on the basis that he was too busy or ill. Warrants were sought by the trustee

to have Mr Skase arrested but these were dismissed on the ground that as the warrants could not have been served in Spain, where Mr Skase resided, they would have been of marginal utility.[6] The ASC then sought to have Mr Skase charged and jailed for contempt for refusing to honour his undertakings to the court. This application was also dismissed.[7]

In 1994 the Brisbane District Court issued a warrant for Mr Skase's arrest to require him to answer charges relating to breaches of directors' duties and bankruptcy offences. Extradition of Mr Skase from Spain was subsequently sought and refused.[8]

Mr Skase's trustee has continued his investigations including offshore inquiries through the Australian courts pursuant to letters of request to the UK courts to effect examination of relevant persons under the *Insolvency Act 1986* (UK).

1.19 However in the Commission's view multilateral conventions are only effective as tools in managing cross border legal risk in narrow circumstances. Current conditions suggest that more emphasis should be put on bilateral negotiations and on implementing existing conventions.

Respecting sovereignty

1.20 Another component in the development of the law in this area is the approach taken to issues of sovereignty and the extra-territorial application of laws. As Australia's markets and commerce stretch beyond national borders there are growing pressures to reduce the emphasis on national sovereignty and to have an impact beyond Australia's geographic limits. When a cross border legal issue arises it is often in the context of a firm's frustration at its inability to enforce an Australian legal right outside Australia, or in the context of a firm's difficulties in adjusting a regional or international business to meet separate national regulations. There is a natural tendency to try to solve these problems by extending the extra-territorial effect of Australian laws or court orders, or by creating a supra-national authority or regulatory regime to overcome the inefficiencies of separate national regulation.

1.21 In the Commission's view this type of solution should be treated with some caution. It will only be appropriate in limited circumstances.[9] Often it will be more effective, and will better suit Australian business interests, to maintain territorial limits and seek greater cooperation in applying local laws quickly and cheaply.

Additional issues

1.22 Inevitably the preliminary nature of the inquiry has meant that the Commission has not been able to examine many relevant issues in as much detail as they require. Three topics in particular have not been addressed in this report and should be considered further in subsequent work.

- *Choice of law* - choice of law principles are closely related to the jurisdictional issues discussed in chapter 4 and Part II of the report but were not the focus of the issues raised in this inquiry.

- *Comparative law* - the inquiry focused on Australian law and considered the law of other countries only to the extent necessary to understand the nature of the cross border problems faced by Australian business.

Box 1C

Abraham Goldberg - the Linter litigation

The Linter Group was an Australian group of companies associated with Abraham Goldberg. It carried on business primarily as manufacturers and distributors of clothing. By 1988 through a series of acquisitions the group comprised a large number of companies involved in the Australian clothing industry handling well-known names such as King Gee, Speedo, Pelaco, Exacto, Formfit, Kortex, Stubbies and other Australian clothing manufacturing icons.[10] In May 1988 the group needed further

funds to pay for some of the acquisitions and to acquire more.

To do this it was decided to raise funds in the USA by way of a subordinated debenture issue. In October 1988 Linter Textiles Corporation issued a prospectus in New York offering debentures maturing in October 2000 and carrying 13.75% interest. The prospectus issue, fully subscribed, raised $US200 million.

In January 1990 the Linter group collapsed. At that time it had an estimated deficiency of $A550 million. Linter Group Ltd and all of its operating companies were put into receivership. The receivers first sought a scheme of arrangement between the companies and their creditors but later sold each of the businesses and brand names. This crystallised a greater deficiency. This loss was eventually borne mainly by the US debenture holders, together with about twenty Australian and overseas banks. The trade creditors largely escaped loss.

During 1991 and 1992 the companies, by then each a shell, were serially put into liquidation under the NSW Companies Code and the Corporations Law. The liquidators held the proceeds of the sale of the businesses, being some $400 million.

These events led to a multiplicity of proceedings in Australia (Sydney and Melbourne) and in the United States (New York), including

- proceedings in Sydney to determine whether the subordination was effective in the winding-up of the Linter companies under Australian law[11]
- proceedings in New York by the debenture holders against certain banks and professional advisers
- proceedings in Sydney by the debenture holders and also by some banks against other banks and professional advisers[12]
- proceedings in Melbourne by the liquidators of Linter to recover property of Linter paid in breach of director's duties[13]
- proceedings in Sydney to determine the distribution of the $400 million held by the liquidators from the sale of the businesses.[14]

Each proceeding brought with it a variety of cross-claims, applications for anti-suit injunctions, questions of proper forum and other tactical manoeuvres. These included many pre-trial applications for evidence gathering (documents as well as oral testimony) and considerations of applicable statutes of limitations.

- *Consumer protection and other issues* - the broader context for cross border civil remedies and legal risk includes issues relating to consumer protection, human rights, environmental protection and similar concerns.[15] These should be considered in more detail in subsequent work on this topic.

Consultations and submissions

1.23 The Commission focused its consultations in this inquiry on the sectors of the Australian business, government and professional communities most involved in international trade and investment. It also sought information and comments from legal practitioners, academics and government officers in relevant overseas jurisdictions.

1.24 There were several stages to the inquiry.

- In the second half of 1995 the Commission distributed to various individuals and groups a circular outlining the scope of the inquiry and seeking comments on the main issues raised by the terms of reference. The individuals and groups included:

Accounting Firms/Insolvency Practitioners	Insurers
Arbitrators	Journalists
Attorneys-General	Judiciary

Banks
Business and Professional Associations
Chief Justices
Consumer Groups/Public Interest Groups
Corporate Advisers
Corporate Lawyers/In-house Counsel
Ethnic Communities Councils
Government Agencies
Law Reform Commissions
Law Societies/Bar Associations
Legal Academics/Law Schools
Legal Practitioners/Firms
Schools/Departments of Economics
Trade Specialists/Research Institutes
Trading and Investment Firms

- In March 1996 the Commission held half day seminars in Sydney and Melbourne introducing the issues in the inquiry through guest speakers to an invited audience of lawyers, accountants, business executives and government officials.

- The Commission distributed at those seminars, and subsequently to other interested parties, background papers analysing the issues involved in cross border litigation and arbitration from an Australian perspective.

- The Commission also held a number of private consultations during 1995 and 1996 with individuals involved in international trade and investment as principals or advisers. A list of the consultations is set out in Appendix D.

1.25 The Commission received 45 submissions. A list of the submissions is set out in Appendix C.

Outline of the report

1.26 This report is in two parts.

- Part I sets out the Commission's findings and recommendations on improving Australian law on cross border civil remedies, including systematic reform directed more broadly at cross border legal risks.

- Part II outlines Australian law and practice on cross border litigation and arbitration and gives an overview of relevant international agreements and arrangements. These chapters address the specific issues raised in sections 2 and 3 of the terms of reference and also provide background information to the comments in Part I.

1.27 The structure of Part I of the report is as follows.

- Chapter 2 puts civil remedies and cross border legal issues in context, outlining the relevant business and economic factors, the legal issues arising from those factors, the current legal responses and the Commission's view on the scope for reform to address cross border legal risks.

- Chapter 3 discusses Australia's current involvement in international agreements and initiatives and further initiatives that could be pursued to address cross border legal issues.

- Chapter 4 discusses particular litigation, arbitration and insolvency initiatives that could be pursued to improve the remedies available in cross border disputes.

- Chapter 5 discusses finance law and electronic commerce as two areas of high priority for law reform on cross border issues.

1.28 The structure of Part II of the report is as follows.

- Chapter 6 introduces the legal issues involved in international litigation, commenting on jurisdiction, service outside jurisdiction, judicial assistance and the recognition of foreign judgments.

- Chapters 7 and 8 summarise the civil remedies available in Australian courts under Australian law for the six types of claim specified in the inquiry's terms of reference: debt recovery, corporate insolvency, misappropriation of assets, breach of contract, negligence and breach of fiduciary and statutory duties.

- Chapter 9 summarises other civil remedies available for those six types of claim under international treaties or arrangements to which Australia is a party, and other relevant international arrangements that are available to be considered.

- Chapter 10 comments on the application of those remedies in Australia's external territories.

- Chapter 11 outlines Australian law on international commercial arbitration.

1.29 For simplicity the analysis in Part II of the report adopts two limits. First where it is necessary to consider other legal systems to illustrate the application of Australian civil remedies outside Australia, the report refers only to the legal systems in one or more of the following

California, USA	Cook Islands
Germany	Indonesia
Switzerland	Vietnam.

Secondly, when analysing Australian law, the report only considers the civil remedies available to a party in the District and Supreme Courts of New South Wales and the Federal Court of Australia.

Acknowledgments

1.30 The Commission was assisted in this inquiry by many people. It particularly wishes to thank Freehill Hollingdale & Page and the Australian Securities Commission for making secondments of key staff available, Baker & McKenzie for its assistance in preparing the background papers, Blake Dawson Waldron and Mallesons Stephen Jaques for their help in organising the seminars in Sydney and Melbourne in March 1996, the speakers at those seminars - Mark Chapple, Trevor Morling, Patrick Kilroe, Les Andrews, Alan Oxley, Terry Cutler, Michael Pryles and Michael Schoenberg - and Margaret Ryan in preparing the indices.

PART 1

2. Remedies, commerce and cross border risk

Introduction

2.1 Cross border transactions have always attracted legal risks. What has changed is the volume and range of international commerce in which Australia is involved and the complexity and significance for Australia of the legal issues that this commerce generates. Cross border legal issues are emerging as a separate area of commercial risk that need to be more precisely identified and better managed.

2.2 This chapter discusses the nature and extent of the cross border legal issues facing Australian firms. It outlines the trade and investment activity that is giving rise to cross border legal issues in Australia and some economic trends affecting those issues. It then identifies the range and types of legal issues arising and how the law and legal institutions are currently seeking to address those issues. It discusses the business perspective on the significance of those issues and how, ideally, they should be handled. The chapter concludes with the Commission's recommendation that this is an area that needs systematic law reform.

Australia's international trade and investment

Increasing regional and international involvement

2.3 Australian firms have become increasingly involved in international trade and investment over the last twenty years. This trend is set to continue.[16] It reflects the general international growth in trade and capital flows.[17] In broad terms the APEC region has become Australia's largest and fastest growing regional market for exports but Australian investment flows are still dominated by European economies and the United States.[18]

2.4 The increasing involvement is resulting in the growing integration of Australian firms into other countries' economies or into regional economies. Many Australian firms now have subsidiaries, joint ventures and a well developed network of business relationships outside Australia. They are involved in trade and investment patterns that cross several borders in one project rather than simply two-way transactions. They are involved in markets that are regional rather then national. This is illustrated by the short case studies in this chapter of Australian firms such as Boral, TNT and Telstra and of foreign firms with Australian interests such as ABB and Campbells.[19]

2.5 The net effect of these changes is an increase in the significance for Australian firms of legal problems affecting their international trade and investment, and an increased exposure to a more complex range of issues. For example, from a legal perspective the export of commodities generally gives rise only to issues of contract and recovery of debts. By contrast a corporate joint venture for the manufacture outside Australia of parts for a complex product to be assembled and sold elsewhere raises numerous potential legal issues. Those issues might include problems concerning corporate governance, insolvency, licensing, employment, intellectual property, distribution agreements or financing as well as fundamental contract and debt recovery issues.

Pattern of trade flows

2.6 In general terms all sectors of the Australian economy have increased their exports over the last ten years.[20] In relative terms the services sector has increased its share of exports in the last decade.[21] It has been suggested that manufactured exports, particularly ETMs, will regain their share in the longer term.[22] Manufacturing generally gives rise to a wider range of legal issues than services since it involves longer term investment and a more complex range of distributor, supplier and other supporting business relationships.

2.7 There have also been changes in the regional pattern of trade flows, with differences both in the trade growth rates for each region and the composition of exports and imports for each region.

Box 2A

Boral - overview of operations[23]

Incorporated in 1946 as 'Bitumen and Oil Refineries (Australia) Limited', Boral is now one of Australia's twenty largest corporations. Its core businesses are the manufacture and supply of building products and construction materials and the exploration, production and distribution of gas.

For the financial year 1994-95, Boral's Australian operations represented approximately 87% of its operating income. Boral also operates substantial building products and construction material operations in the United States and Europe. It is currently expanding into Asia, with particular emphasis on Malaysia, Indonesia and China. Starting in the 1960's, it added to its product lines by acquiring in 1987 Blue Circle Southern Cement Limited (one of Australia's largest cement producers), in 1990 Midland Brick Company Pty Ltd (the largest producer of clay bricks in Western Australia) and in 1993 Sagasco Holdings Limited (South Australia's principal gas utility).

Boral has three main business divisions:

- *building products* - produces a wide range of housing industry products; it holds a substantial market share in the Australian home building product industry and exports woodchips from NSW and Tasmania, to Japan.
- *construction materials* - provides a range of raw materials and services for dwelling, non-dwelling and engineering construction.
- *energy* - Boral Energy supplies LPG (of which it is the leading distributor in Australia) to all states of Australia, New Zealand, and some South Pacific islands.

Boral also has a non-core services and engineering division comprising tyres and tyre re-treading as well as an engineering company.

Boral's American operations are in the home building and commercial construction industry. It supplies the United States market through brickworks in nine US states. The largest producer of clay bricks in the US, its annual production capacity is 1.5 billion bricks. One of the largest concrete roof tile manufacturers in the US, Boral has plants in four US states. Its Arkansas gypsum plasterboard plant distributes to eastern and central US.

Boral has European operations with almost half of its European sales in Germany. These operations are primarily in home building and secondarily in commercial construction/ civil engineering. Boral has 6 brickworks in northern Germany and 7 in The Netherlands which supply the local markets and export to European countries. It produces clay and concrete roof tiles from four German plants.

In the Asia-Pacific region, Boral has a 50% joint venture interest in and management of the leading pre-mixed concrete producer in Indonesia, which, in turn, has an 85% interest in Indonesia's first gypsum plasterboard plant. Through a 51% owned Malaysian subsidiary, it participates in the Malaysian building products market. In China Boral has entered into a joint venture to build and operate a major plasterboard facility in Shanghai. It acquired a screen door manufacturing operation in Singapore and has an electrostatic powder coating plant (with local partners) in Vietnam. In the Pacific, Boral has a 50% interest in an LPG distribution in New Zealand. Boral has gas supply facilities throughout the South Pacific.

- Australia's trade in the APEC region is dominated by manufactured exports and imports. Over the last decade the share of manufactured exports in Australian exports to APEC has increased by one quarter while manufactured imports have remained steady.[24]

- The European Union is Australia's second largest destination for exports of merchandise and services, and largest source of imports of merchandise and services.[25] The largest segment of merchandise exports continues to be unprocessed primary products but there has been significant growth in exports of elaborately transformed manufactures. These now represent almost a quarter of Australia's total

exports to the EU.[26] Merchandise imports from the EU are dominated by capital goods, industrial supplies and transport equipment.[27]

- Australia's merchandise trade with the USA produces a significant deficit. In the 12 months to March 1996 it was approximately $13 billion. Imports from the USA are dominated by machinery and transport equipment, manufactured goods and chemical and related products. Commodities, machinery and transport equipment are the largest segments of Australia's exports to the USA.[28]

2.8 These trade flows indicate the increasing importance of international commerce, and thus cross border risks, to the Australian economy. They also highlight the need to consider each region separately and in the context of their different patterns of trade.

Pattern of investment flows

2.9 Traditionally Australia has been a capital importing country. In recent times (except for a brief but dramatic decline during the recession in the early 1990's) Australia has experienced a marked increase in its outward foreign direct investment. There are several features of this increase in Australian direct investment abroad that are significant for cross border legal issues.

- The bulk of this investment is by multinational enterprises - firms which control and manage establishments in at least two countries - and these firms account for substantial shares of sales, employment, exports, investment and taxation revenue in Australia.

- This type of investment grew markedly over the 1980's at rates quicker than the OECD, including that of Japan, and quicker than Australia's growth in exports and GDP.

Box 2B

TNT - overview of operations[29]

TNT operates a global transport group - 'The Worldwide Transportation Group'. It provides a wide variety of transport services to all segments of business, the majority of which have an international element.

The business is divided into five main segments:

- *Domestic time-sensitive freight* - This division provides domestic markets with guaranteed time of delivery service where freight does not cross international borders. TNT is a major provider of these services in Australia, the United Kingdom, Germany, Italy, Spain, France with a developing operation in China.

- *International time-sensitive freight* - This division services the international market with guaranteed time of delivery service where the freight does cross international borders and consignments generally weigh less than 30 kilograms. Through GD Express (in which TNT owns a 50% share), this segment of the business operates in 200 countries throughout the world.

- *Logistics* - This division plans, implements and controls the flow and storage of goods, services and related information from point of origin to point of consumption. TNT is a provider of logistics solutions in Australia, the United Kingdom, continental Europe (including The Netherlands, Belgium, Germany and Italy) with a developing capability in North and South America and Asia.

- *General freight* - This division transports heavy freight where it does not cross an international border and delivery is required in 2-3 days. This operation is conducted primarily in Australia, Canada and Brazil where TNT has transport infrastructure.

- *Aviation* - This aspect of TNT's operations is conducted through TNT's 50% ownership of each

of Ansett Airlines and Ansett Worldwide. TNT's aviation interests provides passenger services in Australia, New Zealand and the Asian region, as well as operating the world's third largest aircraft sale and leasing business.

- The growth of this type of investment was strong in services throughout the 1980, and has also been strong in manufacturing since 1986.

- The share of this type of investment in English speaking countries doubled throughout the 1980's, while the share fell for Hong Kong and ASEAN (although since 1988 the latter's share has increased).[30]

2.10 These features have two significant legal implications. Australian firms now have an increasing exposure to the types of cross border legal issues faced by investors as against borrowers or subsidiaries. Investors are particularly concerned with their ability to recover their loan or equity, and with the level of transaction costs and legal risk associated with the investment. Secondly, the types of firms which have this exposure are generally the multinational enterprises and, given their role in employment, investment and taxation revenue in Australia, their exposure has significance for the Australian economy as a whole.

2.11 In terms of the regional and sectoral distribution of Australian direct investment abroad, as at December 1994

- approximately half was in services, with about one third in manufacturing and one sixth in mining[31]

- the vast bulk was in the UK, USA and New Zealand (about 70%) with only a small proportion in ASEAN[32]

- Australian firms expected to increase their manufacturing investments in Asia at a much higher rate than in other regions.[33]

Economic trends

2.12 In addition to the changes in trade and investment patterns and the growing economic integration described above, there are two other economic trends that are shaping the range and significance of cross border legal issues for Australian firms.

- ***Deregulation.*** This is expressly intended to improve the competitive strength of Australian firms and thereby increase the opportunities for greater exports. It also has the further effect of raising the significance (at least for Australian firms) of the laws that support a 'level playing field' such as laws on competition, property, government tendering and dispute resolution. Those types of laws are likely to become, from an Australian firm's perspective, more important topics for cross border harmonisation.

- ***Technology.*** Changes in technology and communications are opening up new cross border opportunities. This is particularly evident in the finance and telecommunications industries. Issues and problems are arising which do not fit easily into existing legal frameworks and which are not easily resolved by separate, national regulation. This is discussed further in chapter 5.

Box 2C

Telstra - overview of operations[34]

Telstra is Australia's major telecommunications supplier. It provides domestic, commercial and international telecommunications products (including service installation and repair, customer service, marketing and billing) for approximately 6.2 million residential customers and a large number of corporate and off-shore customers. It also supplies telecommunications services to Australia's major

corporations and state and federal government departments.

It has a substantial International Business Unit which develops its electronic communication and information services in the international marketplace. It negotiates, makes and manages agreements with various organisations and other carriers for the provision of all international telecommunications traffic. Some examples of the International Business Unit's activities are:

- Telstra is part of an international consortium, Mitra Global Telekomunikasi Indonesia, the successful bidder which will build and operate telephone networks in Central Java.
- Through three Vietnam offices, Telstra has a ten year old partnership with a local Vietnam partner, Vietnam Posts and Telecommunications. This partnership upgrades Vietnam's international telecommunications infrastructure. Telstra has committed $100 million to complete projects including satellite earth stations and international exchanges in Danang, Ho Chi Minh City and Song Be.
- Telstra is one of four initial parties (in company with VNPT, Hong Kong Telecom and the Communications Authority of Thailand) in the submarine optical fibre cable system, T-V-H, linking Vietnam with Thailand and Hong Kong and with other connections into the global network.
- Telstra has opened an office in Beijing, indicating a commitment to long-term investment in China.
- Through Modi Telstra, an Indian joint venture, India's first cellular to cellular, cellular to PSTN and cellular to international telephone calls were made.
- More than 80 multi-national companies have selected Telstra to provide their Asia-Pacific regional communications needs.
- Telstra has a contract with L M Ericsson (the Swedish telecommunications company) to establish a communications hub in Australia for Ericsson's Asia-Pacific corporate communications network.
- Telstra's South Pacific Network Project includes PacRimWest (an optical fibre cable which carries high-speed telecommunications traffic directly into the Asian region), TASMAN 2 (Australia to New Zealand) and PacRimEast (New Zealand to Hawaii), providing high quality digital telecommunications link between Australia and Guam with onwards connections to Asia, North America and Europe via a global network of optical fibre systems.
- Telstra (UK) Limited provides services to UK companies with significant telecommunications requirements in Australia and the Asia-Pacific region.

Cross border legal issues

Identifying cross border legal risk

2.13 Cross border legal risk can be assessed by identifying the particular legal issues arising from Australia's international trade and investment and evaluating their impact on Australian firms. For the purpose of this feasibility report, the Commission has gathered information and based its comments on three sources: the track record of particular cross border litigation; comments in consultations and submissions; and the analysis and research in Part II of this report. These sources point consistently to the inability of current laws and practices to deal adequately with the cross border legal issues that are now emerging. Civil remedies are rarely a realistic commercial option because of the difficulties involved in cross border litigation. Other mechanisms which deal with these issues are sporadic and limited.

Glimpses through cases

2.14 Australian firms experience cross border legal problems in their most direct and distressing forms when they are involved in an insolvency, litigation or arbitration that has a cross border element. These are rare cases. Very few disputes can withstand the costs involved in a cross border litigation or arbitration and most bankruptcies and insolvencies involve small businesses, not the larger enterprises that are the major cross border participants. Nonetheless these cases give a glimpse of the types of legal problems that can affect Australian firms involved in international trade and investment.

2.15 Some of the sharpest illustrations are found in the high profile insolvencies and court cases outlined separately in chapters 1 and 2, including litigation concerning Alan Bond, Christopher Skase, Linter, Robert Maxwell and CSR.[35] They illustrate some general points

- all of these cases are very expensive, very complex and slow[36]
- in all of them the outcome at each stage of proceedings turned on the precise details of the case and relevant law, sometimes involving technicalities peculiar to the case - there is no single, straightforward solution to cross border legal problems
- nonetheless there are some common areas of difficulty, notably jurisdiction, service, collecting evidence and tracing assets - these are discussed further in chapter 4.

Box 2D

ABB - overview of operation[37]

ABB Asea Brown Boveri Ltd (ABB) is a Swedish/Swiss group of over 1000 companies consisting of 36 business areas organised into 4 business segments operating in Europe, the Americas, Asia, Australasia and Africa. Group revenues for 1995 came to $US33.7 billion. ABB's business activities include

- power transmission and distribution
- industrial and building systems
- transportation
- financial services.

An example of the cross border aspects of ABB's activities is found in the financial services arm, ABB Financial Services, which deals in the delivery of a wide variety of financial services and financial products on a global basis. Its business is divided into five areas

- treasury centres
- project & trade finance
- leasing & financing
- insurance
- stockbrokerage & investment management

Some examples of services provided which have inherent cross border elements include

- a cross-border lease transaction with a German transportation authority, including an American investor and a German lessee - the transaction was in US dollars
- a $US24 million sales support lease agreement, financing a combined heat and power plant in Sweden - this sixteen year lease will involve equipment from Sweden and Finland
- insurance with a protection period that is longer than is traditionally offered by the political risk insurance market - ABB arranged for the risk to be offset in offshore capital markets.

2.16 A high profile insolvency or defendant is not, however, a pre-requisite for a cross border dimension. Cross border issues can arise in a wide range of civil and commercial claims and even litigation which begins as wholly or largely domestic can develop a cross border issue. For example

- in *Connop and Another v Varena Pty Ltd and Others*,[38] a case about a babaco (starfruit) growing venture in New Zealand, the NZ defendants successfully sought security for costs in NSW against the NZ plaintiffs for the NSW litigation

- in *Temilkovski v Australian Iron & Steel Pty Ltd*,[39] a NSW workers compensation case, the law of Yugoslavia became an issue

- in *Laurie v Carroll & Others*,[40] a breach of contract case concerning division of profits from theatrical performances given by Dame Margot Fonteyn and other artists in Australia, the English defendant was held not to have waived his right to object to the court's jurisdiction, having been served after the court had made an order for substituted service - the defendant had been in Victoria for business purposes but only for a matter of days and he had no other connection with Australia.

Insolvencies

2.17 At a broader level consultations and submissions on bankruptcy and insolvency issues indicated that Australian trustees and liquidators need more judicial assistance in collecting evidence and in tracing or freezing assets before litigation is commenced. There was also some discussion on other ways of improving cross border insolvency administration including giving the courts greater ability to liaise directly with the courts of other jurisdictions concerned with the insolvency. These are discussed in chapter 4.

Cross border litigation

2.18 Consultations and submissions dealing with cross border litigation overwhelmingly confirmed that the major concerns are costs, complexity and delay. The general view was that cross border litigation is bedevilled by jurisdictional limits, cumbersome and fragile procedures for collecting evidence and tracing assets, and inadequate enforcement. From a cross border perspective, inter-government arrangements for dealing with international litigation are primitive. This results in forum shopping, costs and lack of confidence in the law.[41] Consultations and submissions confirmed and extended the list of procedural difficulties noted in Part II of this report and suggested various changes to Australian law to help streamline cross border litigation and make it more effective. These are discussed in chapter 4.

Box 2E

Arnotts Limited and the Campbell Soup Company

Arnotts is a listed Australian company with a substantial biscuit manufacturing operation as well as involvement in engineering and the manufacture and distribution of jams.[42]

The Campbell Soup Company (Campbell) is a US based international grocery, bakery and confectionery group most well known in Australia for its range of soups. Campbell has extensive operations in Europe and Australasia. In 1995 it had total sales of $US 7.28 billion.[43]

In 1992 following a contested takeover bid Campbell obtained 57.99% of Arnotts seeking to benefit from Arnotts' advanced processing technology and marketing in the Asian region.[44] One of the conditions imposed by the Foreign Investment Review Board at the time of the proposed takeover offer was that Arnotts' headquarters and manufacturing operations must remain in Australia.

Arnotts has continued to improve its share of the Asian market by further acquisitions (eg the Kohi Biscuit Company in New Zealand) and regional joint ventures (eg 50% interest in PT Helios Arnotts Indonesia) to become the largest biscuit manufacturer in the Asia Pacific region with sales of more than $650 million annually.[45]

More recently Campbell and its associates have gradually increased their holding in Arnotts to 70% after institutional shareholders sold out. If Campbells acquires 85% of voting shares in Arnotts the restrictions in a 1985 agreement that limit its board positions and voting rights will be able to be removed.[46]

2.19 The Commission also sought comment on international and government initiatives relating to cross border litigation, particularly on the continuing inter-government negotiations on the recognition and enforcement of foreign judgments. Australian firms had different attitudes on these issues depending on the particular countries involved. Many who participated in the inquiry were concerned at what they saw as the exorbitant jurisdiction claimed by US courts and their punitive damages awards. In relation to some countries in the Asia Pacific region those same commentators argued for greater extraterritorial effect for Australian court orders. Not surprisingly their views depended on the general legal framework in that country - in particular the level of confidence they had in that country's courts - and on whether they were, for that country, an investor or borrower, exporter or importer, manufacturer or distributor, service provider or purchaser, or had some other role. This indicates the need for a more systematic assessment of the cross border legal risk faced in each country and of Australia's interests in its commerce with each country.[47]

Arbitration

2.20 The comments in submissions and consultations indicated that Australian law on international arbitration was generally sufficient but that further clarification of some provisions in the *International Arbitration Act 1974* (Cth) and of some principles established in the case law would assist. These are discussed in chapter 4. Generally the major concern was lack of effective enforceability of foreign arbitral awards in some countries, particularly in the Asia Pacific region.

Broader business concerns

2.21 Several other key points emerged from the consultations and submissions.

- The two legal issues that Australian firms directly identify as of concern for their cross border trade and investment are tariffs and intellectual property.[48]

- Many business concerns on cross border legal issues are industry specific. For example, particular issues were raised with the Commission on aviation treaties, maritime liability and financial market practices.[49] Each of these issues requires specific industry solutions.

- In general the industry specific issues relate to the support that can be provided by a regulatory regime, for example legal support for the registration of ownership or security interests in property or rules on the allocation of liabilities.[50] In some cases they are concerned with regulation that is stifling business opportunities by being too restrictive or poorly coordinated with parallel regulation in other countries.[51]

- A number of consultations indicated that many of the larger cross border investment transactions, particularly in the Asia Pacific region, involve host government entities or affiliates either as investors or as important participants. This adds a further complication to the legal issues.[52]

- The level of comfort with legal systems varies according to the country, based partly on general familiarity and reputation and partly on specific (usually adverse) experiences.[53] Australian firms and advisers generally seemed to have a high level of confidence in the legal system in England but were more cautious about other countries. There was a general perception that, as a rough rule of thumb, a local firm usually had a 'home town' advantage.

Implications of background research

2.22 The analysis of Australian remedies and Australia's international arrangements in Part II of this report supports and supplements this sketch of cross border legal issues. Each cross border claim can give rise to a multiplicity of legal issues. The mix of issues will vary according to the particular countries involved. In

broad terms the issues relate to common hurdles - how to commence proceedings, get evidence, preserve assets and so forth. But in their detail the issues are idiosyncratic and usually unfamiliar. The overall picture is one of an Australian legal system that is fundamentally national in perspective and effect with only a limited overlay of international agreements on civil procedure.

The range of legal issues

2.23 More generally the comments received in the inquiry, together with the growing involvement of Australian firms in international trade and investment, point to a broad range of current and emerging cross border legal issues. At one end there are issues about dispute resolution - cross border litigation and arbitration - and closely related issues on cross border insolvencies. These are direct, immediately visible and severely damaging for the firms involved but they are relatively rare. At the other end there are issues about the adequacy of aspects of the legal systems that facilitate and provide a framework for cross border transactions, such as intellectual property, government tendering procedures, foreign investment laws and industry regulatory regimes.[54] These issues are of concern to a much wider group of Australian firms. They relate more to risk management than to dispute resolution.

2.24 The issues about the adequacy of legal systems can be illustrated by a financing example. It is common for a financier or investor to require security. Where the enforceability of a security arrangement in a cross border transaction is unclear because of inadequate or inconsistent laws on property and securities, that is likely to result in delays, higher pricing to cover the added risk and possibly cancellation of the transaction. This affects business opportunities not just the resolution of disputes.

The inadequacy of current law and arrangements

2.25 Assessed on a risk management basis, Australian law and international arrangements provide inadequate support.

- Australian firms remain exposed on virtually all aspects of a cross border transaction that give rise to legal risk. For example, if a firm is not paid a debt owing to it when the debt is due, recovery of the debt using the Australian legal system will be difficult in all except a few countries. Conversely if the firm is subject to an exorbitant product or other liability claim, there is little in Australia's international agreements that will protect it.

- The international arrangements supporting cross border transactions, whether on procedural or substantive law, are sporadic and limited in scope. This means that in many situations cross border transactions do not benefit from the support that an effective legal system can provide. This affects business opportunities.

2.26 The size of these exposures should not be underestimated. A rough indication can be gained by comparing the transaction costs, pricing and speed of trade and investment across Australian state borders as against trade and investment across international borders (ignoring distance costs). There are many factors involved in that comparison but in most industries the level of confidence in the enforceability of the law, and the support given by the law to the processing of transactions, are material elements.

Legal initiatives and responses

A vast amount of continuing work

2.27 The inadequacy of current law and international arrangements arises from the complexity of the issues, not lack of attention. There is a vast amount of work undertaken at a national, regional and international level to address these issues. The range of current legal initiatives and responses to cross border legal issues is outlined below to illustrate the extent of the current work and the factors that need to be taken into account in any systematic reform of the law.

Local courts and local advice

2.28 It can easily be overlooked that most of the work in dealing with cross border issues happens at a local level. The first step for an Australian firm with a cross border legal issue is to seek advice from a local lawyer either in Australia or in the other jurisdiction where the issue has arisen. Many issues will be resolved at that level. If a court order is required, the initial application is likely to be made to the local court. In many instances no further proceedings will be taken. Local practitioners and local courts are therefore in the frontline of dealing with cross border issues. It is often their individual approaches and solutions which guide the development of laws and practices on cross border problems.

2.29 Work at this level is enhanced by professional associations like the Inter Pacific Bar Association, Lawasia and the International Bar Association. These assist lawyers to become more familiar with cross border issues, to track down sources of legal advice in other jurisdictions, and collectively to help develop better solutions to cross border problems. There are also several international judicial conferences which assist in a similar way.

2.30 Work at this level should be strongly supported. It was pointed out in the consultations that for the vast bulk of Australian firms local legal advice and local court action is the only realistic option for dealing with cross border legal issues.[55] Cross border litigation of the kind described in Part II of this report is simply too expensive and complex. The best legal support for small to medium size Australian firms is improvements in local courts and procedures, either in Australia or in other jurisdictions in which they are involved. Furthermore many of the legal problems faced by Australian firms in their dealings outside Australia arise out of the interpretation by local officials of the detail of particular laws (eg tariffs) or the local procedures and practices involved in applying and enforcing them (eg licensing procedures). These can only be addressed through detailed local initiatives.

Arbitration and ADR

2.31 Where a dispute is sought to be resolved beyond the local level, there is a growing trend to use international arbitration rather than litigation. For example, the number of arbitrations commenced under the supervision of the International Chamber of Commerce has doubled over the last 10 years to approximately 7 000. It currently has an active caseload of approximately 800 arbitrations.[56] The primary factor driving this is that for both parties it is preferable to determine the dispute by rules *other than* the laws of the other party's country and in a place *other than* the other party's home town.

2.32 Arbitration can, however, be as expensive and as damaging to business relationships as litigation.[57] This has prompted a greater interest in alternative dispute resolution methods, such as mediation, and in dispute avoidance techniques like partnering.[58] While this is an appropriate response to cross border disputes, it is largely ad hoc and does not lend itself to legal or government initiatives.

Industry practice

2.33 There has been considerable work in many industries to develop standard practices and codes on matters of common international concern. This should be strongly supported. Standard industry practices can be more flexible, and are likely to be developed with more expertise and more rapidly, than any formal international legal initiative. They may give as much international consistency or cooperation as is needed, not requiring further legal support. Even where further laws are needed, standard industry practices are a valuable basis for those laws.

2.34 One example that illustrates the advantages of standard industry practices, albeit with some shortcomings, is the ISDA agreements - the master swap agreements developed by the International Swap Dealers Association. These agreements standardized the main terms and conditions in interest rate and currency swaps. They are used as the basis for several other over-the-counter derivative transactions, including interest rate caps, collars and floors, swaptions, bond options and currency options. There are some shortcomings. The agreements are rarely put in place as quickly as they should be for the transactions they cover, and there is some concern that too many variations are being made.[59] Nonetheless they have undoubtedly addressed many of the cross border legal risks involved in derivatives transactions and have significantly streamlined and reduced the costs of managing those issues. They also illustrate that standard

industry practice may not be able to deal with all legal risks - for example, the ISDA agreements cannot by themselves resolve issues like netting or questions about capacity to enter into a swap or other transactions.[60] Supporting legislation is needed for this.

International harmonisation

2.35 There has also been much work over many years directed at harmonizing commercial laws. Some of this is at a global level through bodies such as UNCITRAL, the Hague Conference on Private International Law (Hague Conference) and Unidroit. Outlines of these institutions and their work are set out in chapter 3. More recently there has been considerable work at a regional level. This has been particularly evident in the European Union with the immense legislative program required for the single market. This has comprised more than 250 EU Directives which effectively operate as a regional legal regime.[61] In the Asia Pacific region there is little support for supra-national authorities or laws but there has been a wave of national law making on commercial issues that has been driven by common commercial considerations and has been informed by the laws on those topics in other countries both within and outside the region. There is also regional activity in the Americas through NAFTA and other initiatives, as well as high levels of activity on corporate and securities law issues in most English speaking jurisdictions.

2.36 Much of the success of harmonisation seems to depend upon careful selection of the topic, the type or level of harmonisation that is sought, and the ebbs and flows of political will. Several factors need to be taken into account.

- Internationally, the political will for formal international conventions aimed at unifying laws seems to be waning. The APEC region is not seeking unification of laws and for the most part the legal systems in the region are so disparate that unified laws would not be feasible.[62] The European Union is digesting the lawmaking required for the single market and in some respects seems to be moving away from strict conformity of laws throughout the EU.[63] More generally the focus of political energy now seems to be *implementation* of international agreements rather than settling new principles, as indicated for example by US activity on enforcement of intellectual property laws.

- Nonetheless conventions are very effective when they are widely adopted *and* implemented. Cross border commerce cannot rely solely on contracts where there is a failure in documentation, or torts or fraud are involved, or there needs to be adjustment to laws on a multilateral basis to support the commercial arrangements.[64]

- In addition harmonisation initiatives can be less demanding than conventions aimed at unifying laws. They may aim, for example, at the lower threshold of sufficient similarity in standards to allow reciprocal treatment. Alternatively they may focus more on assisting in enforcement of comparable regulatory regimes rather than on demanding the same or similar laws. This type of harmonisation is illustrated by the regulatory cooperation between the ASC and other securities regulators, and by recent AUSTRAC initiatives.[65]

- Clearly bilateral agreements are likely to be reached more quickly, to be more responsive to Australian firms' interests, and to be able to deal with more detailed issues than any multilateral agreement. Some issues may still lend themselves to global or regional negotiations, given the nature of the markets developing in some industries. However for the most part it may be more productive in the current political climate to focus on developing a network of bilateral agreements on a particular issue rather than directly seeking a multilateral agreement.

- There are some topics which are *not* suitable for international agreement and where countries have an interest in preserving their own laws free from any external impact, even where they may have a commercial impact. Laws relating to censorship are an example. On those topics 'harmonisation' should focus on helping to build or preserve mechanisms that ensure those laws are quarantined.

- Information about, and familiarity with, each country's laws is a pre-requisite to any harmonisation initiative. Some commentators have suggested that one of the major barriers to harmonisation in the Asia Pacific region is lack of adequate information on what the laws and regulations actually are.[66]

- A major issue for Australian firms in relation to international initiatives is ensuring proper implementation, both of international agreements (such as the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958[67]) and of local laws. This requires agreement to commit resources and political will to enforce laws, rather than agreement on substantive law.

These factors are discussed further in chapter 3.

Australian government

2.37 The federal government has primary responsibility for cross border legal issues because it has responsibility for external affairs. It addresses these issues through several administrative arrangements. In general terms these arrangements are as follows.

- The Attorney-General has oversight of Australia's international law obligations and international law policy. This is administered through his Department.

- As part of that function the Attorney-General's Department administers Australia's participation in international institutions such as UNCITRAL, the Hague Conference and Unidroit. It also administers Australia's bilateral civil procedure agreements, and the international treaties falling within the Department's legal policy areas (eg intellectual property).

- The Minister for Foreign Affairs administers through his Department service of process through diplomatic channels and Australia's bilateral investment protection and promotion agreements.

- Other Ministers and Departments deal with the international agreements and arrangements relating to their portfolios. For example, the negotiation of environmental treaties, their incorporation into Australian law and all related monitoring activity is handled by the Minister for the Environment and his Department.

- There is no agency or policy unit directly responsible for cross border legal issues. However there are two agencies within the Attorney-General's portfolio that are concerned with Australian legal services and training outside Australia: the International Legal Services Advisory Council (ILSAC) and the Australian International Legal Cooperation Committee (AILEC). AILEC's brief is limited to strengthening relations between Australia and Vietnam, Cambodia and Laos in the field of law.

Business perspective

Avoiding legal issues

2.38 Cross border legal issues do not rate highly on the agenda of most Australian firms involved in international trade and investment. This is partly because in many countries they have little confidence in the law and do not rely on it and partly because their natural commercial focus is on building a business relationship and avoiding disputes, not on litigation or legal problems. The bottom line impact of cross border legal risk is rarely separately identified and this limits its profile as a business issue.

Managing cross border risk

2.39 Nonetheless Australian firms are having to deal with cross border legal risk. Currently they appear to be doing so in one of four ways

- by transferring the risk to another party - for example, an exporter may transfer payment risk to its bank by using documentary credits, or a joint venture agreement may allocate particular legal risks between the joint venturers

- by trying to avoid or quarantine the impact of foreign laws on their business - for example, a firm may design its corporate structure to quarantine legal risk to a particular subsidiary

- by pricing the increased risk into the fees or return they require
- by taking the risk without compensation or protection.

Improvements sought

2.40 A number of those consulted during the inquiry were pleasantly surprised that something was being done about cross border legal issues. The exposure to unpredictable risks of indeterminate magnitude inhibits business activity and raises costs. However commentators saw no ready solutions. They generally viewed these risks as part of the political risk that made business in a particular country difficult for all foreign firms not just Australian firms.[68]

2.41 It was also widely commented that any initiatives aimed at reducing cross border legal problems should focus primarily on risk management rather than dispute resolution. The emphasis should be on generating the necessary level of comfort in the business relationship and on dispute avoidance so as to help in providing business opportunities rather than simply solving problems after they have occurred. Thus legal initiatives should focus on clarifying and supporting the terms and conditions of the commercial arrangement, on providing ready access to good local advice, and on ensuring quick attention to differences of opinion or operational error. This translates into initiatives like prudential safeguards, secure payments systems, and clear and accessible commercial laws.

Business consultation

2.42 It was apparent from the consultations that Australian firms are generally not involved in the development of international conventions or other initiatives, sometimes even where they are directly relevant to their own industry. This is a major shortcoming. Greater business involvement is essential both to ensure that the convention or initiative properly reflects Australian interests and also to enable it to be adopted and implemented promptly and effectively. Lack of business involvement also inhibits the ability of Australian firms to identify the cross border legal risks they are facing and the potential solutions. Both business and government should actively seek to ensure business involvement to a detailed degree and at all stages. Ongoing business consultation should be a key feature of federal legal policy on this topic.

Risk and perceptions

2.43 The business perspective also highlights the importance of general impressions and perceptions. In a business context the assessment of cross border legal risk is in some respects made on the basis of general beliefs and understandings about another country's legal system rather than detailed analysis. Sometimes this leads to inflated fears.

2.44 In addition perceptions run both ways. To an observer from, say, Indonesia the Australian legal system can appear to be highly litigious and expensive, with social welfare laws creating barriers for business and regulatory traps for an unwary foreign investor. This will affect that Indonesian firm's assessment of the cross border legal risk involved in Australia/Indonesia transactions and the options available in any bilateral negotiations to manage that risk. From all perspectives it is clearly important to improve the level of knowledge and familiarity with the various legal systems affecting cross border transactions and to correct misguided or outdated perceptions.

Box 2F

Maxwell - a cross border insolvency

The collapse of the Maxwell corporate group following the death of Robert Maxwell in 1991 is most often associated with the subsequent revelations of misappropriation of funds from employee pension funds. A less well known aspect is the innovative cross border insolvency arrangements that were put in place to salvage the assets of the Maxwell group.

The Maxwell group of companies spanned numerous jurisdictions. The group was ultimately

controlled by Maxwell Communications Corporation (MCC). MCC shares were traded on the London Stock Exchange, its corporate books were kept in English pounds and it owed most of its estimated US$2.4 billion debt to UK banks and London branches of foreign banks. However, when it was apparent that the Maxwell companies were insolvent MCC was able to file for protection under Chapter 11 of the US *Bankruptcy Code* in the Southern District of New York because 80% of MCC's operations were in the US. The US court appointed an examiner to investigate the final position of MCC. At the same time MCC took UK bankruptcy proceedings to appoint an administrator over the group.[69]

There are some significant differences between UK insolvency administration and Chapter 11 procedures. In the US under Chapter 11 the present management generally remains in control and attempts to create a repayment and restructuring plan to satisfy creditors and resume business. All asset sales must be approved by the US courts. In a UK insolvency administration management of the insolvent company is vested in the court-appointed administrator who develops a reorganisation plan with creditors. The plan may include the sale of assets and the removal and appointment of directors. Court approval of assets sales is not required.

The UK administrator, Price Waterhouse, was thus faced with the difficulty of trying to administer an insolvent UK company where the bulk of the company's assets came under US jurisdiction. As there were no relevant international laws governing joint US and UK insolvencies the parties (the US examiner and the UK administrator) drafted their own in the form of a 'protocol.' Under this agreement the US courts suspended normal bankruptcy proceedings and the UK administrators effectively served as MCC's board of directors and began selling off the smaller MCC assets that were not part of its core operations (such as Macmillan Publishing). In return, the administrators agreed to consult with the US courts and the US examiner on asset sales over $45m, new borrowings by subsidiaries and other matters.[70]

Once the US and UK courts approved the protocol, it required creditor approval which was given in January 1992.

The MCC cross border insolvency plan was the first of several such cooperative arrangements between the courts of different countries.[71]

Country and industry issues

2.45 The issues raised by Australian firms varied significantly depending on the countries and industries involved. For example, an investor in a manufacturing joint venture in Vietnam would face significant legal risk in relation to any security over plant and equipment in Vietnam. There would not be the same risk if the security was over plant and equipment in, say, Germany. By contrast a pharmaceutical company trading in the USA would face product liability risks of a different order from those applying in, say, Indonesia. For this reason in many situations cross border legal issues need to be assessed on a country-by-country basis, identifying the risk for particular industries in those countries in which Australian firms are involved.

Law reform

Reducing cross border legal risk

2.46 In the Commission's view the cross border legal issues faced by Australian firms have now reached a stage where they need to be addressed directly. Current law and international arrangements are not keeping pace with Australia's growing and changing pattern of international trade and investment and the cross border risks and opportunities this is generating. Inadequacies in the law and in international arrangements are creating costs, delay and undue complexity. They need to be addressed as part of the government and business work supporting Australia's international trade and investment.

Systematic reform

2.47 Systematic reform is required to address these issues effectively. Work is required at various levels. Some work is required on litigation and other formal dispute resolution mechanisms. More work is required on the aspects of law that support cross border transactions where there is no dispute, particularly the substantive principles and regulatory arrangements that are applied to international commerce. There is also work needed on the implementation of existing laws and agreements and on non-legal solutions to cross border risks.

2.48 To achieve reform of this nature, Australia's priorities and agenda for reform must be set by the particular cross border risks Australian firms are facing - the risks that translate into higher prices and transaction costs, higher provisions for contingencies or simply barriers to entry into new markets. This will result in a more proactive policy that focuses on Australian trade and investment objectives.

Business advisory committee

2.49 The work on cross border legal issues is primarily government work since it is mainly about law reform and inter-governmental arrangements. However to be properly focused it must be driven by the experiences and views of Australian firms. A process is needed that will gather those experiences and views and will involve Australian firms - manufacturers, traders, commodity producers, financial institutions, professional advisers and other sections of the business community - at all stages, not simply in final consultations. One mechanism to do this would be to use a steering committee of business leaders from each industry sector that is involved in Australia's international trade and investment. These business leaders should have direct and extensive personal experience of international trade and investment. They should include business leaders with experience in small to medium size enterprises as well as larger firms, and with experience generated from a non-Australian perspective as well as an Australian perspective.

Box 2G

CSR - overview of litigation[72]

CSR was established in Sydney in 1855 as a sugar refiner. Since then it has substantially diversified and is now among the world's largest building and construction materials companies and in Australia is a market leader in each of the sugar and timber industries. It is involved in the aluminium refining industry. In Asia CSR produces concrete products (Taiwan and China) and has ten building materials plants under construction or operating.

From 1944 to 1965 a subsidiary of CSR operated an asbestos mine at Wittenoom, WA. Some of the asbestos mined at Wittenoom was exported to a large US company called Johns Manville (Manville), a manufacturer of gaskets, pipes and other asbestos products.

CSR has since become involved in US and Australian litigation defending claims for damages for personal injury from exposure to asbestos. Some of those claims have been brought by or on behalf of employees of Manville. Other claims are based on non-occupational exposure to products containing asbestos. Some of the claims have been resolved. Others are being litigated or are subject to other resolution processes. As at 15 May 1995 CSR had incurred total indemnity payments on Manville employee claims of approximately US $22 400 000 and was subject to approximately 43 700 claims in the US and 440 claims in Australia.

As a result of these asbestos claims CSR commenced actions against its insurers seeking (among other things) coverage for asbestos-related actions against it. This led to a multiplicity of proceedings, highlighting a number of uncertainties concerning anti-suit injunctions.

- In 1992 in NSW and in 1994 in New Jersey, USA, CSR took action against its insurers seeking coverage for asbestos-related commercial exposure in the US between 1955 and 1977. CSR's insurers sought an anti-suit injunction in NSW to restrain CSR from prosecuting the New Jersey action. The trial judge granted the injunction. CSR appealed but the matter settled before the

court handed down its judgment. These suits have now been settled with CSR receiving $A100 million in exchange for a full and final settlement of all claims.

- In 1995 CSR commenced proceedings in the US District Court against its insurers seeking coverage for asbestos-related commercial exposure in the US between 1978 and 1985. The insurers successfully sought an anti-suit injunction in NSW restraining CSR from continuing with the US District Court action pending final hearing.

- CSR sought a stay of the NSW proceedings. The stay was refused. CSR then sought leave from the NSW Court of Appeal to appeal against both the anti-suit injunction decision and the refusal of the stay application. The Court of Appeal refused this leave.

- On 11 April 1996 CSR successfully applied to the High Court of Australia for a stay of proceedings pending the hearing by the High Court of CSR's application for special leave. On 21 June 1996 the High Court granted CSR's special leave application against the adverse Court of Appeal ruling. The High Court is expected to hear the case in November 1996.

2.50 This committee would advise the government on options, priorities and timing for reforms relating to cross border legal issues. It is intended that it would put an agenda and particular recommendations for action to the government. In the course of preparing that agenda it would review current government priorities and those indicated in this report, consider any other options and priorities it thought fit, and identify from a business perspective:

- the major cross border risks that need attention

- the particular countries and industries where legal issues are of most concern to Australian firms

- the bilateral, regional and other international agreements and projects dealing with legal matters that Australia should pursue

- the non-legal solutions and options that Australia should pursue

- the time frames within which these initiatives need to be completed.

The work program of the committee and the frequency and form of its advice to government should be determined by the committee. However, the Commission considers there are some specific issues that the committee should address. These are identified later in this chapter and in chapter 3.

2.51 The Trade Policy Advisory Council (TPAC) which reports to the Minister for Trade has a membership that is similar to the membership contemplated for the committee proposed in this report. TPAC's perspective on trade is also highly relevant to the perspective that the advisory committee would bring to international legal issues. For practical purposes the advisory committee could be established as a sub committee of TPAC. The Attorney-General may wish to discuss with the Minister for Trade whether this would be appropriate.

Recommendation 1 - International Commercial Law Advisory Committee

A business advisory committee should be established to advise the government on options, priorities and timing for reforms relating to cross border legal issues.

Application across portfolios

2.52 Overall responsibility for addressing cross border legal issues should rest with the Attorney-General. However the issues involved cut across other portfolios, particularly where the reform proposed is a multilateral agreement relating to a particular industry. Many of the issues will be relevant not only to the Attorney-General as the Minister responsible for federal legal policy but also to the Treasurer and the Ministers for Foreign Affairs and Trade in connection with their interests in Australia's international

commerce. Some issues will involve other portfolios with a special interest in particular industries, for example telecommunications or aviation.

2.53 The work of the advisory committee is not intended to affect the current procedures and responsibilities for negotiating international agreements. The aim is rather to assist those negotiations by providing a business perspective on cross border legal risk and the options for managing them. For that reason it is recommended that the advisory committee should report jointly to the Attorney-General and the other Ministers who are most broadly involved in international commercial issues.

Recommendation 2 - advising across portfolios

The advisory committee should report to the Attorney-General, the Treasurer and the Ministers for Foreign Affairs and Trade, jointly.

Membership and staffing

2.54 The federal government has many sources of experienced legal advice on international issues. The function of the advisory committee is to provide business, not legal, advice. It is intended that its members will have practical experience of cross border problems and opportunities in a range of industries and countries. Their primary focus should be on assessing, from a business perspective, the importance of those problems and opportunities and on identifying the outcomes that need to be achieved to deal with those problems or to further those opportunities. They will also need to be skilled in identifying non-legal options for achieving those outcomes as well as considering legal options.

2.55 The legal information needed by the committee should be provided by its own secretariat. It is envisaged that the committee would be supported by a small, standing secretariat of two or three staff who would provide specialist legal and economic research and commentary and attend to administrative requirements. This will require appropriate funding and resources as discussed at the end of this chapter.

Recommendation 3 - membership and staffing

The advisory committee should be comprised entirely of business leaders, with participants from each industry sector that is involved in Australia's international trade and investment. The advisory committee should be supported by a small, standing secretariat.

2.56 Cross border legal issues will need ongoing attention. However much of the advisory committee's work will be completed when it has settled its views on the major issues to be addressed by government and the legal and non-legal initiatives that should be given high priority. The position should be re-assessed after three years to determine whether an advisory committee of the kind recommended in this report is still appropriate or a different structure is needed to ensure that the impact of cross border legal issues on Australian firms is properly assessed and addressed.

Recommendation 4 - three year review

The advisory committee should be reviewed by the Attorney-General after it has been in operation for three years to determine whether it should continue for any further period.

The benefits of systematic reform

2.57 The major benefit of the Commission's recommended approach to dealing with cross border legal issues is that it will ensure they receive direct, ongoing attention from a consistent business perspective. This will help in reducing the country and political risk faced by Australian firms in their international dealings, and will have a bottom line impact through the greater opportunities and reduced transaction costs that result from reduced risk.

2.58 The recommended approach will also enable Australia's work on these issues to be more cost effective. It will ensure that further work is assessed in terms of priorities and net benefits, and by reference to particular country and industry issues. If the further work proposed is not likely to contribute to some degree to the profits of Australian firms then it is unlikely that it is addressing a real risk that needs managing. It is also unlikely that there will be much incentive or interest in implementing the proposal. The legal effort put into it may well be wasted.

2.59 Assessing costs and benefits of legal initiatives requires a broad perspective on how legal systems affect business. The costs include the direct cost of participating in the relevant working groups, of debating and adopting any laws settled by the working groups, and of administering and complying with the new laws. Administration and compliance includes both government and private sector costs and extends to the costs of new business systems, legal advice and dispute resolution. The benefits should be assessed in terms of the contribution to trading and investment objectives. The legal initiatives will usually aim to develop an international agreement or arrangement that will last for many years. The benefits will therefore not only relate to the short term gains of current Australian firms but also to the broader support for an industry or a pattern of trade and any multiplier effect that may have.

2.60 A cost/benefit assessment of this kind will help answer the threshold question of whether the initiative should be pursued. More importantly, it will help set priorities within a range of initiatives that may need attention and it will help identify the best solution in terms of administration and enforcement. This last factor is particularly relevant since many of the business concerns raised during the inquiry relate to the lack of effective administration and enforcement of legal principles.

Further work

2.61 The advisory committee should be established as soon as possible. It is the key element in developing the proper focus and priorities for systematic reform. In subsequent chapters in this report the Commission recommends further work in four other areas

- short term cross border litigation reform - a set of litigation and related reforms arising directly out of consultations that should be addressed immediately

- long term cross border litigation reform - a second set of litigation and related reforms that will require more extensive consultation

- finance law reform - a set of finance law issues that need to be reviewed in detail with a view to developing specific reforms

- an electronic commerce 'safe haven' project - a special project to design and test a 'safe haven' model for certain types of commercial ventures.

2.62 The Commission considers that all of this further work has a high priority. The short term litigation reform can be addressed quickly and cheaply and therefore does not need any further ranking. The other work is longer term and the Commission would rank it in the following order: first, the safe haven project; second, the finance law reform; third, the long term cross border litigation reform.

2.63 The cost of each area of work can also be assessed separately.

- The structure of the advisory committee is similar to the structure of bodies such as the International Legal Services Advisory Council (ILSAC) and the Companies and Securities Advisory Committee (CASAC). Its annual costs can therefore be expected to be in the same range as the annual costs of those bodies.

- The cost of consulting on and implementing the short term litigation reforms should be low since it would be a short project with limited consultation and could follow procedures for this kind of reform that are well established in the Attorney-General's Department.

- The long term cross border litigation reforms, the finance law reform and the safe haven project can each be budgeted as equivalent to an 18 month reference to the Australian Law Reform Commission.

3. International initiatives

Introduction

3.1 Much of the discussion in this report is premised on the view that international agreements can help to reduce cross border legal risk. This chapter tests that view. It briefly surveys the international treaties and law reform initiatives in which Australia is or has been involved and gives some preliminary comments on the value of that international work to Australian firms. It then considers what else Australia might seek to do internationally and in particular how Australia should determine which projects have priority. The chapter concludes with some indications on how the principles discussed in the chapter might be applied to specific projects currently under review.

Australia's treaties

3.2 Australia has been active in negotiating multilateral and bilateral treaties. As at 31 December 1994 Australia had entered into (or inherited') 2289 treaties of which 1303 were bilateral and 986 were multilateral.[73] The treaties cover a wide range of topics. Only a few deal with litigation procedures or private international law. However there are many treaties dealing with cross border commerce, generally on an industry or trade regulation basis. For example, there are a number of treaties on agriculture, aviation, commodities, customs, fisheries, health and medical issues, intellectual property, maritime issues, nuclear energy, post and telecommunications, and tax. There are also a large number of trade treaties. These are generally bilateral except for the treaties relating to GATT or the World Trade Organisation which are multilateral.

3.3 With respect to litigation procedure Australia has entered into or acceded to a number of bilateral treaties on service of process and on reciprocal recognition of judgments. At the multilateral level, Australia has also entered into the Hague Evidence Convention[74] but has not yet entered into the Hague Service Convention.[75] These conventions are discussed in chapter 9, together with comments on some other international agreements on litigation procedure that are relevant to Australia.

International law reform

3.4 Australia has been an active participant in international legal initiatives, principally through its membership of the United Nations Conference on International Trade Law (UNCITRAL) and the Hague Conference on Private International Law. Australia also participates in the International Institute for the Unification of Private Law (Unidroit). Although it has been active, Australia is yet to adopt a number of the conventions and model laws on which it has worked.

UNCITRAL

3.5 UNCITRAL was established by the UN in 1966 to promote harmonisation and unification of the law of international trade through the preparation of conventions, model laws and other instruments, co-ordination and co-operation on international trade law, and dissemination of information. UNCITRAL has carried out its work in five main areas

- international sale of goods
- international transport of goods
- international commercial arbitration and conciliation
- new international economic order
- international payments.

Table 3A lists the conventions and other laws and guides issued by UNCITRAL and identifies those that have been adopted by Australia.

3.6 Australia is currently participating in two UNCITRAL projects: the UNCITRAL Working Group on Insolvency, which is discussed in chapter 4, and the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication, which is discussed in chapter 5. The Insolvency project is not expected to be completed for some years. The Model Law on EDI was finalised at the UNCITRAL Annual Session in June 1996. It is to be presented to the United Nations General Assembly when it meets later this year.[76]

The Hague Conference on Private International Law

3.7 The Hague Conference on Private International Law was permanently established in 1955. Thirty eight states (including Australia) are members. Its function is to achieve progressive unification of rules of private international law by the conclusion of treaties.[77] Relevant conventions settled by the Hague Conference include

- 1961 Convention abolishing the Requirement of Legalisation for Foreign Public Documents
- 1965 Convention on Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters
- 1970 Convention on the Taking of Evidence Abroad in Civil and Commercial Matters
- 1978 Convention on the Law Applicable to Agency
- 1985 Convention on the Law Applicable to Trusts and their Recognition
- 1985 Convention on the Law Applicable to the International Sales of Goods.

3.8 Australia is a party to the 1961 Hague Foreign Public Documents Convention, the 1970 Hague Evidence Convention and the 1985 Hague Trusts Convention.[78] Australia is currently considering accession to the 1965 Hague Service Convention. Australia is also participating in the work of the Hague Conference in assessing the scope for a multilateral convention on the recognition and enforcement of foreign judgments. This is expected to take about 10 years to develop. It is discussed in chapter 4.

Unidroit

3.9 Unidroit was set up in 1926 as an adjunct body of the League of Nations and was re-established in 1940 on the basis of a multilateral agreement. It currently has 58 member states, including Australia. It is an intergovernmental international institute (not affiliated to the UN) devoted to the harmonisation and unification of the private law of states.

3.10 Over 70 studies and drafts have been produced by Unidroit, primarily in the areas of sale of goods, credit, carriage of goods, civil liability, procedure and tourism. Table 3B lists the conventions which have been drawn up and adopted by Unidroit together with Unidroit's current projects and indicates their Australian status. Australia is actively involved in Unidroit's work on franchising.

3.11 The work of Unidroit has been taken as the basis for a number of international instruments adopted under the auspices of other international organisations. The most notable for Australian purposes are

- 1956 Convention on the Contract for the International Carriage of Goods by Road[79]
- 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations[80]
- 1980 United Nations Convention on Contracts for the International Sale of Goods.[81]

Table 3A

United Nations Commission on International Trade Law (UNCITRAL)

Conventions and other initiatives	***Australian status***
International sale of goods	
• 1974 (New York) Convention on the limitation period in the international sale of goods	Australia is not a party
• 1980 (Vienna) UN Convention on contracts for the international sale of goods	Acceded to on 17 March 1988 and incorporated by local Sale of Goods legislation
International transport of goods	
• 1978 (the Hamburg Rules) UN Convention on the carriage of goods by sea	Australia is not a party
• 1991 (in draft form) UN Convention on the liability of operators of transport terminals in international trade	Australia is not a party
International commercial arbitration and conciliation	
• 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards	Acceded to on 26 March 1975 and incorporated as Part II of the International Arbitration Act 1974 (Cth) with effect from 24 June 1975
• 1980 UNCITRAL Conciliation Rules	-
• 1982 Recommendations to assist arbitral tribunals and other interested bodies with regard to arbitrations under the UNCITRAL Rules	-
• 1985 UNCITRAL Model Law on international commercial arbitration	Incorporated as Part III of the International Arbitration Act 1974 (Cth) with effect from 12 June 1989
New International Economic Order	
• 1988 UNCITRAL Legal guide on drawing up international contracts for the construction of industrial works	-
• 1994 UNCITRAL Model Law on procurement of goods, construction & services	Not adopted by Australia
• 1993 Guide to enactment of UNCITRAL Model Law on Procurement of goods and construction	-
• 1992 UNCITRAL Legal guide on international countertrade transactions	-
International payments	
• 1988 (New York) UN Convention on international bills of exchange and international promissory notes	Australia is not a party
• 1987 UNCITRAL legal guide on electronic funds transfers	-
• 1992 Model law on international credit transfers	Not adopted by Australia

Other topics	
• 1982 Provisions on a universal unit of account and on adjustment of the limit of liability in international transport conventions	-
• 1983 Uniform rules on contract clauses for an agreed sum due upon failure of performance	-
• 1985 Recommendations to governments and international organizations concerning the legal value of computer records	-
Current projects	
• UNCITRAL Convention on Independent Guarantees and Standby Letters of Credit (adopted in 1995)	Australia is participating
• UNCITRAL Working Group on Insolvency	Australia is participating
• Uniform Rules on Assignment in Receivables Financing	Australia is participating
• UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication (finalised awaiting approval by Governing Council)	Australia is participating

Other international activities

3.12 In addition to this work with international legal institutions, Australia addresses cross border legal issues through bilateral agreements and international cooperation at a regulatory level. Australia also participates in international economic arrangements which have legal implications, notably Asia Pacific Economic Cooperation (APEC), Pacific Economic Cooperation Council (PECC), Closer Economic Relations (CER) and the World Trade Organisation (WTO).

Bilateral negotiations on recognition of judgments

3.13 As at October 1995 there were 31 foreign jurisdictions covered by the regulations under the *Foreign Judgments Act 1991*.[82] These arrangements provide for reciprocal recognition of final money judgments in the superior courts of Australia and the relevant foreign jurisdiction. In the case of New Zealand and the UK, a reciprocal agreement has been reached on the enforcement of inferior court judgments. Australia is continuing the process of bilateral negotiations with many countries to extend the reciprocal arrangements to those countries.[83]

Bilateral investment promotion and protection agreements

3.14 Australia concluded its first bilateral investment promotion and protection agreement with the People's Republic of China in 1988. It has since concluded many further agreements with countries that were formerly centrally planned economies (eg Eastern Europe) and with some countries in the Asia Pacific region and Latin America. These agreements are aimed at building trade and investment confidence between the countries involved by setting out specific legal expectations and requirements. They emphasise

- the promotion and protection of investments
- most favoured nation treatment
- guarantees as to movement of personnel, repatriation of profits and other returns on investment

- transparency of laws relating to investments
- detailed rules on expropriation or nationalisation by the host state
- dispute settlement procedures.[84]

3.15 There has been some concern that as the number of these agreements increases rules have become fragmented and parties have (notwithstanding the aims of the agreements) been treated differently. It has also been commented that continuing to develop these agreements on a bilateral basis will result in a very large number of agreements. For example, it was calculated in 1994 that it would require 105 bilateral agreements to link the (then) 15 participants in APEC and over 200 agreements to link all the members of PECC.[85] This has prompted a greater emphasis on multilateral arrangements such as the APEC Non-Binding Investment Principles endorsed by the APEC Ministers in November 1994 and the Energy Charter Treaty, which extends to member states of the European Union and the former USSR. More recently the OECD has initiated a proposal for a multilateral agreement on investment. Australia has indicated some support for this proposal.[86] Nonetheless bilateral agreements remain the first option in many instances. For example, the USA recently refused to sign the Energy Charter Treaty because it gained more rights in bilateral arrangements with the same states.[87]

Regulatory cooperation

3.16 Cross border commerce is significantly affected by the different national regulatory schemes applying to particular industries and to securities and financial markets. Australia's regulators participate in a number of formal and informal cooperative arrangements aimed at ensuring that the different national regimes work efficiently for international commerce.[88]

3.17 One example is the cooperation between securities regulators. Through the various working parties of the International Organisation of Securities Commissions (IOSCO)[89] the Australian Securities Commission (ASC) has developed arrangements with other foreign securities regulators in policy development and cooperation in enforcement and evidence gathering. In Australia legislative support for this cooperation is provided by the *Mutual Assistance in Business Regulation Act 1992* (Cth). This enables both the ASC and the Australian Consumer and Competition Commission (ACCC) to obtain evidence on behalf of foreign regulators. Some foreign jurisdictions have enacted similar enabling laws which can assist Australian regulators.[90] Informal information and evidence sharing arrangements between foreign securities regulators known as Memoranda of Understanding (MOUs) have been developed on the basis of these laws.[91]

Asia Pacific Economic Cooperation (APEC)

3.18 APEC was established in 1989 as an intergovernmental forum to discuss economic issues in the Asia-Pacific region. APEC includes all the major economies of the Asia-Pacific region. Australia is an active participant.

3.19 APEC operates through a series of meetings at various levels of government. Since its formation in 1989 Ministerial Meetings have been held annually. Leaders Meetings have been held in Seattle (1993), Bogor (1994) and Osaka (1995) bringing together the Presidents or Prime Ministers of member economies. Senior Officials Meetings (SOM) are held more frequently and provide the main means by which APEC work programs (including the implementation of Leaders and Ministers decisions) are carried forward in a range of trade, investment and economic cooperation areas. The SOM also provides guidance to subsidiary committees and groups, notably the Committee on Trade and Investment, the Economic Committee and APEC's ten sectoral Working Groups.[92] Ad hoc advisory groups have also been convened when required such as the Eminent Persons Group and the Pacific Business Forum (succeeded in 1996 by the APEC Business Advisory Council). Expert's Groups also exist in a number of more specialised areas, such as the APEC Experts' Group on Voluntary Consultative Dispute Mediation.

3.20 The three specific objectives of APEC are set out in the Bogor Declaration adopted by the APEC Leaders in November of 1994.[93]They are

- to strengthen the open multilateral trading system
- to achieve free and open trade and investment in the Asia Pacific by 2010 for developed members and 2020 for developing members by a process of facilitation and liberalisation
- to intensify development cooperation in the region.

Legal issues have been raised in APEC in the context of supporting these objectives, and in particular free and open trade and investment. Some of the issues relate to trade regulation. Work is under way to facilitate trade and investment among Asia Pacific economies by the harmonisation of customs procedures, using EDI for customs documentation and the mutual recognition of a progressively wider range of product standards and testing procedures.[94] In addition dispute resolution was raised as a specific topic by the APEC Eminent Persons Group in 1994. The APEC Experts' Group on Voluntary Consultative Dispute Mediation was subsequently established to consider options including possible measures to assist in the resolution of government-government, government-private and private-private trade/commercial disputes.

Table 3B

Unidroit Conventions

Conventions adopted by Unidroit	***Australian status***
• 1964 Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods	Not adopted (but formed basis for UNCITRAL's 1980 Vienna Convention)
• 1964 Convention relating to a Uniform Law on the International Sale of Goods (The Hague)	Not adopted (but formed basis for UNCITRAL's 1980 Vienna Convention)
• 1970 International Convention on the Travel Contract (Brussels)	Not adopted
• 1973 Convention providing a Uniform Law on the Formation of an International Will (Washington)	Not adopted
• 1983 Convention on Agency in the International Sale of Goods (Geneva)	Not adopted
• 1988 Unidroit Convention on International Financial Leasing (Ottawa)	Not adopted
• 1988 Unidroit Convention on International Factoring (Ottawa)	Not adopted
Current projects	
• Principles of international commercial contracts	Australia participating as state member
• Security interests in mobile equipment	Australia participating as state member
• Guide to international franchising	Australia participating as state member

3.21 Several proposals are currently being considered in relation to government-private and private-private dispute resolution.

- Recommendations were made at the Osaka meeting to encourage accession by all APEC member countries to the international arbitration regimes contained in the Washington Convention on the Settlement of Investment Disputes 1965 and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.[95]

- The APEC Group of Experts is currently conducting an extensive familiarisation process in relation to both government-private disputes and private-private dispute resolution and enforcement of decisions in APEC member countries. Once this familiarisation process is complete, it is intending to disseminate the information gathered on dispute resolution processes, possibly through the publication of a guide book on arbitration, mediation and conciliation services in each APEC economy. Further educational and training initiatives are also planned to support this familiarisation process.[96]

- The Pacific Business Forum (PBF) has proposed a study into the merits and desirability of adopting a Trade and Investment Ombudsman (TIO), possibly based on the Japanese Trade and Investment Ombudsman service. The main purpose of a TIO would be to provide administrative, not legal, assistance by providing commercial certainty without compromising a complainant's right of access to the laws of each APEC economy or the WTO. The TIO might, for example, respond to requests for clarification of laws or government policy, complaints concerning non-enforcement or administrative error, and complaints regarding market access issues.[97]

3.22 From the perspective of Australian firms, APEC's focus on customs and dispute resolution is highly relevant. It reflects the major concerns raised during the inquiry in relation to cross border legal risk in the Asia Pacific region. The emphasis on non-legal solutions such as a Trade and Investment Ombudsman and educational and training initiatives fit well with the general view expressed in consultations that litigation and arbitration are a last resort and that other, less confrontational, mechanisms are needed.

Table 3C

Simplified range of international legal techniques

International legal technique	***Examples***
International agreements	*New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958* *Australia New Zealand Closer Economic Relations Trade Agreement (CER)*
Model Laws/Statements of principles	*UNCITRAL Model Law on International Commercial Arbitration* *Unidroit Principles of International Commercial Contracts*
Standard terms and conditions	*ICC's Uniform Customs and Practices for Documentary Credits* *ISDA agreements*
Explanatory guides	*UNCITRAL legal guide on electronic funds transfers* *Unidroit guide to international franchising*
Industry practice/familiarity	

Pacific Economic Cooperation Council (PECC)

3.23 Another private forum with an active role in the APEC process is the Pacific Economic Cooperation Council. PECC was formed in 1980 as a tripartite, business-focused, collaboration between business and independent research institutes. It works alongside, but independent of, 22 regional governments (including Australia). PECC's goals are to advance economic cooperation and market-driven integration in the Asia-Pacific region. It is the only non-government body with observer status in APEC. PECC has contributed to harmonisation of international trade laws and intellectual property in the Asia Pacific through its promotion in the region of accession to conventions such as the 1958 New York Convention, the UNCITRAL Model Law on International Commercial Arbitration and the Berne Convention for the Protection of Literary and Artistic Works.[98]

Australia New Zealand Closer Economic Relations Trade Agreement (CER)

3.24 The Australia New Zealand Closer Economic Relations (CER) Trade Agreement came into force in 1983. Its purpose was to reduce transaction costs, create opportunities to achieve economies of scale in the production of certain manufactures and increase the competitiveness of Australasian exporters in third markets.[99] In 1988 Australia and New Zealand signed further Protocols to create free trade in goods by 1990, to abolish anti-dumping procedures and to include services and quarantine administration under the CER agreement.

3.25 Significant legal reforms accompanied the 1988 developments. Following the conclusion of an MOU on the Harmonisation of Business Law', also in 1988, both governments agreed to examine the scope for harmonisation of business laws and regulatory practices. As a result, harmonisation initiatives have been commenced with respect to corporate and insolvency law and competition law. In 1990 both countries enacted legislation to abolish anti-dumping measures in favour of competition laws to cover relevant anti-competitive conduct affecting trans-Tasman trade in goods. The amendments to competition laws included a number of innovations in litigation procedure. In particular

- reciprocal and compulsory evidence gathering and assistance powers, in each other's jurisdiction, were given to each of the then Trade Practices Commission (now the ACCC) and the Commerce Commission

- court rules were amended and other changes made to provide for (among other things) the reciprocal holding of proceedings in either jurisdiction, the administration of oaths, the taking of evidence in the other jurisdiction through telephone or video link, the provision by each court to the other of registry facilities and staff, and permission for counsel to practice in each jurisdiction.[100]

3.26 The complementary relationship between the Australian and New Zealand legal systems has been further enhanced by more recent reciprocal enforcement of judgment arrangements,[101] revised laws relating to subpoenas, video link proceedings and evidence,[102] as well as miscellaneous business laws.[103] Further developments are envisaged through the setting up of focus groups to pursue harmonisation in the areas of intellectual property, securities markets, civil procedures and company regulation.[104]

World Trade Organisation (WTO)

3.27 The WTO was established on 1 January 1995 following the conclusion of the Uruguay Round of trade negotiations as the successor institution to the General Agreement on Tariffs and Trade (GATT). It is now the legal and institutional foundation of the multilateral trading system, a forum for collective debate, negotiation and adjudication as well as a source of rules on how governments frame and implement domestic trade legislation and regulations.

3.28 One of the areas of WTO activity is intellectual property. Cross border protection of intellectual property rights is a significant issue for Australian business.[105] There are many long standing multilateral treaties dealing with intellectual property but their effect in the Asia Pacific region has been limited. This issue was addressed, again on a multilateral basis, in the Uruguay Round of the GATT through the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) now administered through WTO. Australian legislation implementing the protective provisions of the TRIPS Agreement was enacted in 1995 in relation to copyright and trade marks.[106] Australia is currently seeking to supplement these arrangements in the Asia Pacific region with suitable MOUs.[107]

Evaluating international agreements and harmonisation

The track record to date

3.29 Against the background described above the first issue that arises is how well have international agreements contributed to reducing Australia's cross border legal risk to date? It is premature at this feasibility stage to form a firm conclusion on this issue but it is possible to make some preliminary comments.

- There have been relatively few multilateral and bilateral agreements directly relating to cross border litigation procedures. Part II of this report illustrates the numerous procedural difficulties involved in cross border litigation. The lack of international agreements to date suggests that the issues are too hard, or the legal risks are not well understood or the risks can be more effectively managed by non-litigation techniques.

- Second, there has been more international work on substantive law conventions, particularly at a multilateral level through UNCITRAL and other international institutions. It is, at first glance, surprising that Australia has not adopted more quickly the conventions, model laws and other international legal instruments on which it has worked through these institutions. It is not clear whether the slow response to these conventions arises because a particular convention does not sufficiently meet the needs of Australian firms or because of broader limitations on the value of conventions as a technique for addressing cross border legal risk or for some other reason.

- Third, Australia has entered into a large number of trade and industry treaties. The sheer volume of these treaties suggests that they are a useful technique for dealing with some elements of cross border risk and perhaps are an appropriate focus for dealing with cross border legal risk in relation to particular industries or countries.

- Fourth, there are clearly many gaps in the topics covered by Australia's treaties and international arrangements. Much of legal procedure is simply not addressed, as indicated in the discussion in Part II of this report. The coverage of substantive law topics is irregular and sporadic even in areas where there is a strong international element such as in finance law - this is illustrated in chapter 5. However these gaps are not a specific disadvantage for Australian firms. They apply to firms of all countries. They simply reflect the lack of legal support for international commerce as compared to domestic commerce.

3.30 It would be too harsh to conclude that Australia's international activities are not yielding sufficient benefits. However those preliminary comments suggest that a more detailed analysis is required of the benefits that are expected to be generated by Australia's international agreements in reducing legal risk and whether those expectations are being met.

Evaluating harmonisation

3.31 Australia's experience with international arrangements is reflected to some extent in the reassessment of harmonisation initiatives that is occurring more broadly in the international community. This reassessment is illustrated by a recent commentary on a draft Code on Contract Law prepared in the early 1970's by Dr Harvey McGregor

> Looking back over the 25 year period that has elapsed since the draft was written, one can see a change of mood in respect of law reform, that perhaps reflects more general loss of confidence in social progress. The assumption underlying McGregor's draft and commentary is the problems in the existing law can be accurately identified, and that knowledgeable experts can, after directing their minds to the question, agree on appropriate reforms and put them efficiently in legislative form. Enactment of expert recommendations by a wise legislature can be confidently anticipated, and it can be expected that the legislation will be applied as had been predicted, with beneficial consequences to everyone. I do not say that these ideas have vanished altogether, but I do think that they are less confidently held than they were 25 years ago.[108]

The scepticism about political will and rational law reform evident in that comment is reflected in other assessments of harmonisation that have emphasised the impact of political shifts and the numerous factors affecting political will for a particular proposal.[109]

3.32 There are also other factors that have been identified as limiting the effectiveness of harmonisation through multilateral conventions. Three stand out.

- There is a persistent lack of business involvement in the development of conventions. It seems that sometimes business groups will call for the benefit of harmonisation but expect it to be achieved by the lawyers'.[110] This inevitably creates potential for the convention to fail to properly address the

commercial risk it is seeking to reduce. Indeed, a country may seek harmonisation when it does not in fact suit its national interest.[111]

- It seems that effective harmonisation does not require uniformity but does require a common conceptual basis.[112] This limits markedly the potential topics that are suitable for international conventions. It raises some doubt as to whether agreements between countries, some of which have a common law system and some of which have a civil law system, are likely to be more than superficially effective.[113]

- In almost all areas, including those that lend themselves to strict and precise rules such as tax, it seems that codes of conduct and cooperative arrangements are more effective than a legalistic approach.[114]

3.33 As with Australia's track record, these are preliminary comments only. Their combined effect is not to say that harmonisation through multilateral conventions has no place in reducing cross border legal risk but rather that the topic needs to be carefully chosen, the expected outcome needs to be precisely identified and the political will needs to be marshalled and maintained.

Assessing priorities

Outcomes and techniques

3.34 Some broad principles can be drawn from the preliminary comments and information gathered during the inquiry to help in assessing Australia's priorities in its international legal work. The principles are not novel but it is hoped that by articulating them that they can be developed to support the more detailed program of international and local law reform required to reduce the legal risk faced by Australian firms.

- The first principle is that each international agreement or initiative that aims to improve commercial law at either a procedural or substantive level should have as one of its expected outcomes the reduction or better management of cross border legal risk faced by Australian firms. The expected outcome must be identified sufficiently for it to be monitored after the agreement or initiative is implemented so that success or failure can be demonstrated.

- The second principle is that the expected outcome of each international agreement or initiative should be assessed carefully to see whether it is achievable. This will depend on political will and other factors as discussed above. It will also depend on the particular technique used to address the cross border legal risk and the alternative or supplementary options. These techniques and options are discussed further below. One of the themes in the consultations was that the expected benefit of a convention is not achieved unless it is implemented in the manner contemplated by those preparing it. Some conventions, notably those on arbitration, have clearly suffered from lack of implementation. They illustrate the potential for the achievable outcome to differ from the expected outcome.

- The third principle is that Australia's priorities in its international legal work should be set out according to the value of the achievable outcomes. The assessment of value will usually be a qualitative rather than a quantative judgment as indicated in the discussion in chapter 2 on cost/benefit assessments.

The range of international legal techniques and options

3.35 Table 3C simplifies the range of international legal techniques and options that are currently used to reduce cross border legal risk into five categories - international agreements, model laws/statements of principles, standard terms and conditions, explanatory guides and industry practice/familiarity. Within each of the categories there are many variations and tailor-made solutions that could be developed.[115] The advantages and disadvantages of multilateral and bilateral agreements have been outlined above. The other techniques and options also have their own specific considerations. These are briefly indicated below.

Model laws

3.36 Model laws, such as UNCITRAL's Model Law on International Commercial Arbitration, are more flexible than multilateral conventions. A model law is a legislative text that is recommended to states for adoption as their national law. The state may, in incorporating the text of the model law in its domestic law, tailor the text to meet its particular needs by modifying or leaving out some of the model law provisions.[116] This flexibility is particularly useful from a regional perspective since it allows adjustment to local conditions while setting out a common standard or template.

Statements of principles

3.37 The Unidroit *Principles of International Commercial Contracts* illustrates an alternative, and even more flexible, approach to the statement of uniform law. It can be adopted not only by legislatures but also by domestic courts and in international and domestic arbitrations, mediations and other forms of dispute resolution.

Standard terms and conditions

3.38 Standard terms and conditions generate significant efficiencies for routine business transactions. This has been amply demonstrated at an international level through the ICC's Uniform Customs and Practices for Documentary Credits and the ISDA agreements used in financial markets. The technique is also common in purely domestic transactions.

Explanatory guides

3.39 Explanatory guides are an alternative to more institutional or formalised rule making projects. The primary emphasis in legal guides is usually educational with a secondary emphasis on stimulating the harmonisation of commercial laws.

Industry practice

3.40 Industry practice is a secure ground on which to base any international agreement since the procedures and will to implement the agreement are already in place. However industry practice can take some time to develop. Publications or statements of emerging practices through bodies like the ICC, ISDA and other international associations can help to confirm and develop practices more quickly.

Promoting familiarity with other legal systems

3.41 The various techniques used to promote familiarity with other legal systems should also be recognised as one of the options to reduce risk. Most of this work is low key, often through law schools and academics, but it has particular value in implementing new laws or international agreements and more generally in increasing the level of confidence in the legal systems of other countries.

Advisory committee

3.42 The assessment of Australia's priorities in its international legal work is a critical factor in effective reform on cross border legal issues. It should be a significant part of the work undertaken by the advisory committee recommended in chapter 2. There are essentially three aspects of international legal work to be considered

- the existing conventions and initiatives, particularly conventions on which Australia has worked but which it has not yet ratified
- keeping the existing conventions up-to-date
- new initiatives that Australia should promote.

3.43 The Commission's attention was drawn to the second issue of keeping conventions up-to-date in relation to the *Convention on the Limitation of Liability for Maritime Claims 1976.* This convention effectively caps the liability of shipowners for damage done by deep trawl fishing nets to seabed telecommunications cables. It was submitted that the agreed cap was no longer adequate given developments in both the technology and the commercial significance of telecommunications.[117] There does not appear to be any standard procedure for regularly reviewing Australia's international agreements for issues of that kind.

Recommendation 5 - international legal work

The advisory committee should report on

- the priority to be given to the adoption in Australian law of UNCITRAL, Hague Conference, Unidroit and other conventions which have not yet been ratified, and to the international legal initiatives in which Australia is participating
- the procedures to be adopted by the federal government to ensure that Australia's international agreements are regularly reviewed and proposals for amendment are regularly considered
- any new international initiatives, including non-legal initiatives, which Australia should promote or in which Australia should participate to help address cross border legal issues.

Specific international initiatives

3.44 The broad principles and techniques set out above can be applied to several initiatives raised during the inquiry to indicate how they can help in assessing priorities. Three different types of initiatives are discussed below. The first concerns the Geneva Convention 1948 on aircraft registration and illustrates the assessment of a specific, existing convention. The second proposal, which relates to Australia/New Zealand judicial cooperation, assesses a specific but new proposal that is not based on any existing convention. The third, which deals with APEC, discusses a new and broad proposal.

Geneva Convention 1948

3.45 Sixty-five countries in the world have signed and ratified, adhered to or succeeded to the *Convention on the International Recognition of Rights in Aircraft* (Geneva Convention 1948).[118] The purpose of this convention is to facilitate international recognition of rights in aircraft. These rights include

- proprietary rights in aircraft
- a lessee's rights (provided the lease is for 6 months or more)
- a right to purchase aircraft, coupled with possession of the aircraft
- mortgages, hypotheques and similar rights in aircraft (ie, contractual rights which are created to secure a debt).[119]

The convention does not prohibit the recognition of rights in aircraft under the law of a contracting state. Contracting states, however, agree that they will not recognise any right as taking priority over the rights listed above.[120] Although Australia signed the convention in June 1950 it has not yet ratified its signature to the convention. It shares that position with only 8 other signatory countries.[121]

3.46 Countries which ratify the convention are under an obligation to put into place such measures as are necessary for the fulfilment of the provisions of (the) convention'.[122] This includes providing for

- a legally enforceable system of registration of security and other interests in aircraft (these systems operate in a fashion not dissimilar to the Torrens system of registration of interests in land in NSW -

they confer on the holders of registered security interests certain benefits such as priority and indefeasibility)[123]

- a mechanism for recording interests in aircraft in a record open to the public[124]

- the priority of claims for compensation due for salvage of aircraft and for expenses indispensable for the preservation of the aircraft'[125]

- a system for the disposal of the proceeds of sale of an aircraft.[126]

3.47 In practice, lessees in countries which have ratified their signature to this convention are more attractive lending propositions for international financiers. The amounts borrowed in order to finance these aircraft are significant. By way of indication only, as at May 1996 in the Boeing series the prices of new aircraft range from approximately $US38 million for a Boeing 737-300 (without added options) to $US182 million for a Boeing 747-400 (with full options).

3.48 Currently if an aircraft is leased to an Australian carrier foreign lenders have to be satisfied with commercial comfort rather than a secure system of priority in registration which has legislative backing. This comfort takes the form of more casual arrangements such as

- recording the security interest in a register maintained by the Civil Aviation Authority - but this register has no legislative backing

- in the case of an Australian borrower, recording the existence of the security at the company register - this could have the effect of placing third parties on constructive notice of the financier's interest

- depositing with the financier a deregistration Power of Attorney which can be used in certain specified circumstances.

All of these means of providing security, however, are measured by the international lending community against the fact that 65 countries have agreed to participate in a system which provides certain benefits to a lender. Anything less than that level of benefit will cause that community to require additional security or commercial comfort. This often includes obtaining costly and time-consuming legal and financial advice on the particular arrangement.

3.49 In consultations the Commission was informed that the aircraft financing industry would be assisted if Australia ratified its signature to the convention.[127] The benefits to that industry would include

- an increase in the ease with which international finance for the leasing of aircraft into Australia could be obtained

- reduced legal and financial documentation costs for each such transaction;

- a more hospitable environment for the more ready attraction into Australia of aircraft leasing finance

- a more secure legal framework upon which the providers of international finance can rely for enforcing their security interests in aircraft.

In the absence of Australia's ratification the Australian aircraft financing industry will continue to rely on the common law system of enforcing security interests. This is an effective but more cumbersome system.

3.50 At this feasibility stage the Commission does not have enough information to identify the priority that should be given to ratification of this convention. However, the preliminary indications are that it should have a high priority.

- The expected outcome has been clearly identified - reducing transaction costs and making the Australian aircraft industry more attractive to foreign lenders through a more secure system of registration of interests in aircraft.

- That outcome seems to be achievable - the system is already in place in a number of other comparable countries and the comments and consultations suggested lessees in those countries do have a comparative advantage over Australian lessees.

- The outcome clearly has some value - this is also indicated by the comments in consultations. It is not known how this value compares to the value of other international initiatives but the cost involved in assessing whether to ratify would seem to be too low to make this an issue. To assess value fully, it would also be necessary to determine whether there are any disadvantages in ratifying. None were raised with the Commission during the inquiry.

- The technique for using an international convention also seems appropriate - the financing of mobile equipment is a specific issue with clear cross border implications that is well suited to multilateral agreement (as indicated by Unidroit's current work in this area). It is possible that aspects of the system contemplated by the convention could benefit from updating, given that the convention is almost fifty years old. This could be taken into account when considering ratification and assessing how best to implement it in Australian law.

Recommendation 6 - Geneva Convention 1948

The Minister of Transport should review, as a matter of priority, whether Australia should ratify the *Convention on the International Recognition of Rights in Aircraft* (Geneva Convention 1948).

Australia/New Zealand judicial cooperation

3.51 One suggestion raised during the inquiry was that Australia should discuss with New Zealand the procedures that could be used for direct judicial communication on cross border insolvencies involving both countries. The impetus for this idea is twofold. Under CER Australia and New Zealand have already been able to develop significant levels of judicial cooperation on competition law, far higher than any available under any multilateral agreement or, indeed, any other bilateral agreement. Secondly, direct judicial communication on cross border insolvencies has been discussed among insolvency practitioners and courts and is seen to be promising but fraught with complications. Given the close similarity between the Australian and New Zealand legal systems, a bilateral Australia/New Zealand project offers an opportunity to find solutions to those complications. If solutions can be found the Australia/New Zealand model can then be used as a basis for further bilateral negotiations.

3.52 On a preliminary assessment this project would also seem to warrant priority. The expected outcome - reduced costs and delays from more streamlined insolvency procedures - is clearly identified. It seems achievable given the political will previously evidenced in CER. The project is well suited to bilateral negotiations. There is the question, however, of whether there is sufficient value to justify the work involved. Further information is required on the number and financial significance of trans-Tasman insolvencies and a realistic assessment needs to be made of the potential to extend the model to other countries and the benefits that would generate. This should be done by the advisory committee discussed in chapter 2.

Recommendation 7 - judicial communication on insolvencies

The advisory committee should report on the potential for direct judicial cooperation and communication between Australian and New Zealand courts on trans-Tasman insolvencies with a view to streamlining the administration of those insolvencies.

APEC law reform

3.53 There was much interest in the inquiry in the possibility of a regional law reform program developed through APEC. This was prompted by the view that law reform is currently enjoying a high profile in many of the APEC member economies as evidenced by the high level of national law making in the region. At the same time many of the comments in the consultations suggested that legal risk for cross border commerce in the region is high, at least from the perspective of Australian firms. Given this political will and legal need it was suggested that a program of regional law reform should be developed and pursued by Australia.

3.54 There are difficulties in translating this into a specific proposal. Three topics seem to attract high levels of regional cross border legal risk.

- *Intellectual property* - Intellectual property issues are already being addressed on a multilateral basis through the WTO and the WIPO. Much of the work of those organisations is concerned with enforcement of intellectual property rights in the Asia Pacific region. APEC is involved in a supportive and complementary work program which has as its objective the effective protection of intellectual property rights through full and possible accelerated implementation of the TRIPS Agreement. The work program includes developing contact point lists of intellectual property experts and law enforcement officers, a survey of members' intellectual property regimes, cooperative efforts to simplify and standardise intellectual property administrative systems and APEC technical assistance on intellectual property issues.

- *Security interests in land or personal property* - Security over land or personal property is a complex topic. The experience to date in the United Kingdom, Australia and New Zealand suggests that it may be difficult to reach agreement on all of the issues involved in an effective system of security interests, even where the legal systems are closely related. In the case of security over personal property Article 9 of the Uniform Commercial Code in the USA is available as a basis for generating a model law. If a model law were adopted throughout the region there could be expected to be benefits in terms of reduced transaction costs and the greater volumes of business generated by greater confidence. However considerable further work is needed to identify whether those outcomes are achievable, the costs of implementation and the value of the expected benefits.

- *Dispute resolution* - Dispute resolution is the most promising proposal since it is already on the APEC agenda, the current APEC program fits with the views expressed by Australian firms and it is an area of concern for Australian firms. Nonetheless much further work is needed to identify the particular outcomes sought and the benefits they are expected to generate. The preliminary indication is that Australia should continue to be actively involved in APEC's work on dispute resolution with a view to developing it to a stage where it can be assessed as a specific proposal.

Other regional law reform

3.55 Other proposals were raised during the inquiry concerning dispute resolution in the Asia Pacific region that did not involve APEC.

- One proposal was that a regional business panel should be established that could make authoritative but non-binding statements on regional business standards. These statements would indicate what kind of remedy (if any) should be expected as a matter of regional business practice. It was intended that they would be available to inform court decisions and the development of laws in countries in the region. The proposal received mixed support.[128] Some supported the non-confrontational and expert nature of the panel. Others doubted whether there would be any commercial interest in non-binding determinations. Another comment was that it would overlap too much with traditional areas of diplomacy.

- A second proposal was that a regional arbitration tribunal should be established to be available for disputes between individuals or firms located in an AFTA or CER member state. The tribunal would be sponsored by all AFTA and CER member states. It was suggested that there was a need for a regional arbitration institute (as against the existing national arbitration institutes dealing with

international arbitration) and that this might be easier to establish through the smaller membership of AFTA and CER than APEC.

These proposals were not able to be developed or tested during the inquiry but they indicate options the advisory committee may wish to consider further.

3.56 The Department of Foreign Affairs and Trade (DFAT) administers Australia's involvement in APEC and Australia's relationship with AFTA and under CER. The advisory committee could supplement DFAT's work by considering, in the context of cross border issues generally, the potential for cross border legal risk to be reduced by regional law reform initiatives in the Asia Pacific region.

Recommendation 8 - Asia Pacific law reform

The advisory committee should report on the potential for cross border legal risk to be reduced by regional law reform initiatives in the Asia Pacific region.

4. Litigation, arbitration and insolvency

Introduction

4.1 Cross border litigation, arbitration and insolvencies generate issues that are at the heart of cross border legal risk. The civil remedies that are in fact available through those proceedings set the ground rules for negotiations over cross border legal issues and influence the form of the legal support that is given to the commercial arrangements that help in managing cross border risk. Many of the issues raised in the inquiry, and many of the comments in the submissions and consultations, concern problems arising in cross border legal proceedings.

4.2 This chapter outlines the main litigation, arbitration and insolvency issues raised with the Commission and their implications for reform. The recommendations in this chapter fall into two categories

- *proposals* for reform that are essentially technical and will require only limited further consultation, primarily with legal practitioners and the courts
- *issues* for reform that will require more extensive consultation with the legal profession, courts and the business community.

The implementation of these recommendations is discussed at the end of the chapter. In all cases it is contemplated that the Attorney-General will review and form a view on the proposal or issue for reform. However in some cases full implementation will depend upon other bodies such as the courts.

Litigation

Overview

4.3 Chapter 2 outlined the principal concerns expressed in submissions and consultations about cross border litigation and about related problems in insolvency administration and arbitration. The problems arise because of difficulties in the detailed technicalities of the procedures used in court proceedings in Australia and in other countries. The analysis in Part II of this report illustrates many of the technicalities in Australian law and practice and their effect on particular claims and disputes.

4.4 The information and comments received during the inquiry indicate that the reforms required to address these problems are a combination of statutory provisions, changes in court rules and practices, and techniques allowing greater judicial cooperation between the courts of Australia and other countries. The changes need to be led by federal law reform but closely guided by consultation with the business community, courts and legal profession. The reforms fall into five categories:

- commencing proceedings — service and jurisdiction
- obtaining evidence abroad
- secrecy laws
- seeking protective orders regarding offshore assets or to detain absconding defendants
- enforcing Australian judgments outside Australia.

The reforms are discussed below in these categories.

Commencing proceedings — service and jurisdiction

4.5 The commencement of proceedings involving cross border parties and evidence can raise significant issues of service of process and jurisdiction. Australian courts will consider not only their powers to issue summons or applications intended to be served abroad but also whether the actual service of that process in a

foreign court's territorial jurisdiction may raise questions that challenge the authority of foreign courts and government.[129] Questions of that kind involve issues of international comity which Australian courts are reluctant to prejudice even if the extent of such comity is uncertain.

4.6 Sometimes alternative forms of service are available. For example, in a situation where there were close links between a local Australian subsidiary and its foreign parent, service on the US parent company was permitted via service on the local subsidiary.[130] However, where such shortcuts are not available, service of process offshore can be a problem particularly in cases of urgent relief where it is not feasible to use processes such as service through diplomatic channels given the delays these involve.[131]

Reform (1) — Hague Service Convention

4.7 A major barrier to service outside Australia is that some countries prohibit the service of the process (or some kinds of process) of a foreign court without the approval of the local authorities. In some cases breach of the prohibition attracts criminal penalties. This prohibition is more likely in civil law jurisdictions. Such a barrier is mitigated to some degree where it is possible to effect service under the procedures set out in the Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil and Commercial Matters 1965 (Hague Service Convention). It was suggested in several consultations that there would be gains in terms of cost and efficiency if Australia was to become a party to the Hague Service Convention.[132] A consensus has not yet been reached among the States on the terms of accession. Implementation of the convention in Australia could be an opportunity to remove inconsistencies and gaps in the rules of relevant courts in Australia applying in relation to service of documents.[133] The indications from the Commission's inquiry are that this is a priority for review.

Recommendation 9 — Hague Service Convention

The Attorney-General should review, as a matter of priority, the proposal that Australia should accede to the Hague Service Convention.

Reform (2) — service on constructive trustees

4.8 A second service issue arises where as a result of acts partly in, and partly outside, the Australian jurisdiction the foreign party has either knowingly assisted or received funds in breach of trust, thereby giving rise to equitable claims on a foreign party as a constructive trustee in any subsequent recovery action. There is some uncertainty as to whether in that situation there is sufficient territorial connection for service and jurisdiction. This issue has been clarified for English cross border litigation in the relevant English rules of court. The position in Australia requires consistent clarification in all State and federal jurisdictions through suitable amendment of rules of court.[134]

Recommendation 10 — service on a constructive trustee

The Attorney-General should review, as a matter of priority, the proposal that rules of court should expressly authorise extraterritorial service of process for claims against a foreign defendant as a constructive trustee where the liability is alleged to arise out of acts which, viewed as a whole, have been substantially committed within the Australian jurisdiction (whether by the defendant or otherwise).

Reform (3) — overlapping jurisdiction

4.9 It is not uncommon for more than one court to have jurisdiction, under its own rules, in a cross border dispute. This can lead to parallel proceedings which increases costs and creates uncertainty and potential conflict between judgments. Various mechanisms have developed to address this, including (under Australian law) applications to stay proceedings on the ground that the forum is clearly inappropriate (*forum non conveniens*), anti-suit injunctions and negative declarations. Consultations and submissions indicated that the potential for parallel proceedings was a significant cause of complexity, cost and delay.[135] Some commentators suggested that there should be some capacity for direct discussion between the judges

handling the dispute in each country's courts to help overcome any duplication.[136] It has also been suggested that the principles governing the issue of *forum non conveniens* need statutory clarification.[137]

Recommendation 11 — judicial cooperation on forum

The Attorney-General should review, as an issue for reform, the potential for

- direct judicial cooperation between Australian and non-Australian courts where a dispute gives rise to overlapping jurisdiction, and
- statutory clarification of the rules relating to forum non conveniens.

Reform (4) — choice of law and jurisdiction

4.10 One submission drew attention to the complications created by Australia's federal system for choice of law in cross border contracts.

> ... a cross border transaction which provides that the proper law of the contract is to be 'Australian law' opens up a considerable areas of uncertainty. From the point of view of foreign commercial interests, there is a very natural hesitation in entering into a contract which provides that the proper law of the contract shall be, for example, the law of Tasmania or the law of the Northern Territory or the law of NSW, although, if uncertainty is to be avoided, there is no escape from observing this degree of precision.[138]

The same issue can arise in relation to the choice of 'Australian courts' as a choice of jurisdiction.

4.11 One way of simplifying the choice of law is to provide in federal legislation that any reference in a cross border contract to 'Australian law' shall be construed as a reference to the law of the jurisdiction chosen in the contract or, if none, the jurisdiction with which the dispute has the closest connection.[139] This is similar to the way in which Germany overcomes the same federal issue.[140] The Commission considers that this should be considered further both in general principle and in relation to the specific choice of law rules which would be applied.[141] As choice of law and choice of jurisdiction are closely related this statutory reform should be considered in relation to both.

Recommendation 12 — choice of law and jurisdiction

The Attorney-General should review, as a matter of priority, the proposal that there should be clarification of the meaning of a choice of 'Australian law' or 'Australian courts' in a cross border contract.

Obtaining evidence abroad

4.12 Cross border litigation raises significant issues concerning the collection and admission of evidence.[142] It is not uncommon for a cross border dispute to arise out of a complex chain of transactions involving elaborate international corporate structures with the parties disagreeing about many details of the arrangements and events. A thorough investigation is required but there are significant practical difficulties and costs involved in investigating offshore transactions. Specific issues were raised in the inquiry about the use of letters of request to obtain documentary evidence, bilateral agreements on evidence issues, reciprocal cooperation on evidence taking, and the admissibility of foreign evidence. These are discussed below.

Reform (1) — letters of request and documentary evidence

4.13 The *Foreign Evidence Act 1994* (Cth) (Foreign Evidence Act) does not allow letters of request purely for documentary evidence located abroad. Documents can only be sought from foreign non-parties as part of a request for oral testimony.[143] Given the importance of documentary evidence to commercial disputes, this is a significant shortcoming.[144] It limits access to documents that only relate to the oral examination of a witness in a foreign jurisdiction by a foreign court. It also creates a problem for preliminary discovery where evidence is located offshore since discovery is limited to documentary evidence.[145]

Recommendation 13 — letters of request and documentary evidence

> The Attorney-General should review, as a matter of priority, the proposal that the *Foreign Evidence Act 1994* should be amended to allow documentary evidence located outside Australia to be obtained through letters of request to foreign authorities where they are *not* part of a request for oral testimony.

Reform (2) — Bilateral agreements on evidence

4.14 The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970 (Hague Evidence Convention) provides Australian litigants with a procedure to obtain evidence located outside Australia. However it has been criticised for procedural delay and for giving member states the ability to make reservations in relation to pre-trial discovery requests. One response to these difficulties is to supplement the Hague Convention with more extensive bilateral arrangements for gathering evidence across borders.

4.15 Bilateral arrangements of this kind have already been made between states in certain areas such as trade practices and securities.[146] They can streamline procedures significantly. For example, bilateral agreements may provide for the direct communication of a letter of request to the court of the place of execution. They sometimes permit witnesses to be examined by a consul without the intervention of the authorities of the state in which that examination takes place. It may even be possible to obtain the assistance of a foreign court to compel witnesses under a bilateral arrangement even though the state has not made a declaration permitting this under the Hague Evidence Convention.[147] In addition, bilateral arrangements can make the sanction of a local prosecution available for perjury or contempt.[148]

Recommendation 14 — bilateral arrangements on evidence

> The Attorney-General should review, as an issue for reform, the potential to supplement current evidence taking procedures under the *Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters* through bilateral arrangements.

Reform (3) — reciprocal cooperation on evidence

4.16 A third aspect of evidence procedures raised during the inquiry concerns foreign litigants seeking disclosure of information by letters of request to Australian courts. It was noted in one submission that the State legislation which deals with letters of request is silent on the use of the letter of request procedure by a US litigator for the purpose of US style depositions, which are used as part of the US discovery process, rather than for evidence at the trial.[149] The position in England seems to be clear that it is *not* acceptable to use the letter of request procedure for discovery depositions. Case law to date in New South Wales has been more liberal. The Supreme Court of New South Wales has held that

> ... there is power [to make the orders sought] provided that the foreign court is desirous of obtaining the evidence for use, or possible use, at the trial notwithstanding that there is another, and dominant, purpose for which the evidence is required.[150]

4.17 This is a significant issue for the collection of evidence and will have an impact on any reciprocal arrangements Australia seeks on evidence procedures. There is a need therefore for a clear and common position to be developed on this issue throughout Australia (particularly given the contrary approach in England). Closely related to this is the question of whether foreign lawyers are entitled to examine persons resident in Australia for the purposes of foreign proceedings under the letter of request procedure.[151] This also needs to be clarified. It raises the broader issue of Australian lawyers' rights of appearance and representation outside Australia and foreign lawyers' similar rights in Australia. This is discussed further in the section on legal representation and advice below.

Recommendation 15 — cooperation in foreign evidence procedures

The Attorney-General should review, as an issue for reform, whether statutory provisions are needed to clarify

- the judicial assistance available in Australian courts for foreign letters of request, and
- the capacity of foreign lawyers to conduct examinations of witnesses in Australia under the letter of request procedure.

Reform (4) — the 'civil or commercial' threshold

4.18 A further issue on evidence procedures is the meaning of 'civil or commercial' in the legislation enacted by the States to assist with letters of request from a foreign court.[152] This legislation is generally couched in terms of assisting foreign 'proceedings in any civil or commercial matter'. Unfortunately, there is no established common law meaning for this phrase. If the point is taken (as it has been in English litigation) the relevant State court would need to go into a detailed examination of the law in the foreign jurisdiction to determine if the foreign proceedings properly relate to civil or commercial matters in that country and then to determine whether they can be so described in the local State jurisdiction.[153] When determining this issue the court may also need to consider policy questions such as whether a letter of request that relates to foreign revenue or other matters which are arguably of a civil or commercial nature but encompass public law notions, should be assisted by local courts.[154] Statutory guidance is required to define the phrase.

Recommendation 16 — civil or commercial

The Attorney-General should review, as a matter of priority, the proposal that there should be statutory clarification of the meaning of 'civil or commercial' in Australian legislation that authorises Australian courts to recognise and respond to foreign letters of request.

Reform (5) — admissibility of 'mutual assistance' evidence

4.19 For effective litigation in Australia, it is necessary not only to be able to collect foreign evidence but also to have it admitted in the Australian court. However there seems to be a mismatch between Australian law on the collection of foreign evidence and Australian law on its admission in Australian courts. It was submitted to the Commission that there is a gap in the Foreign Evidence Act in relation to the use in civil proceedings of material obtained by the Attorney-General or the Australian Securities Commission under mutual assistance arrangements.

4.20 The Attorney-General and the Australian Securities Commission each have powers and are the beneficiaries of international agreements and arrangements which enable them to obtain evidence from abroad and bring it back to Australia. In the case of the Attorney-General the powers relate primarily to the investigation and prosecution of crimes and the attachment of proceeds of the crime. In relation to the ASC, the powers relate to the ASC's investigatory powers. In either case, the material obtained may also be of relevance and use to a civil litigant. For example, the victims of the crime being investigated may be pursuing civil proceedings in relation to the same matters and a company whose directors are being investigated by the ASC may be pursuing civil remedies against those directors.

4.21 The first issue is whether the Attorney-General or the ASC may lawfully pass on that material to a civil litigant. This is sometimes possible. In some cases it is expressly permitted for certain purposes under the relevant treaty or memorandum of understanding made pursuant to the Mutual Assistance in Business Regulation Act. In other cases the foreign authority may give express permission when the request is put to it.

4.22 The second issue is whether the material, lawfully passed on to the civil litigant, can then be admitted as evidence in the Australian court. This is where the gap occurs. The Foreign Evidence Act only gives the court a discretion to admit the material

- in the case of the Attorney-General's material, in a 'related civil proceeding' — this is a civil proceeding arising from the same subject matter from which the criminal proceeding arose and includes a proceeding under the *Proceeds of Crime Act 1987* or the *Customs Act 1901* or a proceeding for the recovery of a tax, duty, levy or charge payable to the Commonwealth[155]

- in the case of the ASC material, in a civil proceeding which is not a related civil proceeding but is a proceeding under the Corporations Law or the ASC Law in which the ASC is a party.[156]

These provisions seem to limit the court's discretion concerning the admission of this lawfully obtained material to civil proceedings in which the Attorney-General or the ASC is involved. In the case of the Attorney-General's material, there is potential for a broader interpretation of 'related civil proceeding' but this would raise some uncertainty as to the meaning of 'same subject matter'. In any case the reasons for limiting the court's discretion in this way are unclear.[157] It would seem preferable to limit the court's discretion to material that can be demonstrated to have been properly passed on to the civil litigant by the Attorney-General or the ASC rather than to the type of civil proceeding. These provisions should be reconsidered.

Recommendation 17 — admissibility of 'mutual assistance' evidence

The Attorney-General should review, as a matter of priority, the proposal that the *Foreign Evidence Act* should be amended to give the court a discretion to admit in any civil proceedings material that has been obtained by the Attorney-General or the ASC under mutual assistance arrangements and that may properly be released under those arrangements to a litigant in those civil proceedings.

Secrecy laws

4.23 In some countries banks are subject to secrecy requirements that extend beyond the usual duty of confidentiality to the bank's customer. Disclosure of information about a customer's bank account without the client's consent or, in some cases, the permission of the foreign state can lead to civil or criminal liabilities.[158] This can affect the discovery and other disclosure orders that an Australian court is willing to make and the letters of request it is willing to issue.

4.24 Australian law on this point is not settled. The issue usually arises in the context of an application for a stay of a foreign disclosure application on the basis of international comity, bank confidentiality and bank exposure to penalty. Australian courts have looked to overseas judicial decisions to assist them on this issue, particularly US and English decisions. In the US the emphasis has been on balancing the interests, on the one hand, of the US plaintiff as litigant and the integrity of any US laws involved in the dispute and, on the other hand, any interests of the foreign bank and the foreign jurisdiction.[159] In England the balancing approach has been supplemented by an emphasis on the sovereignty of the foreign state and the legitimate interests of professional confidentiality.[160]

4.25 This issue needs to be reviewed. It can have significant practical consequences both for the bank involved and for the party seeking the evidence. There is also a related issue of whether a local bank branch should be quarantined from disclosure orders sought against foreign parent offices or branches. The practice defeats cross border tracing and recovery remedies but also raises the legitimate double penalty issue of when should a bank be exposed to potential contempt for failure to disclose in the foreign proceedings when disclosure would expose it to local liability for breach of confidence.

Recommendation 18 — evidence and bank secrecy

The Attorney-General should review, as an issue for reform, how Australian law and court procedures should take account of bank secrecy and confidentiality requirements in disclosure orders and letters of request.

Protecting offshore assets

4.26 There is little point in pursuing a claim if there are no assets available to satisfy it. For all practical purposes a court cannot provide an effective civil remedy if it cannot prevent a defendant from removing assets beyond the reach of the court's orders (by, for example, taking the asset offshore) or if it cannot help a successful plaintiff to find and collect the defendant's assets after the judgment has been handed down.[161]

4.27 In common law and many civil law jurisdictions the legal response to these issues has been through the development of protective orders (such as the 'worldwide' Mareva injunction and Anton Piller orders). In broad terms these orders respectively restrain the disposal of specified assets and authorise a party to enter specified premises to search for and seize relevant assets. Often courts are willing to give ancillary relief in the form of interim payments and pre-trial disclosure orders to determine where the defendant's assets are, have been moved to or may be moved from, even where they were originally outside the court's jurisdiction.[162]

Reform (1) — extending the effect of protective remedies

4.28 In Australia Mareva injunctions, Anton Piller orders and ancillary relief such as disclosure orders and the appointment of receivers can be expressed to apply to assets, premises or documents outside Australia; that is, they can all be expressed to have extraterritorial effect.[163] However in practice Australian court orders directed to foreign third parties and assets will always require the cooperation of the courts where the third parties and assets are situated unless there are bilateral or other agreements obliging those courts to give effect to the Australian orders.[164]

4.29 Formal international arrangements of that kind may be possible. Article 24 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (Brussels Convention) is one example.[165] An alternative approach could be non-binding memoranda of understanding coupled with domestic legislation to effect protective orders.[166] Such an approach could form an intermediate step to a formal bilateral arrangement. These possibilities need to be examined further.

Recommendation 19 — extending the effect of protective remedies

The Attorney-General should review, as an issue for reform, the potential for bilateral agreements or other international arrangements to extend the effectiveness outside Australia of Mareva injunctions, Anton Piller orders and other protective orders made by Australian courts.

Reform (2) — jurisdiction to grant Mareva injunctions

4.30 One particular issue that needs to be considered in relation to the effectiveness of protective orders is the circumstances in which an Australian court should have jurisdiction to grant a Mareva injunction. If, for example, a fraud occurs outside Australia and there are assets of the fraudster in Australia a Mareva injunction might be sought to freeze the assets of the fraudster pending an overseas judgment. However, if the fraudster is outside Australia and the Australian assets cannot be identified as the proceeds of the fraud there is doubt as to whether an Australian court would consider that it had jurisdiction to issue this injunction.[167] In the absence of a stronger territorial connection with Australia the court is likely to take the view that a Mareva injunction is only ancillary to the exercise of jurisdiction by a foreign court and not in itself a subject for its jurisdiction.[168] Such a situation would therefore create problems for parties seeking to restrain the offshore disposal of assets.

4.31 UK decisions in this area have been influential in Australia. However, the UK approach to pre-judgment Mareva jurisdiction over local assets pending the outcome of foreign proceedings remains uncertain following the recent House of Lords decision in *Mercedes Benz AG v Leiduck*.[169] Despite the more liberal approach to jurisdiction set out in sections 24 and 25 of the *Civil Jurisdiction and Judgments Act 1993* (UK), which allows for the granting of interim relief in support of foreign proceedings, the House of Lords held that the rules of court confined jurisdiction to situations where there was a cause of action. Since a Mareva injunction did not decide upon and give effect to rights it did not involve a cause of action. This decision has been criticised on the basis that it is wrong in law and undermines the policy of the UK legislation, the

Brussels Convention and the need of the international community to be able to effectively prevent the dissipation of assets in situations involving commercial fraud. Calls have subsequently been made for the clarification of the *Civil Jurisdiction and Judgments Act 1993 (UK)*.[170] The Australian position needs to be reviewed in light of these developments.

Recommendation 20 — jurisdiction to grant Mareva injunctions

The Attorney-General should review, as an issue for reform, whether the jurisdiction of Australian courts to grant Mareva injunctions should be extended in accordance with the principles set out in sections 24 and 25 of the *Civil Jurisdiction and Judgments Act 1993 (UK)*.

Reform (3) — keeping absconding defendants in Australia

4.32 One submission commented that there are occasions, particularly in fraud cases, where it is appropriate for courts to restrain a defendant from leaving the country to enable the proper conduct of civil proceedings against the defendant.[171] Since the abolition in most Australian States of the writ *ne exeat regno* there has been doubt as to whether Australian courts have the power to do this,[172] although the Supreme Court of New South Wales has recently made orders to that effect and equivalent orders are available under the Corporations Law for certain investigations and for prosecutions and civil proceedings under that law.[173] This issue needs to be reviewed to determine whether the courts should be given express powers to make such orders and, if so, in what circumstances.

Recommendation 21 — restraining defendants from leaving Australia

The Attorney-General should review, as an issue for reform, whether Australian courts should be given express powers to make orders restraining a defendant from leaving Australia where that is necessary to enable the proper conduct of civil proceedings against the defendant.

Enforcing Australian judgments outside Australia

4.33 A common theme in the consultations was the difficulty of enforcing Australian court decisions outside Australia.[174] In some jurisdictions (for example, Indonesia) foreign judgments are not recognised and the matter must be re-litigated in that jurisdiction to establish the judgment creditor's rights.[175] In a number of jurisdictions (for example, California) there is no international agreement governing foreign judgments but there is a domestic procedure under which the local court may recognise and enforce the foreign judgment.[176] Usually this procedure is cumbersome, costly and slow. In a few jurisdictions (for example, Germany) Australian judgments are recognised and enforced more quickly through reciprocal arrangements. The Australian law in relation to those reciprocal arrangements is now set out in the *Foreign Judgments Act 1991* (Cth) (Foreign Judgments Act).[177]

4.34 There were mixed views in consultations on the policy that should be adopted in relation to recognition and enforcement of foreign judgments. Some commented that the reciprocal arrangements made to date are very limited and there is a clear need to extend them.[178] Only 31 countries are covered by the reciprocal arrangements under the Foreign Judgments Act. They include France, Germany, Japan, and certain Canadian provinces but there are a number of notable omissions such as the USA and Indonesia. One suggestion was that Australia should provide liberal unilateral recognition and enforcement of foreign judgments to establish and support an international 'best practice' on this issue.[179] Others disagreed on the basis that this would unduly increase the risks faced by Australian firms.[180] Indeed, some were wary of any reciprocal arrangements since they undermined the ability to quarantine risk to a particular country, particularly where that country might claim exorbitant jurisdiction.[181]

4.35 Australia has an ongoing program of bilateral negotiations seeking to extend its reciprocal arrangements, particularly in the Asia-Pacific region. Australia is also actively participating in the work of the Hague Conference assessing the scope for a multilateral convention on the recognition and enforcement of foreign judgments based on the Brussels and Lugano Conventions. Although it is expected to take at least ten years to prepare and settle, if it is successful it will be particularly valuable because it will directly

address concerns about exorbitant jurisdiction and excessive damages awards in US litigation. These concerns are unlikely to be effectively addressed in any bilateral negotiations.[182] This bilateral and multilateral work is fundamental to cross border litigation. The Hague Conference work should be given a high priority because of its far reaching potential.

4.36 There is also an issue as to whether Australia should supplement its Hague Conference work by seeking to become a signatory to the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1988 (Lugano Convention) thereby effectively obtaining the same benefits as those provided in the Brussels Convention.[183] This would require the agreement of all the EU member states. It is not clear whether that is a practical prospect. However, if it is, the benefit of becoming a signatory is that it would give Australian firms in the EU the same relief from exorbitant jurisdiction as that currently enjoyed by their European competitors in jurisdictions that are party to those conventions.

4.37 This benefit is illustrated by Article 14 of the French Civil Code. This provision gives the French courts *unlimited* general jurisdiction over any defendant where the plaintiff is a French national. Under the Brussels and Lugano Conventions a French judgment made on such an exorbitant basis of jurisdiction would not be enforceable against the domicillary of any other convention country (that is, a 'Contracting State'). But for Australian corporations or individuals holding property in a Contracting State, such exorbitant jurisdiction still applies and means that the French judgment can be executed against the assets of Australian companies holding assets in France as well as in any of the contracting European states even though it could not be executed against corporations from the contracting states.[184]

Recommendation 22 — foreign judgments

The Attorney-General should

- give a high priority to Australia's participation in the work of the Hague Conference on a multilateral convention on the recognition and enforcement of foreign judgments
- continue Australia's bilateral negotiations on the recognition and enforcement of foreign judgments
- review, as an issue for reform, the practicality of Australia seeking to become a party to the Lugano Convention.

Cross border insolvency

Overview

4.38 The general view arising from consultations and submissions is that Australian bankruptcy and insolvency law is effective for domestic administrations and more responsive than most jurisdictions in assisting foreign insolvencies. However some submissions and consultations commented that there was a need for greater international cooperation because of the difficulties that emerge where realisable assets and competing creditors of the insolvent entity are spread across several jurisdictions.[185] Many of the issues discussed above in relation to cross border litigation apply equally to cross border insolvencies at the stage that legal proceedings are taken. However, there are a number of other cross border legal issues that are specific to insolvencies. These fall into two broad categories

- investigations and evidence
- international management of cross border insolvencies.

Investigations and evidence

4.39 Where there are legal proceedings on foot a trustee in bankruptcy or the liquidator of a company will be able to use the various techniques available in civil litigation to obtain evidence outside Australia that relates to that litigation. However a trustee or liquidator will often need to obtain information before any proceedings are commenced or to obtain information that does not relate to a particular proceeding.[186] To do

this the trustee will need to rely on the special investigation powers available under bankruptcy and insolvency regimes.

4.40 For this purpose section 29(4) of the *Bankruptcy Act 1966* (Cth) (Bankruptcy Act) provides that a court of relevant jurisdiction in bankruptcy in Australia may seek the assistance of competent courts in a foreign jurisdiction on bankruptcy matters. This is usually done by a letter of request. Section 581(4) of the Corporations Law contains a similar provision for liquidators.

4.41 Letters of request issued under these provisions will only be effective in practice if the foreign courts to which they are sent will give effect to them. Australia only has reciprocal arrangements in place with seven countries to assure assistance in a bankruptcy or liquidation: UK, PNG, Jersey, Malaysia, Switzerland, Singapore and the USA.[187] Although arrangements of this kind are not a pre-requisite to the issue of a letter of request, Australian courts are reluctant to issue the request unless there is evidence that the foreign court is likely to accede to the request.[188]

4.42 Comments in consultations and submissions indicated that the reciprocal arrangements work well in the UK, Jersey and USA but that the reciprocal assistance offered in Switzerland is cumbersome and limited.[189] It was also commented that it is critical to the overall effectiveness of cross border investigations by a trustee in bankruptcy or a liquidator to increase the number of countries with which appropriate arrangements are in place.

4.43 The prospects for extending and improving arrangements for mutual assistance in bankruptcy and insolvency investigations are currently being considered by the UNCITRAL Working Group on Insolvency. This is discussed later in this chapter. It was suggested during the inquiry that it would be useful to supplement the UNCITRAL project with some specific work focusing solely on mutual assistance arrangements and assessing the prospects for bilateral arrangements.[190] Mutual assistance was seen as the major area of need in current arrangements. It was suggested that bilateral arrangements might be able to be settled with some countries within a shorter period than is expected to be required for the UNCITRAL project and could provide a greater level of assistance than a multilateral arrangement would allow.

Recommendation 23 — mutual assistance in bankruptcy and insolvency

> The Attorney-General should review, as an issue for reform, the basis on which arrangements for mutual assistance in bankruptcy and insolvency investigations could be extended and improved, considering in particular bilateral arrangements to supplement UNCITRAL's work on this topic.

Admissibility of foreign evidence

4.44 As discussed earlier in this chapter, the Foreign Evidence Act has set up a regime for the admission in Australian courts of material obtained by a letter of request in civil proceedings. However the Act does not deal with the admission of material obtained through letters of request issued under the special investigatory regimes established in the Bankruptcy Act and Corporations Law for bankruptcies and insolvencies. It can be particularly important in insolvency investigations to be able to tender in evidence transcripts of the examination of witnesses outside Australia.[191] In the absence of express statutory provisions, the admissibility of transcripts is uncertain.[192] Consideration should therefore be given to amending the Foreign Evidence Act or the *Evidence Act 1994* (Cth) for this purpose.

Recommendation 24 — admission of insolvency investigation material

> The Attorney-General should review, as a matter of priority, the proposal that the *Foreign Evidence Act 1994* or the *Evidence Act 1994* should be amended to provide for the admissibility of material obtained outside Australia under letters of request or other investigatory procedures provided for under the Bankruptcy Act or the Corporations Law.

Regulatory investigations

4.45 Cross border insolvencies and bankruptcies that involve Australian firms are often the subject of investigation by Australian regulatory and prosecuting agencies. Under their statutory powers of investigation these agencies are able to generate information that trustees or liquidators may not be able to discover independently under their more limited investigatory powers. Often this information can be directly relevant to the investigations and purposes of the trustee or the liquidator. As discussed above in relation to the admissibility of 'mutual assistance' evidence, regulatory agencies are able to obtain evidence abroad through the use of mutual assistance treaties and memoranda of understanding with their regulatory counterparts in other countries.[193]

4.46 A general issue arises as to whether there is scope for greater cooperation between these regulatory agencies and trustees and liquidators, particularly in relation to the pooling of information. The regulatory agencies will only be able to pool information to the extent that doing so is consistent with their statutory obligations and their interest in ensuring maximum cooperation with their regulatory counterparts in other countries. Nonetheless there may be scope to build into their mutual assistance arrangements and memoranda of understanding specific third party release arrangements, where the third party is a trustee or liquidator, to streamline the procedures for getting their permission to release information to third parties. This issue touches directly on the broader question of regulatory cooperation with civil litigants in all cross border civil proceedings.[194]

Recommendation 25 — regulatory investigations

> The Attorney-General should review, as an issue for reform, the scope to change mutual assistance arrangements and memoranda of understanding with a view to streamlining procedures under which foreign government agencies may permit disclosure of relevant information to third party trustees in bankruptcy and liquidators.

International management of cross border insolvencies

4.47 Cross border insolvencies can generate many issues concerning jurisdiction and enforcement. In a local winding up those issues may arise in relation to

- the making of the liquidation order (eg the jurisdiction of a court to liquidate a foreign company)
- identification of the estate (eg the examination of corporate officers overseas)
- realisation of assets (eg sale of real property in another country)
- avoidance of pre-administration transactions (eg preference transactions which occurred at least partially outside the jurisdiction)
- distribution to creditors (eg adjudication upon a foreign creditor's claim which is based upon events occurring in another jurisdiction)
- dissolution (eg determination of the local effect on assets of a foreign dissolution of a foreign company).

If a foreign insolvency administration has already commenced, the further issue arises of whether an Australian court will recognise the foreign proceedings and the foreign liquidator.[195]

4.48 Australian insolvency law generally tends towards a universalist (as opposed to strictly territorial) approach on jurisdiction. For example, it is possible to wind up a foreign corporation under Australian law even if it is not registered within Australia provided there is sufficient territorial connection such as local assets. In addition Australian law will in some circumstances recognise a liquidation in a company's foreign place of incorporation as the primary proceeding with a concurrent Australian liquidation playing an

ancillary role.[196] To support this approach the Corporations Law gives extraterritorial application to the provisions in external administration of corporations.[197]

4.49 Not all countries are so universalist. Many countries isolate insolvencies with cross border elements along purely territorial lines, usually to achieve the public policy goal of protecting local creditors.[198] Submissions and consultations commented on three areas of reform in this respect: the UNCITRAL Working Group on Insolvency; direct communication between courts; and the extraterritorial reach of insolvency laws.

Reform (1) — UNCITRAL working group on insolvency

4.50 The UNCITRAL Working Group on Insolvency is working on a model law to deal with judicial cooperation and access and recognition in cases of cross border insolvency. It is focusing on three aspects of insolvency administration

- facilitating international judicial cooperation
- court access for foreign insolvency administrators
- recognition of foreign insolvency proceedings.[199]

While the group is considering model laws, the emphasis is less on harmonisation of substantive laws or the formulation of treaties and more on the formulation of general guidelines to be developed and implemented by different national insolvency courts, lawyers and accountants. These guidelines are intended to be reflected in the development of a draft Cross Border Insolvency Concordat.[200]

4.51 UNCITRAL's work on insolvency has been prompted by suggestions from insolvency practitioners. It follows a Colloquium on Cross-Border Insolvency held jointly with the International Association of Insolvency Practitioners (INSOL) in 1994. It is the leading multilateral initiative on this topic. Australia is not a party to any multilateral convention on cross border insolvency issues and there are no other relevant multilateral conventions or initiatives in which it could participate.[201] While UNCITRAL's work is not likely to be completed for some years, the initiative is directly relevant to the problems of jurisdiction and enforcement faced in cross border insolvencies involving Australian firms and assets.[202]

Recommendation 26 — UNCITRAL Working Group on Insolvency

The Attorney-General should give a high priority to Australia's participation in the UNCITRAL Working Group on Insolvency.

Reform (2) — direct communication between courts

4.52 One particular issue that has been considered by the UNCITRAL Working Group on Insolvency is direct communication between courts. This was highlighted to the Commission during the inquiry as a promising development that could help coordinate insolvency administrations involving creditors or assets in more than one country.[203] At this stage there is no developed protocol for direct communications. Any such protocol would need to address considerations such as the relationship with diplomatic communications, the onus of cooperation to be placed on insolvency administrators, the level of formality required and of procedural due process, and the language to be used.[204] These considerations would make it difficult to pursue a multilateral agreement on direct judicial communications. However, as discussed in chapter 3 a bilateral arrangement with a country with a closely related legal system, such as New Zealand, may be possible. The author of one submission suggested that a bilateral arrangement between Australia and New Zealand on arbitration of international insolvency disputes could also be considered.[205]

Reform (3) — extraterritorial reach of insolvency laws

4.53 A third area where submissions for reform have been proposed relates to the extraterritorial reach of various bankruptcy and insolvency laws.[206] In some instances, before a company is liquidated substantial

sums of money and other assets are transferred offshore in circumstances where the transfer constitutes a fraudulent, unfair or otherwise voidable preference under the Corporations Law.[207] In order to expand the property available for distribution in an Australian winding up to such assets, the liquidator would have to establish that the Australian court has jurisdiction to avoid the relevant transactions. It has been argued that there is doubt as to the extraterritorial effect of the voidable transaction provisions in the Corporations Law and that without an express reference in the Corporations Law to the extraterritorial operation of those provisions it must be presumed they have no extraterritorial effect whatsoever.[208] Any lack of extraterritorial effect for the voidable transaction provisions would be inconsistent with the general approach of Australian insolvency law. These provisions should therefore be reviewed.

Recommendation 27 — extraterritorial operation of voidable transaction provisions

The Attorney-General should review, as an issue for reform, whether the Corporations Law should be amended in relation to the extraterritorial operation of the voidable transaction provisions.

International arbitration

Increasing in significance

4.54 International arbitration has played a significant role in cross border dispute resolution for many years. It is commonly considered as a mechanism for resolving disputes between foreign corporations and host governments in relation to infrastructure project disputes.[209] It is also increasingly being used to resolve other commercial cross border disputes, including maritime, construction and trade disputes. The use of arbitration is on the increase in the Asia Pacific region albeit somewhat slowly.[210]

Adequacy of Australian law on arbitration

4.55 The Commission sought comments on how effectively Australian laws support international arbitration and what improvements could be made, both domestically and regionally, to enhance the effectiveness of existing arbitration processes. Australian law on international arbitration is outlined in chapter 11 together with some background information on international arbitration practice. The principal Australian statute affecting international arbitration is the *International Arbitration Act 1974* (Cth) (International Arbitration Act). In broad terms this Act incorporates into Australian law the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law), the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), and the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965. In general the comments given to the Commission indicated that the International Arbitration Act was regarded as setting out an appropriate and supportive regime for international arbitrations in Australia. Nonetheless there are some difficulties with international arbitration that commentators suggested should be addressed in reform proposals.

- First and foremost, many of those consulted commented that it was still difficult to enforce foreign arbitral awards in some countries, particularly in the Asia Pacific region, notwithstanding the widespread adoption of the New York Convention.[211]

- Second, there were differing views on the impact of some Australian judgments on arbitration issues, notably the decision on the confidentiality of arbitral hearings in *Esso v Plowman*.[212] One view was that some of the Australian case law did not adequately support international arbitration.[213]

- Third, it was suggested that the legal profession was not sufficiently familiar with the law and practice of international arbitrations and that this should be remedied through tertiary and professional training.[214]

- Fourth, it was suggested that there were a number of technical flaws in the International Arbitration Act which should be remedied to enable the legislation to have full effect.[215]

Reform proposals

4.56 The first three of those points are essentially dependent on the assessment of the advisory committee of how best to deal with the cross border legal risk faced by Australian firms, particularly in transactions involving Asia Pacific countries. Consideration of those points should be deferred pending that assessment. The fourth point on technical flaws is not dependent on that assessment and does not need to be deferred.[216] In summary the particular technical issues raised are

- whether the term 'international commercial arbitration' should be defined in the International Arbitration Act to ensure that parties who choose arbitration rules other than the UNCITRAL Model Law still have the benefit of the International Arbitration Act

- whether additional provisions should be included in the International Arbitration Act to govern arbitrations where parties have opted out of the UNCITRAL Model Law and not made provision for procedural issues such as the appointment of a replacement for an arbitrator who dies or is incapacitated

- whether the International Arbitration Act should set out the grounds on which an award can be challenged if the parties have opted out of the UNCITRAL Model Law.

Comments were also received on drafting points that should be considered, including amendments to sections 22 and 27 of the International Arbitration Act and the suggested deletion of sections 25, 26 and 29.[217]

Recommendation 28 — amendments to the International Arbitration Act

The Attorney-General should review, as a matter of priority, the proposal that amendments should be made to the International Arbitration Act to clarify the principles applying where the parties opt out of the UNCITRAL Model Law and any related technical issues.

Legal representation and advice

4.57 Many countries restrict the right to appear in local litigation on behalf of a litigant to a locally admitted lawyer. Some countries extend this restriction to the right to appear on behalf of clients in arbitrations and before certain government bodies. Many countries also limit the right of foreign lawyers to practice, either alone or in partnership with local lawyers. Recently there has been a trend in Australia and elsewhere to relax these restrictions. However they remain to some extent in many jurisdictions.[218]

4.58 Some submissions commented that these restrictions adversely affect cross border litigation and limit the advice and assistance given on cross border commercial transactions. In particular proceedings they can result in added costs by duplicating in one jurisdiction the work already done by another lawyer in another jurisdiction, for example in examining witnesses or preparing for a hearing.[219] More generally they magnify any cross border legal issues and hinder the administration of cross border legal engagements.[220] By contrast liberal rules on legal representation may lead not only to lower costs but also to greater levels of confidence in the legal systems of different countries. Clients may feel more comfortable relying primarily on their local lawyers throughout the transaction or proceeding. Lawyers may become more comfortable with different legal systems as they become more directly involved.

4.59 There are already well developed proposals for the elimination of barriers to the practice of foreign law in Australia.[221] The issue is also being considered by a number of other countries.[222] This issue should be considered further by the advisory committee to assess whether Australia should promote any other initiatives on the topic.[223]

Implementation

4.60 The proposals for reform are essentially a short term project. It is envisaged that they can be reviewed and settled within six months. The issues for reform will require more detailed discussion within a broader section of the community. The advisory committee should also be consulted on those issues. It is envisaged that they will take about 18 months to review and settle. In some cases implementation will require the involvement and support of other bodies such as the courts or the ASC. They will therefore need to be closely involved in settling any proposed amendments or other reform. For both the proposals and the issues for reform the procedures for consulting on and implementing reforms of the kind contemplated are well established in the Attorney-General's Department so it is appropriate for that Department to undertake this work.

Recommendation 29 — implementation

The Attorney-General should refer to his Department the issues and proposals for reform set out in this chapter.

The *proposals* for reform should be circulated to the legal profession and the courts for discussion as soon as possible with the aim of forming a final view within six months.

The *issues* for reform should be considered in the context of more extensive consultation with the legal profession, the courts and the business community (including consultation with the advisory committee).

5. Finance and electronic commerce

Introduction

Finance law reform is a high priority

5.1 Finance law is a high priority for cross border legal initiatives. Banks and the financial markets underpin much of Australia's international trade and investment. They create and support practical techniques for dealing with credit and settlement risks and many of the other financial risks in international commerce. Finance law helps banks and others in the financial markets to do so, principally by confirming the allocation of financial risks and by requiring prudential safeguards. This means that the particular remedy issues faced by financiers have implications for other participants in international commerce. This chapter outlines and discusses those implications and recommends further work on certain areas of finance law.

Electronic commerce

5.2 This chapter also discusses electronic commerce. This is an emerging priority for cross border legal initiatives. It illustrates the need for legal support for business opportunities. This is being addressed by the Attorney-General's Department's work on electronic commerce law reform which the Commission recommends should be given a high priority. The Commission also recommends a supplementary project - the safe haven' model - to provide a quicker, more flexible response to electronic commerce issues than the traditional forms of international legal initiative allow.

Banks and international commerce

The central role of banks

5.3 Banks play a central role in virtually all international commercial transactions. The inter-bank payments systems provide a mechanism by which value can be transferred from one person in one country to a different person in a separate country. This is primarily a mechanical function but it is fundamental to effective international commerce. Banks also contribute to the management by their customers of credit, settlement and other financial risks. They do this primarily through international trade finance and through the loans and other financial services they provide for international investments. Banks play this central role partly because of the competitive advantages they have built up as institutions but partly also because of laws which, for prudential reasons, give them a virtual monopoly over the payments systems and preserve their advantages in other banking activities.

5.4 This central role suggests that there should be a special focus on banks, and the laws that support them, in cross border legal initiatives. Many businesses do not have the resources to pursue cross border legal remedies, even if they are made cheaper, simpler and quicker. They rely upon someone in a select first tier' group to undertake the cross border risk on their behalf. Banks are one of the major groups of institutions that perform this role. It is therefore appropriate to put a high priority on ensuring that cross border legal remedies support the international commerce of banks as this will in turn indirectly benefit others who rely upon them. The aim is not to focus exclusively on first tier' groups but rather to recognise and pay due attention to the practical remedies they provide for small to medium size businesses and others outside the first tier'.

5.5 This section discusses the cross border legal implications of three areas of bank activity: international funds transfer, international trade finance and the financing of international investment. International funds transfer is discussed in some detail because it illustrates the complexities that can arise in cross border trade and investment and the importance of legal support for business systems. A further role of banks is as a mechanism of international regulation. This is also discussed below.

International funds transfers

5.6 The transfer of funds across international borders relies upon inter-bank payments and clearing systems. These systems have arisen in response to the volume, complexity and costs of making payments in

international commercial transactions. The systems in turn require legal support and this is provided through a patchwork of local laws and international arrangements.

5.7 Local laws are relevant because almost all international funds transfers ultimately depends on domestic clearing systems. A payment anywhere in the world in a given currency is almost always ultimately settled through the home clearing system of that country, except to the extent that the payor and payee share the same bank or their banks share the same correspondent for that currency. Thus nearly all US dollar payments are settled by clearance in New York and nearly all Australian dollar payments are settled by clearance in Sydney.[224]

5.8 The volume, complexity and costs involved in international payments illustrate the size and force of the commercial factors that lie behind legal initiatives aimed at supporting cross border trade and investment. Legal initiatives cannot create the commerce that delivers the benefits but in many cases they are a pre-requisite. The following figures give a broad indication of the significance of payments systems.

- Turnover is a rough guide to volume. The average daily turnover in Australian foreign exchange markets that is attributable to customer based business is estimated at $US9 billion. Australia in turn represents about 2.5% of world turnover.[225]

- The benefit of payments systems is that they reduce costs. They bypass the transport and physical delivery of coins or bank notes from the payor to the payee. This eliminates or reduces the cost of storage and transportation as well as the ensuing risk of loss or theft.[226]

- The complexity arises from the multiple links in each payment transaction. Each payment in the international payments systems is initiated by the issue of a payment order by the payor to the payor's bank. That order initiates a series of further instructions from the payor's bank ultimately to the payee's bank through one or more intermediary banks. Each inter-bank payment order must be paid by the sender to the receiving bank. The receiving bank must have settlement facilities which may be bi-lateral (ie a correspondent account) or multi-lateral (ie accounts held at a central counterparty). There are various arrangements for allocating legal liability between the sending and receiving banks and each of the intermediary banks. The volume of transactions, and the attachment of liabilities at each link in the transaction, creates the potential for very complex cross border legal issues.

5.9 The primary legal support for payments systems is the law of contract. The rights and liabilities of the payor, payee and each of the banks in the chain of transactions are primarily defined by the contracts between each of them and by agency principles. These principles are then supplemented by specific arrangements for communication of payment instructions between banks by, for example, cable or telex (wire transfers') or through telecommunications networks such as SWIFT (see Box 5A). They are also supplemented by clearing house arrangements. These arrangements facilitate the exchange of obligations and their payment, as against simply transferring instructions like SWIFT.

5.10 Clearing houses tend to be national systems rather than international systems like SWIFT. Thus the USA uses Fedwire and CHIPS (see Box 5B). Switzerland has the SIC (Swiss Interbank Clearing'), the UK uses CHAPS, Japan uses BOJ-NET, and Gaitame-Yen, and Germany uses the EIL-ZV and EAF. Some of these systems are owned and operated by a central bank. Others are owned and operated by private associations.[227] There is a variety of legal arrangements underpinning these systems.

Box 5A

SWIFT

The Society for Worldwide Interbank Financial Telecommunication (SWIFT') is a non-profit co-operative society organised under Belgian law, and owned by numerous banks throughout the world. The SWIFT system operated by it is a computerised telecommunications network that operates a global data-processing system for transmitting financial messages over dedicated lines among its members and other connected users.

In its current SWIFT II configuration, SWIFT is a central switch system linking numerous and diverse bank terminals all over the world. The central switch currently consists of two slice processors, one situated in the Netherlands and the other in the USA, each functioning as an independent and *ad hoc* network, linking SWIFT access points. Each country is assigned to a SWIFT access point. Interbank communication is via the SWIFT access points mediated by a slice processor. A system control processor monitors and controls functions of the system but is not involved in routing messages.

More specifically, each SWIFT message travels first on a domestic circuit from the sending bank's terminal to the SWIFT access point for that country. From there, it continues on an international circuit to the slice processor and onward to the SWIFT access point for the receiving bank's country. At that point it is routed on the domestic circuit of that country to the ultimate destination of the receiving bank's terminal. Each message is validated and processed under heavy security.[228]

Box 5B

CHIPS

CHIPS (Clearing House Interbank Payments Systems') is a New York based automated private sector clearing facility for large value transfers. It is owned and operated by the New York Clearing House Association. It is a central switch communication and net net settlement system where participating banks exchange same-day irrevocable payment orders over dedicated communication lines linking each onto the CHIPS central computer. Credit risks are controlled by bilateral credit limits, net debit caps, collateral, and a loss-sharing arrangement among all participants, effectively providing for settlement finality.

CHIPS settlement takes place at the end of each day banking activity. A relatively small number of settling participants settle both for themselves and for their respective correspondent non-settling participants for which they agree to settle. Multilateral balances of settling participants, incorporating also those of represented non-settlement participants, are settled between net net debtor banks and net net creditor banks over Fedwire at the Federal Reserve Bank of New York. Failure to complete the overall daily settlement, notwithstanding the collateralised loss sharing obligations of all banks, may result in unwinding the settlement. This, however, is quite a remote possibility.[229]

5.11 In Australia there are several relevant clearing systems, including paper, direct entry, consumer electronic and high value electronic systems (including BITS, RITS and Austraclear). The current systems are subject to rules issued or being developed by Australian Payments Clearing Association Limited (APCA). APCA is a non-listed public company established in February 1992 with a charter to coordinate, manage and insure the implementation and operation of effective payments systems. Its shareholders include the Reserve Bank, each of the four major banks and State and regional banks.

5.12 The volume and speed of international funds transfers requires very precise and certain allocation of legal risks and liabilities, and well developed systems to manage those risks. Any default is likely to lead to a very complex range of legal issues, involving international, national and private arrangements partly based on contract and partly on statute or a multilateral arrangement. The risks fall into essentially three categories.

- *Herstatt risk*[230] arises where a transaction requires the concurrent delivery of payments. For example, a foreign exchange transaction requires a concurrent delivery of two currencies between two counterparties. Unless there is a delivery against payment mechanism, each transfer is carried out separately on the payment date. The bank that has transferred funds and discharged its own obligation incurs a risk that its counterparty might fail to transfer the consideration.[231] [8] The timing of international funds transfers is such that some degree of Herstatt risk may be inevitable.

- There is also the risk that a bank may fail to make payment or delay in making payment, simply due to administrative error or unclear or misunderstood instructions.

- A third risk is that third party fraud may interfere with the funds transfer and any loss resulting from that fraud will need to be allocated between the payor, payee and banks involved in the transaction.

5.13 Preliminary comments from the finance industry indicate that these are significant and continuing issues which will need further attention from a cross border perspective as new technologies and commercial arrangements open up new ways of making payment. The complexity of the cross border legal issues raised by the Swiss Bank case (see Box 5C) and the issues in the ECHO case study (see Box 5D) illustrate the kinds of questions law reform and international arrangements will need to address. The Australian Treasury Operators Association (ATOA) has been active in developing best practice principles for the industry in Australia and has received some international interest in extending those principles to cross border transactions.

Box 5C

Swiss Bank case - overview[232]

The Swiss Bank case illustrates the complex issues that can arise when a fraud is effected through electronic payments and clearing systems. Many different jurisdictions can be relevant and the law governing the particular payments or clearing system can be a critical factor.

From the judgment of the trial judge, the material facts are as follows.

In 1989 the Essington group of companies (Essington) engaged an agent to raise $500 million to refinance group debt. During the course of that fundraising the agent together with an employee of the Swiss Bank Corporation (SBC) effected the transfer from that bank to the State Bank of NSW (State Bank) of $20 million as a purported advance to Essington under the refinancing arrangements.

The SBC employee in the Zurich office of SBC (SBC Zurich) prepared documentation falsely showing a $20 million overnight deposit by State Bank with the New York office of SBC (SBCNY) repayable the following day. A SWIFT message was transmitted by SBC Zurich to SBCNY. The SWIFT message generated an electronic CHIPS message from SBCNY to the New York office of the State Bank (State Bank NY) for the transfer of $20 million to the account of State Bank NY in purported repayment of the previous day's fictitious deposit. State Bank NY then transferred the funds to Essington's account at State Bank in Sydney. Essington then disbursed the $20 million, in large part by payment of a large commission to its agent but also in discharge of the liabilities of the group, including to State Bank itself.

SBC discovered the fraud and unsuccessfully sought its repayment from State Bank. Litigation over the matter commenced in the Supreme Court of New South Wales in 1989 finalising in 1995 with judgment against State Bank for $12.7 million plus $4 million in interest, credit being given for other recoveries by State Bank.

SBC sought restitution from State Bank and Essington for moneys paid under mistake of fact (among other claims). State Bank countered this by claiming that it had changed its position, in good faith, by disbursing the moneys which were no longer recoverable. At the trial the court held that the CHIPS message did not entitle State Bank NY to treat the funds as available for

Essington as it did no more than effect a payment to State Bank (the CHIPS message did not mention Essington).

On appeal State Bank argued that the fraud provisions of the CHIPS rules bound both banks and required SBC to bear any loss. However, the Court of Appeal decided that the CHIPS rules did not bar SBC from succeeding in a claim in restitution against State Bank.

The proceedings were lengthy and complex. Although consideration of New York law in relation to the application of CHIPS rules was ultimately regarded as unnecessary, comments were made by the court about the need for cross border judicial collaboration in the ascertainment of questions of foreign law.

5.14 There have been a significant number of international initiatives to date on various aspects of international funds transfers, including place and time of payment, foreign money liabilities, general payments issues, clearing and payments systems and netting, electronic data interchange, collections, bankruptcy and private international law.[233] The international initiative that has received most attention is UNCITRAL's Model Law on International Credit Transfers, which was published in May 1992. This model law has not yet been adopted anywhere in the world. The reasons for its apparent lack of success are unclear but may be due to lack of US support as the model law has not been adopted by the USA. It is inconsistent in some respects with US domestic laws and clearing systems rules.[234]

International trade finance

5.15 International trade finance is directly concerned with reducing or removing cross border risk for customers of the bank. There are complications and risks in international trade transactions which are not usually present in domestic transactions. These include direct legal risks, such as the differing legal systems, and other risks which have indirect legal implications, such as geographic separation, difficulties in returning and recovering goods, foreign currencies, international remittance of payments and broader country political or economic risks. In most international trade transactions both the buyer and the seller will wish to control those risks by relying on the safeguards in commercial letters of credit or documentary collections.[235]

5.16 Trade finance forms a significant part of Australian bank business and a significant service to Australian exporters and importers in managing cross border legal risk. The law supporting international trade finance has developed over a long period. The primary instruments - bills of lading, bills of exchange and documentary letters of credit - each now have a body of case law and statutory provisions governing their creation, use and enforcement. Their international use has been greatly assisted by the publication by the International Chamber of Commerce of standard terms and conditions, called the Uniform Customs and Practice for Documentary Credits (UCP). The standard terms and conditions are commonly incorporated in the terms of the credit and thereby become enforceable.[236]

Box 5D

ECHO and settlement risk[237]

Settlement of foreign exchange (FX) trade requires the payment of one currency and the receipt of another, often in different jurisdictions and different time zones. Without an adequate settlement system there is the risk that one party to an FX transaction could pay out the currency it sold but not receive the currency it bought. Drexel, BCCI and Barings illustrate the potential problems.

- In 1990 the Drexel Burnham Lambert group (DBL) collapsed leading to settlement problems between its UK subsidiary (which traded as principal in the FX and gold markets) and various counterparties in these markets.

- In 1991 the Bank of Credit and Commerce International (BCCI) collapsed causing principal loss to UK and Japanese foreign exchange counterparties of the failed

institution. Because settlement of counterparty trades was occurring in different time zones and involved transaction queuing on the relevant automated clearing systems (CHIPS and the Foreign Exchange Yen Clearing House) the BCCI liquidator was able to freeze assets and cancel settlement payments to the detriment of the counterparties.

- The unforeseen collapse of Barings Bank in 1995 caused a problem in the ECU clearing system requiring a counterparty bank to borrow to cover an FX trade Barings Bank could not complete. Without this action by the counterparty bank the settlement of more than ECU 50 billion in payments between the 45 banks participating in the clearing on that day would have been frustrated.

Central banks have paid close attention to settlement risk and have set out various requirements for bilateral and multilateral netting and settlement arrangements to ensure it is minimised.

The Exchange Clearing House Limited (ECHO) provides multilateral level netting and settlement services. ECHO is a privately owned company controlled by a group of major banks which sets certain financial and other criteria for membership. To address the central bank requirements it provides details of maximum and minimum FX settlement risk twice daily to its users, it enables banks to mark limit usage so that the bank can trade its FX exposure down below its own limit, it is operational 24 hours a day, reconciles receipts in real time on the due date and does not release funds until all receipts from the previous day have been confirmed as received.

The multilateral nature of ECHO's clearing house system inevitably creates the potential for legal issues to arise. Where an Australian payment or participant is involved those issues may or may not be determined under Australian law, taking into account (among other things) the law governing ECHO's rules. Some examples of the potential for issues to arise include

- as ECHO is a multilateral netting arrangement, failure of one institutional participant may result in calls on other members and could expose other participants to significant financial exposure or collapse

- if a member of ECHO is unable to meet calls on funds this could cause systemic problems with significant legal dispute over such issues as jurisdiction and liability

- a technical payment failure within the ECHO system could lead to failure outside the ECHO system raising questions about the liability of ECHO itself as well as reflecting adversely on the reputation of ECHO s individual members

as ECHO has access to bank accounts as part of its settlement arrangements with members this may raise the possibility of exposure to fraud.

5.17 The UCP is an example of a successful international legal initiative. It is a significant legal support for international commerce, enhancing the speed, volume, and ease of international trade transactions. Several factors are relevant to its success and should be taken into account in the way in which international legal initiatives are developed and in any expectations of what they may deliver.

- The UCP derived from a long period of industry practice. The first UCP were published in 1933 and they arguably reflected industry practice developed over more than 100 years.

- The UCP are regularly revised to meet changing patterns of international trade. Revised versions were issued in 1951, 1962, 1974, 1983 and 1993.

- The UCP are confined to a narrow issue, in essence the documentary evidence required to confirm a payment instruction. They separate the issue of payment from the underlying features of the transaction. A number of the preliminary comments received by the Commission indicated that an

international legal initiative is more likely to be successful if it is focused very narrowly since this allows more precise rules to be formulated.[238]

The preliminary comments received by the Commission suggest that there are no significant Australian law issues on commercial letters of credit or documentary collections that warrant high priority.

5.18 A closely related issue, electronic data interchange (EDI), does warrant attention. Substantial attention has already been devoted in Australia to the issue of electronic bills of lading relevant to trade finance but there are other continuing international legal initiatives on EDI in which Australia should participate.[239] The International Chamber of Commerce has published uniform rules of conduct for the interchange of trade data by teletransmission (UNCID) which set out high level indicators of the approach to be taken to different EDI related issues. The UN working group on EDI published draft uniform rules in 1993 but these have not yet been widely adopted. There is also a European program developing a standard form EDI agreement (the TEDIS program), a standard EDI agreement published by the UK EDI Association and various industry specific EDI arrangements.

Financing international investment

5.19 Banks play a significant role in financing international investment although the services that they provide are not as dominant as their funds transfer or trade finance services. There are other sources of finance and financial services for international investment, including investment funds and bond markets. The pattern and growth of Australia's international investment is set out in chapter 2. Australian banks are involved both as lenders on projects outside Australia and as lenders within Australia to businesses whose revenues or assets are located outside Australia.

5.20 By contrast with international trade finance, cross border lending has largely developed without any international legal initiatives. Indeed, the Eurobond market developed by avoiding both national and international regulation. Lenders in international projects rely primarily on the structuring of the transaction to limit their credit risk and on the law of contract. This leaves significant gaps in the management of legal risk. Notably they are exposed to all of the difficulties associated with the enforcement of money judgments that are outlined in chapter 4 and Part II of this report. They, and their customers, are also subject to any inadequacies in the property laws of the countries in which the relevant project or asset are located. This is a particular problem in relation to intellectual property and the taking of security.[240]

5.21 Any legal initiatives in this area should focus on the legal support required for the investment rather than the lending activity. Funds transfer and trade finance rely heavily on the banks' capacity to provide those services and this depends in part on their legal support. By contrast the financing of international investment depends primarily on the credit capacity of the business or project in which the investment is being made. The role of taxation is also central to the financing of international investment, in particular withholding tax and the availability of relief from double taxation. This means that legal initiatives should focus primarily on the business or project. This focus will tend to relate more to local laws than international initiatives.

5.22 Nonetheless the two property issues noted above - intellectual property and the taking of security - warrant some international attention. Intellectual property already has a high international profile and is part of the WTO agenda. The law on personal property securities has received less international attention. Unidroit is currently working on a draft convention for the taking of securities over major mobile equipment regularly involved in cross border trade, such as airframes and aircraft engines. UNCITRAL has published a preliminary draft of uniform rules on assignment in receivables financing. There has also been some attention given in local law reform initiatives to the system of registration of personal property securities set out in Article 9 of the US Uniform Commercial Code.[241]

Banks as a mechanism of international regulation

5.23 As a result of their central role in international commerce banks have been used by national governments to assist in international regulation. A stable banking industry is generally considered essential to any economy. Banks are therefore subject to licensing requirements and prudential safeguards in most countries. Some of these prudential safeguards are now applied on an international basis (for example,

capital adequacy rules). In many countries banks are also used to assist in the detection and prevention of money laundering.[242] Banks are usually required by statute to provide this assistance. The use of banks in this way affects the general pattern of the laws applying to banks in cross border transactions, particularly regulatory arrangements. Regulatory arrangements will be examined in the Financial System Inquiry announced by the federal Treasurer on 30 May 1996.

Financial markets

5.24 The central role of the banks should not obscure the emerging importance of other players and markets. Funds managers, superannuation or pension funds, insurance companies and other non-bank financial institutions are all taking an increasing role in international finance. The past two decades have also seen the emergence of new and significant international financial markets, particularly in exchange-traded and over-the-counter derivatives. These new players and markets have an important and developing role in cross border risk management and therefore form part of the context for any analysis of cross border legal risk.

5.25 The central legal issue for these players and markets is the impact of local regulatory regimes. The collapse of Barings Bank in 1995 due to losses incurred in trading on the Singapore futures market illustrates how the prudential safeguards required for a futures exchange can limit the consequences of fraud. In the Barings case, transactions which were essentially cross border in commercial significance were made domestic' by exchange trading rules and then supplemented by the insurance' of margin and deposit requirements. This effectively limited the persons who suffered damage from the fraud to Barings' shareholders and staff. The potential need for cross border legal remedies was effectively reduced by the structure of the Singapore futures market.

5.26 There are some further areas where regulatory or legal support is required. Netting stands out as the highest priority. It is discussed later in this chapter. In some cases the work required may be to remove uncertainties or complexities that have arisen out of the application of existing legal principles to new markets. It was submitted to the Commission that financial markets can be distorted or inhibited by local regulations which have not adjusted to developments in these markets.

5.27 An example of this kind of problem that was given to the Commission is the difficulties faced by funds managers wishing to offer foreign investment products in Australia. It was submitted that the combined effect of the foreign investment fund tax legislation and the prescribed interest provisions of the Corporations Law is to make such offerings commercially impractical notwithstanding that the Australian Securities Commission has issued a policy statement setting out the circumstances in which such offerings would be permissible.[243] The best support for financial markets may therefore come from legal initiatives that have a dual focus: ensuring that prudential safeguards are structured around the development of markets rather than institutions and ensuring that there is ongoing attention to identifying and promptly removing legal uncertainties and unnecessary complexities.

Cross border banking issues

A high level of exposure

5.28 The nature of its business gives the banking industry particular exposure to cross border legal risk. Banks have for many years dealt with customers, payees and correspondent banks in other countries and have had branches in other countries. They have therefore had much experience with the problems of jurisdiction, evidence, asset recovery and so forth outlined in chapter 4 and in Part II of this report. In addition some aspects of banking practice make those problems more acute. Two longstanding issues are the doctrine of tracing and banker/customer confidentiality. An emerging issue is the impact of electronic banking.

Banks, tracing and constructive trusts

5.29 Banks may become exposed through the doctrine of tracing where assets have been fraudulently misappropriated and the proceeds have been deposited in a bank account or, more commonly, transferred through a chain of bank accounts and through several different countries. If the proceeds have been lost or

become irrecoverably intermixed with other funds the victim of the fraud may seek to recover from other participants in the chain of transactions either on the basis of negligence, restitution or constructive trust. Banks are likely to receive such claims because they are invariably involved in the chain of transactions and, unlike the fraudster, have a reputation to consider and a presence and assets in the jurisdiction. The Swiss Bank case (Box 5C) illustrates how this exposure can arise.

5.30 Tracing misappropriated funds can be a very complex process.[244] Much evidence is needed to establish each link in the chain of transactions and the bank's culpability, if any. There can be conflict of law issues with important practical consequences.[245] There is also uncertainty regarding bank liability for knowing assistance or knowing receipt in misappropriation cases. While English courts have recently held that banks will only be liable if they have actual knowledge of the fraud Australian courts continue to apply a lower threshold test for bank culpability whereby constructive knowledge will be attributed to the bank if its knowledge of the circumstances would indicate the real facts to an honest and reasonable person.[246] A further complication arises in the case of multi-jurisdictional transactions involving civil law countries which may not recognise the doctrine of tracing. As the doctrine is one of the principal elements in many restitutionary claims, its complexity, uncertainty and lack of international consistency need attention.[247]

Banker/customer confidentiality

5.31 Australian law, like the law of many jurisdictions, provides that a bank has a duty of confidentiality to its customer. Some jurisdictions supplement this duty by statute so that breach of the duty will give rise to criminal as well as civil proceedings. There are also differences between jurisdictions in the amount of information a bank is required to collect about the identity of its customers.[248] The duty of confidentiality can be a significant impediment to collecting evidence and tracing assets, particularly when it is compounded by only holding limited information about the customer's identity. Given the central role of banks in many international commercial transactions, this can often be an issue in cross border litigation in which the bank is not involved except as a potential source of information.

5.32 Privacy is an additional consideration. Banking raises privacy concerns precisely because it is data intensive. The law has recognised that a balancing of the public interests in privacy and in law enforcement is necessary. Certain laws already override both statutory and common law privacy and confidentiality requirements. For example, the *Financial Transactions Reports Act 1988* (Cth) requires banks to report certain transactions to AUSTRAC. More generally, Information Privacy Principle 11 of the Privacy Act, which includes exceptions to the general rule of non-disclosure, allows for disclosure for law enforcement purposes.

5.33 The European Union's Data Protection Directive has become highly influential in the development of privacy legislation throughout the world.[249] In developing it the EU was concerned not to impede the efficiency of retail cross border payment systems or to raise unnecessary obstacles to the development of more efficient cross border payment systems. Nonetheless there remain doubts that privacy laws can keep up to date with banking developments. One commentator on the EU Directive and its impact on payment systems has concluded that:

> The proposed Directive in its current form can function only if there is a large number of derogations at national level. The control over the banking sector is therefore passing imperceptibly from bank regulators to data protection authorities, and at the same time the data protection authorities are slipping imperceptibly into the shoes of the enterprises.[250]

Electronic banking

5.34 The impact of electronic banking through payment systems and EDI has been briefly canvassed earlier in this chapter. It raises many other issues including problems of evidence, methods of dealing with electronic fraud, questions of liability for systems failures and other issues which do not arise from traditional paper based methods of banking. Data security and electronic money illustrate the types of considerations that are emerging.

5.35 Banks need to keep data secure for several reasons: to satisfy customer requirements of confidentiality and privacy; to maintain their own rights over the use of the data; and to ensure the integrity and availability

of the data so that it can be efficiently used. In the context of cross border remedies one of the particular issues in that third category is when electronic data will be adequate for statutory purposes and for the purposes of evidence. It is necessary to give express recognition in national legislation and by regulatory authorities to the efficacy of electronic records.[251] Australian law is well advanced on this with the recent enactment of the federal *Evidence Act* 1995 which arguably provides for the admissibility of electronically generated business records (for example, SWIFT transaction print outs).[252]

5.36 Currently there are a number of electronic money projects in various stages of development. The Mondex electronic cash system, developed by the National Westminster Bank, provides electronic money in the form of smart cards. The four major Australian banks have purchased an equity stake in Mondex International which gives them rights to the product in Australia.[253] In the Netherlands Digicash is experimenting with payment services using ecash', electronic money on the Internet.[254] Electronic money essentially involves the electronic processing of debit and credit data. To be effective it is necessary to be able to verify the authenticity of the data and to prevent its multiple use.

5.37 The technological features of electronic money have implications for the legal frameworks for national currency systems.[255] The legal concept of money is generally discussed in the context of national jurisdictions since the use of a country's currency is generally limited to within the country where the central bank is a sole issuer of the currency.[256] By contrast electronic money lends itself to international circulation and its use is less readily supervised by national regulators: it is not immediately identifiable from the data transmission whether the data represents electronic money or some other form of information; ownership of the money may be anonymous; the money can be accessed from anywhere on the network and transferred to anywhere in the network regardless of geographical boundaries.

> If money is transformed into electronic data and banks need no physical offices, it is likely that there will emerge virtual banks in a regulatory haven (but not a tax haven) where banks have no regulatory burden.[257]

Finance law reform

The need for systematic reform

5.38 The comments above indicate that there is a range of interrelated finance law issues that need attention both to assist Australia's banking industry and more broadly to assist Australia's international trade and investment. The issues are partly systemic, such as those relating to payments systems, and partly directed at the impact of laws on particular transactions, such as the issues relating to bank confidentiality and tracing. The priority areas are: netting and set off, payments systems, bank confidentiality and privacy, tracing and restitution, and the taking of securities.

5.39 The terms of reference require the Commission to report on the scope for the Commission to review and report further on the matters addressed in this report. The Commission is an appropriate body to review this kind of finance law reform and would be pleased to assist. The terms of reference should be limited to the nominated priority areas of reform listed above, each of which is discussed in more detail in following paragraphs. In addition the further work in this area will involve not only legal analysis but also input from the Reserve Bank, APCA, trading banks and others in the financial community, as well as Australian firms which use financial services in their international trade and investment. The Privacy Commissioner should be consulted on the privacy issues outlined above.

Recommendation 30 - finance law reform

> The Attorney-General should refer to the Australian Law Reform Commission Australia's laws and regulatory practices relating to cross border financial transactions with a view to reporting within two years on the priority areas for reform recommended in this chapter.

Netting and set off

5.40 Close out netting has been recognised for some years as a major legal issue for the financial markets.

> The bi-lateral or multi-lateral netting of contractual payments due on settlement dates, and of unrealised losses against unrealised gains in the event of a counterparty's default, is the most important means of mitigating credit risk. By reducing settlement risk as well as credit exposures netting contributes to the reduction of systemic risk.[258]

5.41 The law in Australia is generally supportive of close out netting although for some years it has been recognised that there are some residual uncertainties.

> A master netting agreement' containing certain provisions can result in a party being entitled to net its obligations under derivatives with a counterparty. However, legislation dealing expressly with the ability of a party to net its obligations under derivatives would help. Having such legislation (similar to that enacted in the USA) would mean that both the Reserve Bank of Australia and participants in the market would have an express legislative framework in which to authorise and create netting arrangements.[259]

5.42 The Companies and Securities Advisory Committee (CASAC) is currently reviewing Australian law and practice relating to exchange traded and off market derivatives. It has been working with the financial community on the issue of close out netting and has recently released a draft discussion paper on the regulation of OTC derivatives markets[260] as well as a draft report on the regulation of on-exchange derivatives markets.[261] It is expected to release a final report by the end of 1996. The issue of close out netting is thus being addressed. The Commission's consultations indicate that prompt consideration and response to CASAC's report will be a significant step in finance law reform.

5.43 The work on finance law reform should also consider the law of netting and set off beyond close out netting for the derivatives markets. It is a broader issue that can have benefits not only for cross border banking generally but also more directly for the trading relationships of Australian firms. In many respects set off is one of the fundamental remedies in cross border banking.

> Remedies in cross border banking fall, in important respects, into the category of self-help. The default clause in a loan agreement, and the right of set-off are well known examples. Self-help looms large because of practical advantages such as speed and the legal, and other, uncertainties surrounding the alternative of invoking the judicial machinery. Yet these self-help remedies are not legally clear cut; in cross border banking this is compounded by the conflict of laws problems to which they give rise.[262]

5.44 The direct benefit of set off to an Australian firm was well illustrated in one of the submissions to the inquiry.

> Hence, to take a simple example, in a transaction governed by the law of an Australian State where A is an Australian business person dealing with an Indonesian company, C and A owes C $10 000 but is himself owed $8 000 the result of an exercise of set off is that A's only enforceable obligation to C will be to pay the balance, namely, $2 000.
>
> The effect of the exercise of the set off is thus as if A had sued C for the $8,000 in an Australian court and had recovered his debt in full. The procedure is, however, both less costly - since there are no proceedings (unless the exercise is contested) - and less problematic since it avoids the need to enforce a judgment where C fails to pay the judgment debt. An exercise of set off is particularly advantageous where an action of recovery for the debt would otherwise have to be brought in Indonesia with all the additional expense and uncertainty that suing in any foreign jurisdiction (and particularly one that offers only limited recognition to foreign judgements) inevitably entails.[263]

5.45 The law of set off in Australia is complex and there can be problems in the exercise of contractual set off.[264] While many foreign jurisdictions recognises some form of set off there are significant differences in doctrines and application.[265] It has been submitted to the Commission that Australian law on set off should be reviewed with a view to establishing a new limited *statutory* right to set off pre-insolvency. This would make the law on set off simpler and more certain and would extend the benefits of set off to firms which had not considered including it in their contracts.[266] The Commission agrees with this submission. The Commission also considers that the review of the law of set off should extend to a review of the prospects for greater international consistency or cooperation on set off. As one of the most serious limitations on the effectiveness of set off arrangements lies in the insolvency of either party any such international initiatives by Australia in the set off area should be coordinated with Australia's participation in the UNCITRAL Working Group on Insolvency.[267]

Recommendation 31 - netting and set off

The priority areas of finance law reform should include Australian law on netting and set off. Netting should only be considered in relation to cross border transactions *not* covered by CASAC s recommendations on netting.

Payments systems

5.46 The significance of payments systems for Australia's international trade and investment is outlined earlier in the chapter. They are a priority for international legal attention because of the significant jurisdictional issues they raise and emerging concerns that Australian participants might suffer losses or incur liabilities with only limited input into the legal framework governing those systems, either by way of individual contract or national regulation. The Swiss Bank case (Box 5C) illustrates the jurisdictional difficulties. The ECHO case study (Box 5D) illustrates the concerns about the potential losses and liabilities.

5.47 These issues need to be explored more fully. They have implications not only for bank regulators but also for participating institutions, the back offices of trading institutions, and traders. An illustration of the types of issues that need to be considered from a legal perspective can be found in the European Union's November 1993 report entitled Minimum common features for domestic payment systems'. That report suggested 10 principles to serve as guidelines for payment systems within the European Union:

- access to interbank funds transfers systems should be limited to credit institutions and properly supervised bodies
- no discrimination in access
- transparency of access criteria
- introduction of real time gross settlement systems
- enhancement of large value net settlement systems
- flexible approach with regard to other interbank transfers systems
- sound and enforceable legal basis
- technical compatibility and efficiency
- pricing policies of European Union central banks
- overlap between operating hours.

It is apparent that those principles raise legal policy issues that go beyond the traditional and settled areas of law on liability for default or fraud.

Recommendation 32 - payments systems

The priority areas for finance law reform should include Australia's legal framework for payments systems and the potential for international cooperation on legal issues relating to payments systems.

Bank confidentiality and privacy

5.48 The issues concerning bank confidentiality and privacy have been outlined earlier in this chapter. Recent reports have recommended that privacy legislation in Australia should be extended.[268] The issue of transborder data flow has been addressed by the OECD in its privacy guidelines.[269] Flowing from those

guidelines has been the EC Directive prohibiting transfers of data to third countries unless the data will be guaranteed an adequate level of protection in that third country.[270] This would have significant implications for Australia's banking industry and its international transactions. Any privacy legislation would need to be carefully framed to fit with bank confidentiality, rules of evidence and data security law. It would also need to take into account the laws on those topics and other jurisdictions, such as the European Union Data Protection Directive. This is an area which requires substantial legal and policy analysis and substantial input from the finance industry and others in the community.

Recommendation 33 - bank confidentiality and privacy

The priority areas for finance law reform should include Australian law on bank confidentiality and privacy, including recommendations on the application of privacy legislation to Australia's finance industry and the prospects for international consistency on bank confidentiality, privacy and related data security law issues.

Tracing, restitution and constructive trusts

5.49 The complexity and other concerns with Australia's law of tracing, restitution and constructive trusts are outlined earlier in this chapter. Australian law on tracing, restitution and constructive trust seems to be unduly complex. This is of particular concern with the increasing potential for undue enrichment claims to arise in cross border transactions. The complexity reflects the very broad scope of situations that are covered by Australian law on tracing and restitution.[271] It is not feasible or commercially appropriate to seek to simplify the law across that broad canvas. However there is a need to review the differences emerging between Australian and English law on such issues as knowing assistance and knowing receipt in relation to claims on banks and to assess whether Australian law can be simplified for the purposes of undue enrichment claims on banks.

Recommendation 34 - tracing and restitution

The priority areas for finance law reform should include

- the prospects for simplifying the doctrine of tracing in relation to claims made on banks and making the doctrine more internationally consistent, and
- improvements that can be made to Australia's law on restitution in relation to claims of undue enrichment made on banks.

Taking security

5.50 The need for adequate laws supporting the taking of security for financing transactions has been mentioned earlier in the chapter. Nonetheless in the Commission's view it is premature to include this in the finance law reform program. Australia's law on personal property securities is currently under review. The federal government is currently considering its response to the Commission's 1993 report on Personal Property Securities.[272] International consistency is one of the issues that will need to be taken into account in that government response. Until the government has responded to that report it would be inappropriate for there to be any further review of Australian law on personal property securities or for Australia to promote any particular project seeking international consistency outside Australia.

Electronic commerce

Business opportunities

5.51 In this report electronic commerce' includes all business transactions on, or using facilities provided by, electronic networks and extends to non-transactional interchanges such as electronic mail and personal entertainment. There has been much discussion in the last couple of years about the opportunities that are expected to be generated from electronic commerce.[273] Some of these opportunities are yet to be realised but others are already being actively pursued. The discussion earlier in this chapter illustrates that in the banking

industry electronic commerce is already significant, particularly in the form of electronic banking. It is expected that electronic commerce will become increasingly important in many other service sectors. Its influence in entertainment and advertising is already apparent. There are also signs of its emerging importance in training and health care. These services in turn have an impact on business practices and markets in other parts of the economy. As a result electronic commerce is encouraging new content industries, the reaching of new markets and the re-engineering of business operations and service deliveries.[274] The US Commerce Department has estimated that electronic purchasing turnover will grow to approximately US$3 000 billion by 2005.[275]

5.52 Electronic commerce reinforces the high priority of finance law reform.

> The on-line economy cannot be achieved without Australia creating a world class electronic payment system for consumer transactions as well as business-to-business transactions.
>
> ...
>
> The ability to charge customers interactively over trusted networks is an essential pre-requisite for a viable consumer on-line service industry. Without easy-to-use payment systems, the provision of content cannot develop into a viable industry. To date in Australia there has been only limited progress towards setting up such payment systems, in contrast to the United States and Europe. Australian banks and credit unions are, however, progressing in trialing of electronic purses', in the form of smart cards.[276]

Legal support

5.53 There is a need for legal support for electronic commerce but not a legal straightjacket. The role of Australian law should be to facilitate national goals for electronic commerce such as enhancing business and trade, ensuring broad access, encouraging use and innovation, and ensuring respect for the rights and sensitivities of users, including interests such as privacy and freedom of communication. Some commentators are concerned that governments may overreact to fears about the new technologies or introduce measures with unintended consequences, for example through regulation of content, gambling, money flows or encryption or through taxes.[277]

5.54 For Australian law the key issues are intellectual property, content regulation and liability issues.[278] Intellectual property laws affect both the incentive to create and publish content on electronic networks and also access to and use of that content. They are central to the development of electronic commerce. It is generally recognised that the current intellectual property laws have difficulty responding to the new technologies and patterns of commerce involved in electronic networks, and require significant amendment or transformation.[279] The other major content issues include: privacy and data security; defamation and censorship; and the allocation between participants of liability for wrong or damaging content and for other failures in the electronic networks.

5.55 There are also other aspects of commercial law for on-line commerce in goods and services that need review and adjustment, including evidentiary issues, consumer protection and product liability, data security, fraud and crime.

Law reform initiatives

5.56 The cross border character and potential of electronic commerce means that legal issues of this kind are of common concern internationally. They are faced by all countries whose firms are involved in electronic commerce. They will be addressed partly through local law making and partly through international initiatives, such as UNCITRAL's work on EDI and the European Union's Data Protection Directive. To ensure that the Australian legal system develops in line with Australian goals, Australia must be fully involved in the relevant international initiatives and must take them into account in its domestic law making. At the same time it will be important to keep Australian law as consistent with international practices as possible.

5.57 At a domestic level Australian laws, both federal and State, need to be thoroughly reviewed to identify aspects which impede or restrict the adoption of efficient electronic practices. Impediments can arise in various ways including lack of recognition or validity of electronic transactions, requirements for written

instruments or records, and a lack of uniformity in State and Territory laws that discourages efficient electronic practices.

5.58 The need for legislative change has been recognised. In September 1995, the then Attorney-General, Michael Lavarch, agreed in principle to legislation, if necessary, to resolve legal issues posed by implementation of electronic commerce and agreed to the establishment of an expert group to define the form and scope of that legislation. Work had commenced on this in the Attorney-General's Department before the change of government. The Attorney-General, Daryl Williams, has recently agreed to the continuation of this initiative. It is understood that the expert group is soon to be established with the objective of reporting as soon as possible and preferably no later than October 1996.

5.59 The Attorney-General's Department is responsible for this project. The Commission understands from the Attorney-General's Department that the project will be undertaken in two stages. At the first stage, the expert group will examine the legal issues arising in the implementation of electronic commerce. The expert group will then make recommendations. Members of that expert group are to be selected from a number of business, legal and other specialist organisations. Once this initial scoping task has been completed, the report of the expert group may be referred to a more broadly constituted group for development of any necessary legislation.

5.60 In the Commission's view the review of the legal implications of electronic commerce should be given a high priority. The indications from this feasibility study are that to address electronic commerce issues effectively, particularly those arising in relation to Australia's international trade and investment, the legal issues considered should include federal laws, uniformity of State and Territory laws, and relevant international legal and non-legal options. The Commission understands from the Attorney-General's Department that it is expected that the expert group will adopt a broad approach of that kind. The Commission would be pleased to assist on any of the cross border legal implications of electronic commerce if the Attorney-General wishes to refer this aspect of the topic to the Commission.

Recommendation 35 - electronic commerce law reform

The Attorney-General should commission a comprehensive review of the legal implications of electronic commerce, including a review of the implications of electronic commerce for federal laws, uniformity of State and Territory laws and relevant international legal and non-legal options. The Commission notes that preparatory work on some parts of this review has already been commenced in the Attorney-General's Department.

Safe haven project

5.61 The indications from this feasibility study are that an advantage could be created for Australian firms if Australian law could be adjusted quickly to meet issues arising in relation to electronic commerce. There is a need both for greater legal certainty on some points and for greater legal flexibility on others. Timing is a key factor. If regulatory difficulties or legal uncertainty affecting a commercial venture cannot be resolved promptly, the venture may lose its commercial viability.

5.62 Traditional methods of addressing business law issues are not quick enough for this purpose. They need to be supplemented by shorter term techniques that are consistent with the broader law reform process but provide more immediate and specific legal certainty and flexibility. For example, the uniform law reform on electronic commerce discussed above is essential and must be given a high priority. However, as a practical matter national uniformity is likely to be hard to achieve and may suffer from delays. This has been Australia's experience with other uniform laws such as the Corporations Law, the Credit Code and most recently the Evidence Act. The problem is compounded if legal principles need to be agreed internationally to be effective. Developing agreed principles through the traditional international institutions is a slow process, often measured in decades.

5.63 Traditional methods of reform also have other shortcomings. Legal initiatives concerning electronic commerce will need to focus as much on deregulation - removing the constraints of inappropriate laws (for example, requirements for written instruments of transfer) - as they do on new laws. This is difficult to do on

a broad generic basis when addressing a wide range of commercial activity, but much easier on an interim, case-specific basis.

5.64 In light of those factors the Commission suggests a short term experimental project to design and test a safe haven' model for the development of on-line electronic trading and investment facilities. The aim would be to develop a new technique for providing legal certainty and support within the framework of existing laws but more quickly and more specifically than is possible through comprehensive legislative reform designed to set out broad principles of law. The safe haven model is intended to be supplementary to the electronic commerce law reform project discussed above and should be developed and administered consistently with that broader law reform.

5.65 The safe haven model could provide specific legal support in two ways.

- It could provide that certain types of electronic trading and investment facilities would be exempt from certain types of regulatory control (for example aspects of the Corporations Law) if they satisfy certain conditions (for example financial capacity, prudential safeguards). The exemptions could be provided by defined categories or by a system of rulings (for example similar to ATO rulings).

- Second, the model could set out supplementary rules to current Australian law on use and liability issues to give greater certainty and support to the particular electronic facilities covered by the model (for example clarifying the extent of rights to use data, or allocating liability for damage resulting from content distorted by systems failure). These rules might take the form of deemed or optional standard terms and conditions for particular categories of transaction.

5.66 The model would be designed primarily through adjustments to Australian law. However if it were necessary and achievable, the project could seek bilateral or selected multilateral adjustments to make the model work. For example, if the particular electronic facility was concerned mainly with commerce with the UK and the USA, and it was necessary to have regulatory cooperation on the interpretation of certain securities law issues, it might be possible to develop a protocol between the relevant national regulators for this purpose.

5.67 The model would be intended to supplement existing electronic commerce law reform initiatives and complement the current work of the Australian Securities Commission on electronic commerce.[280] It is intended, for example, that it would fit with the ASC's current use of its discretionary powers but extend the scope for the use of those powers and also establish similar discretions in other relevant regulators. The ASC's experience with its existing powers and with the development of safe haven' models in other contexts, such as derivatives trading, would be directly relevant. The model would also be intended to complement government initiatives on operational aspects of electronic commerce, including the Commonwealth Electronic Commerce Service' project of the Department of Administrative Services which concerns government procurement and tendering procedures.

5.68 Further work is required in designing the safe haven model in relation both to the scope of the exemptions and rules and to the mechanisms by which they are given legal effect. The model, once designed, also needs to be tested to ensure that it is a cost-effective method of supporting Australia's electronic trading and investment ventures. This should be done by developing and testing the model against a specific commercial venture. Two potential ventures have been raised with the Commission during the inquiry, one concerning the development of software for an electronic payments system and the other concerning the international publication of investment research. Expressions of interest should be sought for other commercial ventures that might be used to develop and test the model.

5.69 It is likely that the development of the model will require legal analysis, commercial expertise relating to the specific commercial venture, and government participation in relation to securities markets and financial systems. It is therefore suggested that the project be undertaken by a working group with those skills, including in particular representation from the Australian Securities Commission and the Reserve Bank of Australia. Since it will relate to both of their portfolios, the working group should be established by the Treasurer and the Attorney-General, jointly.

Recommendation 36 - electronic commerce safe haven'

The Attorney-General and the Treasurer should jointly establish a working group to design and test a safe haven' model for the development of on-line electronic trading and investment facilities in Australia. The model would be supplementary to existing law reform and regulatory initiatives on electronic commerce. The project should be completed within 18 months.

PART 2

6. International litigation

Introduction

Part II of this report - an overview

6.1 As mentioned in chapter 1, Part II of this report outlines current Australian law on international litigation and arbitration. Chapters 6 to 10 focus on litigation commenced in Australia seeking remedies where the relevant person or asset is outside Australia but the transaction has some connection with Australia. Chapter 11 on arbitration is premised on the same mix of cross border elements. These chapters provide some background to the comments and recommendations in Part I of the report and address the summaries and other analysis required by sections 2 and 3 of the terms of reference.

This chapter

6.2 The first section of this chapter - conducting international litigation - gives an overview of jurisdictional and related issues and how they arise. The subsequent sections discuss specific aspects of those issues including jurisdiction, service, enforcement and evidence.

Conducting international litigation

Sovereignty and jurisdiction

6.3 At the heart of all the issues about the conduct of international litigation is the question of sovereignty. In general terms remedies ordered by an Australian court are only enforceable within Australia and its territories. The courts and administrative agencies of other nations are similarly constrained. Their remedies are generally only enforceable within their own territory.

6.4 Disputes with a cross border element therefore inevitably give rise to arguments about jurisdiction. Does the Australian court have jurisdiction to make an order against a person or asset outside Australia? Does a foreign court have jurisdiction to hear the dispute as well as, or instead of, the Australian court?

6.5 Much of the complexity, cost and delay involved in international litigation arises out of the complexity of jurisdictional issues. There is great scope for parallel proceedings in two or more countries, for incomplete or inadequate remedies out of any one court and for lengthy argument challenging jurisdiction. For any particular cross border dispute there are likely to be overlaps or gaps between the jurisdiction of the relevant Australian court and the jurisdiction of courts outside Australia. The jurisdiction of the courts outside Australia will be determined by their own legal system. To provide a basis for analysis this report sets out the principles governing jurisdiction in Australian proceedings.

Australian proceedings

6.6 Analytically, jurisdictional and related issues in Australian litigation can arise at several stages in Australian proceedings. For convenience, issues can be grouped around the issue of initiating process, service and challenge to jurisdiction.

6.7 Legal proceedings are commenced in Australia by the issue of an initiating process, such as a statement of claim or summons. This initiating process is filed with the court. Strictly, it is only effective if the court has jurisdiction to adjudicate the issues raised in the initiating process. The jurisdiction of the court to adjudicate those issues depends on a number of elements including

- whether the initiating process raises a cause of action which that court has jurisdiction to determine (eg breach of contract, negligence, breach of s 52 of the *Trade Practices Act 1974* (Cth))

- whether the court has jurisdiction over the defendant
- whether the court has jurisdiction to grant the remedy sought.

These jurisdictional issues are discussed in more detail later in this chapter.[281] In practice they are not argued at the time that the initiating process is issued because neither the court nor the other parties examine them at that stage.

6.8 After the initiating process has been filed with the court it must be served on the other party or parties to the proceedings. Service outside the geographic jurisdiction of the court is only permitted in defined circumstances. In practice jurisdictional issues are sometimes raised at this stage. Often this occurs where the plaintiff seeks the leave of the court to serve outside the jurisdiction or seeks an order that informal service is effective. The court will wish to be satisfied at that stage that it has jurisdiction to adjudicate the claim raised by the initiating process. Service of process outside Australia is discussed later in this chapter.

6.9 The third milestone in Australian proceedings is when the defendant outside Australia first becomes aware of the Australian proceedings. At that stage the defendant has several options

- the defendant could choose not to come to Australia to defend the proceedings
- the defendant could make a conditional appearance in the Australian court, submitting to the court only for the purpose of challenging its jurisdiction;
- the defendant could appear in the Australian court to defend itself on both jurisdictional and substantive grounds
- the defendant could initiate counter proceedings in the foreign jurisdiction.

6.10 If the defendant chooses not to come to Australia to defend the proceedings this will put at risk any assets it has in Australia and its ability to visit or do business in Australia at a later date. At the same time, should the defendant choose not to appear in the proceedings the path to a remedy is not necessarily free of obstacles for a plaintiff. The plaintiff will need to take action in the defendant's jurisdiction, either by commencing entirely new proceedings or seeking recognition of Australian judgments. Even if the Australian judgment is recognised the foreign court may not grant the same form of relief. Recognition of foreign judgments, and the form of relief that will be granted, are discussed later in this chapter.

6.11 If the defendant chooses to challenge the jurisdiction of the Australian court, it can argue not only that the matter is beyond the power of the court but also that the court should, in its discretion, refuse to hear the matter on the ground that the Australian forum is clearly inappropriate (*forum non conveniens*).[282] Another strategy open to the defendant (depending on the laws of its own jurisdiction) is to commence proceedings in its own jurisdiction seeking a remedy against the plaintiff by seeking an order from a court in its own jurisdiction prohibiting the plaintiff from continuing its proceedings in Australia (ie, an anti-suit injunction') or a favourable declaration which would negative any rights over property sought by the plaintiff in the Australian forum. The plaintiff can in turn counter this by seeking an anti-anti-suit injunction in Australia. *Forum non conveniens* and anti-suit injunctions are discussed later in this chapter.

Investigations and asset seizure

6.12 Frequently the most important and difficult aspects of obtaining an effective remedy in a cross border dispute are

- finding out whether the defendant has any assets and where they are located (or, if assets have been stolen, where they now are)
- making sure that those ascertained assets are not taken away or dissipated, and
- getting hold of the evidence that will demonstrate the validity of the claim.

Often this information and protection is needed before proceedings are commenced or at a very early stage in proceedings. If they are not available at that stage, then in practice the plaintiff will either be unable to obtain judgment or unable to obtain any payment or asset in satisfaction of the judgment.

6.13 The two most useful forms of relief available under Australian law to meet these problems are the Mareva injunction and the Anton Piller order. A Mareva injunction temporarily restrains dealings in the specified assets pending hearing of the claim. It can be accompanied by an order requiring disclosure of assets wherever situate.[283] An Anton Piller order authorises a party to enter specified premises to search for and seize relevant assets pending hearing of the claim. Both of these orders are in the discretion of the court. They can be obtained quickly (that is, in a matter of hours) if the court is satisfied that it is appropriate to grant them. They are only available where proceedings have been commenced but in practice a short initiating process can be tendered to the court when applying for the order. Both orders are discussed in more detail in chapter 7.

6.14 Those orders help a plaintiff to prevent identified assets from being taken away or dissipated but may provide only limited assistance to actually identify relevant assets prior to judgment or liquidation. The reason for this is that courts, in considering identification orders, may take into account significant competing policy interests, particularly oppression and privacy concerns. The most relevant legal mechanisms for finding assets and evidence for private proceedings are discovery, letters of request and a liquidator's powers of investigation. Letters of request concerning the taking of evidence are discussed later in this chapter together with other foreign evidence issues. Discovery and investigations by liquidators are discussed briefly in chapter 4.

6.15 The circumstances that give rise to a cross border dispute sometimes also have regulatory or criminal implications. Various government agencies may undertake investigations and seek other legal redress, including police, corporate and securities regulators, and tax authorities. In addition there might be others involved in private enforcement such as receivers. The report is not directly concerned with these investigations and enforcement. However, they are discussed briefly in chapter 4.

Judicial assistance

6.16 Aside from specific remedies, Australian courts also have a number of powers that can be used to assist the enforcement of remedies of Australian courts outside Australia. The most important of these powers is the letter of request' under which the Australian court asks the foreign court to grant relevant orders in the foreign jurisdiction. Letters of request may relate to enforcement or evidence. Both types are discussed later in this chapter.

Jurisdiction

Introduction

6.17 This section discusses the territorial limits to the jurisdiction of Australian courts. It first outlines the jurisdiction of the Federal Court of Australia and the New South Wales Supreme and District Courts. It then considers particular jurisdictional issues relating to the issue of initiating process. The final part of the section considers the implications for court orders of laws which have extra-territorial scope, using the Corporations Law as an illustration.

Supreme Court

6.18 The Supreme Court of New South Wales is a court of general jurisdiction. It is ultimately derived from the Third Charter of Justice issued in 1823 which gave the colony of New South Wales a Supreme Court of unlimited jurisdiction (within the realms of the colony) modelled on the superior courts at Westminster.[284] This position is preserved by the *Supreme Court Act 1970* (NSW).[285]

6.19 A superior court of general jurisdiction such as the Supreme Court of New South Wales cannot be deprived of remedial or geographic jurisdiction in its State except by express statutory words or implication[286] or where it can be shown that the relevant jurisdiction exists in some other court.[287]

6.20 The jurisdiction of the Supreme Court of New South Wales may be extended outside the territorial limits of the State by statute so long as

- the statute is for the peace order and good government' of the State,[288] and
- the exercise of the jurisdiction is ultimately referable to the enforcement of the statute within the State.[289]

6.21 In such cases decisions made by the Supreme Court in accordance with the terms of the statute will not be in excess of jurisdiction even if they involve consideration of matters outside the State.[290] There must be a connection between the State and the circumstances said to be within the statute. However this only needs to be a remote and general connection.[291] Consequently the New South Wales legislature is competent to make laws which operate extraterritorially including laws which make it an offence to commit a prohibited act outside the State provided there is in the prohibited act an element sufficiently connected with the State.[292]

6.22 There is nonetheless a general presumption that the legislation and laws of New South Wales are not intended to have extraterritorial effect and court jurisdiction is similarly limited.[293] Thus unless some statute specifically grants extraterritorial jurisdiction consistent with requirement for a connection with the State, the courts of the State have no jurisdiction to deal with matters occurring beyond the territorial limits.[294] This is subject to the further qualification to the presumption against extra-territorial jurisdiction that such a presumption will be rebutted if it would render ineffective the operation of the relevant statute.[295]

6.23 In geographic terms the sovereign and legislative territorial limit of each State in Australia extends beyond the land borders to the area between the low water mark and the 12 nautical mile territorial waters limit.[296] This right in the States is subject to certain limitations, including the reservation of the right in the Commonwealth to use the sea bed for communications, defence and similar reasons. The State's legislative and sovereign power also extends beyond the territorial waters for certain limited purposes such as fisheries (by arrangement with the Commonwealth), ports and harbours. The territorial jurisdiction of the Supreme Court of New South Wales therefore extends to these offshore limits.

Federal Court

6.24 The Federal Court of Australia and its jurisdiction are derived from the *Federal Court of Australia Act 1976* (Cth).[297] The court has jurisdiction to deal with substantive matters that are

- within the power of Commonwealth Parliament as defined in the Constitution,[298] and
- set out in the laws of the federal Parliament.[299]

6.25 The Federal Court is not a court of general jurisdiction and is confined to the exercise of such powers as are either expressly conferred by statute, impliedly conferred by statute or linked and necessary to the exercise of these conferred powers.[300] Where the Federal Court is invested with jurisdiction to determine a particular matter it has jurisdiction to determine the entire proceedings. This applies even where the matter has common law elements or relates to certain State legislation, except where those elements can be severed from the proceedings and heard by the relevant State court.[301] The Federal Court also has implied incidental jurisdiction to hear matters that do not arise under laws of the federal Parliament but are related or similar to the matters that the federal Parliament has given the Federal Court jurisdiction to hear.[302]

6.26 The geographic limits of the Federal Court jurisdiction will depend on the terms of the statute granting the jurisdiction. The federal Parliament's capacity to make such legislation depends on its powers under the Constitution. Thus the Constitution is the ultimate determinant of the territorial limits to the jurisdiction of the Federal Court.

6.27 Several of the federal Parliament's powers under s 51 of the Constitution can be read as contemplating federal legislation applying outside Australia's boundaries. The two most obvious are the trade and commerce power (s 51(i))[303] and the external affairs power (s 51(xxix)). Furthermore, since the *Statute of Westminster 1931* (UK) and the *Statute of Westminster Adoption Act 1942* (Cth), it is no objection to the

validity of a law of the Commonwealth that it purports to operate outside Australia.[304] Thus the federal Parliament has power to legislate for the settlement of industrial disputes extending outside Australia and the Federal Court has jurisdiction to hear such matters.[305]

6.28 Under the *Acts Interpretation Act 1901* (Cth) all Acts of the federal Parliament are to be taken to have effect in and in relation to the territorial sea of Australia and in relation to the territorial sea surrounding any external territory of Australia.[306]

District Court

6.29 The District Court of New South Wales is not a court of general jurisdiction and thus relies on the jurisdiction granted to it under the *District Court Act 1973* (NSW) (District Court Act) and any other specific legislation.[307]

6.30 Pursuant to s 10 of the District Court Act the District Court of New South Wales is granted jurisdiction throughout the whole of the State. Under the *Interpretation Act 1987* (NSW) the District Court (as well as all other State courts) is vested with jurisdiction in relation to all matters arising out of the laws of the State as if the coastal waters' of the State are within the limits of the State.[308] The coastal waters' are the seas, seabed and sub-surface and the air above that sea, up to the 12 nautical mile offshore limit.[309] The granting of jurisdiction throughout the whole of the State does not give the District Court the same general jurisdiction enjoyed by the Supreme Court to hear matters outside the territorial limits of the State.[310] However it does not preclude the grant of extra-territorial jurisdiction to the District Court.[311]

Initiating process

6.31 In analytical terms the first jurisdictional issue to which these territorial limits apply is whether the court has jurisdiction to issue the initiating process against the defendant. The common law position needs to be considered separately from statutory effects.

6.32 At common law an action may not be commenced against an individual defendant unless that person is within the jurisdiction at the time of service of the initiating process (except in very special circumstances).[312] It is irrelevant whether the individual is a foreigner, how long he or she is in the jurisdiction and for what reason he or she is in the jurisdiction.[313] The possession of assets in the jurisdiction by a potential defendant is also an irrelevant consideration.

6.33 In the case of a potential corporate defendant incorporated outside the jurisdiction, the common law position is that a process may only be issued against it if it has a presence in the jurisdiction. Presence is determined by whether the corporation is carrying on business in Australia. This concept is discussed in chapter 7.

6.34 A party can always submit to a jurisdiction by nominating a party within the jurisdiction on which process may be served or, in the case of a written agreement, by contracting to submit to the jurisdiction. Australian courts have capacity to enable an initiating process in these circumstances to be served out of the jurisdiction.[314]

6.35 The common law position is substantially expanded for most Australian courts by their procedural rules. For example, the New South Wales Supreme and District Courts and the Federal Court of Australia all have criteria regarding jurisdiction which must be satisfied before any action may be commenced in those courts.[315] In many respects these are not as strict as the common law requirement that the potential defendant must be within the jurisdiction at the time of service. All actions proposed to be commenced in any of these forums must satisfy these criteria.

6.36 Nonetheless, even where the plaintiff has a *prima facie* case for which the relevant Australian court has jurisdiction under these court rules, the relevant court retains the discretion to refuse leave to serve out of the jurisdiction or to deny leave to continue the proceedings.

- In jurisdictions where the plaintiff must apply for leave to serve the initiating process on the defendant out of the jurisdiction, such as the Federal Court, the onus is on the plaintiff to show that the case falls within one or more of the grounds upon which service out of the jurisdiction is permitted.

- In those jurisdictions where prior leave is not required, such as the Supreme Court of New South Wales, where the defendant does not appear within the requisite time the plaintiff must seek leave to proceed against the defendant.[316]

- Jurisdiction obtained by service out of the jurisdiction and exercised upon persons outside the forum is an extreme jurisdiction which will be exercised with great caution.[317]

- The plaintiff must make full and fair disclosure of all the relevant facts regarding the international aspects of the case. If it appears that the plaintiff has not done so, the court will refuse leave.[318]

- In the exercise of its discretion the court will consider whether the forum is a clearly inappropriate place to try the action (*forum non conveniens*).

The procedures for effective service out of the jurisdiction (outside Australia) and *forum non conveniens* are both discussed later in this chapter.

Laws with extra-territorial scope

6.37 Some Australian legislation has extraterritorial application. Where an Australian court hears a claim arising under legislation of that kind it will have jurisdiction to make determinations about events and circumstances occurring outside Australia and to order remedies in respect of those events or circumstances. However its orders will only be enforceable within the territorial jurisdiction of the court. Thus the extraterritorial scope of the legislation will increase the scope of the evidence and issues to be considered by the court but, strictly, will not increase the territorial scope of the remedies available from the court.

6.38 This can be illustrated by the Corporations Law. Section 110D of the Corporations Law specifies that Chapters 1 to 6 and Chapter 9 of the Corporations Law apply to

- natural persons, whether resident in the State or Australia or not and whether Australian citizens or not

- all bodies corporate and unincorporated bodies whether formed or carrying on business in Australia or not, and

- acts and omissions outside the relevant State, whether in Australia or not.

6.39 This provision clearly empowers the Federal Court and State and Territory Supreme Courts to hear matters involving elements outside Australia in certain circumstances. The only qualification is that, as the Corporations Law is State legislation (except in relation to the internal territories), its extraterritorial scope will be limited by considerations of what is a law for the peace, order and good government of the State and whether the exercise of the jurisdiction is ultimately referable, however remotely, to the enforcement of the Corporations Law within the relevant State.

6.40 The effect of this extra-territorial scope can be illustrated by the financial benefits provisions in Part 3.2A of the Corporations Law. Section 243H(2) provides that a child entity of a public company must not give a financial benefit to a related party of the public company except as permitted by Division 4 or 5 of that Part of the Law. Thus the UK subsidiary of an Australian public company must not lend more than $2 000 on terms which are not arms length (for example, interest free) to the UK resident daughter of one of the directors of the Australian public company. If it does so without prior disclosure and shareholder approval the UK resident daughter will have contravened s 243ZE(2) which is a civil penalty provision and attracts the civil and criminal consequences set out in Part 9.4B. The UK subsidiary will also be governed by UK companies law. It is therefore possible that the transaction will also give rise to a similar liability on the part of the UK resident daughter or the UK subsidiary (or both) in the UK.

6.41 In terms of legislative intention this result is fully consistent with the object of Part 3.2A which is to protect the Australian public company's resources, local and foreign, by requiring prior disclosure and shareholder approval of financial benefits to related parties that could diminish the resources of the public company. However in terms of its cross border implications, the result creates a number of difficulties for the Australian court. All of the relevant parties are in the UK. All of the evidence is likely to be in the UK. Any restitution to the UK subsidiary will need to be enforced in the UK. In addition the Australian proceedings may overlap with UK proceedings on the same matter.[319]

6.42 In summary where Australian laws have extraterritorial scope this clearly gives rise to greater potential for overlapping jurisdiction between the courts of Australia and courts outside Australia. There is also a potential mismatch between the claim that the Australian court can determine and the remedies the Australian court is able to order in relation to that claim.

Service of process outside Australia

Introduction

6.43 This section discusses the extent to which Australian courts will authorise or recognise service outside Australia. It considers general principles first, then forms of valid service and, finally, setting aside service of process outside Australia.

General principles

6.44 Where the party is in the jurisdiction service of an initiating process in any court in Australia is required to be in person.[320] It is however sufficient that service be accomplished by putting down a copy in that person's presence and explaining its nature.[321] In the case of service on a corporation service may be effected either by serving the initiating process personally on two directors or by mailing it to the registered office.[322] In the case of a registered foreign company service may be effected by leaving it at, or sending it by post to, the registered office of the foreign corporation, the address of the local agent of the foreign company[323] or that of any two directors resident in Australia.[324] The court however retains a jurisdiction to authorise service on a registered foreign company in any other manner it sees fit.[325]

6.45 Where the party is outside the jurisdiction, the analysis is more complicated. In each of the situations considered in chapters 7 and 8 the proceedings are required to be commenced by serving an initiating process out of an Australian court on a defendant located in a foreign country. Each of the methods of service described above is likely to be difficult to effect outside Australia. There can also be local legal restrictions. The rules of court in Australia take into account some of the logistical difficulties in effecting service in a foreign jurisdiction. These are outlined below.

Forms of valid service

6.46 ***Substituted service.*** In some situations personal service or service in accordance with the other requirements outlined above may be waived and an alternative form of service ordered by the court. Substituted service may be ordered where

- it is impracticable to serve the document in the required manner, and
- it is reasonably probable that the form of substituted service ordered by the Court will be effective to bring notice of the proceedings to the party to be served.[326]

6.47 ***Informal service.*** Alternatively, a party attempting service in a foreign jurisdiction may seek an order from the court that the relevant initiating process has been served by virtue of informal service. In this case, if the court is satisfied that the service in the required manner was impracticable but steps have been taken to bring or will have the tendency to bring the contents of the document to the attention of the person to be served, the court will order that service has been effected.[327]

6.48 ***Service in accordance with the law of the foreign jurisdiction.*** Where a document is required to be served outside Australia the document need not be served personally so long as the document is otherwise served in accordance with the laws of service applicable in the foreign jurisdiction in which service is to take place.[328] It is not mandatory for service to be effected in accordance with the law of the country in which service is to take place. The validity of service is at all times to be judged in accordance with the relevant Act and Rules of the Australian court.[329] However where the method of service is not effective under the local law, this may affect the recognition of the Australian judgment in that jurisdiction.

6.49 ***Service in Convention countries.*** Australia has acceded to a number of conventions relating to legal proceedings in civil and commercial matters.[330] In the case of service in countries that are party to these conventions (and in the case of the Supreme Court of New South Wales, any other country the Attorney General by instrument filed in the proceedings may direct) a special procedure for service exists. In such cases a person wishing to serve documents in the convention country may apply to the Prothonotary or the Registrar (as appropriate) of the relevant court in Australia for approval to

- seal and send documents requiring service to the convention country, and
- provide an appropriate letter of request addressed to the appropriate court in the country in which service is sought (as required).[331]

Service in this manner would be effected through the Secretary of the Attorney-General's Department and then through official channels in the convention country. A certificate from a judicial authority or other responsible person in the relevant convention country that service has been effected in this manner will be evidence of the service or attempted service taking place. Before the Prothonotary or Registrar is able to undertake this process the party seeking service must ensure that a translation of the documentation is also supplied and served where the country for service does not have English as its official language.[332] The party must also give an undertaking to pay all the costs of the Prothonotary's or Registrar's request for service.[333] If service is not attempted through this official channel then, unless the law of the convention country otherwise requires, there is no requirement to serve a translation.[334]

6.50 ***Service in non-convention countries.*** The Federal Court also has an additional procedure which may be used to implement service in a non-convention country.[335] A party seeking extra-territorial service in this manner must file a request form with the Federal Court and supply a translation of the document to be served. The Federal Court must then seal the documents with a special seal for extra-territorial service and forward the documentation and a formal request to the Secretary of the Attorney-General's Department for transmission to the government of the relevant country. Service is proved by the transmission of a certificate from the relevant court or government of the country in which service is to take place, certifying that service has taken place either personally or in accordance with the rules for service in that country.

Setting aside service of process outside Australia

6.51 The courts in Australia retain an overriding discretion to set aside an originating process on a variety of grounds. This is a flexible discretion able to be exercised having regard to all the circumstances of the case.[336]

6.52 One of the principal circumstances in which the court will exercise this discretion is where a document has not been served in a proper manner.[337] The considerations that the court will take into account include whether the plaintiff has an arguable case on the merits[338] and the basis on which authority to serve the initiating process outside Australia is maintained by the serving party.[339]

6.53 Generally Australian courts have a discretion to disregard irregularities in service. The traditional view was that any irregularity in service outside the jurisdiction should only be disregarded in exceptional circumstances.[340] However more recent case law suggests that an irregularity going to the mode of service will be more easily waived than an irregularity that has an impact on the positions of the parties if the proceedings are permitted to proceed.[341] In practice service has not been set aside even where the irregularity is quite substantial, for example writs for service on separate defendants being served on the wrong defendants or no writ being served but rather a form of acknowledgment of service being served.[342]

6.54 Other factors considered by the courts are

- whether the proceedings would subsequently be stayed as an abuse of process on the basis that Australia was a clearly inappropriate forum (*forum non conveniens*) or for some other reason,[343] and

- whether the serving party would not otherwise be able to pursue an action in the foreign court.[344]

Challenging jurisdiction

Introduction

6.55 This section discusses the discretionary grounds on which a court can stay proceedings in Australia or seek to prevent parallel proceedings outside Australia. If a claim is outside the jurisdiction of an Australian court the defendant can require the court to strike out the claim and terminate the proceedings. There is no discretion involved. But even where the court does have jurisdiction the defendant can ask the court to exercise its discretion to stay the proceedings on the ground that the forum is clearly inappropriate. The court may also, in its discretion, grant an anti-suit injunction to prevent parallel proceedings outside Australia.

Forum non conveniens

6.56 In any Australian proceedings the defendant may request the court to grant a stay of the proceedings on the basis that the trial in Australia is clearly inappropriate because the matter has little to do with the local forum (*forum non conveniens*). However in Australia it is difficult for a defendant to obtain a stay on this basis. It will only be granted where the defendant demonstrates that

- the local court is such an inappropriate forum that continuation of the proceedings there would be oppressive to the defendant, or

- having regard to the circumstances of the particular case and the availability of the foreign forum, the local forum is clearly an inappropriate forum for the determination of the matter.[345]

Generally this will only be demonstrated if the defendant can identify an appropriate foreign tribunal to whose jurisdiction it is amenable and which would entertain the particular proceedings at the instigation of the plaintiff, and can show that the Australian court is so clearly an inappropriate forum that the continuation of the matter in the Australian court would oppressive to the defendant.

Anti-suit injunctions

6.57 A second order available from the Australian courts where proceedings have been brought in another jurisdiction for the same cause of action is the anti-suit injunction. Where such an order is granted it operates to restrain the parties from pursuing the concurrent foreign proceedings. Although the injunction is only enforceable against the parties, it is usually effective to restrain the matter from proceeding in the foreign forum.[346] Australian courts will only make such an order in special circumstances where the applicant for the injunction can demonstrate that there is a strong need for restraint of proceedings in the other jurisdiction to protect the integrity and processes of the local court from interference by the foreign court.[347] In all cases the Australian courts will only make such an order with great caution and with an eye to the possibility of overreaching their jurisdiction particularly where the proceedings restrained in a foreign jurisdiction involve a national or resident of that jurisdiction.[348]

Enforcement outside Australia

Introduction

6.58 Australian officials cannot enforce unilaterally the judgments of Australian courts outside Australia. To do so would breach the sovereignty of other countries. In recognition of this, Australian law includes some mechanisms to assist in enforcement outside Australia and to encourage international cooperation in enforcement proceedings. The principal mechanisms are letters of request and reciprocal recognition of

judgments. These are outlined below. The forms of relief available when enforcing outside Australia will nonetheless be determined by the foreign court. This is also discussed below.

Letters of request

6.59 Australian courts are able to issue letters of request both in bankruptcy proceedings and in relation to corporate insolvency and external administration under the Corporations Law.

6.60 Under the Bankruptcy Act a court of relevant jurisdiction in bankruptcy in Australia may seek the assistance of competent courts in a foreign jurisdiction in matters of bankruptcy. The assistance of such competent courts of foreign jurisdiction may be obtained by way of a letter of request from the relevant Australian court.[349]

6.61 In order for the relevant Australian court to issue such a letter of request the court must first be satisfied that the foreign court to which the request is to be addressed has jurisdiction in bankruptcy to act in aid of and be auxiliary to the Australian court in a matter of bankruptcy.[350] If the relevant Australian court is of the opinion that the court of the foreign jurisdiction does not have power to act on the request it will not issue the request.[351] This will necessarily involve the court examining the jurisdictional capacity of the foreign court to deal with the areas the subject of the request.

6.62 The relevant Australian court retains an overall discretion whether to make the request or not.[352] The discretion is to be exercised with regard to considerations of utility and comity.[353] Other considerations such as inconvenience to parties and the possibility of increased costs are relevant if, for example, it is possible and reasonable in the circumstances for the trustee in bankruptcy to take out proceedings in the foreign court directly.

6.63 The actual request usually takes the form of a letter to the justices of the relevant foreign court which

- outlines the nature of the proceedings
- indicates the nature of the entitlement to the property located within the foreign jurisdiction
- outlines the grounds on which it has been represented to the issuing court that the property should be dealt with in accordance with the laws of the issuing court
- requests that the foreign court vest the identified property of the bankrupt in the trustee appointed in the jurisdiction of the issuing court and grant orders sought by the trustee for the purposes of implementing its rights as trustee in bankruptcy.[354]

6.64 It is not necessary for a treaty to exist to ground the jurisdiction of the court to issue a letter of request to a foreign jurisdiction.[355] The request may relate to either real or personal property owned by the bankrupt.[356]

Corporations Law

6.65 The position in relation to requests directed to courts of foreign jurisdiction in bankruptcy matters is also mirrored in relation to corporate insolvency and external administration matters. Under s 581(4) of the Corporations Law a court of relevant jurisdiction in Australia can request a court of another country which has jurisdiction in matters relating to the external administration of companies to act in aid of the Australian court in external administration matters. An external administration matter' is defined in s 580 and includes the winding up of an Australian or foreign company either in Australia or overseas.

6.66 This power is exercised on a similar basis to the power to issue letters of request in bankruptcy proceedings. The issuing court will need to be satisfied that the foreign court has jurisdiction and capacity to act on the request in relation to external administration. The same considerations of utility, comity, convenience and cost will be taken into account in the exercise of the court's discretion.

6.67 As in the case of the bankruptcy letter of request, the actual request usually takes the form of a letter to the justices of the foreign court which

- outlines the nature of the proceedings
- indicates the nature of the entitlement to the property located within the foreign jurisdiction
- outlines the grounds on which it has been represented to the issuing court that the property should be dealt with in accordance with the laws of the issuing court
- suggests the possible orders that could be made by the foreign court to assist the Australian court in administration of the winding-up process.[357]

Reciprocal recognition of judgments

6.68 One of the principal mechanisms for international cooperation in enforcement proceedings is reciprocal recognition of judgments. Under Australian law foreign judgments will be recognised and enforced in Australia if they fall within the category of judgments recognised under the Foreign Judgments Act or if they otherwise qualify for recognition under the common law. This section concentrates on recognition provided in the Foreign Judgments Act.

6.69 The Foreign Judgments Act provides a framework for enforcement of foreign money judgments in Australia based on assurances that the foreign jurisdictions to which the Acts applies will substantially reciprocate in the enforcement of judgments of the Australian Supreme and Federal Courts.[358] Under the Act, a mandatory procedure is established for the relevant Australian court to register and enforce money judgments of foreign courts to which the Act is proclaimed to apply. Non-money judgments such as injunctions are within the scope of the Act but have not yet been prescribed in the regulations in relation to any of the reciprocating foreign jurisdictions.

6.70 The foreign countries and courts to which the Act applies are set out in regulations. Of the foreign jurisdictions set out for the Commission's attention in the terms of reference only the Cook Islands, Switzerland and Germany have been made the subject of the Foreign Judgments Act.[359] If the Act is not proclaimed to apply to a particular foreign jurisdiction then enforcement of the foreign money judgment in Australia is to be conducted at common law, requiring the judgment debtor to be served in or having submitted to the jurisdiction of the enforcing court in Australia.[360]

6.71 A foreign jurisdiction is only entitled to receive the benefit of recognition of its money judgments in Australian courts under the Foreign Judgments Act where the Governor-General is satisfied that substantial reciprocity of treatment is assured in respect of enforcement of money judgments of Australian courts.[361] This is not a strict enforcement obligation on the part of the relevant foreign jurisdictions. The Foreign Judgments Act merely empowers the Governor-General to remove the recognition of the relevant foreign money judgments if it becomes apparent that the enforcement of Australian money judgments accorded by the relevant foreign jurisdiction is substantially less favourable than that afforded by the Australian courts.[362]

6.72 To implement the reciprocal recognition of judgments the Act sets out a procedure to facilitate the enforcement of Australian money judgments outside Australia. Thus, under the Foreign Judgments Act, on application by a judgment creditor an Australian court is required to provide

- a certified copy of a judgment, and
- a certificate containing particulars with respect to the causes of action and rate of interest payable on the sum payable under the judgment,

in order that the judgment creditor may attempt to enforce that judgment outside the jurisdiction.[363]

6.73 The certificate and certified copy of judgment will only be provided where the judgment creditor is seeking to enforce the judgment in one of the foreign jurisdictions to which the Act applies.[364] The procedure is not available in the District Court (except by way of issue through the Supreme Court after an application to have the matter transferred to the Supreme Court) but a similar procedure is available in the Federal

Court.[365] In all other cases the judgment creditor has to rely on the certified judgment obtained from the relevant court.

6.74 The court will not make orders for execution of any levy, sequestration, attachment or garnishee process or for enforcement of the judgment where the execution is to be conducted outside the jurisdiction.[366] Similarly while upon delivery of a writ the sheriff acquires a legal right to seize the goods specified in the writ,[367] a sheriff cannot seize and sell property out of the jurisdiction of the court.[368]

Form of relief

6.75 Regardless of the judicial or statutory assistance available, in any enforcement proceedings taken outside Australia a party attempting to enforce an Australian right can only obtain relief in the form and manner which the forum in the foreign jurisdiction provides.[369] The ultimate remedy obtained by a party in a foreign jurisdiction may therefore be more or less than would have been obtained if the action were confined to a cause of action arising solely within Australia.

6.76 The foreign forum may also enforce a relevant Australian right by means of a remedy that was not otherwise available to the party in Australia.[370] Alternatively, the remedy allowed by the Australian court may not be recognised in the foreign jurisdiction and the foreign court may grant an alternative remedy. The degree to which the foreign court will modify the remedy will depend on the mechanisms for enforcement available in the foreign jurisdiction and how closely the remedies from the two jurisdictions compare. The foreign court may decide that the relevant Australian remedy is too different from any available in its own jurisdiction to permit enforcement at all.[371]

6.77 In enforcement proceedings in a foreign jurisdiction the law of the foreign jurisdiction not only determines how enforcement is to take place but also by which property the judgment is to be satisfied.[372] The law of the foreign jurisdiction will also determine priorities of creditors. However a court in the foreign jurisdiction would not be expected to apply a rule of its own domestic law that operates to protect a party from liability where the relevant law of Australia applied in the Australian judgment imposes such a liability.[373]

Foreign evidence

Collecting evidence outside Australia

6.78 Disputes with a cross border element will invariably require evidence to be collected outside Australia. If the person outside Australia who has that evidence does not wish to give it, a court order will be needed to compel the person to do so. However, strictly, Australian courts can only compel evidence to be given within Australia and its territories. There are two mechanisms which address this difficulty: letters of request and certain mutual assistance powers.

6.79 Section 7(1) of the Foreign Evidence Act empowers the courts to make certain orders relating to the giving of evidence by a person outside Australia. If it appears in the interests of justice to do so, the court may order (in broad terms)

- the examination of a person outside Australia before a judge, court officer or other nominated person
- the issue of a commission for the examination of a person outside Australia
- the issue of a letter of request to the judicial authorities of a foreign country to take the evidence of a person or cause it to be taken.

The letter of request will be the most useful procedure if the person outside Australia does not wish to give evidence since it can lead to appropriate compelling orders from a court with jurisdiction over that person.

6.80 The Attorney-General has power under the *Mutual Assistance in Criminal Matters Act 1987* (Cth) to arrange for evidence to be taken in a foreign country, or for documents or other articles in a foreign country

to be produced, for the purpose of a proceeding in relation to a criminal matter in Australia. However it is unlikely that an Australian court would compel any foreign evidence collected in this manner to be produced in a civil proceeding, regardless of its relevance, since it will usually only have been provided on the basis that it will only be used in relation to the relevant criminal proceeding.[374]

6.81 The Australian Securities Commission has also established arrangements giving it access to foreign evidence through memoranda of understanding with its counterpart regulators in various other jurisdictions, including UK, Hong Kong, New Zealand, USA and France. These arrangements are given statutory support in the *Foreign Evidence Act 1994* (Cth) (Foreign Evidence Act). However, it is unlikely that an Australian court would compel production by the ASC to a party in a separate civil proceeding of evidence the ASC collected under these arrangements where that party could not use an Australian court to obtain the evidence from its original owners or holders and the documents are subject to a restricted use undertaking.[375]

Documentary evidence

6.82 It appears that under the Foreign Evidence Act letters of request cannot be issued for the purpose of obtaining only documentary evidence, unattached to a record of oral testimony. At the same time Australian courts do have the power to order production of documents alone in response to a letter of request from a foreign court. Concern has been expressed that if this interpretation of the Act is correct, it is anomalous and would prevent much evidence being obtained that is needed for commercial matters, particularly from corporations.[376]

7. Australian remedies: debt and insolvency

Introduction

7.1 The previous chapter outlined the principal factors in Australian law and practice affecting international litigation. Against that backdrop this chapter summarises the civil remedies available in Australian courts under Australian law for two of the six types of claim identified in the inquiry's terms of reference: debt recovery and corporate insolvency. The other types of claim are discussed in the following chapter. This chapter discusses debt and insolvency remedies in three sections

- first, the remedies available as a matter of general principle, disregarding the particular international features of the claim
- then, the territorial limits to those remedies
- third, the extent to which those remedies are enforceable outside Australia.

As noted in the previous chapter, to simplify the analysis the chapter considers only the remedies available to a party in the District and Supreme Courts of New South Wales and the Federal Court of Australia.

Debt recovery

The claim

7.2 This section considers the remedies available for debt recovery against assets outside Australia. The following example reflects section 3(a) of the terms of reference of this inquiry.

Debt recovery example

This example concerns a straightforward import/export transaction. A sole trader who is not a resident of Australia owes money on the purchase of goods sold by an Australian company. The goods have been received by the trader in his home country. The trader has no assets in Australia but owns land in his home country.

The range of remedies available

7.3 The civil remedies generally available in Australia for debts owed where goods have been supplied but not paid for arise through

- obtaining and enforcing a money judgment
- bankruptcy proceedings.

7.4 There are also anticipatory remedies available where there is a risk that the debtor will leave the jurisdiction or remove or dissipate his or her assets. These include

- a Mareva injunction
- an Anton Piller order
- interim bankruptcy orders.

7.5 For jurisdictional reasons some of these remedies will not be available or will be of limited value in the debt recovery. To illustrate this the remedies are first discussed in general terms and then the jurisdictional issues are considered.

Money judgment

7.6 The simplest procedure available to the Australian company is to seek a default judgment in its favour for the amount of the debt. To do so the exact amount claimed must be stated in the initiating process. If the defendant does not file a defence, judgment is entered in favour of the plaintiff for the amount claimed. Default judgments have the same force as those made after a fully heard trial and the same methods of enforcement are available. They can be set aside but only in limited circumstances. The methods of enforcement include

- examination of the debtor
- levy against property
- attachment or garnishment of debts or income owed to the debtor
- charging and stop orders
- court appointed receivership.

Each of these methods of enforcement is discussed below to illustrate the range of remedies contemplated by Australian law. However they are generally of little value to the Australian company in the debt recovery example because (as discussed later in this chapter) they generally do not extend to individuals or assets outside the jurisdiction.

Examination of debtor

7.7 All courts with jurisdiction to hear a debt recovery matter in New South Wales have procedures by which the attendance of the judgment debtor at an examination hearing can be compelled for the purposes of discovering what assets the judgment debtor has with which to satisfy the judgment.[377] A judgment creditor may seek to use this order to determine which of the judgment debtor's assets it would be easiest to enforce the debt against.

Levy against property

7.8 All courts of relevant jurisdiction in New South Wales have power to issue warrants to seize the property of a judgment debtor.[378] Such orders authorise the sheriff to seize and sell the judgment debtor's property and pay the proceeds of such sale to the judgment creditor.

7.9 All courts have power to issue these warrants against goods and chattels as well as money, negotiable instruments, bonds and securities. The New South Wales Supreme and District Courts may also authorise seizure and sale of interests in land.[379] This remedy is not available in the Local Court but an unsatisfied judgment in the Local Court can be registered in superior courts and enforced against land.

7.10 Items that are owned in conjunction with several owners or are subject to claims or rights by other parties (for example, a finance company) may be seized and the judgment debtor's share sold. Certain interests such as stocks and shares cannot be seized but income generated from them may be, and the assets themselves may be subjected to a charging order (see below). Other items such as money in court held for the benefit of the judgment debtor also may not be seized but may be subjected to a stop order (see below).

Attachment or garnishment

7.11 Debts and income owed to judgment debtors may be accessed by the judgment creditor through attachment or garnishee orders.[380] The debts must be present debts which are payable at the date of the order. Specific legislation in New South Wales permits attachment to bank deposit accounts which are not otherwise recognised at common law as currently owing or accruing to the judgment debtor.[381]

7.12 In the New South Wales Supreme Court this is a two stage process. The court first grants an order which attaches to the debt and sets a hearing date. The second stage is an order absolute which requires the

judgment debtor to pay the debt attached to the judgment creditor.[382] In the two lower courts this procedure is combined into one order.[383] The orders in all cases are directed to the garnishee (for example, the bank) and cover all debts owed by the garnishee to the judgment debtor.

7.13 Attachment of income commonly appears in the form of an order for an employer of the judgment debtor to pay that person's wages or salary to the judgment creditor instead of the judgment debtor. At common law these orders may only apply to present debts and not future wages thereby making it necessary to serve a new order on the garnishee each time an amount is payable to the judgment debtor. However, the Local and District Courts of New South Wales have power to issue a variety of future wages attachment orders.[384]

Charging and stop orders

7.14 Orders may also be sought in the New South Wales Supreme Court for the charging of the judgment debtor's stocks and shares as well as stop orders over any monies held in court for the benefit of the judgment debtor.[385] A charging order may also be used against a bank account. The procedure for obtaining and enforcing an order is similar to the two stage procedure outlined in relation to the attachment of debts. The effect of a final charging order is the same as if the judgment debtor had granted a charge over the relevant assets in favour of the judgment creditor.

Court appointed receiver

7.15 Section 67 of the *Supreme Court Act 1970* (NSW) empowers the Supreme Court to appoint a receiver of a debtor's property where it is deemed just or convenient to do so. This is a particularly useful remedy where that court is of the opinion that none of the execution processes outlined above is adequate.

7.16 The Supreme Court may, in its discretion, appoint a receiver of specific items of the judgment debtor's assets.[386] The court may make such an order in respect of assets that would not otherwise be subjected to any of the other execution orders or where the usual processes would be inadequate or inconvenient. A receiver in this instance is not given the power to sell the assets but is entitled to receive the alleged debtor's specified property and thus prevent it being dealt with. This may have significant practical benefits for the judgment creditor if bankruptcy proceedings are later commenced. The court is not likely to grant this order where the debt is small.

Bankruptcy proceedings

7.17 An alternative way in which a supplier such as the Australian company may recover its debt is to apply to have the debtor declared a bankrupt. There are two ways in which a creditor may seek to do this

- present a creditor's petition to a Registrar in Bankruptcy (Supreme or Federal Court) or
- obtain a final judgment or order against the debtor and then obtain a bankruptcy notice from the Registrar.

In both cases the debt sought to be recovered must be in excess of $1 500 and must be a liquidated sum (not merely the basis of a cause of action).[387]

7.18 A creditor's petition can only be presented if the debtor has committed one of the 'acts of bankruptcy' set out in s 40 of the *Bankruptcy Act 1966* (Cth) (Bankruptcy Act) within the previous six months. These are acts or events which indicate that the debtor is not willing and not able to pay its debts.

7.19 Where a final judgment has been obtained and the debtor fails to pay the amount owing under the judgment, the debtor is deemed to have committed an act of bankruptcy which is an act upon which any creditor may found a creditor's petition.[388]

7.20 Alternatively the creditor could seek to establish other acts of bankruptcy. Assuming at this stage bankruptcy proceedings could apply in the case of this example, they might include

- certain dealings (within or outside Australia) by the debtor with his/her property (eg assignments and dealings that would otherwise be void against the trustee in bankruptcy if the debtor were to become bankrupt)

- certain conduct intended to defeat creditors, or

- certain conduct indicating an inability to pay debts as they fall due,

occurring within the relevant six month period.

7.21 The consequences of the debtor being declared a bankrupt are that all the property of the bankrupt vests in either the Official Trustee or a registered bankruptcy trustee for distribution to creditors. The relevant property available for distribution will include property of the bankrupt at the date of the act of bankruptcy, any preferences given to other creditors within six months before the petition ('relation back period'), property acquired after the date of the act of bankruptcy, and any property acquired by the bankrupt on or after the date of bankruptcy and before discharge.[389]

7.22 Section 81(1) of the Bankruptcy Act gives the court, on application by a creditor with a provable debt or by the relevant trustee in bankruptcy, power to summon certain persons for public examination, whether before, during, or after the end of the bankruptcy proceedings. The people who can be summoned include the bankrupt, a person suspected of possessing property of the bankrupt, and any person believed to be indebted to the bankrupt. This is an important tool for creditors such as the Australian company as it enables the discovery of property to which the trustee is entitled.

Anticipatory remedies

7.23 Although not relevant to the debt recovery example (because the debtor and assets are already out of the jurisdiction), anticipatory remedies are important where there is a risk that the alleged debtor will leave the jurisdiction, remove his or her property from the jurisdiction or generally set up his or her affairs to make recovery more difficult.

Mareva injunction

7.24 The most useful anticipatory remedy is the Mareva injunction. This temporarily restrains the alleged debtor from dealing with some or (rarely) all of their assets in any way which may inhibit or prevent recovery of the alleged debt, pending hearing of the action for recovery of the debt. The injunction may alternatively be framed so that it applies even after judgment has been made in order to aid the judgment creditor in enforcing the judgment.[390] This interim remedy does not operate so as to create a security interest for the applicant and may only be granted by the Supreme Court, the Federal Court or the District Court. Where the alleged debtor or the third party fails to comply with the order this is deemed to be contempt of court.

7.25 To obtain the remedy the applicant must show that

- the debt is owing or there is a serious question to be tried

- there is a real risk that the alleged debtor is about to leave the jurisdiction or is about to dissipate its assets and

- proof or enforcement of the debt will be made more difficult if the alleged debtor's behaviour is not appropriately restrained.[391]

7.26 To satisfy the first element, it is not necessary for the applicant to prove the claim will ultimately be successful, just that it has a good arguable case.[392] The other two elements require the applicant to show that the order is necessary to protect the debt claimed. There must be particular reasons why the applicant believes that the assets will be removed from the jurisdiction or liquidated. It is not sufficient simply that the

alleged debtor intends to leave the jurisdiction[393] or is a foreigner. Nor is it sufficient that the debtor is actually disposing of its assets, as this may be just the debtor conducting its normal course of affairs.[394]

7.27 A Mareva injunction may be granted in Australia whether or not the defendant is domiciled or present within the jurisdiction.[395] However in *The Siskina*[396] it was held that a Mareva injunction could not be granted where the defendant was not amenable to the jurisdiction of the court independently of the claim for the injunction. Therefore a plaintiff cannot claim a Mareva injunction against a defendant who is not subject to the jurisdiction or where the action to which the Mareva injunction relates cannot be heard by the court in the jurisdiction where the Mareva injunction is sought.[397]

7.28 One further advantage of the Mareva injunction to parties claiming from debtors is that it can be framed to bind third parties instead of or as well as the debtor. This is of particular relevance where the debtor's assets may be in the control of other parties (usually items such as funds in a bank account, goods in the hands of others held on behalf of the debtor etc). In such situations the applicant would have to demonstrate that the account or the goods are that of the debtor before the court will make the requested order.

7.29 The Mareva injunction is a discretionary remedy of the court and as such there are no rules or considerations which a court is bound to follow. However there are a number of issues the court will consider in exercising its discretion to make such an order

- the harm likely to be caused to the debtor
- whether there was some kind of culpability in the applicant's actions leading up to the application
- whether it will require a great degree of court supervision to police the order, and
- whether the order will cause undue hardship on the parties or any relevant third party (where applicable).

7.30 Before granting this remedy the court will also usually require the applicant to give an undertaking to compensate the debtor (or a third party where appropriate) for damage suffered as a result of a wrongfully issued order.

Anton Piller order

7.31 Where goods supplied by a party are still in the hands of the debtor (or its agent), the applicant may seek an order requiring the debtor or third parties to authorise it to enter specified premises in order to search for and seize the relevant goods pending hearing of the debt claim in court.[398] As with Mareva injunctions, failure by the debtor to comply is a contempt of court. Such orders, known as Anton Piller orders, may be obtained before or during proceedings or after judgment in aid of execution.[399]

7.32 Before such an order will be granted there must be clear evidence that the debtor has the goods in its possession and that there is a real possibility that the goods will be destroyed or disposed of before the debt recovery matter can be heard.[400] As this remedy is also only awarded at the discretion of the court the considerations outlined in relation to Mareva injunctions apply in the case of Anton Piller orders, including the requirements that

- the applicant has a good cause of action against the debtor
- the applicant has a sufficiently strong case to justify the order
- the applicant has fully disclosed all relevant facts
- there will be a serious loss to the applicant if there were a denial of the relevant order and this is greater than the loss likely to be suffered by the debtor, and
- the applicant's undertaking as to damages is adequate.

7.33 Traditionally these orders have largely been confined to the areas of infringement of intellectual property rights and have only been used in debt recovery matters in isolated instances.[401] The courts are generally reluctant to make such orders as they are at the 'extremity of the court's powers'.[402]

Interim orders in bankruptcy proceedings

7.34 Anticipatory remedies are also available in bankruptcy proceedings. As soon as a creditor's petition is filed (and before the debtor is declared bankrupt) any creditor may apply to the court for a direction that a trustee take control of the property of the debtor and make such orders in relation to that property as the court deems fit.[403] The court will only do this where it considers it to be in the interest of creditors. This direction is on an interim basis only and will invariably require proof that the petition is well founded.

7.35 Alternatively, a court exercising jurisdiction in bankruptcy has specific statutory power to grant injunctions or such other equitable orders as it considers necessary for the purposes of carrying out or giving effect to the Bankruptcy Act.[404] This power includes Mareva injunctions.[405] When applying for an injunction pursuant to the Bankruptcy Act it is not necessary to prove necessity for the order, merely that relief is necessary in the interests of justice including the preservation of assets in order that they may be appropriately distributed among creditors.[406]

Jurisdiction - the need for a connection

7.36 These remedies will only be available to the Australian company in the debt recovery example if there is a sufficient connection between the Australian jurisdiction and the non-resident businessman or the transaction. The necessary connection varies according to the remedy sought.[407]

Jurisdiction in the enforcement of judgment debts

7.37 In the debt recovery example the judgment debt and the orders available to enforce it are based on a breach of contract. The Supreme Court of New South Wales has jurisdiction over claims arising out of a contract where

- the contract is made in the State
- the contract is made on behalf of the person to be served by or through a person carrying on business or residing in the State
- the contract is governed by the law of the State
- the breach of contract was committed in the State.[408]

The position is similar in the Federal Court.[409] The District Court Act allows the Court to hear a matter where either a material part of the cause of action was in New South Wales or the defendant was resident in New South Wales at the time of service of the document commencing the action.[410]

7.38 There are several factors relevant to the issue of where the contract was made (all of which go beyond the assumed facts).

- The contract will be taken to have been made within Australia if the offer was made by the businessman outside Australia and the Australian company accepted that offer in Australia.
- The contract will also be taken to have been made within Australia if it is written and was executed within Australia or the last party to execute was within Australia.
- If the contract was made within Australia but later varied outside Australia it will still be regarded as having been made in Australia.[411]

The issue of jurisdiction to hear matters relating to a contract involving international elements is considered further in chapter 8.

Jurisdiction in bankruptcy proceedings

7.39 In general terms

- the Bankruptcy Act extends to debtors who are not Australian citizens
- upon bankruptcy all of the property of the bankrupt vests in the trustee whether it is situated in Australia or elsewhere
- the system of priorities provided under Australian law is not affected by the place where the property is located or where the claimant is domiciled.

7.40 However there are territorial limits to this broad jurisdiction. Involuntary bankruptcy proceedings may only be commenced where there is a prescribed connection with Australia, there are special requirements for service of bankruptcy petitions, and there are comity considerations when there are parallel bankruptcy proceedings in different countries.[412]

7.41 An applicant is not permitted to take bankruptcy proceedings on the filing of a petition against a debtor unless, at the time of the relevant act of bankruptcy on which the petition was based,

- the debtor was ordinarily resident or had a dwelling house in Australia
- the debtor has a place of business in Australia or was carrying on a business within Australia or
- the debtor was the member of a partnership or a firm carrying on business in Australia by means of a partner, agent or manager.[413]

7.42 A person is deemed to be ordinarily resident in a country where there is some element of permanence or the person lives in that country in the ordinary course of his or her life. A person can be ordinarily resident in more than one country.[414] A debtor carries on business within the jurisdiction if that person trades within the jurisdiction or, having ceased trading, still has any debts of the business outstanding within the jurisdiction.[415]

7.43 A petition that has been filed with the court must be served on the debtor before the debtor is declared a bankrupt.[416] The Bankruptcy Act and Bankruptcy Rules displace all relevant rules of any court in regard to service and must be strictly adhered to. Generally service must be effected by delivering to the debtor personally a court authorised copy of the petition as filed together with other relevant documents.[417]

7.44 If the court is satisfied that for some reason prompt personal service cannot be effected it may order substituted service.[418] Substituted service is usually effected by delivering the authorised copy of the petition and ancillary documents to an adult person at the debtor's usual or last known residence or business,[419] or by advertising notices in newspapers[420] or, if the debtor is in another country, by sending a notice of the presentation of the petition.[421] The method of service must be one that is likely to bring the petition to the notice of the debtor.[422]

7.45 In the debt recovery example it is possible that bankruptcy proceedings have been commenced against the non-resident businessman in his own jurisdiction. An Australian court is not deprived of jurisdiction merely because of these proceedings overseas[423] but in such a situation the Australian court has a discretion to stay the local bankruptcy proceedings.

7.46 The appropriate procedure for the Australian court in this situation is unclear. The traditional approach would be for the Australian court to administer the assets in Australia and leave the foreign court to administer the assets within its control, each jurisdiction requiring all creditors to prove their debts in each jurisdiction. Under this approach Australian creditors would need to prove in the foreign bankruptcy under the foreign law.

7.47 There is however some conflicting authority on this point. One suggestion is that if a bankruptcy has commenced in a foreign country an Australian court would probably *not* be competent to hear the matter and the relevant proceedings in Australia would probably be discharged to allow the court to assist the foreign trustee with such orders as may be required in respect of property within Australia.[424] This position runs contrary to *Re Artola Hermanos*[425] but recent cases suggest that Australian courts will follow this 'stepping back' approach.[426] Other commentators take the view that '[it] is undoubtedly the current English and Australian point of view, viz that there should be separate and independent proceedings in every jurisdiction in which assets exist'.[427]

Jurisdiction: Mareva injunction

7.48 It now appears to be settled law in Australia that a court can grant a Mareva injunction against assets located outside Australia, even when they had not been located in Australia at any time beforehand.[428] However, if such an order is to be made the court will need to be satisfied that there is some link with the local jurisdiction. The connection on which the courts have concentrated is the connection of the defendant with the local jurisdiction. There is insufficient information in the facts outlined in the debt recovery example to determine whether a Mareva injunction would be available in that situation.

Jurisdiction: Anton Piller orders

7.49 The courts generally appear to have discretion to make an Anton Piller order in respect of premises located outside Australia. However this discretion has rarely been exercised.[429] When exercising its discretion the court will consider the possibility of harm to the debtor located overseas. Generally the court will be unwilling to make an order in respect of foreign premises where the debtor is situated outside the jurisdiction unless the debtor is a person 'over whom the courts have unquestionable jurisdiction'.[430]

Enforcement of remedies outside Australia

7.50 If the Australian company is able to obtain Australian court orders of the kind discussed above, there are three further factors it will need to consider when seeking to enforce them outside Australia: the special position of land, local forms of relief, and letters of request in bankruptcy proceedings.

7.51 The law relating to land presents a fundamental obstacle to the Australian company. It is settled law that a local court does not have jurisdiction to hear any action for the determination of title to land or other immovable property outside the jurisdiction.[431] The one exception is where the action relates to enforcement of a contract or implied contract in relation to that land.[432] Consequently there is no jurisdiction in any court in Australia to entertain an action in relation to the non-resident businessman's land or to allow any execution against it.

7.52 This principle applies to bankruptcy proceedings as well as to direct enforcement of judgment debts. A transfer of a bankrupt's movable property to the trustee in bankruptcy operates as an assignment of the movables wherever locally situate.[433] However, real property is governed by the law of the jurisdiction in which it is located. Accordingly a declaration of bankruptcy will not operate as an assignment to the trustee in bankruptcy of such property outside the jurisdiction unless the law of the country where the property is located makes provision to this effect.[434]

7.53 As noted in chapter 6, s 29(4) of the Bankruptcy Act permits the court to request a court of an external jurisdiction in bankruptcy to act in aid of and be auxiliary to it in a matter of bankruptcy. In some jurisdictions this may be of particular benefit. For example, s 426 of the *Insolvency Act 1986* (UK) requires that courts having jurisdiction in bankruptcy in the United Kingdom assist a court in 'a relevant country' when requested by applying the insolvency law which is applicable by *either* court in relation to comparable matters falling within its jurisdiction. For the purposes of this Act Australia is a 'relevant country'.

7.54 The Australian court has a discretion whether to make this request and that discretion is to be exercised with regard to considerations of utility and comity.[435]

Corporate insolvency

The claim

7.55 This section considers the remedies available for debt recovery in a corporate insolvency where control of the corporation is outside Australia. The following example reflects section 3 (b) of the terms of reference of the inquiry.

Corporate insolvency example

This example deals with the insolvency of a multinational corporation. A multinational corporation incorporated in Europe has assets in Australia and Europe and is controlled by directors and shareholders in Europe. It is put into liquidation in its home jurisdiction with debts owing to an Australian supplier.

The range of remedies available

7.56 The first remedy the Australian supplier should consider is proving its debt in the foreign liquidation. This would be governed by the laws of the foreign jurisdiction. In terms of remedies available in Australia, the principal remedy is to commence Australian proceedings to wind up the European corporation in Australia. These would be parallel proceedings to the European liquidation. There are also anticipatory remedies available to preserve the European corporation's assets, including the appointment of a provisional liquidator, Mareva injunctions and Anton Piller orders.

7.57 There are a number of jurisdictional issues to consider in relation to these remedies, including the connections between the foreign company and Australia and the implications of parallel proceedings. These are discussed below as jurisdictional and enforcement issues. It is assumed for this analysis that the Australian supplier is a trade creditor and is not the holder of any security over assets of the European corporation.

Creditors' winding up

7.58 Winding up a company in Australia is governed by the Corporations Law. The Corporations Law applies to foreign companies (as well as locally incorporated companies) if, in broad terms, the foreign company carries on business in Australia. The Corporations Law empowers the various State Supreme Courts and the Federal Court to hear all matters relating to the liquidation of corporations. In general terms, the grounds on which the winding up of a corporation may be sought under the Corporations Law include failure to comply with a statutory demand, execution returned unsatisfied, proof of insolvency, and the 'just and equitable' ground.

Statutory demand

7.59 Where a company is unable to pay its debts as and when they become due and payable, a creditor may seek to have the company wound up in insolvency. The liquidator would then be required to distribute the assets of the company to all creditors in accordance with the priorities set out in the Corporations Law. Under s 459P of the Corporations Law any creditor of a company has standing to apply for an order that the company be wound up.

7.60 One of the grounds on which a company will be deemed to be insolvent is failure to comply with a statutory demand within the prescribed time.[436] A creditor can initiate this process (in cases where the debt is greater than $2 000) by serving a demand for payment on the company in a form that complies with statutory requirements. If the company does not pay within 21 days of service of the statutory demand and does not move to have the demand set aside, the company will be deemed to be insolvent. If the company is unable to prove that it is solvent at the time of the hearing of the winding-up application it will be wound up and a liquidator appointed to take charge of the appropriate distribution of company assets.[437]

7.61 Any creditor of the company (whether secured or unsecured) may serve a statutory demand.[438]

Execution returned unsatisfied

7.62 A second ground on which a company may be wound up in insolvency by a creditor is on an execution or other process, or a judgment or order of the court in favour of a creditor and against the company being returned unsatisfied in whole or in part.[439] When considering such an application the court may go behind the return to ensure that it was in fact unsatisfied and may even investigate the judgment on which the proceedings are based.

7.63 In relying on this process to obtain a winding-up the creditor must first obtain judgment for its debt, seek enforcement of the judgment debt, have the execution returned unsatisfied and then make the application for winding-up on this basis.

Proof of insolvency

7.64 A third ground on which a company may be wound up in insolvency is on the basis of a party such as a creditor proving to the court the actual insolvency of the company.[440] In all cases this is principally a question of fact. Examples may include that the company has failed to honour bills of exchange, that there are a large number of outstanding debts and unsatisfied judgments, or that admissions have been made by the company of its inability to pay.

7.65 In considering such a claim the court is entitled to exercise a wide discretion and will consider the nature of the business of the company,[441] the character of the unpaid debt,[442] whether the debt was incurred to keep the company as a going concern rather than in the course of trading,[443] and whether the company's liquid assets exceed liabilities.[444]

Just and equitable grounds

7.66 A fourth ground on which a company may be wound up in insolvency is on the basis of a claim by a creditor that it is just and equitable to do so.[445] It is common practice for a creditor who is seeking a winding-up order on any of the above grounds to include in its application a claim that it is just and equitable that the court order the winding-up of the company. If such a claim is raised the court will apply a broad range of considerations which may include

- whether the company was formed without a genuine intention that it should carry on business in a proper manner
- whether the company was formed for the purposes of fraudulent or illegal purposes, and
- whether the company has undertaken fraudulent trading.

Creditors seeking to wind-up a company on this basis will have to either satisfy the court that the matter falls into one of the previously recognised categories (for example, statutory demand, unsatisfied execution, proof of insolvency) or otherwise demonstrate that there are grounds on which it is just and equitable to wind the company up.

Anticipatory remedies

7.67 There are three anticipatory remedies available in Australia that are relevant to a winding up: the appointment of a provisional liquidator, a Mareva injunction and an Anton Piller order.

Appointment of a provisional liquidator

7.68 At any time after the filing of a winding-up application[446] the court can appoint a provisional liquidator where it is demonstrated that there is a need to protect the company's assets for fear of dissipation pending the hearing of the application, and these assets cannot otherwise be protected by appropriate undertakings.[447] The courts have indicated that they have a wide discretion in deciding whether to appoint a provisional liquidator.[448]

7.69 In exercising its discretion to make such an order the court will consider such issues as the possibility of dissipation of the assets, the likely outcome of the application for winding-up[449] and the consequences of the effect on the company of the intrusion into its affairs as a result of the appointment.[450]

7.70 The provisional liquidator takes control of the company and is charged with responsibility for maintaining the position of the company at the time of its appointment. The basis of this appointment is to preserve the assets of the company to enable the court to correctly decide whether the company should be wound up.[451] In exceptional cases the court will also entrust the provisional liquidator with power to sell assets, for example in those cases where sale is the only appropriate means by which to preserve the company's assets.[452] Provisional liquidators are subject to supervision of the court and have certain fiduciary obligations in the exercise of their powers.[453] The appointment of a provisional liquidator may be sought by any creditor of the company.

7.71 However, if another creditor has already appointed a receiver, a provisional liquidator will not be appointed unless the receiver is shown to be dissipating the company's assets.[454]

Mareva injunctions and Anton Piller orders

7.72 A creditor to a corporation may also consider the possibility of seeking Mareva injunctions and Anton Piller orders in much the same way as a creditor may seek these remedies against an individual debtor. A significant advantage with these forms of orders compared with the interim protection afforded by the provisional liquidator is that the Mareva injunction can be framed to immediately bind third parties that may be in possession of the company's assets. A creditor could not always rely on a provisional liquidator to take such extreme steps to protect the company's property.

Territorial limits

7.73 The general framework for winding up a corporation that is described above is qualified by territorial limits when it is applied to the European corporation in the corporate insolvency example.

Winding up a foreign company in Australia

7.74 The European corporation is a foreign company for the purposes of the Corporations Law.[455] An Australian court will only have jurisdiction to wind it up in Australia if it has been registered under the Corporations Law or carries on business in Australia.[456] Broadly, the grounds on which it can be wound up are that it is unable to pay its debts, has been dissolved, has ceased to carry on business in Australia or has a place of business in Australia only for the purpose of winding up its affairs, or the court is of the opinion that it is just and equitable that it should be wound up.

7.75 In practice the critical jurisdictional issue is whether it carries on business in Australia. The concept of carrying on business is not defined in the Corporations Law. In broad terms, at common law it means conducting some form of commercial enterprise, systematically and regularly, with a view to profit.[457] It generally refers to some repetitive act in trade and would rarely be satisfied by the proof of only one transaction.[458] There would usually need to be some repetitive contacts and activities, or physical presence, in Australia to find that a company is carrying on business in Australia.

7.76 The Corporations Law supplements the common law concept with some indicative provisions. First, a foreign company will be regarded as 'carrying on business' in Australia if it

- has a place of business in Australia
- establishes a share transfer office or share registration office in Australia or
- administers, manages or otherwise deals with property situated in Australia (whether as an agent, legal personal representative or trustee), whether by its employees or agents or otherwise.[459]

7.77 Secondly, the Corporations Law provides that certain conduct is not of itself enough to lead to the conclusion that a foreign company is carrying on business in Australia, including

- maintaining a bank account
- effecting sales through an independent contractor
- soliciting or procuring an order that becomes a binding contract only if the order is accepted outside Australia
- creating evidence of a debt or creating a charge on property
- conducting an isolated transaction that is completed within 31 days, not being a transaction repeated from time to time, or
- investing any of its funds or holding any property.[460]

7.78 The question of whether a foreign company is 'carrying on business' in Australia is one of fact in which all the circumstances surrounding the company and its activities will be taken into account.[461] There is insufficient information in the facts outlined in the corporate insolvency example to determine whether the European corporation is carrying on business in Australia. It seems unlikely that its purchases from Australian suppliers are isolated transactions but it is not known where the supply orders are accepted and there is no information on the type or level of activity or assets of the European corporation in Australia.

7.79 In addition to the 'carrying on business' factor, the court may also take into account other connections with Australia. The court's jurisdiction to wind up a foreign company is discretionary. There is case law suggesting that it is necessary to establish a 'proper commercial connection' with the relevant Australian jurisdiction such as assets within the jurisdiction and some reasonable possibility of benefit accruing to creditors from the winding up order.[462]

7.80 If, as in the situation outlined in the corporate insolvency example, winding up proceedings have already been commenced in the foreign company's home jurisdiction, this will also be a significant consideration in the exercise of the court's discretion. This is discussed further below.

Jurisdiction where foreign winding-up is in progress

7.81 In broad terms where a foreign company is already being wound up in its home jurisdiction, the ability to commence Australian winding up proceedings is preserved but Australian law encourages cooperation between the local and foreign insolvency administrations.

7.82 On one hand the fact that the company is already in the process of being wound up in the place of incorporation is no bar to the making of a local winding-up order.[463] Conversely, the fact that liquidation proceedings have not been commenced in the place of incorporation does not prevent the commencement of local winding-up proceedings.[464] The winding-up of a foreign company (whether registered or not) in Australia is required to be conducted pursuant to the law of Australia even where there are winding-up proceedings in the jurisdiction of incorporation.

7.83 On the other hand where the foreign company is being wound up outside Australia, the Australian court must act in aid of courts of prescribed countries under the Corporations Law, and may do so at its election in relation to courts of other countries.[465] The prescribed countries are Jersey, Canada, PNG, Malaysia, New Zealand, Singapore, Switzerland, United Kingdom and USA.[466] The winding up proceedings in the Australian jurisdiction, where commenced subsequently to the foreign proceedings, are expressed to be 'ancillary' to the foreign proceedings and if a formal request from the foreign court is filed requesting aid in an external administration matter, the relevant Australian court may exercise the same powers in assisting the foreign proceedings as it could in relation to the winding-up of a local corporation.[467]

7.84 The Australian court may, in its discretion, refuse to wind up the foreign company if in its view a local winding up is not necessary, for example where there are few local assets and these can be adequately administered by the foreign liquidator.[468]

Jurisdiction where foreign winding-up has been completed

7.85 Where the foreign company has been dissolved in its place of incorporation, the commencement of the winding up order in the local Australian jurisdiction may still be undertaken. On such an application the foreign dissolved company will be revived for the purposes of the local winding up. This means that local debts owed by the company are revived together with its legal personality provided those debts are not adversely affected by the foreign dissolution.[469]

International conventions

7.86 Australia is not a party to any international convention regarding insolvency. Its international cooperation is therefore sourced legally in s 581 of the Corporations Law (and, in relation to natural persons, s 29(4) of the Bankruptcy Act). This provides for particular cooperation with the prescribed countries listed in paragraph 7.83 and for discretionary cooperation with other countries.[470]

Enforcement of remedies

7.87 If an ancillary winding up of the European corporation is commenced in Australia, there are two further considerations for the Australian supplier: to what extent will its access to the local assets be affected by the foreign liquidation and how can it recover assets located outside Australia?

Local distributions

7.88 As a general principle, in local winding-up proceedings local creditors are not entitled to priority ahead of foreign creditors. Apart from the general priority rules all creditors of the company rank equally wherever they are or wherever the debts were contracted.[471]

7.89 Where there are parallel proceedings the local liquidator in Australia has specific duties placed upon it pursuant to the Corporations Law in addition to the usual obligations of a liquidator, including the requirements

- to obtain a court order before paying out any creditor of the foreign company, to the exclusion of another creditor and

- to recover and realise the property of the foreign company in Australia and pay the net amount to the liquidator of the foreign company in its place of incorporation unless ordered otherwise by the court.[472]

7.90 These requirements make it clear that, without prior court approval, the local liquidator is not permitted to do more than recover and realise the local assets of the foreign company and pay the net amount to the foreign liquidator. This reflects the general principle that Australian courts are obliged to ensure appropriate distribution to all creditors, whether foreign or local. The courts may indeed order that funds be transmitted to the foreign liquidator in the jurisdiction of incorporation even though the creditors who have proven their debts in the local jurisdiction have not all been satisfied.[473]

7.91 However the Australian courts clearly retain a discretion to direct that some other procedure be adopted. It would be expected that this would occur where there was a risk that the proceeds from the local assets, when remitted to the foreign liquidator, would not be divided appropriately among all creditors,[474] including local creditors.

7.92 The general practice appears to be for the ancillary winding-up to deal with creditors notified to the liquidator in the local jurisdiction and to remit any surplus to the principal liquidator.[475] On this approach the Australian supplier would be able to participate directly in the distribution of assets in Australia pursuant to the local liquidation.

Recovery of assets located outside Australia

7.93 Where the assets are located outside Australia, as a general principle the Australian court will only make orders or issue letters of request to assist the Australian liquidator to collect and distribute those assets

where they are appropriate as part of the ancillary winding up. Australian orders and requests are therefore unlikely where the assets are located in the foreign liquidator's home jurisdiction but may be considered for other jurisdictions if they would assist the foreign (and Australian) liquidation.[476]

7.94 Where Australian orders or requests are not available, the Australian supplier would need to seek recovery through the foreign liquidation or any ancillary winding up in any other jurisdiction.

8. Australian remedies: misappropriation and other defaults

Introduction

8.1 This chapter continues from chapter 7 the summary of civil remedies available in Australian courts under Australian law. It covers the remaining four of the six types of claim identified in the inquiry's terms of reference: misappropriation of assets, breach of contract, negligence and breach of fiduciary and statutory duties. As in chapter 7, this chapter discusses each of those claims in three sections

- first, the remedies available as a matter of general principle, disregarding the particular international features of the claim
- then, the territorial limits to those remedies
- third, the extent to which those remedies are enforceable outside Australia.

To simplify the analysis the chapter considers only the remedies available to a party in the District and Supreme Courts of New South Wales and the Federal Court of Australia.

Misappropriation of assets

The claim

8.2 This section considers the remedies available for recovery of property that has been misappropriated and transferred overseas. The following example reflects section 3 (c) of the terms of reference of the inquiry.

Misappropriation example

This example concerns an employee in Australia who steals money from his Australian employer. In order to delay or avoid detection the employee remits the funds offshore by electronic transfer through a series of accounts to a bank outside Australia in a country with strict bank secrecy laws. The receiving bank is then instructed to forward the funds to a bank in a third country to which the employee then travels to enjoy the fruits of his fraud.

The range of remedies available

8.3 Where a party has had certain of its property improperly taken by another party it may seek to recover the property through a number of equitable, restitutionary or legal claims. These include actions for

- money had and received
- a declaration of constructive trust
- a declaration of equitable lien
- an account of profits
- damages.

8.4 These remedies may need to be supported by other orders such as Mareva injunctions and Anton Piller orders to ensure that the misappropriated property is not lost or dissipated.

8.5 Many, but not all, of these remedies will require the claimant to establish that it was owed a fiduciary duty and that the transfer of the property breached this duty. Some of the remedies will also require the claimant to establish that the property can be traced' through the various transfers and accounts so that the equitable or legal claim can still be attached to it. These fiduciary and tracing requirements add considerable

complexity to the employer's claim for restitution or compensation. They are discussed below in the context of particular remedies.

8.6 A major consideration in exploring the remedies available to the employer is the extent to which it has an action against a third party, such as one or more of the intervening banks. In practice it may be difficult to find the employee or, once found, the employee may have no money left. In those circumstances the employer will often wish to focus on the liability of the banks and other parties involved in the transactions. Remedies against third parties are discussed separately below.

8.7 Generally the jurisdictional issues relate to discretionary powers of the court. For most of these remedies the court will have jurisdiction to grant the remedy in relation to both the employee and third parties, and in relation to assets located outside Australia. However the court, in its discretion, will take into account the assistance and form of relief available in the relevant jurisdictions outside Australia. The court will also consider whether it is the most convenient forum for the proceedings. These issues are discussed below as territorial limits and enforcement issues.

8.8 A further factor affecting the analysis is the relationship between these civil remedies and any criminal proceedings taken against the employee. It is possible that criminal proceedings will have been instituted and these could affect the evidence available, the property available to be recovered (bearing in mind proceeds of crime legislation) and whether the employee returns to Australia (for example, under extradition proceedings).

Money had and received

8.9 In an action for money had and received the obligation to account is imposed on the defendant by the common law as a personal obligation upon receipt of the plaintiff's money. The basis of the action is in restitution or unjust enrichment.[477] It is therefore a claim the Australian employer may make against the fraudulent employee.

8.10 The advantage of this remedy is that it is simply a personal obligation on the employee to repay the money he or she has misappropriated. The usual problem with such a claim, however, is that the fraudulent employee does not have sufficient personal funds to make the required repayment.

8.11 This is a significant problem because the defendant to an action for money had and received generally must be the immediate recipient of the money from the owner or from someone who should have paid it to the owner.[478] The remedy is only available against third parties in the rare cases where the third party has received money which the plaintiff can still identify as his own and the third party is not a bona fide purchaser for value.[479]

Equitable remedies

8.12 Equitable remedies provide other grounds for recovery from the fraudulent employee. More importantly they also provide a basis for recovery from third parties, such as the banks involved in the misappropriation example.

Fiduciary relationship

8.13 It is useful to start with an outline of the relevant features of fiduciary relationships since these lie behind the possible equitable remedies. Beneficiaries who are owed a fiduciary duty by a party who has misappropriated, received or acted as an accessory to the misappropriation of, the beneficiary's property, including money, may assert that

- they have never been divested of the right to the assets they seek, or
- they have a right to undo previous dispositions of the property.

This is particularly important where the property has been transferred to a third party and it is sought to recover the property from that third party.

8.14 Fiduciary relationships arise in two ways in the misappropriation example. First, an employee is in a position of trust in relation to money received and controlled on behalf of his or her employer, thus giving rise to a fiduciary relationship.[480] Secondly, a fiduciary relationship comes into existence whenever money is stolen. Such money becomes trust money in the hands of the thief and that person is unable to divest it of that character.[481]

8.15 There has been a clear breach of fiduciary duty in the misappropriation example. The employee has misappropriated the beneficiary employer's money and has taken private benefits or advantages from, and as a consequence of, his or her fiduciary office. Breach of the fiduciary relationship by way of misappropriation of the beneficiary's property may give rise to personal remedies against the former employee such as an account of profits and damages or proprietary remedies such as a declaration of constructive trust or an equitable lien.

Constructive trust

8.16 Where a fiduciary has misappropriated property of a beneficiary the beneficiary can seek a declaration from the court that the relevant property or gain is held by the fraudulent fiduciary on constructive trust for, and vests in, the beneficiary and also an order that the fiduciary surrender the property to the beneficiary.[482] A beneficiary seeking to recover property that the fiduciary has misappropriated by asserting a constructive trust needs to establish both

- that the beneficiary has an equitable interest in the property misappropriated, and
- that the interest can be followed into that or other property in the hands of the defendant fiduciary (the equitable doctrine of tracing).[483]

This issue of tracing is addressed separately later in this chapter.

8.17 To establish the necessary equitable interest the beneficiary must have had a pre-existing property interest in the property misappropriated. This then entitles the beneficiary to seek to have that property returned or some other remedy of account for its value. It is arguable that it is also necessary to show that

- the defendant fiduciary has been enriched by the receipt of a benefit
- that benefit has been gained at the expense of the beneficiary and
- it is unjust that the defendant fiduciary retain that benefit.[484]

8.18 On the facts outlined in the misappropriation example and subject to the question of tracing, it is clear that the Australian employer can establish these elements in relation to the employee.

Equitable lien

8.19 The equitable lien is similar to the constructive trust except that it does not confer any property rights in the things to which it applies, nor does it confer a right to obtain possession of those things.[485] Equitable liens operate as judicially imposed charges to secure personal obligations owed by the current legal owner of the relevant property. In cases where money is misappropriated and then unidentifiably mixed with a larger fund, the fund can be charged to the amount of the beneficiary's money entitlement so long as that fund is sufficiently identifiable.[486] As a consequence equitable liens do not depend on tracing in the same way as constructive trusts.

Account of profits and claim for interest

8.20 A defaulting fiduciary has a personal obligation to account for gains from use of the beneficiary's property as well as the misappropriated property itself. Any party that has made a profit by breaching the property rights of another party may be called to account to that party for that profit.[487] In effect the party owing the duty must account to the owner of the property for any accretion to the property it was entrusted

with resulting from that party's breach of duty.[488] The basis of such a remedy is that such a wrongdoer should be stripped of all profits which it would be unconscionable that it retain.[489]

8.21 For this remedy to apply the gain must be identified. All that is required to be shown is that the fiduciary made the profit or gain, not that he or she still holds it.[490] In the misappropriation example the amount of gain obtained by the fraudulent employee from use of the misappropriated funds would appear to be any interest earned on the funds while they were deposited in the bank account(s). If for some reason it is difficult to determine the amount of interest earned by the employee on the funds the courts will award interest representing the presumed profit that should have been enjoyed by the rightful owner which the employee had made from its misuse of the property.[491] The rate of interest to be applied is the 'current mercantile rate',[492] and is awarded at the discretion of the court[493] and solely for compensatory purposes.[494]

Damages in equity

8.22 The case law suggests that where there is a breach of a fiduciary duty the wronged party is entitled to recover compensation from the fiduciary as an alternative to restitution of the actual assets removed by the fiduciary.[495] There is however some commentary rejecting the case law in support of this proposition as doubtful authority.[496] Notwithstanding this, there are a large number of categories of misconduct by fiduciaries that have been the subject of equitable compensation claim.[497]

8.23 Equitable compensation is viewed as an alternative to the declaration of a constructive trust as a method by which recalcitrant fiduciaries can be made to account for gains that are obtained at the expense of beneficiaries. If the transaction that breaches the fiduciary duty cannot be reversed it will be necessary for equity between the parties that monetary compensation be awarded in accordance with general equitable principles of restitution.[498] This form of compensation will be the only remedy available in such cases to ensure that the beneficiary is returned to the same position it would have been in at the time of the hearing if no breach had been committed.[499]

8.24 Where assets are not able to be restored *in specie* the restitution by money is to be quantified as at the date of recoupment, not before.[500] In this sense equitable damages are essentially intended to reverse an unjust enrichment by the award of a money equivalent of the assets misappropriated. By awarding suitable compensation equity is attempting to restore the plaintiff as far as possible to the same position as if the disputed transaction with the fiduciary had never taken place.

8.25 Equitable compensation awarded in New Zealand and Canada has included an element similar to exemplary damages to act as a deterrent to fraudulent fiduciaries.[501] Equitable compensation on that basis has not been awarded in Australia to date.

Mareva injunction

8.26 Mareva injunctions are discussed in chapters 4 and 7. The comments in those discussions apply also in this chapter. In this case the employer would be seeking Mareva injunctions

- directed to the employee to prevent the employee from directing the bank to transfer the funds from the current account, and

- directed to the relevant bank to prevent the bank from releasing the money held in the relevant account.

Such injunctions may be granted against the banks themselves whether or not they are defendants to the proceedings. However, special considerations apply to the granting of a Mareva injunction against a bank. It is a general principle that the Mareva injunction does not and should not confer any security interest on the plaintiff. It has been held that such an injunction cannot be framed so as to prevent the bank from paying its creditors and customers its due debts.[502] Thus any such Mareva injunction will be ordered only on terms that permit the relevant bank to meet its obligations to its customers.

Anton Piller order

8.27 To assist in and prove the tracing of the employer's funds it may be possible for the employer to obtain an Anton Piller order for the inspection of relevant bank records to follow the movement of the employer's funds once they were misappropriated by the employee. This form of order is also discussed in chapter 7.

8.28 There are several cases where the courts have granted Anton Piller orders in relation to matters involving tracing of misappropriated funds.[503] In such cases the plaintiff is entitled to inspect records and require the defendant to do other such things as the court orders with a view to preserving and securing evidence relating to the action until trial of the action before the court. The orders are subject to various conditions: the relevant undertakings as to costs must be given by the party seeking the order, the order must be directed to a party in the proceedings and the investigations must only be used for the purposes of following and tracing the misappropriated funds.[504]

8.29 A number of English cases have made it clear that, as with Mareva injunctions, such orders can be obtained against the relevant bank operating the accounts of the defendant fiduciary notwithstanding that the bank is not a party to the proceedings.[505] Other English cases have suggested that there may be an equitable duty to disclose on the part of a bank if it has handled funds which are the subject of a claim of misappropriation.[506]

Tracing in equity

8.30 Tracing' refers to the equitable principle of following property misappropriated as it is mixed with other property or passes from one party to another. Tracing is ancillary to most equitable proprietary remedies with the exception of the equitable lien. The courts will only identify funds by way of tracing where

- the funds have been remitted from the beneficiary seeking relief by a party in breach of a fiduciary relationship,[507] and

- there is no intervening bona fide purchaser for value without notice of the beneficiary's legal interest in the relevant property.[508]

8.31 If the money claimed by the beneficiary seeking restitution is part of a mixed fund in the hands of the fraudulent fiduciary (located, for example, in a bank account), then there may be certain limits to the amount of money the beneficiary may claim out of this fund as its own. Firstly, the party cannot claim more than the lowest intermediate balance of the relevant fund as the fund is deemed to have been spent in excess of that amount.[509] Secondly, tracing is only possible so long as money continues to exist in a fund (regardless of whether it is mixed or not) which can be located and clearly identified.[510]

8.32 The nature of the mixing will determine the extent to which the wronged party's funds may be traced and identified as its own.[511] For example, where the mixing takes place in a continuous and active bank account the first funds deposited are presumed to be the first funds withdrawn unless there is a contrary intention by the account operator.[512]

Tracing at common law

8.33 This is a limited form of remedy because of the strict requirements to be met before the misappropriated assets may be traced. As a general principle where a party has had legal title to property (other than money) removed from its control without consent and it can establish its ownership of the property immediately before being deprived, the party is still the legal owner of the property and able to make a proprietary claim for the property. This will be regardless of who has possession of the property, including bona fide purchasers for value without notice. This proprietary claim against the party finally in possession of the property is known as common law tracing and does not require the existence of a fiduciary relationship with any party in order to be established.

8.34 The main exception to this principle is money. Where money is stolen property in the notes or coins does not pass to the thief. But if the thief passes the money into currency, by making payment with it,

ownership will pass with possession notwithstanding the thief's lack of title providing the transaction was bona fide and for valuable consideration.[513]

8.35 In the misappropriation example the employee did not initially make payment with the stolen money but instead deposited it with a series of banks. It was ultimately transferred to a deposit in a bank outside Australia. If it is still in that bank account and has not passed into currency, then it may still be recoverable through common law tracing.[514] However this is unlikely. It would require not only that it has not been mixed with other money when transferred through the successive accounts but also that it has not been exchanged into a different currency.[515]

Common law remedies against third parties

8.36 If the stolen money can be traced at common law to the bank with which the money is now deposited and the bank is not a bona fide purchaser for value, then this will be one of the rare situations where the employer can take an action against the bank for money had and received. The bank will be liable to repay the money and this may cause it some loss which it may seek to recover from the employee or, if it can identify a cause of action some other party involved in the series of transactions.

Equitable remedies against third parties: constructive trust

8.37 If the action for money had and received is not available the employer may seek to recover from one or more of the banks on an equitable basis. To do so it must establish some level of culpability on the part of the bank as a constructive trustee. Generally the bank must know or be deemed to know of the fiduciary relationship between the employer and the employee, and must receive some benefit from its receipt of the money (for example, repayment of a debt) or assist others to receive trust property.

Constructive trust: knowing receipt

8.38 In the misappropriation example the bank will be taken to have sufficient knowledge of the fiduciary relationship for it to be required to hold the money on constructive trust for the employer if

- the bank knew of the trust relationship between the employer and employee concerning the stolen money and the breach of the ensuing trust relationship, or

- the bank wilfully ignored the obvious breach of fiduciary duty, or wilfully and recklessly failed to make inquiries that an honest and reasonable person would have made.

In such a case, the bank need not know all matters concerning the nature of the trust relationship and the circumstances of its breach but it must have sufficient knowledge to make it dishonest for it to have received the property.[516] The mere fact that a recipient has some suspicion or feels some anxiety as to the origins of the property it receives is not sufficient knowledge.[517] The requisite amount of knowledge will also be assumed where the bank is negligent in regard to the rights of the beneficiary in relation to the property. An example of this would be where the officers of the 'recipient' bank have knowledge of the facts leading to the conclusion that a fiduciary relationship exists but these officers do not give any consideration to those facts and act in contravention of the trust relationship.[518]

Constructive trust: accessories

8.39 Alternatively, a party such as a bank may not actually 'receive' property misappropriated from beneficiaries but still be liable to account on the basis that it is an 'accessory' to the breach of the fiduciary relationship. Accessories' in such a case are held liable for their participation in the breach of trust. To establish this the bank must have

- assisted in the breach, and

- possessed sufficient knowledge of what was happening.[519]

8.40 To establish this liability the accessory (that is, the bank) must assist the fiduciary with the intention of furthering the breach of duty,[520] and the acts on the part of the accessory must be part of the fiduciary's intention and design and not things of minimal importance.[521] It is not sufficient that the bank simply permitted or allowed the fraud to occur.[522] The bank must also be aware that the fiduciary owed obligations to the beneficiary. The bank will be taken to have sufficient knowledge if, given the facts that were within the knowledge of the bank, a reasonable person would have concluded that there was fraud or breach of a trust. A bank that consciously refrains from inquiry for fear of learning of the fraud will have sufficient knowledge.[523] Knowledge of circumstances which indicate a breach of trust to an honest and reasonable person is sufficient. There is insufficient information in the facts given in the misappropriation example to determine whether any of the banks would be liable on these grounds.

Territorial limits

8.41 The Australian courts will have jurisdiction over the actions taken against the employee because the breach of fiduciary duty occurred within Australia. This applies notwithstanding that the employee may now be outside Australia and notwithstanding any of the other extra-territorial elements.[524] The cause of action will be taken to arise within the jurisdiction where the breach of duty occurred. It is not necessary that all of the events necessary to complete the cause of action have occurred within the relevant jurisdiction.[525]

8.42 The Australian courts' jurisdiction over the banks outside Australia is less clear. As pointed out in chapter 4 there is no specific provision in any of the rules of court in Australia giving the court jurisdiction over a party located outside Australia on the basis that it is a constructive trustee for a beneficiary located within Australia.[526] Case law in the United Kingdom suggests that a court will be likely to exercise jurisdiction in relation to an extra-territorial constructive trustee if a substantial part of the acts of the fiduciary employee and the defendant bank(s), viewed as a whole, took place within the relevant jurisdiction of the court.[527] It is not a requirement for an action to be maintained against an offshore bank that the misappropriated funds have been transferred into an account which it operates in Australia. It is therefore arguable that the relevant court in Australia has jurisdiction to hear the matter against the foreign bank(s) as defendant constructive trustee(s) since the proceedings are founded on a cause of action arising out of acts substantially performed within Australia.

Forum non conveniens

8.43 In cases such as the misappropriation example there is a real possibility that there may be more than one appropriate forum for determining the claim for unjust enrichment.[528] Thus it is possible that even where there is jurisdiction in the relevant Australian court the matter still may be unable to be heard in Australia because another forum is more appropriate.

8.44 It is likely that the most appropriate forum will be the place with which the obligation for restitution has the strongest connection. On that test it is likely that Australia would be deemed the most appropriate forum for the misappropriation example on the basis that the employee is apparently resident in Australia, the employee was working for the employer in Australia, and the original breach of duty occurred in Australia.[529]

Enforcement of remedies outside Australia

8.45 The enforcement outside Australia of remedies ordered in relation to the claims discussed in this chapter raises issues about debt recovery, damages, Mareva injunctions and Anton Piller orders. However the major practical issue is the difficulty of identifying where the money has gone, particularly when there are strict bank secrecy laws involved. This is discussed below.

Debt recovery

8.46 For most of the claims discussed in this chapter (including money had and received, constructive trust and equitable lien) the remedy ordered by the Australian court will be payment of a certain sum of money by the defendant to the employer, that is, a money judgment. The enforcement of the money judgment outside Australia will be subject to the same considerations as those discussed in relation to debt recovery in chapter 7.

Damages

8.47 The claim for damages in equity and for an account of profits are subject to a further qualification. In each case, if the Australian judgment needs to be enforced outside Australia, the amount awarded will be determined by the jurisdiction in which enforcement is sought.

Mareva injunction

8.48 As discussed in chapter 7 a court may grant a Mareva injunction against assets located outside Australia provided the court is satisfied that there is a case to be answered within its jurisdiction. The court will be more disposed to granting such an injunction where the defendant employee is resident or domiciled within the local jurisdiction but this is not an essential requirement. So long as the main proceedings have been commenced and there is a case to be answered in the local jurisdiction the relevant court can be expected to issue a Mareva injunction against the misappropriating employee.[530] This will be the case even where the funds are located in a bank account outside the relevant jurisdiction and the employee is currently outside the jurisdiction.

8.49 In the case of proceedings commenced within Australia against any or all of the banks in which the employer's misappropriated funds have been or were deposited or are now currently located, a Mareva injunction would also usually be granted by the courts in Australia. This is notwithstanding that the funds have been deposited in the accounts of banks located outside the jurisdiction. This is on the basis that although the relevant defendant bank is outside the jurisdiction and the relevant funds are also outside the relevant jurisdiction, a cause of action in which the relevant Australian court has jurisdiction has been commenced or is in the process of being commenced.[531]

8.50 As indicated elsewhere, a Mareva injunction is likely to be framed so as not to be enforceable until so declared by the court in the country in which enforcement is sought.

Ancillary orders

8.51 It is open to a court in Australia to grant ancillary orders in conjunction with other relief such as Mareva injunctions. Such ancillary relief includes Anton Piller orders (permitting persons to enter premises to obtain documents and items), orders for discovery, orders for cross examination of deponents and any other orders that are appropriate. For these purposes the court takes into account the extent to which ancillary orders are desirable in order to render the primary relief sought more effective and also the need to minimise hardship and prejudice to the defendant and other persons who may be affected.[532] Such orders could be sought against a foreign bank requiring disclosure of documents and other information in relation to an action involving tracing of misappropriated funds. Such an order would be drawn up in a similar fashion to a Mareva injunction to be served in a foreign jurisdiction. It is possible, however, that the courts of the foreign jurisdiction will regard this as over-reaching by the Australian court and will not directly enforce the order. Unless the circumstances are exceptional an Australian court might decline such an order.[533]

8.52 It is possible that there is a branch of one or more of the relevant overseas banks located within the Australia. However this will not entitle a plaintiff in Australia to require the local branch to make available relevant account details for investigation. Each branch of the bank is treated as a separate entity for these purposes.[534]

8.53 The relevant consideration for identifying the bank and the branch to which the order is to be addressed is not where the funds may be located but rather the jurisdiction which governs the debtor/creditor relationship between the bank and the customer.[535] Usually this will be where the account is opened notwithstanding that funds are currently located in another account in another country.[536]

8.54 As a consequence the plaintiff employer may need to obtain Anton Piller orders against a number of banks in a number of different countries in order to obtain and secure relevant transaction records. Where these are granted they will be framed in a similar way to the Mareva injunction to be served outside the jurisdiction. That is, their operation in respect of the foreign jurisdiction will not take effect until approved by the relevant court of that jurisdiction.

8.55 Because of potential differences in judicial recognition of these orders between jurisdictions this requirement has the potential to frustrate the employer's attempts to obtain information through use of these orders.

Finding the evidence

8.56 The main problem for the employer relates more to the collection of evidence than to the enforcement of the ultimate remedy. To establish its claim the employer will need to evidence the transfer of the funds through the accounts of the various banks involved in the transaction.

Banker's duty of confidentiality

8.57 However, information about bank accounts is generally confidential. It is an implied term of the banker/customer relationship that the bank will keep the customer's account information confidential. The English courts have laid down a number of exceptions to this principle, including disclosure under compulsion of law, disclosure in the public interest and disclosure in the best interests of the bank.[537] These may be interpreted strictly. In *FDC Co Ltd v Chase Manhattan Bank, NA*, the Hong Kong Court of Appeal held that an order directed to a bank by a foreign court to disclose information was not sufficient to constitute a requirement for disclosure under compulsion of law'.[538]

8.58 When exercising its discretion, an Australian court making such an order will consider the sanctions that will apply if the branch of the bank located outside the jurisdiction fails to comply. In *FDC Co Ltd v Chase Manhattan Bank, NA*, failure to disclose in compliance with the orders meant that the office of the bank located within the local jurisdiction was liable to daily fines for non-compliance with the order directed to the overseas office.[539]

8.59 In *Nanus Asia Company Inc v Standard Chartered Bank*[540] the United States Securities and Exchange Commission required disclosure of information by an overseas branch of a local bank with the sanction that if the information was not disclosed the funds of the local bank in the United States would be frozen. The High Court in Hong Kong concluded that such orders represented an improper exercise of the foreign penal jurisdiction of a foreign court which the rules of English conflict of law would not permit except in special circumstances.

Bank secrecy laws

8.60 These difficulties are compounded where a bank is within a jurisdiction that has strict secrecy laws. The bank secrecy laws in Switzerland provide an illustrative example. A number of different Swiss statutory provisions limit the availability and disclosure of information which may be made by a Swiss financial institution to an outside inquirer.[541]

- Article 162 of the *Swiss Criminal Code* prohibits the disclosure of commercial secrets by those legally or contractually obligated to maintain their secrecy.

- Article 273 of the *Swiss Criminal Code* aims to protect Swiss sovereignty and the Swiss economy by making it a crime to reveal manufacturing or business secrets to a public or private foreign authority or its agents.

- Article 28 of the *Swiss Civil Code* allows private parties to recover damages for pecuniary losses caused by disclosure of confidential commercial or business activities, manufacturing processes or information regarding a business organisation.

- Article 47 of the *Swiss Federal Banking Law* prohibits disclosure by bank employees or agents of confidential customer information without the customer's consent, punishment for which includes a fine or imprisonment for six months.

8.61 These provisions combine to prevent disclosure of banking information held within Swiss jurisdiction on the basis of the interests of public policy and maintaining the confidentiality of such information. The

effect of these laws has been that courts outside Switzerland often refuse to make orders requiring disclosure by a Swiss bank on the grounds that

- any such order for disclosure is likely to be ineffective and not acknowledged in Switzerland
- to require such disclosure would mean that witnesses in Switzerland would face civil and criminal consequences for making the disclosure, and
- if the order was not likely to be complied with, the local branch of the bank to which the order for disclosure had been directed would not be in contempt unless it controlled the relevant account held abroad.[542]

Nonetheless courts outside Switzerland have found that this Swiss legal regime has the legitimate purpose of protecting commercial privacy inside and outside Switzerland'.[543] The United States Federal Court has noted that to insist that such orders be carried out would be extremely harmful to international comity.[544]

Implications of bank confidentiality and secrecy for remedies

8.62 This discussion suggests that although a plaintiff may seek Anton Piller or similar orders, and an Australian court has capacity to make such orders, a great deal of consideration will have to be given to the exact nature of the orders in relation to foreign banks. In the case of an attempt to seek information regarding an account held by a bank in a country with strict secrecy laws such as Switzerland, it is likely that the Australian court will not make the orders sought by the plaintiff. This will present significant barriers to plaintiffs such as the employer in the misappropriation example. Without such assistance it may never be able to trace successfully the stolen money either into the hands of the fraudulent employee or the bank. This may frustrate its ability to obtain any effective remedy.

Breach of contract

The claim

8.63 This section considers the remedies available for a cross border breach of contract. The following example reflects section 3 (d) of the terms of reference of the inquiry.

Breach of contract example

This example concerns a dispute about a distribution agreement. An Australian company appoints a local agent in an APEC country to distribute the Australian company's products in that country. There is a disagreement. The agent does not remit to the Australian company the proceeds of sales when due and the Australian company terminates the agency agreement and seeks to recover the unpaid proceeds. The agent cross claims for wrongful termination and unpaid commission.

The range of remedies available

8.64 After terminating the agreement the Australian company could seek one or more of the following remedies in relation to its claim that the agent has breached the contract

- recovery of proceeds of sale
- damages
- a Mareva injunction
- a final injunction

- declaratory relief.

Each of these remedies is considered in turn.

Recovery of proceeds of sale

8.65 Termination of the contract releases the Australian company from its future rights and obligations pursuant to the contract. Termination will not of itself compensate the Australian company by returning the proceeds of sale owed to it by the agent pursuant to the contract nor will it compensate the Australian company for any losses suffered as a result of the agent's failure to pay such sums.

8.66 To recover the amounts the agent was meant to remit to it under the contract the Australian company will first have to quantify the amount outstanding and due for payment. It must then commence an action against the agent for this amount as a debt. The resulting judgment debt, when granted by the relevant court, may be enforced by the Australian company against the agent in the manner described in chapter 7 if payment is not made by the agent within an appropriate time after the order of the court.

8.67 The fact that the Australian company has terminated the contract does not affect its right to sue for the debt owed. The right to recover the debt from the agent arises prior to the act of termination.[545] It would be usual for this action to be heard together with a claim for damages and a declaration that the contract has been validly terminated.

Damages

8.68 Where a breach of contract occurs the party not in breach is prima facie entitled to recover damages.[546] Thus, on proving that the agent has breached the contract by failing to remit amounts due, the Australian company may also seek an award of damages in its favour. This award can be made by the court independently of whether the contract is terminated.[547] Under Australian law the Australian company's claim for damages may include

- the sum owing (if not separately recovered)
- interest on that amount from the date the cause of action arose to the date of judgment[548]
- loss of the value of the bargain with the agent[549]
- loss of market opportunity[550]
- loss of establishment costs (that is, reliance damages)[551]

and any other foreseeable loss that was within the contemplation of the parties, was directly related to the defaulting party's breach of contract[552] and is not too remote.[553] For each item of compensation claimed there will have to be sufficient evidence that the loss flowed from the agent's breach of contract. The court will be careful to avoid double counting of losses. The Australian company must also take all reasonable steps to mitigate its losses.[554]

Mareva injunction

8.69 Where the Australian company is concerned that there are still certain of its goods in the hands of the agent it may consider requesting that the court grant a Mareva injunction to prevent these goods being sold by the agent pending final outcome of the proceedings. Alternatively, it may be concerned that the proceeds of sale of the goods it has supplied may be located in an identifiable account and about to be dissipated by the agent. The comments in chapter 7 relating to Mareva injunctions apply in this context.

Final injunction

8.70 If the Australian company considers that an injunction of this kind is also needed after the proceedings have been completed, it may seek as a permanent order

- a prohibitory injunction preventing the agent from selling any more of the Australian company's goods in its possession or that come into its possession or control, or
- a mandatory injunction requiring the return of any of the Australian company's goods that are currently in or come into its possession or control.[555]

However, these remedies are discretionary and will usually only be granted where damages are an inadequate remedy.[556] Damages will only be an inadequate remedy if the goods concerned are unique and cannot otherwise be replaced.[557]

Declarations

8.71 The cross claims by the agent that the contract has been wrongfully terminated and the Australian company has failed to pay due commissions would most likely be heard as part of the proceedings dealing with the Australian company's claims against the agent. To resist those cross claims the Australian company may seek declarations that the Australian company has validly terminated the contract and the agent is not entitled to any unpaid commission.[558] Declarations are at the discretion of the court.[559]

Territorial limits

8.72 The Federal Court and the Supreme and District Courts of New South Wales have jurisdiction over claims arising out of a contract, even where the facts are not entirely confined to the State or the Commonwealth, provided there is sufficient connection with the relevant Australian jurisdiction. There will generally be taken to be sufficient connection where[560]

- the contract is made within the jurisdiction
- there is a breach of the contract (regardless of where the contract is made) in the jurisdiction
- the contract is specified to be governed by the law of the jurisdiction
- the contract is made by or through an agent residing or carrying on business within the jurisdiction on behalf of a principal trading or residing outside the jurisdiction, or
- the subject matter of the proceedings is property in the jurisdiction.

The facts outlined in the breach of contract example are not sufficient to determine whether the Australian courts would have jurisdiction in this case. Nevertheless, some further comments can be made on determining where the contact was made and where the breach occurred.

Contract made within Australia

8.73 The contract will be considered to have been made within Australia if

- the Australian company accepted, in Australia, an offer from the agent to act as its agent in the relevant country (however communicated), or
- the contract was reduced to writing and was executed within Australia or the last party to execute was within Australia.

Breach of contract in Australia

8.74 To establish jurisdiction on the ground that there has been a breach of contract in Australia it is necessary to show that there has been a breach of some part of the contract that was required to be performed in Australia.[561] It is not necessary that the entire breach of contract take place within Australia nor does the breach have to be substantial. In the given scenario the agent has failed to remit the proceeds of sales to the Australian company. As a general principle, failure to perform a money obligation is considered to be a breach at the place where the money is due and payable.[562] If the proceeds of sale were payable directly to the Australian company in Australia, the agent's failure to do so constitutes a breach of the contract in Australia and the relevant courts in Australia have jurisdiction to hear the matter.

Enforcement of remedies outside Australia

8.75 Enforcement outside Australia of the remedies outlined in this chapter is subject to a number of constraints that have been discussed in earlier chapters.

- If the Australian company wishes to recover the proceeds of sale or its damages award outside Australia, it will need to follow the procedures for the enforcement of judgment debts outside Australia.

- Damages will only be enforceable in the relevant foreign jurisdiction to the extent that the heads of damage comprised in the Australian judgment are recognised in the foreign jurisdiction. In addition the amount payable under each recognised head of damage will be calculated in accordance with the rules of the foreign jurisdiction.

- Injunctions will generally be framed on the basis that they will only have effect if they are declared to be enforceable or are enforced by the foreign court.

Parallel proceedings

8.76 A further set of enforcement issues may arise if the agent chooses to commence proceedings in its own jurisdiction disputing the termination of the agreement. The Australian court orders are directed primarily at recovery of amounts owing and damages on the basis that the termination is valid. They do not deal with any continuing obligations of the Australian company that would arise if the termination was not valid. There is potential for conflicting judgments if there were parallel proceedings and this would complicate enforcement. In particular, parallel proceedings could raise the prospect of anti-suit injunctions.

Negligence

The claim

8.77 This section considers the remedies available for torts arising in an international commercial context. The following example reflects section 3 (e) of the terms of reference of the inquiry.

Negligence example

This example concerns negligence outside Australia that causes loss to an Australian company. A New South Wales construction company enters into a joint venture with a number of non-Australian joint venturers for the construction of a major infrastructure project in South East Asia. Due to negligent preparatory work on site by one of the non-Australian joint venturers, the New South Wales company's crane is damaged beyond repair. The New South Wales company seeks a remedy for its loss.

The range of remedies available

8.78 As a general principle there are two remedies the New South Wales company could seek: damages and injunctive relief. Relevant categories of damages include compensatory, aggravated, exemplary, nominal, contemptuous and equitable damages. These are subject to certain limits. The injunctive relief might be directed at preventing further damage or compelling the performance of a particular act. Each of these remedies is discussed below.

Damages - general principles

8.79 Damages may be constituted by a sum of money payable by way of compensation, appeasement or civil fine for the loss or injury inflicted by a tortfeasor. The principal remedy for a tort is compensatory money damages. Compensible losses recoverable in tort may either be pecuniary or non-pecuniary. Pecuniary loss includes lost profits, lost earnings, losses incurred in restoring damaged property to its original condition or in replacement of damaged property, and expenses incurred by the injured party in mitigating the loss. Damages for all losses, past and future, must be assessed once and for all in a lump sum award. The application of this rule means that

- an award of damages must encompass all losses, past and future
- a plaintiff cannot seek review of an award where material circumstances affecting the award later change, and
- an award of damages bars subsequent claims founded upon the same cause of action.

The different categories of damages that are relevant to the negligence example are discussed below.

Compensatory damages

8.80 Damages are generally intended to compensate for loss. The aim is to compensate persons who have suffered loss by awarding them a sum of money that will put them in the same position as they would have been in had the wrong not occurred.[563] Pecuniary losses, such as property loss, permit precise calculation. However future economic loss, such as loss of expected profit, is more difficult to assess because it depends on contingencies and requires the court to predict future events. Compensation for future loss on this basis is recognised as necessarily inexact but the overriding requirement of calculation of damages to restore the plaintiff to the pre-injury position, insofar as money is able to achieve this aim, still applies.

8.81 For tortious damage to goods and chattels (as in the case of the negligence example) the normal measure of compensation is the amount by which the value of the goods is reduced because of the damage. That amount is usually calculated by adding the cost of repair to any residual diminution in value which may exist after repair. There may also be consequential losses such as the cost of hiring another chattel during the repair period.

8.82 Where the plaintiff's goods are destroyed the normal starting point for the measure of loss is their market value at the time of the loss. However, if it is reasonable for the plaintiff to wait some time before purchasing a substitute (for example, if it is waiting until the defendant's insurer declares the chattel a total loss'), then the date for assessment of value may be extended. In all cases of destruction the value awarded is reduced by the scrap value of the destroyed chattel.[564]

8.83 For profit earning chattels, the value of the goods to be compensated includes the chattel's ability to earn a profit as well as its capital value.[565] As mentioned earlier, loss of the opportunity to make a profit may often be difficult to establish with certainty but once it is established by the plaintiff as a probable loss of some substance then the plaintiff is entitled to fair compensation for the loss.[566] Costs of adaptation of a replacement chattel to perform fully the functions of the destroyed chattel may also be recovered.[567] Damages for loss of use of a destroyed chattel in the period between destruction and replacement are calculated in the same way as damages for loss during repairs and include loss of profits,[568] hire charges,[569] and other consequential losses.[570]

8.84 On these principles the Australian company can be expected to be compensated for the following

- damage done to its equipment or replacement cost of the equipment (depending on whether the equipment is completely destroyed)
- any interim costs such as hiring of replacement equipment and other consequential losses, and
- loss of future profits arising from the damage to the equipment.

Aggravated damages

8.85 Aggravated damages are awarded as compensation for injury to the plaintiff's feelings caused by the defendant's insulting or humiliating conduct.[571] Negligence may, in limited circumstances, justify aggravated damages but as a rule any impact of the circumstances in which damage occurs is taken into account when calculating compensatory damages.[572] The facts set out in the negligence example do not suggest any basis for an award of aggravated damages.

Exemplary damages

8.86 Exemplary damages are intended to punish the defendant for conscious wrongdoing in contumelious disregard of another's rights'.[573] In addition to the punishment of the defendant, an award of exemplary damages may be intended to demonstrate the court's disapproval of the conduct and to deter the defendant and others from similar behaviour,[574] or to prevent unjust enrichment by subtracting a profit made by the defendant and passing it to the plaintiff. Exemplary damages may apply to any particular category of negligence.[575] The cause of action is irrelevant. The critical factor is the fact of the defendant behaving with sufficient wanton disregard for the plaintiff's welfare.

8.87 In the negligence example if the negligent joint venturer acted wantonly and recklessly with regard to the New South Wales company's equipment, actual malice on the part of the negligent joint venturer is not required to be established by the New South Wales company before an award of exemplary damages can be made. It is not clear on the facts whether the requisite behaviour on the part of the negligent joint venturer has actually occurred.

Nominal damages

8.88 Nominal damages are awarded in recognition of the fact that a tort has been committed but there has been no consequent injury or loss.[576] This form of damages is now rarely awarded and in any case there is no need for it in the New South Wales company's case as there is clear evidence of actual damage having been suffered.

Contemptuous damages

8.89 Contemptuous damages are awarded to record the court's disapproval of a plaintiff's claim and its view that the action should never have been commenced. The New South Wales company appears to have a legitimate claim in negligence and therefore an award of this kind is unlikely.

Equitable damages

8.90 A court exercising jurisdiction in equity has the discretion to award equitable damages either in addition to, or in place of, a specific order. If equitable damages are awarded, the court will normally follow the common law principles of assessment and the damages will be the same as if they had been obtained at common law.[577] Equitable damages are likely to be more advantageous to the plaintiff than damages at common law if there are continuing wrongs because equitable damages may include compensation for prospective losses which may be occasioned by future wrongdoing.[578] There is no evidence in the given scenario of such continuing wrongs on the part of the negligent company and consequently this form of damages will offer no advantage over pursuit of common law damages by the New South Wales company.

Limits on compensation

8.91 In all cases involving a claim for damages by a plaintiff on the basis of a tortious act of the defendant the plaintiff has to overcome a number of limits to the recovery of damages.

- Causation - a requirement that the plaintiff establish a connection between every aspect of its loss and the defendant's tortious act or omission is a prerequisite to the recovery of damages.[579]

- Certainty - a requirement that the losses claimed by the plaintiff must be established with sufficient certainty to satisfy the court, both of their existence and extent. Entirely speculative losses are not recoverable.

- Remoteness - a requirement that in negligence actions, the plaintiff must show that there was a real risk' of the damage occurring, and that the actual damage occurring could not be brushed aside as far fetched.[580] The precise damage need not be foreseen.

- Mitigation - the requirement that the plaintiff take all reasonable steps to avoid losses as a result of the defendant's tort. The doctrine of mitigation relieves the defendant from paying that portion of the loss over which the plaintiff had full control and should prudently have avoided.

- Contributory negligence - the obligation of the court to reduce a plaintiff's damages on a percentage basis where the defendant can establish that the plaintiff's negligent conduct either wholly or partly caused the loss or injury it suffered.

The New South Wales company will need to address all of those issues in order to claim the full value of its loss.

Injunctions

8.92 In the case of tortious acts by a defendant, injunctions are usually ordered for two purposes.

- Specific injunctive relief is ordered to protect proprietary interests. If it appears that the negligent company may continue to act negligently, an injunction may be granted to prevent further damage to the property, in this case the equipment.

- *Quia timet* injunctions or mandatory injunctions are granted to compel the performance of some positive act or acts, such as returning the property to the plaintiff.

If relief by way of an injunction is ordered by the court, the right to common law damages may still be pursued. A Mareva injunction may also be granted by the court in order to preserve the equipment pending the resolution of proceedings. This form of relief is more fully discussed in chapter 7.

8.93 Depending on the continuing conduct of the negligent joint venturer and whether the equipment is worth preserving or has been destroyed beyond repair, the New South Wales company may request the court to award both forms of injunction. This will prevent the negligent joint venturer from continuing to use the equipment in a destructive manner and require the equipment to be returned forthwith. While proceedings are on foot the New South Wales company should also consider the possibility of a Mareva injunction to prevent the negligent joint venturer continuing to use the equipment and thus tampering with any evidence.

Territorial limits

8.94 The negligence example contemplates a tort being committed outside Australia with damage done to the New South Wales company's equipment located outside Australia and a defendant outside Australia. There are therefore significant extraterritorial elements to the claim.

8.95 To initiate proceedings in the Supreme Court of New South Wales against a defendant outside Australia for damages arising from negligence, the plaintiff's case must come within one of the categories specified in

Pt 10 r 1A of the Rules of the Supreme Court of New South Wales.[581] Paragraph (e) of that rule permits an initiating process to be served outside Australia where damage is suffered in New South Wales, notwithstanding that the tort occurred wholly outside Australia.[582] The initial tendency was to construe this provision narrowly so that all damage had to be suffered within the State.[583] However subsequent decisions have made it clear that the provision will apply to a tort that has been committed outside the State where only part of the damage occurs within the State.[584] Damage' for the purposes of this provision is not to be confined to the immediate physical injury or loss suffered at the time the cause of action first accrued. This provision applies where the plaintiff has suffered or continues to suffer, within the forum, any physical, financial or social consequences of an injury or damage first received abroad.[585]

8.96 Consequently, this rule applies where the damage suffered within the State is financial loss incurred by the New South Wales company in respect of repairs to property and loss of profit, even where both the actual damage to the property and the necessary repairs or replacement occur outside the State.[586] The position is the same in the Federal Court (subject to the requirement to obtain the prior leave of the Court).[587]

8.97 On the facts of the negligence example it appears that the New South Wales Supreme Court and the Federal Court of Australia may have jurisdiction to hear the matter. Damage in the sense of the consequential disadvantage or detriment such as loss of earnings or profits and the obligation to pay for repairs or replacement of the equipment are losses suffered by the plaintiff company in Australia.

8.98 The situation at the District Court level is somewhat different.

- Under s 47(1)(b) of the *District Court Act 1973* (NSW) the District Court will have jurisdiction to hear a matter arising from a tort committed wholly outside New South Wales, provided the foreign defendant was resident within New South Wales at the time of service of the document which commenced the plaintiff's action. This apparently is not the case in the given scenario as the negligent company appears to have been at all relevant times located outside the jurisdiction.

- However s 47(a) also grants the District Court jurisdiction where a material part of the cause of action arose within New South Wales. This has been held to mean one or more of the essential elements of the claim which would entitle a plaintiff to succeed. Consequential loss suffered within the State is not sufficient.[588]

Thus, for the Australian company to be able to argue that the District Court has jurisdiction to hear the matter it will have to argue that damage, as an essential part of the cause of action, is actually suffered by it in Australia.

Choice of law

8.99 The territorial limits to the court's jurisdiction are also affected by the governing law of the transaction. Effectively for claims of the kind in the negligence example, the governing law is the law of the place where the wrong occurred. The better view of the current position in Australia is that a plaintiff such as the New South Wales company may only sue in Australia in respect of a wrong occurring outside the jurisdiction if

- the circumstances of the claim are such that had the matter arisen within Australia the plaintiff would be entitled to seek to enforce against the defendant a civil liability of the kind which the plaintiff is currently attempting to enforce

- by the law of the place in which the wrong occurred, the circumstances of the case give rise to a civil liability of the kind the plaintiff is attempting to enforce,[589] and

- the civil liability under the law of the place in which the wrong occurred is a continuing liability.[590]

Although this is the better view the law on this point is not yet settled. It should be noted that this view represents a stricter requirement than that which was previously applicable.[591]

8.100 In effect, this rule requires the Australian court to consider the kind of civil liability arising on the occurrence of the wrong in the foreign jurisdiction. The parameters of the Australian court's judgment will effectively be guided by the liability prescribed for the wrongs in the foreign jurisdiction. If a particular liability is denied in the foreign jurisdiction it is also to be denied to the Australian court on the basis that even if the Australian court gave the relevant award it would not be enforceable in the foreign jurisdiction. Thus Australian courts are only able to give judgment in respect of liabilities and remedies recognised in the foreign jurisdiction, but are entitled to form their own conclusions within these categories.[592]

Enforcement of remedies outside Australia

8.101 Damages in tort will only be enforceable outside Australia to the extent that the heads of civil liability on which the award is based are recognised in the foreign jurisdiction. In addition the amount of damages for each head of liability will be calculated in accordance with the rules of the foreign jurisdiction.[593] There have been some recent suggestions in a number of cases that calculating the amount of the award may be a matter of substance and not procedure, especially in matters of tort where the separation between the procedural and substantive issues regarding damages is rather narrow.[594] Nonetheless it appears that the better view still is that quantum is a matter for the forum in which enforcement is sought and that such assessment by the foreign court should be made with reference to the heads of damage identified by the forum giving the original judgment.[595] As indicated above, determination of the heads of damage is a matter for the forum hearing the action, subject to the overriding requirement that the heads on which a liability is found are heads which are recognised in the relevant foreign jurisdiction.

8.102 The discussion on Mareva injunctions in chapter 7 applies to this scenario. In particular while the Australian court may grant either a Mareva injunction or permanent injunction, the law of the foreign jurisdiction may not recognise such an order and the Australian court will only make such an order if it is satisfied that the court of the relevant jurisdiction will recognise it and provide a similar remedy. The Australian court will usually frame the order so that it will not be enforceable unless it is recognised by the foreign court.

Breach of statutory and fiduciary duties

The claim

8.103 This section considers the remedies available for breaches of statutory and fiduciary duties with an international element. The following example reflects section 3 (f) of the terms of reference of the inquiry.

Breach of duty example

This example concerns a breach of an Australian director's duties outside Australia. The director is a director of two companies: an Australian funds management company and a European insurance office. She is based in a financial centre in North America. She fails to act in the best interests of the Australian company in relation to certain futures transactions entered into in that financial centre between the Australian and European companies. The Australian company suffers a loss from the transactions and wishes to recover from the director for breach of duty.

The range of remedies available

8.104 In general terms, if the international components are disregarded and the two companies and the director were all based in Australia, the director would be taken to have breached her duties both under general law and under the Corporations Law. In particular she is likely to have breached her duties to

- act in good faith for the benefit of the company as a whole
- act honestly
- act for proper purposes

- exercise reasonable care, skill and diligence, and
- avoid or disclose any conflicts of interest or duty.

The remedies available to the Australian company in relation to the breaches of those duties include

- rescission of relevant contracts
- equitable compensation
- damages for breach of duty
- compensation under the Corporations Law.

Each of these is considered in turn after first outlining the relevant statutory and fiduciary duties.

Duty to act in good faith for the benefit of the company

8.105 Directors owe a duty to act in good faith for the benefit of the company as a whole.[596] It is apparent that the director in the scenario has breached this duty by not acting in the best interests of the Australian company. This duty is echoed in the duty of officers of a corporation to act honestly in exercise of powers and discharge of duties, contained in s 232(2) of the Corporations Law. A director breaches s 232(2) of the Corporations Law if he or she consciously fails to act in the interests of the company, even where there is no intention either to deceive or to defraud.[597] There may be a requirement that the director be consciously aware that what he or she is doing is not in the best interests of the company.[598] However on at least one view the section is taken to mirror exactly the fiduciary duty and may not require actual dishonesty in order for there to be a breach.[599]

Duty to act for proper purposes

8.106 Pursuant to s 232(6) of the Corporations Law an officer must not make improper use of his or her position to gain, directly or indirectly, a personal advantage or to cause detriment to the corporation. By securing an advantage to the overseas company and causing detriment to the Australian company the director is clearly in breach of the section.

Duty of care, skill and diligence

8.107 Directors owe a general duty of care to their company.[600] In addition, if the director is an executive director under contract, there may be an express or implied term that he or she will exercise reasonable care, skill and diligence.[601] It is not clear from the breach of duty example whether there has been a breach of these duties. Section 232(4) of the Corporations Law reinforces the general law position with a statutory requirement of care and diligence expected of officers. Under this provision an officer must exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the circumstances.

Duty to avoid or disclose conflicts of interest

8.108 The director's obligations to the Australian company in relation to the futures transactions are in conflict with her duties to the European company.[602] The director will be in breach of duty if she has not made full disclosure of her interest. Even if such disclosure had been made she may still be in breach of this duty if she negotiated or voted on the contract.[603]

Rescission

8.109 A transaction to which a company is a party may be voidable at the election of the company if it was brought about by a director acting in breach of his or her duties. The remedy would be sought against the

other company which was party to the transactions rather than the director. Rescission or avoidance of a transaction is only possible where the rights of innocent third parties would not be prejudiced.

8.110 In the breach of duty example the remedy of rescission may be available against the European company since it had actual knowledge (through its mutual director) of the director's breach of her duties. It is necessary to impute such knowledge so as to prevent the European company from asserting that it is an innocent third party. However the knowledge of the guilty' director will only be imputed to the European company in certain circumstances. The European company will certainly be attributed with the knowledge of the director if the director is the controller and directing mind of the company rather than just one of several directors.

Equitable compensation

8.111 Equitable monetary compensation is available where a breach of fiduciary duty causes loss to the company. The breach of duty example is likely to involve breaches of one or more fiduciary duties and there is clear evidence of loss to the Australian company. Recovery of equitable compensation will be subject to the application of general equitable principles which may deny relief in certain circumstances, including where

- the plaintiff does not itself have clean hands
- the company has acquiesced in the breach
- laches, or
- it is not possible for the parties to be restored to their previous position.

Having found that there has been a breach of duty by the director and none of these equitable considerations apply, the court must then consider whether the loss sustained by the company would have occurred but for the director's breach before it will order equitable compensation.[604] On satisfying itself on all these questions and following the general principle of restitution in equity, the director will then be ordered to restore the Australian company to the same position that it would have been in if the breach of duty had not occurred.

8.112 On the facts given in the breach of duty example there appears to be sufficient evidence of a breach of duty by the director and no evidence of unacceptable conduct on behalf of the Australian company. It also appears that the loss to the Australian company flows directly from the actions of the director in breach. Consequently the members of the Australian company could expect the relevant Australian court to order compensation if rescission is no longer possible.[605] Where such an order for equitable compensation is obtained, the obligation for restitution is personally enforceable against a director in Australia in the usual manner in the form of a judgment debt. This procedure is discussed in chapter 7.

Damages for breach of duty

8.113 As an alternative to seeking equitable compensation, the Australian company may bring proceedings for a breach of the duty of care or on the basis of a breach of statutory duty. As indicated above, the Australian company can readily point to a breach of statutory duty by the relevant director and possibly the duty of due care and diligence. Accordingly it may seek compensation on this basis in the alternative to equitable damages.

Compensation under the Corporations Law

8.114 Directors owe certain statutory duties to their company under s 232 of the Corporations Law. Breaches of s 232 are subject to civil penalties,[606] which may be imposed by the court on the application of the Australian Securities Commission[607] or a person authorised by the Minister.

8.115 If an application for a civil penalty order is made on this basis, a corporation may intervene in the application to seek compensation.[608] A corporation is entitled to be heard in such cases only if the court is

satisfied that the person against whom the civil penalty order is being sought committed the contravention in relation to the corporation, and only then on the question of compensation.[609] If the court is so satisfied and the corporation has suffered loss as a result, the court may order the director to pay the corporation such compensation as the court specifies.[610]

8.116 If the proceedings are in a criminal court the court may also order the defendant to pay compensation to the company if it finds the defendant guilty of a breach of a civil penalty provision or that a person has contravened a civil penalty provision and it is satisfied that the relevant corporation has suffered loss.[611] However, a corporation is not entitled to intervene in criminal proceedings.[612]

8.117 In addition, under s 1317HD of the Corporations Law a corporation may recover compensation from a director who has contravened a civil penalty provision. The amount recoverable is equal to any profit acquired through the act or omission constituting the contravention as well as any loss or damage suffered by the corporation as a result of that act. The amount is recoverable as a debt and does not depend on a civil penalty order having been made against the director.[613]

Territorial limits

8.118 The breach of duty example involves a breach of duty by a director who apparently has no personal connection with Australia. The director is apparently neither a resident nor domiciled within Australia. Furthermore the futures transactions which have given rise to this breach of duty occurred entirely outside Australia.

8.119 In these circumstances the territorial limits to jurisdiction are significant. It is likely that Australian courts do *not* have jurisdiction to deal with the director's breaches of his or her *non-statutory* duties. The Federal Court and the Supreme and District Courts of New South Wales do not have jurisdiction because, on the facts given in the breach of duty example

- the director is neither in Australia nor resident or domiciled in Australia
- the breach of duty occurred outside Australia, and
- there are no other relevant grounds of jurisdiction.[614]

8.120 However it appears that an action can be maintained against the relevant director for the breach of *statutory* duties under the Corporations Law because of the express extraterritorial scope of the Corporations Law. As indicated above, it is likely that this director is in breach of the statutory duties set out in s 232(2), (4) and (6) of the Corporations Law. Section 110D of the Corporations Law deems these provisions to apply (as relevant to this case) to

- natural persons, whether resident in Australia or not and whether Australian citizens or not
- all bodies corporate and unincorporated bodies, whether formed or carrying on business in Australia or not, and
- acts and omissions outside Australia.

This clearly gives the Federal Court and Supreme Court jurisdiction over the director in relation to these breaches of statutory duty.

8.121 However this is not an absolute jurisdiction to hear matters in relation to all directors of all corporations wherever they or the corporations are located in the world. There must be some connection with Australia for constitutional validity. This connection either has to be attracted through the substance of s 232(2), (4) and (6) of the Corporations Law or determined on the basis of constitutional limitations as applied to the particular facts.

8.122 Sections 232(2) and (4) apply to any exercise of powers or discharge of duties by a director of a corporation incorporated in Australia, whether within or outside Australia. Where the corporation is incorporated outside Australia those sections also apply to the exercise of powers or the discharge of duties by the director outside Australia but only if they are in connection with

- the corporation carrying on business in Australia
- an act the corporation does or proposes to do in Australia
- a decision by the corporation whether to do or not to do an act in Australia.[615]

The breach of duty example is within these limitations and accordingly the relevant Australian courts have jurisdiction over the breaches of s 232(2) and (4).

8.123 The same restrictions do not apply to s 232(6) which sets out the duty not to obtain any gain through improper use of position.[616] For this section it would appear that general constitutional considerations will determine the necessary connection. It can be expected, however, that since the matter involves the exercise of duties by the director of an Australian corporation to the detriment of that corporation, this will constitute a sufficient connection with Australia.

Enforcement of remedies outside Australia

8.124 The enforcement of compensation ordered under the Corporations Law depends on how it is characterised. If it is viewed as similar to damages in tort, then it will only be enforceable to the extent that this head of liability is recognised in the foreign jurisdiction and the quantum will be assessed in accordance with the rules of that jurisdiction. If it is viewed as similar to equitable compensation then it will be subject to the general enforcement issues relating to debt recovery.

9. International agreements

Introduction

9.1 This chapter discusses a third factor that influences the scope of Australian remedies: treaties, conventions and other international agreements and arrangements relating to civil procedure. The chapter outlines the current international agreements to which Australia is a party that deal with service or enforcement issues. It also discusses other international agreements to which Australia is *not* a party but which are relevant to the issue of service and enforcement extraterritorially. Finally, the chapter briefly considers current initiatives and proposals in the areas of service and enforcement, and the possible benefits for Australian litigants if such agreements came into force with Australia as a party.

International agreements involving Australia

Introduction

9.2 Australia is not currently a party to any multilateral convention regarding reciprocity of enforcement of court judgments or service of court documents. Australia does however have bilateral agreements with a number of countries relating to service of documents, and Australia has reciprocal arrangements for the enforcement of judgments with a number of countries. These have been briefly referred to in chapter 6 and are discussed in more detail below.

Service of process - UK treaties

9.3 Australia is a party to a number of treaties entered into by the United Kingdom and certain European countries in the 1920s and 1930s.[617] These treaties set out an agreed procedure for service of documents and the taking of evidence in civil and commercial matters for each relevant jurisdiction. In relation to international service of documents in civil and commercial matters the general provisions of the treaties are as follows

- Documents may be served on a person within the jurisdiction of the foreign Contracting Party, regardless of that person's nationality, in accordance with the procedures set out in the treaty.

- A Consular Officer' of the Contracting Party seeking service must request a Competent Authority' (as defined in the treaty) of the Contracting Party in which service is required, to cause the documents to be served.

- The request for service must be in the language of the Contracting Party in which the documents are to be served, and must state certain information including the full name and address of the party to be served.

- The documents to be served must be in duplicate and must be either in the language of the Contracting Party in which service is to take place or be accompanied by a certified translation into such language.

- Actual service of the documents is to be accomplished by the Competent Authority of the Contracting Party in which the documents are to be served and where a special manner of service is requested of that Competent Authority that manner of service is to be followed in so far as it is not incompatible with the law of that Contracting Party.

- Service in accordance with a request is not required to be undertaken where the relevant sovereign of the Contracting Party in which service is to take place considers that such service would compromise its sovereignty or safety.

- The Competent Authority attempting to perform the execution of service in the jurisdiction of the Contracting Party in which service is to take place must provide a certificate proving the service or

explaining why service was prevented and setting out the manner in which service was attempted or completed.

9.4 The Rules of the Federal Court of Australia and the New South Wales Supreme Court Rules outlined in chapter 6 closely follow these requirements where a party is seeking assisted service in a country with which Australia has such a treaty. The rules in each court however have a further requirement that the court also provide a letter of request for forwarding by the Attorney General to the relevant Competent Authority in the foreign Contracting Party. This is not required under any of the relevant treaties themselves.

9.5 Where service is required in a country with which Australia does not have a treaty service may still be possible. It is common for Australia to effect service for parties from non-contracting countries or for non-contracting countries to effect service for Australian parties. Requests for service must go through the Attorney General.

9.6 As these treaties relate only to service of legal documentation and not enforcement of judgments there are no immediate effects on the ability of an Australian litigant to obtain a particular remedy against a defendant in a foreign jurisdiction. However, by providing an official channel for service of documents these treaties, and the rules of Australian courts giving effect to them, do offer assistance to Australian plaintiffs in commencing and conducting proceedings. It is understood however that these official channels are perceived to be slow. This tends to devalue the benefit of the treaties, especially in cases where there is some urgency in serving the documents on the foreign defendant.

Other agreements concerning service

9.7 There is one other international agreement offering some assistance to Australian litigants in relation to service of legal documents. Australia is a party to the Vienna Convention on Consular Relations signed on April 24, 1963. This Convention was ratified by Australia on February 12, 1973 and came into force on March 14, 1973.[618]

9.8 Article 5(j) of the Vienna Convention identifies one consular function as transmitting judicial and extra judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force, or in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State'. This contemplates two consular actions

- direct consular action whereby the consular officer effects service of the documents directly on a party in the foreign jurisdiction

- indirect consular action whereby the consular officer transmits the documents for service to an appropriate authority in the foreign jurisdiction for service to be effected by that authority.

In some foreign jurisdictions service in either manner is permitted only in respect of an addressee who is a national of the country seeking service.

9.9 This provides one further avenue that an Australian party may consider using for service of legal documentation in a foreign jurisdiction but has no benefit in relation to enforcement of Australian judgments in foreign jurisdictions.

Reciprocal recognition of judgments

9.10 As discussed in chapter 6 the Foreign Judgments Act sets out a framework for recognition of foreign judgments in Australia on the basis of reciprocal recognition of Australian judgments in those foreign jurisdictions. The operation of the Act is based on agreements between Australia and the relevant foreign jurisdictions and is supported by a series of regulations.[619] In summary, the Act provides a framework for enforcement of foreign money judgments in Australia based on assurances that the foreign jurisdictions to which the Act applies will substantially reciprocate in the enforcement of judgments of the Australian Supreme and Federal Courts.[620] If the Act is not proclaimed to apply to a particular foreign jurisdiction then enforcement of a money judgment of a foreign court in Australia is to be conducted at common law,

requiring the judgment debtor to be served in or having submitted to the jurisdiction of the enforcing court in Australia.

9.11 It is important to note that the number of countries included on this basis is limited in scope and that a number of important jurisdictions and trading partners of Australia are not included.[621]

9.12 The Foreign Judgments Act can offer significant assistance to an Australian party seeking to recover on the basis of enforcement of a judgment in a foreign jurisdiction. That is, it permits that party to take the judgment of the relevant Australian court directly to the relevant foreign jurisdiction and obtain enforcement on the basis of suitable remedies permitted within that foreign jurisdiction. There is no need for that party to take fresh proceedings in that foreign jurisdiction. The Australian party merely follows the procedure set out for registration of the judgment. The main limitation to this form of assistance to Australian parties is the limited number of countries with which Australia has this reciprocal enforcement arrangement.

9.13 The treaties relating to service and the bilateral arrangements for recognition of judgments are the major part of Australia's extraterritorial arrangements in relation to service and enforcement.

UK agreement on recognition of judgments

9.14 Australia has one other separate agreement regarding reciprocity of recognition and enforcement of judgments from a foreign jurisdiction. On 23 August 1990 Australia and the United Kingdom entered into an agreement providing for reciprocal recognition and enforcement of civil and commercial judgments.[622] The agreement contains an undertaking by the United Kingdom to enforce money judgments and arbitration awards (other than matters in respect of taxation and maintenance) of the Federal, Supreme and District Courts of Australia. This agreement entered into force on the exchange of Notes at London on 1 September 1994.

9.15 Pursuant to Article 3(1) of the agreement the British government also undertakes not to recognise or enforce judgments given against defendants domiciled in Australia by courts of the Contracting States to the Brussels/Lugano/San Sebastian Conventions exercising exorbitant jurisdiction. This is an important protection for Australian parties. This is a particularly important agreement to have with the United Kingdom because of the economic and political relationships which Australia shares with the United Kingdom. The effect of the Brussels/Lugano/San Sebastian Conventions and exorbitant jurisdiction of Contracting States on Australia is discussed below.

9.16 Provision is also made for the reciprocal enforcement of judgments for the recovery (clawback) of sums paid in respect of a judgment of a court of a third country involving an exorbitant exercise of its jurisdiction in antitrust proceedings or in proceedings for an award of multiple damages.[623]

9.17 This agreement with the UK bolsters the existing arrangements for the enforcement of judgments of Australian courts in the United Kingdom, to the advantage of Australian plaintiffs.

Taking evidence abroad

9.18 Australia acceded to the Hague Evidence Convention on 23 October 1992.[624] The Convention allows for the examination of witnesses and the production of evidence in other Contracting States. Measures of compulsion in the Contracting State are used to secure the evidence, which is subject to any rules of privilege that exist in Australia or the Contracting State.

Arbitration

9.19 International arbitration is arguably the area of procedure with the most comprehensive coverage in international commercial law. There are a number of major arbitration treaties and agreements in place. They are discussed in chapter 11.

Brussels Convention (1968)

9.20 There are several important multilateral agreements regarding extra-territorial service and enforcement of foreign judgments to which Australia is *not* a party. These include the related Brussels/Lugano/San Sebastian Conventions, the Hague Service Convention, the Hague Foreign Judgments Convention and the European Convention on Bankruptcy.

9.21 The Brussels Convention was signed by the six original member States of the European Union on September 27, 1968. The Brussels Convention is also operative in each new member State of the European Union. Membership is restricted to European Union members only. It is relevant to Australia in two ways: it has implications for Australian firms trading or investing in Europe, and it has been used as the model for the Lugano Convention which is not restricted to European members only.

Main principles

9.22 The basis of the Brussels Convention is one of mutual recognition of civil and commercial judgments of Contracting States without any special procedure being required.[625] The presumption in favour of recognition can only be rebutted in limited circumstances, for example where recognition would be contrary to public policy.[626] The Convention does not apply to bankruptcy, winding-up and analogous proceedings.[627] Even cases that flow directly from a bankruptcy or winding-up are not covered by the Convention.[628]

9.23 Where a party is sued by any interested party within a Contracting State in relation to any of the specific grounds referred to in the Convention, the judgment resulting from the hearing of the matter is able to be readily recognised and enforced in any other Contracting State.[629] The Contracting State in which enforcement is sought may not apply local rules to determine whether the judgment may be enforced and may not review the substance of the case. In other words, the judgment is prima facie enforceable if

- it emanates from another Contracting State
- is in one of the categories that are the subject of the Convention, and
- does not fall within the limited exemption categories.

9.24 The overriding tenet of the Brussels Convention is that persons domiciled' in a Contracting State shall, whatever their nationality, be sued in that state.[630] However, in certain circumstances the Convention permits a defendant 'domiciled' in one Contracting State to be sued in another Contracting State. In relation to the examples in chapters 7 and 8, these circumstances are as follows

- contractual dispute - the court in the Contracting State where performance of the obligation forming the basis of the relevant legal proceedings was to take place has jurisdiction[631]
- tortious matters - the court in the Contracting State where the harmful event occurred has jurisdiction[632]
- disputes arising out of operations of a branch, agency or subsidiary in a Contracting State - the court in the Contracting State where the branch or agency is located has jurisdiction to hear the matter[633]
- disputes involving immovable property and (generally) tenancies of immovable property - the court in the Contracting State in which the property is situated[634]
- disputes involving the validity of the constitution, dissolution of companies or other legal associations or the decisions of their organs - the court of the Contracting State in which the company is seated.[635]

Areas of overlapping jurisdiction

9.25 This automatic assumption of jurisdiction clearly has potential for conflict with the assumption of jurisdiction by courts of states that are not party to the Brussels Convention. For example, Australian courts

will assume jurisdiction over a tortious matter if damage is suffered in Australia, notwithstanding the fact that the harmful event occurred outside the jurisdiction.[636] This conflicts with the Brussels Convention's provisions on tortious matters.

9.26 The Brussels Convention's provisions on immovable property present particular concerns as they dispense with the requirement that the defendant be in the Contracting State or indeed in any Contracting State. The court of the Contracting State in which the immovable property is located has jurisdiction with respect to that property. It has been held that this provision does not just cover claims relating to title to such property but also any proceedings relating to that property, including actions for rent.[637]

9.27 As a result of these rules, and the possibility of these triggering events occurring in a number of Contracting States in relation to the same matter, more than one court may have jurisdiction to hear the matter.[638] Except in the case of immovable property, a plaintiff may then sue in an appropriate Contracting State of its choice and, relying on Article 26 of the Convention, seek enforcement in any other Contracting State.

Implications for Australia

9.28 There are some significant adverse consequences for a country such as Australia in not being able to become a Contracting State to the Brussels Convention. Most importantly, once a judgment is delivered in one Contracting State against a defendant resident in Australia the judgment is recognised and enforceable in all other Contracting States.[639] If the Australian defendant has assets in one member country and a judgment is entered against it in another member country the judgment may easily be enforced against those assets in the other member country.

9.29 The one possible exception to this may lie in Article 27(5) of the Convention. This Article prevents a Contracting State from recognising a judgment from another Contracting State where that judgment is irreconcilable with the judgment of a non-Contracting State and the parties and the cause of action are exactly the same. Thus if an Australian court judgment is inconsistent with the judgment of a Contracting State, on the same cause of action and with the same parties, the judgment in the Contracting State will not be enforceable in any other Contracting State.

9.30 There are other important issues of concern for Australian litigants, particularly Australian defendants. If a judgment of a court of a non-Contracting State, for example Australia, is recognised in a court of any Contracting State, for example the United Kingdom, there is potential for this judgment to be immediately recognised throughout all member States. This interpretation relies on the assumption that the decision by the court in the Contracting State (in this case, the United Kingdom) to recognise the non-member judgment constitutes a 'judgment' for the purposes of Article 25 of the Convention, making the provisions of the Convention apply.[640] This conclusion is not settled either way and is the subject of much controversy. However on the face of the wording in Article 25 it would appear that this interpretation is strongly arguable.[641]

9.31 There are further implications for Australian defendants as a result of the treatment of 'exorbitant' jurisdiction of Contracting States' courts under the Brussels Convention. 'Exorbitant' jurisdiction means an exercise of jurisdiction which extends beyond the traditional categories of jurisdiction recognized by all States. This type of jurisdiction is found where the domestic law of a country contains assumptions of jurisdiction in circumstances that are not usually recognised in the jurisdictions of other countries.[642] Most Contracting States to the Convention have such laws.

9.32 While these laws as identified in the Convention are prohibited between member States,[643] they still operate in respect of non-member States and within the relevant Contracting State itself. Thus once a judgment based on 'exorbitant' jurisdiction has been made against a party in a non-Contracting State by a court in a Contracting State this judgment is given effect across all Contracting States by way of Article 26 of the Convention. In effect this is recognition of an 'exorbitant' jurisdiction of one Contracting State by all other member States where previously there would have been no such recognition by these other Contracting States. This should raise concerns for defendants located in non-Contracting States such as Australia who are now made significantly more vulnerable in relation to their interests in Europe than was previously the case,

although as at 1994 no application of 'exorbitant' jurisdiction in this manner has been made against an Australian defendant.[644]

9.33 Non-Contracting States may be able to obtain some relief for defendants within their jurisdiction from the effects of the Convention, especially the 'exorbitant' jurisdiction effects, by negotiating bilateral agreements with Contracting States. Article 59 of the Convention permits a Contracting State to enter into an agreement which refuses to recognise any 'exorbitant' judgments given in other Contracting States against defendants from the non-Contracting States. One such example is the Agreement providing for reciprocal enforcement between Australia and the United Kingdom.[645] In Article 3(1) of this Agreement the British government has undertaken not to recognise or enforce judgments given against Australian defendants by courts of the Contracting States to the Convention where those courts are exercising 'exorbitant' jurisdiction. This agreement has been in force since September 1, 1994.

Potential benefits

9.34 Despite the problems for Australian litigants as a result of Australia not being a Contracting State to the Brussels Convention, there is potential for some benefit to Australian plaintiffs as a consequence of the results outlined above. This would appear to be the case where the defendant located in a Contracting State to the Convention has assets in other Contracting States. By obtaining a judgment in, or recognition of an Australian court judgment by, the court of a Contracting State the Australian plaintiff might obtain immediate enforcement rights in relation to assets located in all other Contracting States. In the case of recognition of a judgment of an Australian court this will depend on the interpretation afforded the word 'judgment' in Article 25 of the Convention and whether recognition of a judgment of an Australian court by a court of a Contracting State is taken to be a 'judgment' enforceable in other Contracting States for the purposes of the Convention.

Mareva injunctions and other protective remedies

9.35 A further area of interest to Australian litigants is the provisions in the Brussels Convention relating to prior protective remedies, including Mareva injunctions.[646] The Convention permits a party to apply to the court of a Contracting State for protective measures available under the law of that State even if the courts of another Contracting State have jurisdiction as to the substance of the matter to which the protective measures relate and no proceedings of the case have been commenced in the Contracting State in which the Mareva injunction is sought.[647]

9.36 At common law Mareva injunctions are only granted where the proceedings to obtain such a protective remedy relate to a wider cause of action in the jurisdiction.[648] A Mareva injunction could not traditionally be granted in the local jurisdiction in relation to proceedings in another foreign jurisdiction. Under Article 24 of the Convention this position has been reversed so that prior protective measures can be obtained in one Contracting State in relation to proceedings in another Contracting State. As England and Ireland are both Contracting States to the Convention it is possible that this will have some effect on Australian law with respect to Mareva injunctions.[649] This may also have consequences for Australian litigants seeking to obtain Mareva injunctions in various parts of Europe. For example, by commencing an action in one Contracting State, Mareva injunctions may be obtained in other Contracting States notwithstanding that no proceedings have been commenced in those States.

Service of process

9.37 The Brussels Convention also has relaxed provisions relating to the service of documents between Contracting States. Article IV of the Protocol annexed to the Convention provides for service through the use of process servers of the Contracting States.[650] Under the Protocol the process server of the requesting State may turn directly to the process server of the State where service is sought, thereby bypassing any formal requirements to conduct service through official consular or government channels. In the case of a document to be served in a Contracting State that has no treaty in respect of service with the forum Contracting State, the law of the forum Contracting State applies. This presents opportunities for Australian plaintiffs. For example, where it is possible, Australian plaintiffs could consider the commencement of proceedings in a Contracting State to make service in another Contracting State much easier than if an action is run only in Australia and service is sought out of Australia.

Advantages and disadvantages of membership

9.38 Evidently this kind of Convention is one from which Australia would receive a number of benefits if it were able to and did become a party. It would mean that none of the Western European jurisdictions that are Contracting States could exercise 'exorbitant' jurisdiction in relation to Australian defendants. Additionally, if Australia were to become a Contracting State Australian plaintiffs would be able to obtain protective remedies such as Mareva injunctions in other Contracting State jurisdictions without the need to commence proceedings in that Contracting State in relation to the main matter in dispute.

9.39 The advantages or disadvantages to Australian litigants in the predetermined jurisdiction categories under the Brussels Convention would depend on the facts of the specific action. For example, in contract disputes Australian courts would no longer be able to claim jurisdiction on the basis that the contract was made in Australia because the governing criterion for jurisdiction under the Convention is the place where the performance of the obligation forming the basis of the action was to take place.

9.40 The principal disadvantage to being a party to a convention like the Brussels Convention, however, would be the ease with which European plaintiffs could access Australian defendants domiciled and assets located in Australia. This needs to be considered in the context of and in the light of the number of Contracting States with which Australia has reciprocal enforcement of judgment arrangements under the Foreign Judgments Act.[651]

9.41 As noted above, a state may only become a Contracting State to the Brussels Convention upon joining the European Union which clearly precludes Australia. However, the Lugano Convention does not have such a geographic or economic zone restriction to becoming a party and is almost in exactly the same terms as the Brussels Convention. There are also proposals for the creation of a convention in similar terms but with a much wider membership.[652]

Lugano Convention (1988) and San Sebastian Convention (1989)

9.42 The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters done at Lugano (Lugano Convention) was signed on 16 September 1988. This Convention together with the San Sebastian Convention of 1989[653] effectively extends the regime established by the Brussels Convention to the whole of Western Europe. The comments made in relation to the Brussels Convention therefore largely apply to these conventions as well.

9.43 The most important attribute of the Lugano Convention is that unlike the Brussels Convention the Lugano Convention can be acceded to by any other State with consent of the original signatories, being all of the European Union and the European Free Trade Association States, and the unanimous agreement of all existing parties.[654]

9.44 As indicated in the outline above of the principles applying under the Brussels and Lugano Conventions, there may be advantages for Australia in becoming a party to the Lugano Convention. There would also be some disadvantages. It is possible for Australia to become a party to this Convention but this is likely to be politically difficult given the level of approval required by the existing members. Current discussion in the Hague Conference on Private International Law in regard to a worldwide convention on mutual reciprocity of recognition of judgments (which has used the Lugano Convention as a model) may be a more productive approach. Nonetheless, as the Hague Conference deliberations are likely to take some time, it would be useful to consider whether there is any realistic possibility of Australia becoming a party to the Lugano Convention.

Other international agreements and arrangements

Hague Service Convention (1965)

9.45 The Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil and Commercial Matters (Hague Service Convention) was entered into on November 15, 1965 and has twenty

six Contracting States, including the United States and the United Kingdom.[655] Australia is not a Contracting State.

9.46 A number of conditions must be met before the Hague Service Convention can apply between Contracting States

- the matter must be civil or commercial
- the address of the person to be served must be known and
- the service of a writ must take place from one Contracting State to another Contracting State.

On satisfaction of these conditions attempts at service will be effected via a certain Central Authority appointed by each of the Contracting States.[656] The Central Authority or other authorised officer of the Contracting State seeking service requests the Central Authority of the Contracting State in which service is sought to effect service of the addressee at the nominated address.[657] After service is effected or has been attempted but is unable to be completed, the Central Authority of the Contracting State in which service was to take place must provide a standard certificate supplying details of the service or inability to serve.[658]

9.47 The Hague Service Convention also permits an alternative method of service to be conducted by diplomatic officers of the nation from which the documents for service originate. However any Contracting State may bar service in this manner except where service is to exercised on a national of the Contracting State from which the documents originate.[659] Consular channels and, in exceptional circumstances, diplomatic channels may be used to transmit requests and documents for service to the relevant Central Authority.[660]

9.48 The Hague Service Convention requires that documents served under the regime be written in either French or English.[661] There is no requirement that the documents to be served be written in or be accompanied by a translation into the official language of the Contracting Party in which service is to be conducted. Depending on the jurisdiction, there are concerns that service in this manner represents substantial injustice and fails to allow due process in non-French speaking and non-English speaking Contracting States and may be set aside on this basis. Most Contracting States have indicated that their relevant Central Authorities will not conduct service unless there is a translation into the national language of the country.[662] In any case many of the Contracting States have bilateral agreements between themselves that require a translation to be part of any documentation served within the jurisdiction.

9.49 From an Australian perspective the Hague Service Convention has the advantages that

- it almost exactly replicates the existing Federal Court Rules, the New South Wales Supreme Court Rules and the bilateral treaties on service discussed in chapter 2 to which Australia is already a party[663]
- it permits service by consular officials of the Contracting State requesting service in the jurisdiction of the Contracting State in which service is to take place in the same way as Australia has already agreed pursuant to the Vienna Convention on Consular Relations 1963
- there is no requirement that the court give a letter of request, as under the current Federal Court Rules and New South Wales Supreme Court Rules
- there are a number of important Contracting States to this Convention with which Australia does not have bilateral agreements in relation to extra-jurisdictional service of legal documents.

Hague Foreign Judgments Convention (1971)

9.50 The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (Hague Foreign Judgments Convention) was entered into on February 1, 1971 and is in force only in the Netherlands, Cyprus and Portugal. This Convention does not create rights in favour of

parties in Contracting States but acts as a guideline for bilateral enforcement agreements between Contracting States.

9.51 Essentially, the Hague Foreign Judgments Convention provides for conditions in which foreign judgments (from other Contracting States) should be recognised and does not specify the circumstances in which the courts of a Contracting State can exercise jurisdiction over foreign defendants.[664] It lists a number of 'exorbitant' jurisdictions that may not be taken from one Contracting State and enforced in another Contracting State, in much the same way as the Brussels/Lugano/San Sebastian Conventions. Like the Brussels/Lugano/San Sebastian Conventions this does not prevent a Contracting State from actually exercising this 'exorbitant' jurisdiction *per se* and enforcement of an 'exorbitant' judgment within that Contracting State and outside the other Contracting States under the Convention is still acceptable.[665]

European Convention on Bankruptcy (1990)

9.52 There are currently no comprehensive multilateral international agreements in respect of bankruptcies. The lack of progress in this area appears to be attributable to the reluctance of any state to hand over international bankruptcy matters in relation to their respective jurisdictions and in which their own citizens are involved for determination by foreign jurisdictions.

9.53 The Council of Europe Convention (European Convention on Certain Aspects of Bankruptcy) was signed on June 5, 1990.[666] This Convention grants the country where the insolvent party has the 'centre of its main interests' jurisdiction to make arrangements for the bankruptcy.[667] The trustee in bankruptcy in that jurisdiction has powers to access the bankrupt's assets in any Contracting State without the need for recognition of the trustee's authority in each of the relevant Contracting States. Notwithstanding this the trustee must act in accordance with the local law of the Contracting State in relation to the particular asset.

Hague Conference initiatives

9.54 A number of international bodies are currently working on models for multilateral conventions on civil procedure. This section discusses two recent initiatives

- the work of the Hague Conference on Private International Law concerning the recognition and enforcement of judgments in civil and commercial matters
- the proposals being considered by the International Law Association (ILA) Committee on International Civil and Commercial Litigation.

9.55 The 17th Session of the Hague Conference on Private International Law convened a Special Commission (Hague Special Commission) to investigate the possibility of development of a Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. This Commission met in the Hague in June 1994 and discussed, among other matters, the possibility of developing a regime based on the Brussels and Lugano Conventions.[668] The Hague Special Commission is not yet dedicated to drafting a convention and no convention has been proposed at this stage.

Mechanisms for mutual recognition

9.56 The possibility of bringing in new Contracting States to the Brussels/Lugano Conventions was considered by the Commission but it was acknowledged that they were designed to be used in relation to a localised group of states seeking closer economic co-operation.[669] Consequently application on a worldwide basis was not feasible without significant amendment.

9.57 The Hague Special Commission has reached the conclusion that any such Convention extending a mutual recognition regime outside Europe should have a structure similar to the Brussels/Lugano Conventions. The regime should specify

- the circumstances which national courts of Contracting States can exercise jurisdiction over defendants in other Contracting States, and

- provide for the conditions in which judgments of one Contracting State will be recognised in other Contracting States.[670]

In considering a possible form of such a convention it has been largely agreed that certain areas such as insolvency and bankruptcy should not be brought under the regime and should be made the subject of separate agreement.

Principles governing mutual recognition

9.58 The Hague Special Commission otherwise considered that in general the jurisdiction of Contracting States to hear matters with elements in other Contracting States should be determined in accordance with the determinants of jurisdiction used in the Brussels/Lugano Conventions.[671] The following outlines the relevant conclusions of the Hague Special Commission on jurisdiction between Contracting States as they relate to the legal proceedings for the examples in chapters 7 and 8.

(a) Where jurisdiction cannot be founded on any of the other agreed categories for determination of jurisdiction in the Convention, a plaintiff must commence its action in the jurisdiction of domicile of habitual residence of the defendant. This is the same as Article 2 of the Brussels/Lugano Conventions.

(b) Matters relating to immovable property should usually be heard in the jurisdiction where the property is located. This is the same as Article 16(1) of the Brussels/Lugano Conventions.

(c) There should be a provision in the finally settled Convention allowing a court to assume jurisdiction as a result of a specified connection with a contract where a dispute arises. This might for example be the place for performance as in the case of Article 5(1) of the Brussels/Lugano Conventions.

(d) Jurisdiction should be granted to the court in the place a transaction is entered into (akin to the place of business) by a corporation, association or individual. This is the same as Article 5(5) of the Brussels/Lugano Conventions.

(e) A jurisdiction should be granted in tort but the Hague Special Commission is not settled as to the basis on which it should be granted. The Brussels/Lugano Conventions Article 5(3) as interpreted in *Bier BV v Mines de potasse d'Alsace*[672] grants jurisdiction to a court of the place where the act causing harm occurs or in the place where the harm is suffered. It was left open whether this should be more narrowly defined.[673]

(f) Counter-claims should be heard in the court having jurisdiction over the plaintiff's claim. This is similar to Article 6(3) of the Brussels/Lugano/San Sebastian Conventions.

(g) The parties may agree as to which forum will be applicable. This follows Article 17 of the Brussels/Lugano Conventions.

(h) The final form of the convention should contain restrictions on the application of certain 'exorbitant' jurisdictions. Restrictions relevant to the examples in chapters 7 and 8 include: no automatic jurisdiction to hear a matter if the defendant has property in the jurisdiction; no automatic jurisdiction on the basis of temporary presence of the defendant in the jurisdiction at the time of service of the initiating writ; and the possibility of classing the attachment of jurisdiction to the occasional acts of doing business in the forum as being exorbitant. This largely replicates the position in the Brussels/Lugano Conventions.

(i) There should be a list of exceptions or defences to the automatic enforcement of judgments from other Contracting States similar to Article 27 of the Brussels/Lugano Conventions but this list should be extended to include situations of fraud.

(j) There should be an ultimate decision maker on issues relating to the Convention in much the same way that the European Court of Justice is the ultimate decision maker on the Brussels Convention.

Prospects for agreement

9.59 The Hague Special Commission has noted that there will be some difficulty in getting all potential Contracting States to agree to the exact rules of the regime. This is largely because many countries will not be willing to give up jurisdiction to hear certain matters where damage is suffered in the local jurisdiction as a result of a tortious act committed outside the jurisdiction, and allowing foreign courts the jurisdiction to hear such matters.[674]

9.60 This concern might arise in Australia where, for example, the courts currently have jurisdiction to hear such matters where a tortious act is committed overseas and at least part of the damage occurs within the jurisdiction.[675] A convention similar to the form of the Brussels/Lugano Conventions would grant jurisdiction to the court where the harmful event actually occurs, thereby removing jurisdiction of the relevant Australian court. There would, however, be a converse benefit to this for Australia if such a form of convention were to be adopted and the United States were a party. A party committing a tort in Australia could only be sued in Australia and not in the United States, thereby avoiding the risk of an adverse judgment in the United States. Any recovery in the United States in this case would have to rely on the reciprocity regime of the convention by way of enforcement of the decision of the relevant Australian court.[676]

9.61 The other concerns and benefits to Australia outlined in the discussion of the Brussels/Lugano Conventions are equally applicable to a multilateral judgments convention of the kind discussed by the Hague Special Commission.

ILA Committee initiatives

9.62 The ILA Committee on International Civil and Commercial Litigation comprises a number of European Union countries, the United States, Australia, Japan, Indonesia, Argentina and Canada and works closely with the Hague Conference on Private International Law. The Committee has recently completed a study of international jurisdiction in tort.

9.63 The Committee is also currently investigating the possibility of international co-operation in relation to the taking of protective and preventative measures. One issue being considered is whether a provision similar to Article 24 of the Brussels/Lugano Conventions should be adopted. This Article allows application to be made in any Contracting State for provisional protective measures even if actual proceedings on the case are not commenced in the court of the Contracting State and the courts of another Contracting State have jurisdiction to hear the substance of the matter forming the dispute. This represents a significant deviation from the common law position.

9.64 A further project undertaken by this Committee involves an examination of the possibility of transnational co-operation regarding the transfer of proceedings to the most appropriate forum.

10. External territories

Introduction

10.1 The terms of reference for the inquiry require the Commission to consider the application of Commonwealth law in Australia's external territories in relation to cross border civil remedies. This chapter discusses the general legal framework applying in Australia's external territories and, within that context, the remedies available in those territories for cross border disputes. For this purpose the chapter focuses on the extent to which the principles governing Australian court orders and remedies that are set out in chapters 6-8 also apply in Australia's external territories.

Legal framework applying in the external territories

Introduction

10.2 Australia currently has the following external territories

- Ashmore and Cartier Islands
- Christmas Island
- the Cocos (Keeling) Islands
- the Coral Sea Islands
- the Australian Antarctic Territory
- the Territory of the Heard and McDonald Islands
- Norfolk Island.

The legal framework applying in these territories is a mixture of Commonwealth law, State law and local Territory law. This section outlines the framework applying in each territory.

Commonwealth laws

10.3 Each of the external territories owes its existence to an Act of the federal Parliament.[677] These Acts contain the majority of provisions determining the legal and political structure applying in that external territory.

10.4 Several important provisions in relation to the external territories exist outside the specific federal Act governing existence of the Territory. Section 15B(2) of the *Acts Interpretation Act 1901* (Cth) deems any reference in a Commonwealth Act to a 'Territory' to include a reference to the 'coastal sea of the Territory' as if that coastal sea were a part of the relevant Territory. 'Coastal sea' is defined in s 15B(4) to be the territorial sea adjacent to the Territory. The territorial sea is the area 12 nautical miles offshore. Consequently the laws of the Commonwealth and the jurisdiction of the courts competent to hear matters relating to those laws extend throughout the relevant external territory and up to this limit.

10.5 Under s 122 of the Australian Constitution the federal Parliament retains authority to make laws for all territories including all external territories. This has been said to be a plenary power and that all that needs to be shown to support an exercise of this power in the form of a statute is that there is a sufficient nexus or connection between the law and the relevant Territory.[678] It is a power that is sufficiently wide to allow the federal Parliament to make laws providing for the direct administration of a Territory and also to allow the federal Parliament to endow a Territory with separate political and administrative institutions and functions.[679] In this way the federal Parliament retains overall plenary power to make laws in respect of all its Territories as it sees fit, subject to any other inherent limitations contained in the Australian Constitution.[680]

10.6 The *Acts Interpretation Act 1901* (Cth) makes it clear that, except for the Christmas Islands and the Cocos (Keeling) Islands, legislation of the federal Parliament only applies to the external territories if it is expressly stated to do so or if it is obvious from the legislation in question that it was intended to do so.[681] This position is restated in each of the relevant Acts governing the existence of each external territory (excluding the Christmas Islands and the Cocos (Keeling) Islands).[682] In the case of the uninhabited external territories,[683] very few federal laws have been so expressed. In the case of the Christmas Islands and the Cocos (Keeling) Islands these Territories are defined as part of the definition of 'Australia' in the *Acts Interpretation Act 1901* (Cth) and therefore all laws of Australia are applicable to these Territories unless specifically excluded.

Indian Ocean Territories

10.7 The Cocos (Keeling) Islands and Christmas Islands comprise the Indian Ocean Territories of the Commonwealth. These islands became Territories of the Commonwealth in the 1950's and until recently had a system of law inherited from Singapore when they became dependencies immediately after the Second World War. The Islands are not self governing but they do have a local government.

10.8 The Indian Ocean Territories occupy a unique position in relation to the application of laws of the Commonwealth when compared with the position of other external territories. Since July 1 1992 and pursuant to s 17(a) of the *Acts Interpretation Act 1901* (Cth), a reference to 'Australia' in a Commonwealth statute specifically includes a reference to the Indian Ocean Territories. Consequently all laws of the Commonwealth, subject to specific exceptions that may be stated or implied in a particular statute, are applicable to the Indian Ocean Territories as if they were a part of Australia.[684] No other external territories have the laws of the Commonwealth generally applying in this manner. The Ordinances of the Governor-General have no effect to the extent they purport to affect the application of a federal statute in relation to the Indian Ocean Territories.[685]

10.9 As a result of the *Territories Law Reform Act 1992* (Cth) a Western Australian based legal system was introduced to the Indian Ocean Territories from 1 July 1992. The federal Government has also agreed with the Western Australian State Government for it to administer the new laws with respect to the Indian Ocean Territories on an agency basis on behalf of the Commonwealth. This is to be conducted on a contract basis. This is specifically provided for in s 8H of the respective Acts supporting the existence of each Indian Ocean Territory. In effect this gives responsibility for enforcement of all laws, State and federal, to the appropriate courts of the State of Western Australia.

10.10 For both the Indian Ocean Territories the Western Australian courts have jurisdiction in relation to each Territory as if the Territory were a part of the State of Western Australia.[686] The rules of practice and procedure of the West Australian courts will also apply to each Territory.[687] However, this position is made subject to any other law relating to each Territory existing before July 1 1992 that is to remain in force.[688] The Western Australian Supreme Court is responsible for the overall administration of justice in the Indian Ocean Territories.

10.11 Subject to the preserved existing laws and the laws of the federal Parliament as they apply to each Territory, the laws of Western Australia are also deemed to be in force for each of the Territories.[689] However an Ordinance by the Governor-General relating to any of the Territories may amend or repeal any law of Western Australia.[690] Alternatively, the Western Australian Parliament may terminate the operation of a Western Australian statute in either of the Territories.[691]

Norfolk Island

10.12 The preamble to the *Norfolk Island Act 1979* (Cth) makes it clear that it is the federal Parliament's intention that this Territory should progressively achieve internal self government as a Territory under authority of the Commonwealth. The federal and Norfolk Island Governments have been discussing and negotiating on the progressive transfer of State and local government responsibilities to the Norfolk Island Government. This transfer is still in progress. The position now is that this Territory has a substantial degree of self government with responsibilities similar to those of the Northern Territory and Australian Capital Territory governments.

10.13 The Norfolk Island Legislative Assembly is now the main source of statute law for Norfolk Island. The Assembly has the power to make laws for the peace, order and good government of Norfolk Island. Subject to several express limitations, this is a plenary law making power.[692] However, the Territory is not sovereign. The powers of the Legislative Assembly to legislate for the Territory are subordinate to the powers of the federal Parliament and the Governor-General to

- pass Laws and Ordinances for the Norfolk Island Territory under s 122 of the Australian Constitution and s 27 of the *Norfolk Island Act 1979* (Cth) respectively, and

- disallow part or all of any proposed law of the Legislative Assembly.[693]

The federal Minister also has a power of veto over legislation passed by the Legislative Assembly, the subject matter of which comes within Schedule 3 of the *Norfolk Island Act 1979* (Cth).[694]

10.14 Even though the powers of the Legislative Assembly are expressed in the same terms as the powers of State and internal territory[695] legislatures, the legislative capacity of the Norfolk Island Legislative Assembly is not restricted in the same ways as these other legislatures.[696] For example, State and internal territory legislatures are ordinarily not permitted to make laws in regard to immigration. This is not the case in Norfolk Island which can make such laws with ministerial consent.[697] Norfolk Island has its own immigration, taxation and social security regimes. It is also not constrained by the usual requirement, whether written or unwritten, that trade, commerce and intercourse between the States and the Territories shall be absolutely free.[698]

10.15 Ordinances made by the Governor-General pursuant to s 27 of the *Norfolk Island Act 1979* (Cth) in most cases must be introduced into, and approved by, the Legislative Assembly. However, where urgency requires, this requirement can be dispensed with. The Governor-General may promulgate an Ordinance even if the Legislative Assembly rejects it if the Legislative Assembly's response is deemed to be unacceptable. The federal Parliament has an option to disallow Ordinances of the Governor-General. Conflict between Ordinances and Acts of the Legislative Assembly of the Territory is resolved in favour of the Ordinance.[699] However, conflict between ordinances and Acts of the federal Parliament is resolved in favour of the latter.[700]

10.16 Ordinances made by the Governor-General under the *Norfolk Island Act 1957* (Cth) (now repealed) remain in force until such time as they are amended or repealed by the Assembly or by an Act of the federal Parliament or a later Ordinance of the Governor-General. The same applies to laws made under the *Norfolk Island Act 1913* (Cth). The consolidated laws issued by proclamation on December 24 1913 are the next most important source of law and, in the absence of the Norfolk Island Judicature Ordinance 1960, would have been the final source of law. However, the Judicature Ordinance had the effect of making the Island's legal regime subject to English statutes which were current in 1828 and which had been received in Norfolk Island in 1960.

10.17 Norfolk Island has a Court of Petty Sessions and a Supreme Court. It does not have a county or district court. The Norfolk Island Court of Petty Sessions was established under the Court of Petty Sessions Ordinance 1960. It deals with summary criminal matters and civil matters where the amount of damages sought is $10 000 or less. The jurisdiction, practice and procedure of the Supreme Court of Norfolk Island are set out in the Supreme Court Ordinance 1960.[701] It has unlimited jurisdiction and may sit in the Australian Capital Territory, New South Wales and Victoria. The Court may make its own rules but where it does not the rules of the Australian Capital Territory Supreme Court apply.

Uninhabited external territories

10.18 The uninhabited external territories are generally considered to be

- Ashmore and Cartier Islands

- the Coral Sea Islands

- the Australian Antarctic Territory, and
- the Heard and McDonald Islands.

As indicated above, legislation of the federal Parliament only applies to these external territories if it is expressly stated to do so or if it is obvious from the legislation in question that it was intended to do so. Very few federal laws have been so expressed.

10.19 There are two other sources of law governing these territories. First, Ordinances may be made by the Governor-General for the peace, order and good government of a particular territory.[702] Secondly, each of these external territories is expressly linked by statute to one of the internal territories so that, to the extent that there are no such federal laws or special Ordinances applying, the laws of that particular internal territory are deemed to be in force for the external territory as if the external territory forms part of the internal territory.[703]

10.20 An Ordinance made by the Governor-General may not be made so as to affect the application of an Act of the federal Parliament as it applies to the particular territory.[704] However an Ordinance can amend or repeal an Act that is in force in the external territory by virtue of the adoption of the laws of the relevant internal territory.[705] The courts of the relevant internal territory are granted jurisdiction in and in relation to the relevant external territory.[706] These external territories are for all intents and purposes treated as if they were a part of the internal territory with which they have these legal ties.

Application of remedies principles in the external territories

Introduction

10.21 Notwithstanding their different sources of law, for practical purposes the external territories occupy the same position as the States and the internal territories in regard to

- the remedies available from courts with jurisdiction in relation to those territories for disputes with an international element, and
- the enforcement of judgments of the relevant superior courts in foreign jurisdictions.

This section outlines how the general principles governing cross border civil remedies in Australia also apply in the external territories.

Application of treaties

10.22 By virtue of being part of the Commonwealth, each of the external territories will enjoy the benefit of any treaty or other international agreement to which the federal Government is a signatory.

Reciprocal enforcement of judgments

10.23 Reciprocal enforcement of judgments is discussed in chapter 6. Except where otherwise indicated in chapter 6 the position in relation to enforcement of judgments of the courts of external territories is the same as applies for the States.

10.24 The Foreign Judgments Act specifically extends to each external territory.[707] Consequently money judgments of the court of a foreign jurisdiction to which the Foreign Judgments Act applies are prima facie registrable and enforceable in the external territories. As a result of the reciprocal presumption underlying the Foreign Judgments Act, money judgments of superior courts of Australia are recognised in those foreign jurisdictions. This will include the judgments of the relevant superior courts having jurisdiction in relation to each external territory. Consequently the external territories enjoy the same degree of reciprocal acknowledgment and enforcement of judgments as the other States and Territories.

Judicial assistance

10.25 As outlined above, apart from specific federal Parliament enactments and Ordinances, the rules of court and other applicable law are determined for each external territory (excluding Norfolk Island) by the internal territory or State with which it is associated. Consequently the various forms of judicial and legislative assistance may vary between each external territory because of differences in jurisdictional origins. A detailed investigation of these is beyond the scope of this report. However the position in relation to the Federal Court and the New South Wales Supreme and District Courts is outlined in chapter 6 and for most practical purposes can be considered representative of all States and Territories of the Commonwealth.

Service of process

10.26 While not a direct issue in relation to the enforcement of judgments of Australian courts in foreign jurisdictions, the various enactments throughout the Commonwealth in relation to cross border enforcement within the Commonwealth give further insight into the legal position occupied by the external territories. The position is that the external territories receive no different treatment from any other part of the Commonwealth for the service and execution of process or for mutual enforcement of judgments.

10.27 In particular, the *Service and Execution of Process Act 1992* (Cth) not only applies to all of the external territories[708] but also sets out its deemed application to certain specified States and internal territories.[709] The one exception is Norfolk Island which, as outlined above, does not assume the law of any other State or internal territory. Additionally for the purpose of the Act, the external territories that are not deemed to be part of a State or internal territory, such as Norfolk Island, as well as the internal territories, are to be regarded as States for the purposes of the Act.[710] The Act provides for service between different 'States' and enforcement of judgments of one 'State' in another 'State'. Consequently the Act applies to each of the external territories as if it were either part of a 'State' or a 'State' itself. Thus the same rules apply to enforcement of a judgment of a court of a particular external territory in another State, or vice versa, as apply to enforcement of a judgment of a court of one State in another State.

Corporations Law

10.28 The Corporations Law is an example of a law of the federal Parliament being made to apply expressly to the external territories. However this application is not uniform throughout the Corporations Law, and the external territories are in certain respects treated differently from the rest of the Commonwealth.

10.29 In particular, under the definition of 'foreign company' in the Corporations Law[711] a body corporate incorporated in an external territory, or an unincorporated body formed in an external territory and not having its head office or principal place of business in Australia, is deemed to be a foreign company. 'Australia' is specifically defined to be that area of the Commonwealth excluding the external territories.[712] By contrast the provisions contained in the Corporations Law with respect to listed corporations apply to corporations whether they are listed in Australia or the external territories.[713]

10.30 In relation to the breach of directors' duties outlined in chapter 8, the Corporations Law as it applies to each State, the Australian Capital Territory and the Northern Territory makes no distinction between the external territories and the rest of the Commonwealth.[714] Under s 232(4A) the statutory duties of officers under the Corporations Law apply to any person occupying the position of officer

- of any corporation (local or foreign) discharging duties in the 'jurisdiction' of the relevant State or internal territory

- of a local corporation discharging duties outside the 'jurisdiction' of the relevant State or internal territory, or

- in any other case, discharging duties outside the 'jurisdiction' the relevant State or internal territory but in connection with a corporation carrying on business or doing or not doing things in the 'jurisdiction'.

The term 'jurisdiction' in that section includes the coastal sea of the relevant State or internal territory and, as discussed above, will include where relevant each of the external territories. This is because the external

territories are deemed to have the law of and be included in the jurisdiction of a State or an internal territory. As Norfolk Island is not integrated into any State or internal territory jurisdiction, these provisions do not apply to cover that jurisdiction. Furthermore the Norfolk Island Supreme Court is not given jurisdiction to hear matters relating to the Corporations Law.[715]

Bankruptcy Act

10.31 Pursuant to the Bankruptcy Act the only courts with jurisdiction in bankruptcy are the courts of each of the States, the Federal Court and the Northern Territory.[716] The courts of the external territories are not included. Consequently it is necessary for a request to be made by an external territory court for a court with jurisdiction under the Bankruptcy Act to aid it in matters of bankruptcy.

10.32 A court with jurisdiction in bankruptcy under the Bankruptcy Act must act in aid of and be auxiliary to the relevant court of an external territory.[717] Where there is a letter of request from a court of the external territory the recipient court with jurisdiction in bankruptcy must exercise its powers in regard to the matter as if the matter had arisen within its own jurisdiction.[718] In this respect the Bankruptcy Act operates as a code.[719]

11. International arbitration

Introduction

11.1 Arbitration is increasingly being used for the resolution of commercial disputes. It is particularly relevant to international disputes because it can be a neutral alternative to each party's court system. This chapter is a brief overview of international arbitration from the perspective of Australian law.

11.2 The purpose of this chapter is twofold: first, to provide an overview of the international arbitral organisations available and to outline the nature of the work carried out by them as well as the rules by which they operate. Secondly, to outline some of the major legal issues relating to international arbitrations. The chapter focuses on enforcement and choice of law issues.

International arbitration associations

Overview

11.3 Various organisations and regimes, both government and private, have been established to provide a framework and a place for international commercial arbitration. A number of institutions have evolved (and continue to evolve) which facilitate international arbitration.

11.4 The best known international arbitration organisations are the Paris-based International Chamber of Commerce (ICC), the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) and the London Court of International Arbitration (LCIA). There are also many other arbitral bodies which supervise international arbitrations, including those which are styled as national bodies but which administer a considerable volume of international arbitrations on a regular basis.[720]

International Chamber of Commerce

11.5 The Paris-based International Chamber of Commerce (ICC) runs an arbitration service supervised by the ICC's International Court of Arbitration. Based on its caseload ICC arbitration is probably the most frequently used international arbitration service.[721] In 1994 384 new requests for arbitration were submitted to the ICC and by the end of 1994 the ICC was administering a case- load of 801 pending arbitrations.[722]

11.6 The service provided by the ICC is that of a formal administrative body.[723] The ICC does not conduct arbitrations itself but 'administers' arbitrations all over the world. An arbitration submitted to the ICC is run and heard by an arbitrator, subject to the ICC Rules. Where parties cannot agree on matters such as the place of arbitration or the arbitrators, these are determined by the ICC. After the arbitral award is determined it must be submitted for the approval of the ICC's International Court of Arbitration which has the power to make modifications or draw the arbitrator's attention to points of substance. Costs of the arbitration (which are paid in advance) are divided equally between the parties.

11.7 Some users of ICC arbitration have commented that its procedural rules are too complex. However, the ICC operates on the premise that a high level of supervision and administration is necessary to ensure that cases, especially complex ones, proceed quickly and effectively.

11.8 The ICC requires parties to draw up terms of reference which define the issues at the outset of the arbitration. Some users of the system have queried the benefit of this, commenting that it is impractical to bind parties to the initial claims in the terms of reference because facts uncovered after the beginning of the arbitration often alter the nature of the claims.[724]

11.9 In the Asia-Pacific region there has been an increase in the number of requests for ICC arbitrations in the period 1981 to 1990. In 1981 there were 21 parties from the region involved in ICC arbitration and in 1990 the number was 70. It should, however, be noted that confrontational approaches to dispute resolution (such as arbitration and litigation) are not culturally popular with Asian-Pacific parties.

> ... ICC experience does lend support to the conventional wisdom that arbitration has traditionally been less utilized in the Pacific Basin than elsewhere and is not the preferred method of dispute settlement in certain Asian countries, China and Japan being those most often named, which have a preference for dispute settlement by negotiation, mediation and conciliation.[725]

International Centre for the Settlement of Investment Disputes (ICSID)

11.10 ICSID was created under the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID Convention). It is available only in cases where one of the parties to the dispute is a nation or a national agency.[726] More than 80 national states have ratified the ICSID Convention, including Australia.[727] All of these states have agreed that there shall be no possibility of challenging an ICSID award before the courts of the place of arbitration. All signatories have bound themselves to recognise and enforce ICSID awards to the same extent as if they were final national court judgments.[728] Failure of a nation to carry out the awards of its arbitrations has negative consequences with ICSID and the World Bank, under the aegis of which ICSID operates.

11.11 ICSID supervises and provides facilities for arbitration but does not itself conduct the arbitrations. It has the power to provide facilities for disputes which do not fall within the 'investment' criteria of the ICSID Convention as long as one party is a nation or a national agency. The parties may agree on the arbitrator and the place of arbitration, otherwise the treaty makes provision for these procedural matters.[729]

11.12 ICSID has had a relatively small number of arbitrations - 30 in as many years, of which fewer than 10 have resulted in final awards. However, this statistic must be considered in the light of the relative youth of the organisation as well as the fact that the nature of the institution is unlikely to lead to a large caseload. The transactions to which states (or their agencies) are party tend to be significant and disputes are not embarked upon lightly.

London Court of International Arbitration

11.13 The London Court of International Arbitration (LCIA) is an institution comprised of the Chamber of Commerce, the Corporation of the City of London and the Institute of Arbitrators. Generally, it handles the same type of general commercial dispute as the ICC although the LCIA caseload is much smaller than the ICC. However, like the ICC, the LCIA bears responsibility simply for the organisation of the procedure and for the appointment of the arbitrators.

11.14 In an LCIA arbitration the arbitrator 'can order the preservation, storage, sale or other disposal of any property or thing under the control of any party'.[730] Further, the parties appear to be free to apply to the 'competent court for preaward conservatory measures'.[731] The LCIA can '... order any party to provide security for all or part of any amount in dispute in the arbitration'.[732]

11.15 The rules of the LCIA discourage the appointment of arbitrators who are not independent or impartial. The LCIA retains a discretion, in certain circumstances, to refuse a party the making of a new nomination and to make an appointment of an arbitrator itself.

11.16 LCIA arbitrators may express their award in any currency and may award simple or compound interest at any rate which they consider to be appropriate. They are not bound by interest rates prescribed by law.

Asia-Pacific arbitral bodies

11.17 Several arbitration centres and institutions operate in the Asia-Pacific region, including the

- Singapore International Arbitration Centre (SIAC) and the Singapore Institute of Arbitrators
- Hong Kong International Arbitration Centre (HKIAC)
- China International Economic and Trade Arbitration Commission (CIETAC)
- Korean Commercial Arbitration Board

- Japan Commercial Arbitration Association
- Thai Arbitration Centre (TAC)
- Kuala Lumpur Regional Centre for Arbitration
- Indonesian National Arbitration Association (BANI).

11.18 As well, there are two Australian arbitration institutes which are available for international arbitration

- The Australian Centre for International Commercial Arbitration (ACICA). ACICA is Melbourne-based, operated by an independent board and closely associated with the Australian Institute of Arbitrators
- The Australian Commercial Disputes Centre (ACDC). ACDC is Sydney-based, it acts as the Asia-Pacific Registry for the London Court of International Arbitration and it has various affiliations with arbitral bodies in other countries.[733] ACDC also has a focus on mediation and other forms of alternative dispute resolution.

11.19 It is difficult to obtain comparable statistics on the caseloads of these arbitral bodies. They appear to vary widely, ranging from the relatively small caseload of the Japan Commercial Arbitration Association[734] to the more substantial volume of work handled by the Chinese CIETAC.[735] At all events (with the possible exception of China) the caseload of these organisations is significantly smaller than that of the ICC.[736]

National and international arbitration

11.20 Many countries have a national arbitral body which extends the scope of its operations and offers services for international arbitrations. Some examples include the American Arbitration Association which handles a significant number of international cases due to the large number and strength of the American market players in the international scene, the Arbitration Institute of the Stockholm Chamber of Commerce which has historically been popular in contracts involving the People's Republic of China and the former Union of Soviet Socialist Republics and the Vienna Arbitral Centre of the Austrian Federal Economic Chamber which is often selected in matters involving the former COMECON countries - Hungary, the Czech Republic and Slovakia - especially where the arbitration is likely to be in German.

Specialist arbitral tribunals

11.21 In addition there are many specialised, industry-specific arbitral institutions and bodies which deal only with a particular type of dispute. For example, the Hamburg Commodity Exchange, the Federation of Oils, Seeds and Fats Associations (FOSFA) of London and the Odd Lots Committee of the New York Stock Exchange.[737] There are also industry-specific arbitration rules, such as the recently settled World Intellectual Property Organisation (WIPO) arbitration rules which are used in intellectual property disputes.[738]

11.22 The industry-specific institutions provide assistance in organising arbitrations as well as a set of procedural rules, with varying schemes for matters such as the choice of the arbitrator or arbitral tribunal.

11.23 It is possible to agree to arbitration without referral to a particular arbitration institution. This is known as ad hoc arbitration. It can give rise to particular jurisdictional and procedural issues. Most frequently, in the experience of international arbitrators,[739] problems arise through lack of attention to the procedural pitfalls involved in international arbitrations - the parties need to agree on matters such as the choice of law, the language, place and procedure of the arbitration, the means by which facts will be proved and many other matters. However, ad hoc arbitration can work well if there is a spirit of co-operation and an ongoing relationship which the parties wish to preserve.[740]

Model rules for arbitration

UNCITRAL Model Law

11.24 The UNCITRAL Model Law was developed to provide a standardised and universal set of arbitral rules, suitable for use in any tribunal seeking to resolve a dispute irrespective of the national origin or status of the participants.

11.25 The *International Arbitration Act 1974* (Cth) (International Arbitration Act), an Act of the federal Parliament, provides for the UNCITRAL Model Law (except Chapter VIII) to have the force of law in Australia in international commercial arbitrations. The term 'international commercial arbitration' is the subject of specific definition in the Model Law). The parties may by agreement opt out of using the Model Law. Should the parties opt out, thereby excluding the Model Law and agreeing for example that another set of rules such as the ICC Rules should apply, those other rules will not have the force of law which the International Arbitration Act would otherwise render. The provisions of the State commercial arbitration legislation will, to the extent of any inconsistency, apply and override the rules upon which the parties have agreed. Thus

> ... despite the wider prohibition on recourse to courts contained in the ICC Rules, the full supervisory jurisdiction provided by the Commercial Arbitration Acts would apply, rather than the narrower scope for court action imposed by the Model Law.[741]

11.26 The UNCITRAL Model Law is a comprehensive work governing the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, the conduct of the arbitral proceedings and the making of and recourse against the award. Its provisos give the parties considerable discretion but provide safety nets for decision-making where the parties cannot agree on matters such as the place of arbitration, the number of and the appointment of arbitrators. Rules exist on apportioning the costs of the arbitration which are usually borne by the unsuccessful party. Recourse against the award is through other judicial authorities.

ICSID Convention

11.27 The International Arbitration Act stipulates that Chapters II-VII of the ICSID Convention (to which Australia is a party) have the force of law in Australia where the parties to the dispute are the Government of the Commonwealth and a national of an ICSID Contracting State and the parties have agreed in writing to submit to ICSID. If the ICSID Convention applies, other laws do not.

Non-institutional arbitrations

11.28 Arbitrations which are not 'international commercial arbitrations' under the UNCITRAL Model Law are subject to State and Territory commercial arbitration legislation. This legislation leaves much to the parties themselves about which to reach consensus in the arbitration agreement including questions as to the conduct of the arbitration.

Legal issues in international arbitration

Legal infrastructure

11.29 Arbitration requires a legal infrastructure in which to function. The arbitral process is intended to lead to a binding determination of a dispute. If it is to be binding, the law must support (among other things) the agreement to arbitrate, the arbitral procedures, the determination of substantive liabilities and crucially, the enforcement of the arbitral award.

Unilateral arbitration clauses

11.30 Arbitration is usually based on an arbitration agreement. However, some nations have granted a right to arbitration, usually in relation to actions of public authorities and through ICSID, irrespective of whether any specific agreement has been concluded with the claimant. Most of these rights are in bilateral investment

protection treaties. However, they have recently been included in the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty.

Enforcement

11.31 Enforcement is one of the most important concerns in international arbitration. There are two critical issues. First, there is the problem of enforcing an arbitration agreement. Second, there is the problem of enforcing the final award made as a result of the arbitration.

Enforcing the arbitration agreement

11.32 It is important that an agreement to arbitrate is binding upon the parties to the agreement and enforceable at law. In Australia actions to enforce an arbitration agreement are generally in the form of an action seeking to stay judicial proceedings brought about by the breach of the agreement.[742] Applications for a stay on the basis of an arbitration agreement may be made under State or Territory Commercial Arbitration Acts, the International Arbitration Act or through the inherent jurisdiction of the court.

11.33 The court's jurisdiction to grant the stay will depend on which arbitration law regime applies to the arbitration agreement. It has been argued that there are uncertainties in determining which regime applies, particularly the international regimes for arbitration.[743]

Commercial Arbitration Acts

11.34 State and Territory Commercial Arbitration Acts allow a party to an arbitration agreement to seek a stay of court proceedings instituted in breach of an arbitration agreement.[744] A stay is only available where the applicant has not delivered pleadings or taken any step in the court proceedings other than the entry of appearance. Where an application for a stay is made after the applicant has delivered pleadings in the court action, the applicant for the stay must first seek the court's leave in order to make the application.[745] The power of the court to grant a stay is discretionary but courts have indicated a tendency to grant a stay, particularly where a contract with an international element is involved.[746]

International Arbitration Act 1974

11.35 As mentioned above, the International Arbitration Act adopts the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and the UNCITRAL Model Law on International Commercial Arbitration as part of Australian domestic law. Both have provisions that allow for a stay of court proceedings due to arbitration clauses in international contracts.[747]

11.36 Although the International Arbitration Act is silent as to the extent of the recognition of foreign arbitral awards, it seems that the tendency is to allow the award to be relied on as a defence provided that the award is one made on the merits of the case (and not, for example, entered as a default judgment).[748] It is now established that an issue estoppel can be based on a foreign judgment.[749] However, it is not yet clear whether an issue estoppel can be based on a foreign arbitral award.[750]

Inherent jurisdiction

11.37 Some recent cases indicate that the court has an inherent power to stay proceedings on the basis of an arbitration agreement although courts are reluctant to exercise this jurisdiction.[751] However, such a power could be important if an arbitration agreement does not fall within statutory provisions. This may occur, for example, if the agreement is not in writing.

Enforcement of arbitral awards

11.38 Arbitral awards are generally binding on the parties to the arbitration. Under the International Arbitration Act there are provisions for the recognition and enforcement of foreign awards in Australia. These reflect both the New York Convention and the UNCITRAL Model Law. These provisions are available where the New York Convention or the UNCITRAL Model Law applies to the arbitration agreement. However, s 8(4) of the International Arbitration Act restricts enforcement to awards made in

countries which are also signatories to the Convention or those made in other countries provided that the applicant is domiciled or ordinarily resident in Australia or in a signatory country.

New York Convention

11.39 The New York Convention adopted by the United Nations Conference of International Commercial Arbitration is intended to facilitate enforcement of foreign arbitral awards. It has achieved widespread international acceptance. It proceeds on the assumption that an award has been made and is concerned with the recognition and enforcement of foreign arbitral awards. It is not concerned with the conduct of the arbitration itself. Once an award has been made, if it complies with the requirements of the convention, it will be enforceable in accordance with the terms of the convention.

11.40 Australia is a party to the New York Convention. As at January 1995 there were 102 other nations which had ratified, acceded to and approved the convention.[752] The parties include most countries with which Australia has significant economic dealings, and in particular includes the USA, Japan, China, UK, Canada, New Zealand and all the ASEAN and European Union countries. Taiwan is not a signatory.

11.41 Ratification or accession by a country of an international convention (such as the New York Convention) does not necessarily, of itself, produce the consequence that that country does not need to do more in order to give effect to the convention. Having ratified the convention, that country is bound as a matter of international law to give effect to the convention. The constitutional law of a particular country often requires further steps to be taken before the treaty forms part of the local law of the country. A joint UNCITRAL and International Bar Association project is investigating the extent to which signatory countries have put in place domestic arrangements to enable enforcement in their country of an award under the New York Convention.[753]

11.42 The Indonesian legal system provides an example of the need for domestic arrangements. Although Indonesia ratified the New York Convention in 1981, the Supreme Court of Indonesia decided in 1984 that it was still necessary for implementing regulations to be adopted in order to enable the enforcement of awards under the Convention. The Court held that until this was done the foreign arbitral award could not be enforced by the courts of Indonesia. The implementing regulations were issued in 1990 specifying in detail how foreign arbitral awards can be enforced. The process includes obtaining from the Supreme Court of Indonesia a declaration called an 'exequatur' which will not be issued by the Supreme Court if the foreign arbitral award is contrary to the fundamental principles of the Indonesian legal system, society or public policy. Once the exequatur is granted the award will be enforced.[754]

Reservations under the New York Convention

11.43 Some states have adopted the New York Convention with one or both of the permitted reservations

- the 'reciprocity reservation' - the declaration that a state will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State

- the 'commercial reservation' - a state may declare that it will apply the Convention only to differences arising out of legal relationships, whether or not contractual, which are considered as commercial under the national law of the state making the declaration.

Over 50 states have made the reciprocity reservation and a significant number have made the commercial declaration.[755]

11.44 The New York Convention and the UNCITRAL Model Law provide similar bases on which the enforcement of a foreign award may be refused

- incapacity of a party to the arbitration agreement

- invalidity of the arbitration agreement

- lack of notice or inability to present a case
- award outside submission
- improper composition of arbitral authority or improper arbitral procedure
- award has been set aside or is not yet binding
- subject matter not arbitrable under the *lex fori*
- enforcement contrary to public policy, eg affected by fraud or in breach of natural justice.

11.45 There is also some scope to enforce foreign arbitral awards in Australia at common law where the International Arbitration Act does not apply.[756]

11.46 Some difficulties have arisen in determining the scope of the New York Convention and the UNCITRAL Model Law under the International Arbitration Act. There are few judicial decisions on international arbitration in Australia.[757] These difficulties are outlined in chapter 4.

11.47 Arbitral awards made in Australia would be enforceable overseas in countries which are parties to the New York Convention or have adopted the UNCITRAL Model Law. However, problems of scope and interpretation may exist.

Choice of law

11.48 It is usually necessary to determine at various stages of an arbitration which law should apply to particular aspects of the arbitration. This can be difficult. The law to which an individual reference to arbitrate is subject may be different to the law which governs the general agreement to arbitrate.[758] The applicable laws may vary according to the stage of the arbitration or the issue to be determined. For example, the law applying to a determination of the validity or interpretation of the arbitration agreement often differs from that applying to the arbitration itself.[759]

Laws for the framework of the arbitration

11.49 Parties can select which law is to form the substantive rules of the arbitration to cover, for example, the fairness of the proceedings and the rights of the parties. In Australia if no law is specified and the arbitration agreement satisfies the definition of 'international commercial agreement' in the International Arbitration Act, the UNCITRAL Model Law provides a framework of rules for the conduct of the arbitration.[760] However, parties may decide to arbitrate under other rules.[761] For example, the ICC, the LCIA and the American Arbitration Association all have their own rules of arbitration.

11.50 It may also be open to the parties to empower an arbitrator to resolve a matter in accordance with international law, transnational law or by reference to general principles of justice and fairness. The latter option frees the arbitration itself from any formal system of law. Article 19(1) of the UNCITRAL Model Law supports this proposal

> the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

11.51 However, courts in the United Kingdom have indicated that an arbitration procedure must be governed by the municipal law of a country.[762] Australian courts have not yet commented on this proposition.

Opting out of UNCITRAL

11.52 Some difficulties are caused by opting out of the UNCITRAL Model Law. It has been argued that if parties opt out of the UNCITRAL Model Law, the definition of international commercial arbitration in Article 1(3) of the UNCITRAL Model Law does not apply.[763] This effectively allows parties who have opted out to include their own definition of international commercial arbitration in their arbitration rules. Others argue that in such a situation the domestic Commercial Arbitration Acts apply.[764]

11.53 It has also been argued that by opting out of the UNCITRAL Model Law parties lose statutory protection for recognition and enforcement of Australian arbitration awards.[765] An Australian arbitral award made in Australia by non-Australian parties may not be considered to be a 'foreign arbitral award' under the New York Convention.

Recent Australian cases

Esso Australia Resources Ltd & Others v Plowman & Others*[766] *- confidentiality in arbitration

11.54 The question whether documents produced or information disclosed to an opposing party in an arbitration which is to be heard in private are confidential simply because the arbitration is to be heard in private was determined by the High Court of Australia in *Esso Australia Resources Ltd & Others v Plowman & Others* (Esso v Plowman) in April 1995. The four to one majority decision of the court is that such documents and such information are not confidential merely because of the private nature of the hearing.

The facts

11.55 The case arose out of agreements for the sale of Bass Strait gas by Esso/BHP to two Victorian public utilities, the Gas & Fuel Corporation and the State Electricity Corporation. Esso/BHP sought an increase in the price of the gas supplied pursuant to the agreements. The utilities refused to pay. The agreements contained arbitration clauses and the dispute was referred to arbitration pursuant to those clauses. The utilities sought disclosure of information relating to the calculations justifying the proposed price increases which, in the absence of confidentiality agreements, Esso/BHP was not willing to provide. The utilities refused to enter into confidentiality agreements. Esso/BHP insisted, pointing to the commercially sensitive nature of the information of which disclosure was being sought.

The major questions

11.56 The major questions posed for the court's determination were whether, either because of an implied term in the arbitration agreements or because of the inherent nature of arbitration as a method of resolving disputes

- arbitration hearings are to be conducted in private
- the parties to an arbitration have a general obligation of confidence in relation to all documents and information prepared for and used in the arbitration, and
- the parties to an arbitration have an obligation of confidence in relation to documents and information compulsorily disclosed during the course of an arbitration.

The answers

11.57 In response to those questions the majority of the High Court held that

- while the arbitrator has the power, in determining the procedure to be followed at an arbitration, to decide who shall be present at an arbitration hearing, that power is to be exercised subject to the provisions of the contractual submission to arbitration
- the parties to an arbitration have a narrow duty (similar to that carried by a party in relation to discovered documents) of confidentiality in relation to all documents and information prepared for and used in the arbitration, and
- subject to the legitimate interest of the public in obtaining information about the affairs of public authorities, documents produced under compulsion (pursuant to an arbitrator's direction) attract the same confidentiality which would attach to them if the parties were litigating their dispute.

Confidentiality

11.58 The court took the opportunity to consider the broader question of whether in Australia 'confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration'.[767] The Court held that it was not.

11.59 The majority observed that in an arbitration the goal of complete confidentiality cannot be achieved. This is because, among other reasons

- witnesses in the arbitration could not be bound by any such obligation
- a court may be called upon to review an arbitration award, and
- a party may need to disclose various details about the arbitration to a third party (such as an insurance company).

Privacy

11.60 The court held that in Australia, subject to any contrary intention in the arbitration agreement, arbitrations are to be held in private, that is, they are not open to the public. Chief Justice Mason commented

> ... I prefer to describe the private character of the hearing as something that inheres in the subject matter of the agreement to submit disputes to arbitration, rather than attribute that character to an implied term.

All five judges who heard the case agreed that privacy is an inherent quality of commercial arbitrations.

Commercial concerns

11.61 There has been some criticism of the decision on the ground that it will undermine the confidence of parties in the privacy of arbitration hearings in Australia and thereby make Australia a less attractive location for arbitrations.[768] Other commentators have suggested that these concerns are overstated.[769]

11.62 Few jurisdictions deal with the issue of confidentiality in legislation governing arbitrations.[770] The Singapore legislation provides that on the application of any party, arbitration proceedings shall be heard 'otherwise than in open court'.[771] A wider duty of confidentiality than that stated in Esso v Plowman, does not appear to be provided in more than a handful of jurisdictions.[772]

11.63 Where confidentiality is a concern the parties can provide for a duty of confidentiality in their arbitration agreemnt. Esso/BHP could, for example, have required the arbitration clauses in the gas sale agreements to include a duty of confidentiality. However, parties should be aware that witnesses in the arbitration will not be bound by the arbitration agreement and hence will not be bound by any contractual obligation of confidentiality.

Statutory amendments

11.64 If legislative provision were to be made for the duty of confidentiality, the scope and extent of the duty would need to be addressed. Attention would also have to be given to the question of whether to enact this duty for international arbitrations only or for both international and domestic arbitrations.

Resort Condominiums v Bolwell & Another[773] - enforcement of foreign interlocutory order

11.65 The question of whether an interlocutory order of a foreign arbitrator made in a foreign jurisdiction is enforceable in Queensland as a 'final award' pursuant to the New York Convention, was considered by Lee J in the Supreme Court of Queensland in *Resort Cndominiums International Inc v Bolwell & Another* in October 1993 (Resort Condominiums). The judge held that such an award was not enforceable as an 'arbitral award' pursuant to the Convention. It is understood that the decision is subject to appeal.

The facts

11.66 Resort Condominiums (RCI USA), a US corporation, conducted a world-wide time sharing business. It ran the 'RCI Exchange Program'. Briefly, the program allowed exchange (usually during vacations) between persons in separate countries who wished to spend vacation time in one another's country. RCI USA entered into a license agreement with RCI Australia pursuant to which RCI Australia was permitted to operate the RCI Exchange Program in a certain part of the Asia-Pacific region in exchange for a royalty fee. Disputes broke out between the parties based upon RCI USA alleging against RCI Australia, among other matters, non-payment of royalty fees and breach of other conditions of the license agreement. The license agreement contained an arbitration clause.

11.67 RCI USA obtained a temporary restraining order in the Indiana State Court against RCI Australia which required the provision of information, financial statements and other information including discovery. RCI USA terminated the license agreement. Complex procedural battles took place between the parties, both in the US courts and before an arbitrator in Indianapolis. RCI Australia participated by teleconference in the arbitration proceedings but only to object, asserting that as the license agreement terminated so the right of either party to refer the matter to arbitration had ceased. Having made that point, the representative for RCI Australia withdrew. Nonetheless, the arbitrator heard RCI USA's application for interim relief and made detailed orders. Until the making of a final award, the arbitrator restrained RCI Australia from refusing to comply with the trust account provisions of the license agreement, acting otherwise than in accordance with the arbitration clause, refusing to allow RCI USA access to its financial material and related conduct. In the Supreme Court of Queensland RCI USA sought to enforce the arbitrator's award. RCI Australia opposed the application.

The major questions

11.68 The main questions which Lee J had to decide were whether

- an 'arbitral award', as referred to in the New York Convention, included an interlocutory order made by an arbitrator or whether it only referred to an award which finally determined the rights of the parties
- if an award determines some of the matters in dispute between the parties (an 'interim award') that is sufficient to render it an award which the Australian court would enforce
- a general discretion exists whether to enforce a foreign award
- the orders made by the arbitrator in this case were contrary to public policy.

The answers

11.69 Lee J held that

- a reference to an 'arbitral award' in the New York Convention does not include an interlocutory order made by an arbitrator but only an award which finally determines the rights of the parties
- the expression 'arbitral award' may include a valid interim award, however, the particular ruling made by the arbitrator in this case was not an 'arbitral award' as it did not determine all or at least some of the matters in dispute between the parties
- there exists a general discretion whether to enforce a foreign award
- some of the orders made by the arbitrator were contrary to public policy and so ought not be enforced, being far-reaching as to both subject matter and time and made without regard for the scope of the license agreement.

The issues raised by the decision

11.70 The decision in Resort Condominiums has attracted considerable comment and some criticism. The principal objection to the decision is directed to the decision that there is a general discretion whether to enforce a foreign award, beyond the matters set out in Article V of the New York Convention. Some commentators strongly disagree with this conclusion. They argue that it has seriously undermined the purpose of the convention which is to require enforcement of foreign awards in all cases, subject only to the grounds stated in Article V.[774] Other critics of the decision have said that it is not supported by the authorities cited to support it.[775]

11.71 In addition, there has been criticism of the broad construction the decision appears to give to the public policy exception to the enforcement of foreign awards. This criticism is on the basis that the breadth of this construction could compromise the cardinal objective of the convention, namely the speedy and liberal enforcement of foreign awards.[776]

Appendix A: Participants

The Commission

The Division of the Commission constituted under the *Law Reform Commission Act 1973* for the purposes of this reference comprises the following

President

Alan Rose AO

Deputy President

Sue Tongue (to October 1995)
David Edwards PSM (from December 1995)

Members

Chris Sidoti (to August 1995)
Michael Ryland
Kathryn Cronin (from February 1996)

Officers

Team Leader

Ginta Viliunas (from January 1996)

Law Reform Officers

Sabina Lauber (to April 1996)
Christopher Dellit (from April 1996)

Project Assistants

Tamara Cooper

Typesetting

Anna Hayduk

Library

Joanna Longley *Librarian*
Merryl Charleston *Librarian* (from August to October 1995)
Emma Joneshart *Library Officer* (from April 1995)

Appendix B: Abbreviations

AAA	American Arbitration Association
ABC	Australian Bankruptcy Cases
ABS	Australian Bureau of Statistics
ABLR	Australian Business Law Review
ACCC	Australian Consumer and Competition Commission
ACDC	Australian Commercial Disputes Centre
ACICA	Australian Centre for International Commercial Arbitration
ACLC	Australian Company Law Cases
ACLR	Australian Company Law Reports
ACSR	Australian Corporations and Securities Reports
ADB	Asian Development Bank
ADR	Alternative Dispute Resolution
ADRJ	Australian Dispute Resolution Journal
AFTA	ASEAN Free Trade Area
AGPS	Australian Government Publishing Service
AILEC	Australian International Legal Cooperation Committee
ALI	American Law Institute
ALJ	Australian Law Journal
ALJR	Australian Law Journal Reports
ALRC	Australian Law Reform Commission
ALT	Australian Law Times
APCA	Australian Payments Clearing Association Ltd
APEC	Asia Pacific Economic Cooperation
ASC	Australian Securities Commission
ASEAN	Association of South East Asian Nations
ATOA	Australian Treasury Operators Association
AUSTRAC	Australian Transaction Reports and Analysis Centre
AWAS	Ansett Worldwide Aviation Services
BANI	Indonesian National Arbitration Association
Bankruptcy Act	*Bankruptcy Act 1966* (Cth)
Brooklyn J Int L	Brooklyn Journal of International Law
Brussels Convention	Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968
CAA	*Commercial Arbitration Act 1984* (NSW)
CASAC	Companies and Securities Advisory Committee
CEDA	Council for Economic Development and Assistance
CER	Australia New Zealand Closer Economic Relations Trade Agreement
CHAPS	Clearing House Automated Payment System
CHIPS	Clearing House Interbank Payment System
CIETAC	China International and Economic Trade Arbitration Centre
CLR	Commonwealth Law Reports
Corporations Law	*The Corporations Law, set out in The Corporations Act 1989* (Cth) s 82
CMR	Convention on the Contract for the International Carriage of Goods by Road 1956
CSLJ	Companies and Securities Law Journal
DFAT	Department of Foreign Affairs and Trade
DLR	Dominion Law Reports

ECE	Economic Commission for Europe
ECHO	Exchange Clearing House Ltd
ECR	European Court Reports
ECT	European Energy Charter Treaty
EDI	Electronic Data Interchange
ER	English Reports
ETM	Elaborately transformed manufactures
EU	European Union
FCR	Federal Court Reports
Foreign Evidence Act	*Foreign Evidence Act 1994* (Cth)
Foreign Judgments Act	*Foreign Judgments Act 1991* (Cth)
FRD	Federal Rules Decisions (USA)
FTLR	Financial Times Law Reports
GATT	General Agreement on Tariffs and Trade
Hague Conference	Hague Conference on Private International Law
Hague Evidence Convention	Convention on the Taking of Evidence Abroad in Civil Convention and Commercial Matters 1970
Hague Foreign Judgments Convention	Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters Convention 1971
Hague Service Convention	Convention on the Service of Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters 1965
HKIAC	Hong Kong International Arbitration Centre
HKLR	Hong Kong Law Reports
IBL	International Business Lawyer
ICC	International Chamber of Commerce
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965
IFLR	International Financial Law Review
ILA	International Law Association
ILM	International Legal Materials
ILO	International Labour Organisation
ILSAC	International Legal Services Advisory Council
INSOL	International Association of Insolvency Practitioners
IOSCO	International Organisation of Securities Commissions
ISDA	International Swap Dealers Association
JBFLP	Journal of Banking and Finance Law and Practice
JBL	Journal of Business Law
KB	Kings Bench Reports
LCIA	London Court of International Arbitration
Lloyd's Rep	Lloyd's Reports
LQR	Law Quarterly Review
LRCP	Law Reports Common Pleas

LR QB	Law Reports Queens Bench
Lugano Convention	Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988
MLR	Modern Law Review
MOU	Memorandum of Understanding
M&W	Meeson and Welby's Exchequer Reports
NAFTA	North American Free Trade Association
New York Convention	Convention on the the Recognition and Enforcement of Foreign Arbitral Awards 1958
NSWLR	New South Wales Law Reports
NZLJ	New Zealand Law Journal
OECD	Organisation for Economic Development
PBF	Pacific Business Forum
PECC	Pacific Economic Cooperation Council
QB	Queens Bench Reports
QBD	Queens Bench Division Reports
Qd R	Queensland Reports
QLJ	Queens Law Journal
QWN	Queensland Weekly Notes
Ret (Ct of Sess)	Rettie's Court of Session Cases
SA	South African Reports
SALR	South Australian Law Reports
San Sebastian Convention	Convention on the Accession of the Kingdom of Spain and the Portuguese Republic to the Convention on the Jurisdiction and enforcement of Judgments in Civil and Commercial Matters 1989
SASR	South Australian State Reports
SC	South Carolina Reports
SCR	Supreme Court Reports (Canada)
SCR(NSW)	Supreme Court Reports(New South Wales)
SIAC	Singepore Institute of Arbitrators
SR(NSW)	State Reports (New South Wales)
SWIFT	Society for Worldwide Interbank Telecommunication
TAC	Thai Arbitration Centre
Tas SR	Tasmanian State Reports
TEDIS	Trade Electronic Data Interchange Systems
TIO	Trade and Investment Ombudsman
TLR	Times Law Reports
TPAC	Trade Policy Advisory Committee
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UCP	Uniform Custom and Practice for Documentary Credits (ICC)
UN	United Nations

UNCID	Uniform Rules of Conduct for the Interchange of Trade Data by Teletransmission
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985
UNESCO	United Nations Educational, Scientific and Cultural Organisation
Unidroit	International Institute for the Unification of Private International Law
UNSWLJ	University of New South Wales Law Journal
UQLJ	University of Queensland Law Journal
Vienna Convention	UNCITRAL Convention on Contracts for the International Sale of Goods 1980
VLR	Victorian Law Reports
VR	Victorian Reports
WAR	Western Australia Reports
WIPO	World Intellectual Property Organisation
WLR	Weekly Law Reports
WTO	World Trade Organisation

Appendix C: List of submissions

American Law Institute (Pennsylvania, USA)	*Submission 22*
ASC (Australian Securities Commission, Sydney)	*Submission 32*
Association of Superannuation Funds of Australia Limited (Sydney)	*Submission 16*
ASX (Australian Stock Exchange, Sydney)	*Submission 15*
Attorney-General's Department (Australia)	*Submission 33*
Attorney-General's Department (Australia)	*Submission 18*
Barclay, KF (Scottish Law Commission)	*Submission 20*
Beaumont, The Honourable Justice B A (Federal Court of Australia)	*Submission 5*
BHP (Melbourne)	*Submission 31*
Bieker, N (Hadiputranto, Hadinoto & Partners, Jakarta, Indonesia)	*Submission 13*
Booth, CD (The University of Hong Kong - Faculty of Law)	*Submission 21*
Bradley, MJ (Deacons Graham & James, Hong Kong)	*Submission 14*
Chapple, M (Baker & McKenzie, Sydney)	*Submission 26*
Close, AL QC (BCLRC, Canada)	*Submission 7*
Confidential	*Submission 24*
Confidential	*Submission 45*
Davies, Professor M (The University of Melbourne)	*Submission 25*
Heath, PR (Stace Hammond Grace and Partners, New Zealand)	*Submission 39*
Heath, PR (Stace Hammond Grace and Partners, New Zealand)	*Submission 11*
Jacobs, MS QC (Sydney)	*Submission 12*
Joint Insolvency Committee of the New Zealand Society of Accountants and the New Zealand Law Society	*Submission 35*
Kindred, AM (Shaub & Williams, California, USA)	*Submission 23*
Law Reform Committee (Singapore)	*Submission 8*
Law Reform Committee (Singapore)	*Submission 19*
Lowe, P (Insolvency and Trustee Service of Australia, Canberra)	*Submission 37*
Lowenfeld, Professor AF (New York University)	*Submission 9*
MacDonald, A (Bain & Company, Sydney)	*Submission 34*
Mallesons Stephen Jaques, Sydney (K Coleman)	*Submission 42*
Mallesons Stephen Jaques, Sydney (K Coleman)	*Submission 43*
Mason, R (The University of Southern Queensland)	*Submission 3*
McCracken, Dr S (Macquarie University, Sydney)	*Submission 27*
Nygh, The Honourable P (Sydney)	*Submission 6*
Pinos, T (Cassels Brock & Blackwell, Toronto, Canada)	*Submission 38*
Queensland Law Society Inc - Court Practice and Procedural Committee	*Submission 36*
Russell, J (Asian Development Bank, Manila, The Philippines)	*Submission 29*
Solomon Islands Law Reform Commission	*Submission 30*
Schlosser, Dr P (The University of Munich, Germany)	*Submission 40*
Siehr, Professor Dr KMCL (Rechtswissenschaftliches Seminar der Universitat Zurich)	*Submission 41*
Smart, P St J (The University of Hong Kong, Faculty of Law)	*Submission 17*
Street, Sir L (Sydney)	*Submission 10*
Suhadibroto (Deputy Attorney General for Civil and Administrative Affairs - Indonesia)	*Submission 44*
Sutton, R (Law Commission, New Zealand)	*Submission 1*
Tobias, M QC (The New South Wales Bar Association)	*Submission 4*
Tobias, M QC (The New South Wales Bar Association)	*Submission 2*
Vischer, Dr B (Advokaturbuero/Law Office, Zurich, Switzerland)	*Submission 28*

Appendix D: List of consultations

The Commission consulted the following people and organisations in the course of the reference.

ALRC Sydney seminar - invited audience of practitioners, business people and government, held at Blake Dawson Waldron, 21 March 1996	*Consultation 22*
ALRC Melbourne seminar - invited audience of practitioners, business people and government, held at Mallesons Stephen Jaques, 26 March 1996	*Consultation 24*
AWAS - Ansett Worldwide Aviation Services (Peter Wood, Richard Woods & Iain Dunlop)	*Consultation 43*
Attorney-General's Department (Kathy Leigh & John McGinness, International Civil & Privacy Branch, Civil Law Division)	*Consultation 19*
Attorney-General's Department (Jenny Clift, Julie Brooks, International Trade Law, Business Law Division, Mark Zanker & Andrew Sellars, Insolvency Trustee Service Australia)	*Consultation 26*
Attorney-General's Department (Steven Skehill, Colin Neave, Norman Raeburn, Geoff Bellamy, Civil Law Division & Richard Moss, Insolvency Trustee Service Australia)	*Consultation 1*
Attorney-General's Department (Jim Murphy, Business Law Division)	*Consultation 5*
Attorney-General's Department (Peter Lowe & Mark Zanker, Insolvency & Trustee Service Australia)	*Consultation 4*
AUSTRAC (Neil Jensen)	*Consultation 14*
Austrade (Barbara Higgs)	*Consultation 39*
Bailey, David, John Grace & Tim McEvoy (Freehill Hollingdale & Page, Melbourne)	*Consultation 51*
Bankers Trust Australia (Stephen Lyons, Kevin Bush & Duncan McKay)	*Consultation 32*
Boland, Jenny (Corrs Chambers Westgarth & Family Law Council) & Richard Bell (counsel, NSW Bar)	*Consultation 38*
Church, Peter, Bernadette Murray & Tan Hock Lin (ASEAN Focus Group, Sydney)	*Consultation 10*
Coleman, Karen (Mallesons Stephen Jaques, Sydney)	*Consultation 45*
CSR Ltd (Brian de Boos & Brian Gill)	*Consultation 46*
CSR Ltd (Brian Gill & Chris Bertuch)	*Consultation 34*
Davis, Professor Jim (Australia National University) The Honourable Justice John Lehane (Federal Court of Australia) Richard Pearson (South Pacific Project Facility)	*Consultation 6*
de Fina, Tony (Melbourne)	*Consultation 20*
Dee, Bill (Australian Competition & Consumer Commission, Canberra)	*Consultation 35*
Department of Foreign Affairs & Trade (Tony Vincent, Valerie Grey, Tim Yeend, Mark Scully & Pat Archer)	*Consultation 25*
Diamond, Michael (Diamond Peisah & Co)	*Consultation 2*
Donnelly, Max (Ferrier Hodgson)	*Consultation 48*
Eyre, Richard (Asian Development Bank, Manila)	*Consultation 41*
Fennessy, James (Lend Lease Corporate Services, Sydney)	*Consultation 15*
Gilbert, Ian, Russell Barnier (Australian Bankers' Association) Josephine D'Arcy (National Australia Bank, Melbourne) Alison Champion, Jacqueline Lipton (ANZ, Melbourne)	*Consultation 50*
Griffiths, Gavan (Solicitor-General of Australia)	*Consultation 23*
Gruen, Nicholas (Industry Commission, Melbourne)	*Consultation 11*
Harders, Geoff (Resolution, Canberra), John Butler (Freehill Hollingdale & Page, Canberra), Dennis Rose, Ian Cunliffe & John Clarke (Blake Dawson Waldron, Canberra), Dennis O'Brien (Minter Ellison, Canberra), Brian O'Callaghan (Phillips Fox, Canberra)	*Consultation 3*
Henwood, Neville (legal practitioner, Darwin)	*Consultation 8*
Jacobs, Marcus QC (counsel, NSW Bar)	*Consultation 31*
Kean, Bruce (Sydney)	*Consultation 49*
Kirby, The Honourable Justice Michael (NSW Court of Appeal)	*Consultation 16*
Leung, Conita (Asian Pacific Studies Centre, Sydney University) & Professor Sun (East China University of Politics and Law, Shanghai)	*Consultation 30*
Lindgren, The Honourable Justice Kevin (Federal Court of Australia)	*Consultation 33*

McCawley, Peter (Asian Development Bank, Manila) *Consultation 9*
Merritt, Chris (Australian Financial Review, Sydney) Bryan Frith (The Australian, Sydney) Karen Snowden (ABC, Sydney) *Consultation 12*
Metzger, Barry (Asian Development Bank, Manila) *Consultation 42*
Neasmith, Robyn (Neasmith Consulting Pty Ltd) & Les Andrews (Dresdner Australia Ltd) *Consultation 47*
Nieuwenhuysen, John (Committee for Economic Development of Australia, Melbourne) *Consultation 52*
Nygh, The Honourable Peter (Sydney) *Consultation 29*
Reinhart, Greg (Victorian Law Reform Committee) *Consultation 17*
Rowe, Peter & Michael Vrisakis (Freehill Hollingdale & Page, Sydney) & Ian Matheson (Australian Investment Managers' Association) *Consultation 28*
Salgo, Andrew (Baker & McKenzie, Sydney) *Consultation 7*
Sharpe, Diana (Gillett Sharpe, Sydney) *Consultation 36*
Shepherd, Ian (Partnership Group Pty Ltd) *Consultation 13*
Sigman, Harry (legal practitioner, California) *Consultation 44*
Steele, Keith & Graeme Johnson (Freehill Hollingdale & Page, Sydney) *Consultation 21*
Sutton, Alastair (Forrester, Norall & Sutton, Brussels) *Consultation 18*
Telstra Corporation Ltd (Diane McLean, Kalinga Wijeyewardene & Austin Carwardine) *Consultation 53*
Transfield Holdings Pty Ltd (Gerald Fletcher & Penny Graham) *Consultation 37*
Transparency International Seminar, Sydney (Peter Rooke - Chief Executive) *Consultation 40*
Tucker, John (Attorney-General's Department - International Legal Services Advisory Council & Australian International Legal Cooperation Committee) *Consultation 27*

Appendix E: Terms of reference

Finance law and international commerce

I, DARYL WILLIAMS, Attorney-General of Australia, having regard to the 1996 report of the Law Reform Commission on legal risk in international transactions (ALRC 80) refer to the Law Reform Commission for review and report under the *Law Reform Commission Act 1973* the following aspects of the laws and regulatory practices in Australia relating to cross border financial transactions

- Australian law on netting and set off but considering netting only in relation to cross border transactions *not* covered by the recommendations of the Companies and Securities Advisory Committee arising out of its review of derivatives

- Australia's legal framework for payments systems and the potential for international cooperation on legal issues relating to payments systems

- Australian law on bank confidentiality and privacy, including the potential for international consistency on bank confidentiality, privacy and related data security law

- the prospects for simplifying the doctrine of tracing in relation to claims made on banks and making the doctrine more internationally consistent, and improvements that can be made to Australia's law on restitution in relation to claims of undue enrichment made on banks.

THE COMMISSION shall, in performing its functions in relation to this reference, consult the Attorney-General's Department, the Treasury, the Reserve Bank of Australia, the Australian Securities Commission, the Privacy Commissioner and such other government and private bodies as the Commission considers appropriate.

IN MAKING its report the Commission shall have regard to its function in accordance with section 6(1)(d) of the *Law Reform Commission Act* 1973 to consider and present proposals for uniformity between laws of the Territories and laws of the States.

THE COMMISSION is required to make its report within 2 years from the date of this instrument.

DATED:

Daryl Williams
Attorney-General

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1 See Boxes 1A, 1B, 1C and 2F.
2 There have been a large number of cases. See in particular *Re Bond; ex parte HongkongBank of Australia Ltd* (1991-1992) 105 ALR 581, and *Re Bond; ex parte Ramsay (trustee of Bond, a bankrupt)* (1994) 126 ALR 720.
3 T Sykes *The Bold Riders* Allen & Unwin Sydney 1994, 186-238.
4 T Sykes *The Bold Riders* Allen & Unwin Sydney 1994 321-324.
5 *Re Australian Securities Commission and Skase* (unreported) Federal Court of Australia 30 May 1991.
6 *Re Skase; ex parte Donnelly* (1993) 114 ALR 303.
7 *Australian Securities Commission v Skase* (unreported) Federal Court of Australia 13 January 1993.
8 For an assessment of the ruling of the Spanish Audiencia Nacional refusing the Australian Government's request for extradition see M Gorina *Commonwealth v Skase*: a matter of life or death or a nomination for an Oscar?' (1995) 18 *UNSWLJ* 502.
9 Particular consideration needs to be given to whether there is sufficient connection with Australia and whether the extraterritorial provision will be effective: ASX *Submission 15*; BHP *Submission 31*.
10 Linter Group Ltd *Annual Report 1988*.
11 *United States Trust Co of New York & Others v Australia and New Zealand Banking Group Limited & Others* (1995) 37 NSWLR 131.
12 *Allstate Life Insurance Co & Others v Australia and New Zealand Banking Group Limited & Others* (No 19) (1995) 134 ALR 187.
13 *Linter Group Ltd v Goldberg & Others* (1992) 7 ACSR 580.
14 *United States Trust Co of New York & Others v Australia and New Zealand Banking Group Limited & Others* (1993) 11 ACSR 7.
15 On consumer protection issues arising in cross border transactions see J Goldring Consumer protection, globalization and democracy' an unpublished paper, expected to be published in *Cardozo Journal of International and Comparative Law* Winter 1996 and A Asher Access to justice - the third stage: consumers' access to justice in the global marketplace' *Paper* International Marketing Supervision Network, Vienna December 1995.
16 In 1970 Australian investment stocks outside Australia were $534 million. By 1994 they had grown to $47 575 million, representing an average annual growth of 20.5% during the period: Bureau of Industry Economics *Investment abroad by Australian companies* Report 95/19 AGPS Canberra 1995, 12.
17 Global foreign direct investment increased roughly threefold between 1980 and 1990 at an average annual rate of 11%. It grew even more quickly during 1983 to 1989, at an average annual rate of 29%. This is nearly four times the growth rate of world income (8%) and more than three times the growth rate of world trade (9%) for the same period: Bureau of Industry Economics *Investment abroad by Australian companies* Report 95/19 AGPS Canberra 1995, 3.
18 Bureau of Industry Economics *Potential gains to Australia from APEC* Occasional Paper 29 AGPS Canberra 1995, 12-13.
19 See Boxes 2A-2E.
20 Australian Bureau of Statistics *International merchandise trade Australia - March quarter 1996* ABS Cat No 5422.0 AGPS Canberra 1996, 50-54.
21 'Globally, services have increased their share of exports from 18% in 1985 to 21% in 1991 ... Services directly comprise 20% of Australian exports and 70% of gross domestic product': LEK Partnership *Intelligent exports '... and the silent revolution in services*' : a report Australian Trade Commission Sydney 1994, 13.

22 ALRC Melbourne Seminar *Consultation 24*.
23 Boral Ltd *Annual Report 1994/1995*; Correspondence from Boral Ltd 12 July 1996.
24 Bureau of Industry Economics *Potential gains to Australia from APEC* Occasional Paper 29 AGPS Canberra 1995, 13.
25 Department of Foreign Affairs and Trade *Australia-European Union trade & investment: towards 2000* Department of Foreign Affairs and Trade Canberra 1996, 1.
26 id 2-3.
27 id 3-4.
28 Australian Bureau of Statistics *International merchandise trade Australia - March quarter 1996* ABS Cat No 5422.0 AGPS Canberra 1996, 28-29.
29 TNT *Annual Report 1995*
30 Bureau of Industry Economics *Investment abroad by Australian companies* Report 95/19 AGPS Canberra 1995, xix.
31 id 16.
32 id 23.
33 id xxiv.
34 Telstra *Annual Report 1995*.
35 See Boxes 1A-1C, 2F and 2G.
36 See M Chapple *Submission 26*; S McCracken *Submission 27*; Queensland Law Society *Submission 36*; Confidential *Submission 45*; CSR *Consultation 34*; CSR *Consultation 46*; Transfield *Consultation 37*; J Boland & R Bell *Consultation 38*; K Coleman *Consultation 45*; M Donnelly *Consultation 48*; I Gilbert & Others *Consultation 50*.
37 ABB *Annual Report 1995*; ABB Financial Services *Annual Report 1995*.
38 [1984] 1 NSWLR 7.
39 (1967) 67 SR (NSW) 211.
40 (1958) 98 CLR 310.
41 See J Davis & Others *Consultation 6*; P Church & Others *Consultation 10*; K Steele & G Johnson *Consultation 21*; ALRC Melbourne Seminar *Consultation 24*; ALRC Sydney Seminar *Consultation 22*.
42 Australian Stock Exchange *Yearbook* 1995.
43 Campbell Soup Company *1995 Annual Report*.
44 ASX Public Information System Arnotts Ltd public announcement 14 December 1992 giving extracts from independent expert's report.
45 ASX Public Information System Arnotts Ltd public announcement 24 August 1995.
46 C Cummins 'Campbell lifts Arnotts stake to 70%' *Sydney Morning Herald* 7 May 1996.
47 One factor to consider is the effectiveness of extraterritorial provisions. See ASX *Submission 15*.
48 See P Church & Others *Consultation 10*; ALRC Sydney Seminar *Consultation 22*; ALRC Melbourne Seminar *Consultation 24*; D Sharpe *Consultation 36*; Austrade *Consultation 39*; CSR *Consultation 46*; B Kean *Consultation 49*; Queensland Law Society *Submission 36*; Confidential *Submission 45*.
49 AWAS *Consultation 43*: aviation treaties; Telstra *Consultation 53*: maritime liability; R Neasmith & L Andrews *Consultation 47*: financial market practices.
50 AWAS *Consultation 43*; Telstra *Consultation 53*.
51 P Rowe & Others *Consultation 28*; ALRC Melbourne Seminar *Consultation 24*.
52 See P Church & Others *Consultation 10*; J Fennessy *Consultation 15*; ALRC Sydney Seminar *Consultation 22*; ALRC Melbourne Seminar *Consultation 24*; BT Australia *Consultation 32*; D Sharpe *Consultation 36*; Transfield *Consultation 37*; AWAS *Consultation 43*; CSR *Consultation 46*; R Neasmith & L Andrews *Consultation 47*; B Kean *Consultation 49*; D Bailey & Others *Consultation 51*; J Nieuwenhuysen *Consultation 52*.
53 J Davis & Others *Consultation 6*; ALRC Melbourne Seminar *Consultation 24*; CSR *Consultation 34*; B Kean *Consultation 49*.
54 eg issues were raised with the Commission in relation to the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and the recognition by Australian courts of foreign entities such as Hong Kong limited partnerships: Queensland Law Society *Submission 36*.
55 See A Sutton *Consultation 18*; K Steele & G Johnson *Consultation 21*; ALRC Sydney Seminar *Consultation 22*; ALRC Melbourne Seminar *Consultation 24*; BT Australia *Consultation 32*; CSR *Consultation 34*; D Sharpe *Consultation 36*; Transfield *Consultation 37*; J Boland & R Bell *Consultation 38*; Austrade *Consultation 39*; AWAS *Consultation 43*; K Coleman *Consultation 45*; CSR *Consultation 46*; B Kean *Consultation 49*; Telstra *Consultation 53*.
56 M Jacobs *Consultation 31*; also see ch 11.
57 ALRC Melbourne Seminar *Consultation 24*; J Tucker *Consultation 27*; Transfield *Consultation 37*; J Boland & R Bell *Consultation 38*; D Bailey & Others *Consultation 51*.
58 J Davis & Others *Consultation 6*; D Sharpe *Consultation 36*; CSR *Consultation 46*; B Kean *Consultation 49*; Telstra *Consultation 53*.
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60 On netting, see chapter 5. On corporate capacity, see *Hazell v Hammersmith & Fulham London Borough Council & Others* [1992] 2 AC 1.
61 D Wyatt & A Dashwood *European Community law* 3rd ed Sweet & Maxwell London 1993, 374.
62 Attorney-General's Department *Consultation 26*; Legal Aspects of Regional Cooperation Seminar organised by the Office of the General Counsel, Asian Development Bank, Manila 29 April 1996.
63 A Sutton *Consultation 18*.
64 ALRC Sydney Seminar *Consultation 22*; R Neasmith & L Andrews *Consultation 47*.
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67 This is discussed further in chapter 11.
68 J Davis & Others *Consultation 6*; P Church & Others *Consultation 10*; J Fennessy *Consultation 15*; BT *Consultation 32*.
69 C Chittenden 'After the fall of Maxwell Communications: is the time right for a multinational insolvency treaty ?' (1993) 28 *Wake Forest Law Review* 161, 163.
70 For a more detailed description of the contents of the protocol see P Carrington & B Murphy 'Reconciling UK administration and US chapter 11 after Maxwell' (1992) 11(7) *Internatioanl Financial Law Review* 20, 22.
71 See, eg, *In the Matter of Everfresh Beverages Inc* (unreported) Ontario Court of Justice 20 December 1995.
72 CSR Group Ltd *Annual Report for the year ended 31 March 1995* and CSR *Consultation 34*. There have been a number of proceedings. See in particular *CSR Ltd v New Zealand Insurance Co Ltd* (1994) 36 NSWLR 138, and *CSR Ltd v Cigna Insurance Australia Ltd* (1996) 70 ALJR 565.
73 *Australian Treaty List* AGPS Canberra 1996, as at 31 December 1995, (viii). Not all of these treaties are still in force.
74 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970 acceded to by Australia on 23 October 1992.
75 Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil and Commercial Matters (1965).

76 See Attorney General's Department (Cth) 'Review of developments in international trade law' *Paper* Twenty-Second International Trade Law Conference Canberra 27-28 October 1995, 276-8; F Musolino Investment protection agreements and the trend to a multilateral investment agreement' *Paper* Twenty-First International Trade Law Conference Sydney 17-18 October 1994.
77 G Droz A comment on the role of the Hague Conference on Private International Law' (1994) 57 *Law & Contemporary Problems* 3.
78 *Australian Treaty List* AGPS Canberra 1996, as at 31 December 1995, 351.
79 Under the auspices of the United Nations (UN) and Economic Commission for Europe (ECE).
80 Under the auspices of the International Labour Organisation (ILO), United Nations Educational, Scientific and Cultural Organisation (UNESCO), and World Intellectual Property Organisation (WIPO).
81 Under the auspices of UNCITRAL.
82 Including Alberta, Bahamas, British Columbia, British Virgin Islands, Cayman Islands, Dominica, Falkland Islands, Fiji, France, Germany, Gibraltar, Grenada, Hong Kong, Israel, Italy, Japan, Malawi, Manitoba, Montserrat, New Zealand, Papua New Guinea, St Helena, St Kitts and Nevis, St Vincent & the Grenadines, Seychelles, Singapore, Solomon Islands, Sri Lanka, Tonga, Tuvalu and United Kingdom.
83 Attorney General's Department (Cth) 'Review of developments in international trade law' *Paper* Twenty-Second International Trade Law Conference Canberra 27-28 October 1995.
84 See *Halsbury's Laws of Australia Vol 27: Trade and Commerce* Butterworths Sydney 1995, 420-2375.
85 F Musolino Investment protection agreements and the trend to a multilateral investment agreement' in Attorney-General's Department (Cth) *Paper* Twenty-First International Trade Law Conference Sydney 17-18 October 1994.
86 M Hiscock The OECD Proposal for a multilateral agreement on investments' in Attorney-General's Department (Cth) *Paper* Twenty-Second International Trade Law Conference Canberra 27-28 October 1995.
87 ibid.
88 AUSTRAC *Consultation 14*. In the Osaka Action Agenda APEC economies have undertaken to enhance the competitive environment through effective and adequate competition policy and to eliminate trade and investment distortion arising from domestic regulations which impede free and open trade and investment in this region.
89 For a description of the functions and activities of IOSCO see J Davidson The International Organisation of Securities Commissions' in G Walker & B Fisse (eds) *Securities regulation in Australia and New Zealand* Oxford University Press Melbourne 1994.
90 eg in the US the *International Securities Enforcement Cooperation Act 1990* enables the Securities and Exchange Commission and certain self regulatory organisations to gather evidence and even take administrative action against parties notified by a foreign securities regulator to have committed securities law violations similar to US securities violations.
91 In August 1994 the then Trade Practices Commission (which became the ACCC in November 1995) signed an investigation and enforcement cooperation agreement with the New Zealand Commerce Commission.
92 There are Working Groups on Energy, Fisheries, Human Resource Development, Industrial Science and Technology, Marine Resource Conservation, Tourism, Telecommunications, Trade Promotion, Trade and Investment Data and Transportation.
93 *APEC Bogor Declaration of Common Resolve* 15 November 1994.
94 B Bora The Asia Pacific Economic Cooperation process' in Attorney-General's Department (Cth) *Paper* Twenty-Second International Trade Law Conference Canberra 27-28 October 1995.
95 See ch 4.
96 Asia Pacific Economic Cooperation Experts' Group on Voluntary Consultative Dispute Mediation *Report for the Committee on Trade and Investment* APEC Secretariat, Singapore April 1996.
97 Pacific Business Forum *The Osaka Action Plan: roadmap to realising the APEC vision - report of the Pacific Business Forum* APEC Secretariat, Singapore April 1995.
98 Australian Pacific Economic Cooperation Committee *Harmonising international law to benefit trade, business and investment in the Pacific region: an initiative under the auspices of the Pacific Economic Cooperation Council (PECC): information papers* Australian Pacific Economic Cooperation Committee, Canberra 1995.
99 Bureau of Industry Economics *Impact of the CER Trade Agreement: Lessons for Regional Economic Cooperation* AGPS Canberra 1995.
100 Barker J & Beaumont J Trans-Tasman legal relations-some recent and future developments' (1992) 66 *ALJ* 566. These reciprocal arrangements apply to the Federal Court of Australia and the High Court of New Zealand.
101 Regulations taking effect from 16 October 1992 have been made extending the *Foreign Judgments Act 1991 (Cth)* to the High Court and District Court of New Zealand. See *Foreign Judgments Regulations 1992 (Cth)* reg 3-5.
102 See the *Evidence and Procedure (New Zealand) Act 1994* (Cth), itself part of the recent package of reforms to the Commonwealth evidence laws. The corresponding New Zealand legislation is the *Evidence Amendment Act 1994*.
103 See J Farmer The harmonisation of Australian and New Zealand business laws' in K Vautier, J Farmer & R Baxt (eds) *CER and Business Competition-Australia and New Zealand in a Global Economy* CCH Auckland 1990.
104 Bureau of Industry Economics *Impact of the CER Trade Agreement: Lessons for Regional Economic Cooperation* AGPS Canberra 1995, 32.
105 D Sharpe *Consultation 36*; Transfield *Consultation 37*; B Kean *Consultation 49*.
106 *Copyright (World Trade Organisation) Amendment Act 1994* (Cth) and subsequent regulations; *Trade Marks Act 1995* (Cth) and subsequent regulations.
107 Attorney General's Department (Cth) Review of Developments in International Trade Law' *Paper* Twenty-second International Trade Law Conference Canberra 27-28 October 1995.
108 SM Waddams Codification, law reform and judicial development' (1996) 9 *Journal of Contract Law* 192, 192.
109 L Nottage Trade law harmonisation in the Asia-Pacific region: A realist's view from New Zealand and a way forward?' [1995] NZLJ 295; R Kubarych International regulatory harmonisation: The economic and financial environment', (1988) Vol XIV *Brooklyn J Int L* 255. On the value of harmonisation to international commercial transactions as well as barriers to it see R Goode Reflections on the harmonisation of commercial law' in R Cranston & R Goode (eds) *Commercial and consumer law: national and international dimensions* Clarendon Press New York 1993. On legal harmonisation techniques see L Del Duca Developing transnational harmonisation procedures for the twenty-first century' in R Cranston & R Goode (eds) *Commercial and consumer law: national and international dimensions* Clarendon Press New York 1993.
110 L Nottage Trade law harmonisation in the Asia-Pacific region: a realist's view from New Zealand and a way forward?' [1995] NZLJ 295, 296.
111 R Signore Juridic park: Traps and illusions of harmonisation (A work of legal fiction)' (1995) 77 *Journal of the Patent & Trade Mark Office Society* 699.
112 R Cuming 'Harmonisation of the secured financing laws of the NAFTA partners' (1995) 39 *St Louis University Law Journal* 809.
113 P Legrand 'European legal systems are not converging' (1996) 45 *International & Comparative Law Quarterly* 52. But compare the more optimistic assessment of European Union efforts to harmonise securities laws in M Warren 'Global harmonisation of securities laws: the achievement of the European Communities' (1990) 31 *Harvard Business Law Journal* 185.
114 M Daly & J Weiner 'Corporate tax harmonisation and competition in federal countries: some lessons for the European Community?' 46(4) *National Tax Journal* 441.

115 A more comprehensive set of nine categories is suggested by Professor Goode in R Goode Reflections on the Harmonization of Commercial Law' Cranston & Goode (ed) *Commercial and consumer law: national and international dimensions* Clarendon Press New York 1993, 3.
116 C J Cheng UNCITRAL developments and banking operations' in J Norton, CJ Cheng and I Fletcher *International banking operations and practices: current developments* Graham & Trotman London 1994.
117 Telstra *Consultation 53*.
118 The countries include the United States, nine European Union countries (Belgium, Netherlands, Luxembourg, Germany, Italy, France, Denmark, Portugal and Sweden), several non-EU European countries (eg Greece, Switzerland, Hungary, Norway), some Asian countries (eg Pakistan, the Philippines , Thailand), several African countries (eg, Algeria, Central African Republic, Chad, People's Republic of Congo, Ivory Coast, Egypt, Ethiopia, Mauritius, Morocco, Niger, Rwanda, Seychelles, Togo and Zimbabwe) and several South American countries (eg Argentina, Brazil, Ecuador, Chile, Paraguay and Uruguay).
119 Geneva Convention 1948, Article 1.
120 id, Article 1 para (2).
121 China, Colombia, Dominican Republic, Peru, United Kingdom and Venezuela each signed on 19 June 1948; Ireland signed on 30 November 1948 and Iran signed on 18 March 1950.
122 id Article XV.
123 id Article I.
124 id Article III.
125 id Article IV.
126 id Article VII.
127 AWAS *Consultation 43*.
128 See L Street *Submission 10*; MJ Bradley *Submission 14*; P St J Smart *Submission 17*; CD Booth *Submission 21*; M Davies *Submission 25*; Confidential *Submission 45*.
129 See decision of Pincus J in *Re Skase* (1991) 104 ALR 229.
130 See *Amalgamated Wireless (Australia) Ltd v McDonnell Douglas Corporation* (1987) 16 FCR 238 referred to in M Chapple *Submission 26*.
131 M Chapple *Submission 26*; Queensland Law Society *Submission 36*; A MacDonald *Submission 34*.
132 Attorney-General's Department *Consultation 19*; AM Kindred *Submission 23*; A MacDonald *Submission 34*. See also Law Reform Committee Singapore *Submission 19*.
133 These inconsistencies and gaps are discussed in Attorney-General's Department *Submission 33*.
134 L Aitken 'Transnational bank fraud' (1994) 68(4) *ALJ* 790; Mallesons Stephen Jaques *Submission 42*.
135 M Chapple *Submission 26*; T Pinos *Submission 38*; K Steele & G Johnson *Consultation 21*; CSR *Consultation 34*; see also A Bell 'The negative declaration in transnational litigation' (1995) 111 *LQR* 674 and on the related issue of forum shopping strategies in transnational litigation see A Bell 'The why and wherefore of transnational forum shopping' (1995) 69 *ALJ* 124.
136 T Pinos *Submission 38*; CSR *Consultation 34*; K Coleman *Consultation 45*.
137 See PE Nygh *Conflict of laws in Australia* 6th ed Butterworths Sydney 1995, 108.
138 L Street *Submission 10*.
139 ibid.
140 Article 4(3) of the (German) Private International Law Revision Act 1986 amending the German Civil Code. For an English translation see G Wegen 'Federal Republic of Germany: Act on the revision of the private international law: introductory note' (1988) 27 *ILM* 1.
141 The choice of law rules may need to be more detailed. See B Beaumont *Submission 5* discussing possible misconceptions on choice of law highlighted by *Gardner v Wallace* (1995) 184 CLR 95. See also Australian Law Reform Commission Report No 58 *Choice of law rules* ALRC Sydney (ALRC 58).
142 See M Davies *Submission 25*.
143 See the judgment of Lockhart J in *Sabre Corporation Pty Ltd v Russ Kalvin's Hair Care Company* (1993) 46 FCR 428 holding that the court has the power to direct a party to proceedings to take steps to obtain access to and discover documents which are in the possession, power or control of a third party (including an offshore third party) where there is a real likelihood that the party to the proceedings would be given access to the documents upon request. See also Mallesons Stephen Jaques *Submission 43*; M Davies *Submission 25*.
144 See Rogers J in *Westpac Banking Corporation v Hallibi* (unreported) NSW Supreme Court 22 December 1987.
145 M Davies *Submission 25*.
146 D Levarda 'A comparative study of US and British approaches to discovery conflicts: achieving a uniform system of extraterritorial discovery' (1995) 18 *Fordham International Law Journal* 1340.
147 W Kennet 'The production of evidence within the European Community' (1993) 56 *Modern Law Review* 342, 357.
148 B Beaumont *Submission 5*.
149 Mallesons Stephen Jaques *Submission 43* referring to the NSW decision of Rolfe J in *Application of Forsyth; re Cordova Philips Roxane Laboratories Inc* (1984) 2 NSWLR 327 and the decision of the House of Lords in *Rio Tinto Zinc Corporation & Others v Westinghouse Electric Corporation* [1978] AC 547.
150 *Application of Forsyth* id 333.
151 Mallesons Stephen Jaques *Submission 43*. For a discussion of cross border legal services see Trubek et al 'Global restructuring and the law: studies of the internationalisation of legal fields and the creation of international arenas' (1994) *Case Western Reserve Law Review* 407.
152 eg *Evidence on Commission Act 1995* (NSW), Pt 4.
153 This occurred in *Re State of Norway's Application (No 1)* [1989] 1 All ER 661; *Re State of Norway's Application (No 2)* [1989] 1 All ER 701.
154 Mallesons Stephen Jaques *Submission 42*.
155 s 20 and 3.
156 s 28.
157 Mallesons Stephen Jaques *Submission 42*; see also K Coleman 'The Foreign Evidence Act' (1995) 18 *UNSWLJ* 172.
158 D Campbell *International bank secrecy* Sweet & Maxwell London 1992. Disclosure from foreign banks is commonly sought in respect of tracing fraudulent misappropriation as well as the determination of beneficial ownership of securities in the takeovers context.
159 eg *United States v Bank of Nova Scotia* 691 F 2d 1384 (1983); American Law Institute *Restatement of the law, third: the foreign relations law of the United States* American Law Institute St Paul 1987.
160 eg *R v Grossman* [1981] 73 Cr App R 302; *MacKinnon v Donaldson Lufkin* [1986] 1 All ER 653.
161 For a critique of protective orders as prejudgment security as opposed to responses to evasion of judgment see AA Zuckerman 'Interlocutory remedies in search of procedural fairness' (1993) 56 *Modern Law Review* 325.
162 For an overview see LA Collins 'Provisional and protective measures in international litigation' in LA Collins *Essays in international litigation and the conflict of laws* Clarendon Press Oxford 1994. For the Australian position on those forms of protective orders see ch 7. For a civil law perspective on protective orders see P Schlosser 'Coordinated transnational interaction in civil litigation and arbitration' (1990) 12 *Michigan Journal of International Law* 150.

163 *Ballabil Holdings v Hospital Products* (1985) 1 NSWLR 155; *Coombs & Barei Constructions Pty Ltd v Dynasty Pty Ltd* (1986) 42 SASR 413; *Yandil Holdings Pty Ltd v Insurance Company of North America* [1986] 7 NSWLR 571.

164 C McLachlan 'Transnational interlocutory measures for the preservation of assets' in LL Heng et al *Current legal issues in the internationalisation of business enterprises* Butterworths 1995; see also R Crawford 'The extraterritorial effect of Mareva injunctions — the sleeping giant in fairyland' (1990) 18 ABLR 28.

165 Article 24 of the Brussels Convention provides for Mareva-style injunctive relief in the courts of a Contracting State in support of substantive proceedings pending in the courts of another Contracting State.

166 M Mann et al 'The establishment of international mechanisms for enforcing provisional orders and final judgments arising from securities law violations,' (1992) 55 *Law and Contemporary Problems* 303, 326 and M Mann 'International Securities Law Symposium' (1995) 29 *International Lawyer* 729.

167 Mallesons Stephen Jaques *Submission 42*.

168 *WFM Motors Pty Limited v Maydwell* (unreported) NSW Supreme Court 23 April 1993.

169 [1995] 3 WLR 718 effectively affirming the previous controversial House of Lords decision in *The Siskina* [1979] AC 210; P St J Smart *Submission 17*.

170 LA Collins 'The *Siskina* again: an opportunity missed' (1996) 112 *LQR* 8.

171 Mallesons Stephen Jaques *Submission 42*.

172 *Elliott v Elliott* (1975) 1 NSWLR 148.

173 See *Kodak (Australasia) Pty Ltd v Cochrane* (unreported) NSW Supreme Court 4 April 1996; Corporations Law s 1323(1)(k).

174 eg ALRC Sydney Seminar *Consultation 22*; Attorney-General's *Submission 18*; Queensland Law Society *Submission 36*; M Chapple *Submission 26*.

175 Suhadibroto *Submission 44*. For enforcement of judgments outside Australia generally see ch 6. For a comparative perspective on the enforcement of foreign judgments see J McDermott 'A survey of the methods for the enforcement of foreign judgments and foreign arbitral awards in the Asia-Pacific region' [1989] 12 *Loyola of Los Angeles International & Comparative Law Journal* 114.

176 PE Nygh *Conflict of laws in Australia* 6th ed Butterworths Sydney 1995 ch 9, 10.

177 For a list of the countries to which the Foreign Judgments Act extends reciprocal enforcement benefits see the Foreign Judgments Regulations (Amendment) 1993 (Cth) Schedule.

178 ALRC Sydney Seminar *Consultation 22.*

179 M Chapple *Submission 26.*

180 ALRC Sydney Seminar *Consultation 22.*

181 B Kean *Consultation 49*; CSR *Consultation 46*.

182 A von Mehren 'Recognition and enforcement of judgments: a new approach for the Hague Conference?' (1994) 57 *Law and Contemporary Problems* 271; Attorney- General's Department *Consultation 19;* see also *Comments by Australian Experts: Hague Conference on Private International Law Special Commission on Jurisdiction and Enforcement of Judgments 20-24 June 1994* para 27 affirming the importance of Art 24 (protective orders) of the Lugano Convention. See also K Siehr *Submission 41*.

183 The Brussels Convention was concluded in 1968. In 1988-89 its coverage was extended by the Lugano and San Sebastan conventions to include the six member States of the European Free Trade Association.

184 T McEvoy 'The implications for Australia of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters' (1994) 68 *ALJ* 576, 581.

185 P Lowe *Submission 37*; see also Australian Law Reform Commission Report No 45 *General insolvency inquiry* ALRC Sydney 1988 (ALRC 45); R Sutton *Submission 1*.

186 Mallesons Stephen Jaques *Submission 42.*

187 ibid.

188 eg the letter of request sought from and granted by the Federal Court of Australia to the High Court of Justice to oppose a winding up of one of the companies associated with Alan Bond for the benefit of all creditors: *Dallhold Estates (UK) Pty Ltd*; *Re Dallhold Investments Pty Ltd (In Liq) v Dallhold Estates (UK) Pty Ltd* (1991) 10 ACLC 1374.

189 Mallesons Stephen Jaques *Submission 42*; B Vischer *Submission 28*; M Donnelly *Consultation 48*.

190 P St J Smart *Submission 17*; K Coleman *Consultation 45*; P Schlosser *Submission 40*.

191 Mallesons Stephen Jaques *Submission 42.*

192 ibid.

193 For a description of such memoranda of understanding see ASC *Submission 32*.

194 AUSTRAC *Consultation 14*.

195 R Mason *Submission 3* and cases cited therein. There is a more general international need to recognise foreign proceedings and foreign liquidators: see B Vischer *Submission 28*. Note that in Switzerland proceedings involving cross border elements can use the mechanism of parallel 'mini' proceedings, B Vischer *Submission 28*.

196 eg the foreign judicial assistance provisions in s 29 of the Bankruptcy Act and s 580-581 of the Corporations Law.

197 Corporations Law s 110D.

198 CD Booth *Submission 21*.

199 See Draft UNCITRAL Model Legislative Provisions on Cross Border Insolvency issued in April 1996.

200 See 'The law and practice of international insolvencies, including a Draft Cross Border Insolvency Concordat' *Annual Survey of Bankruptcy Law 1994-95* Callaghan, Wilmette 1995. On the need for a more informal approach see C Chittenden 'After the fall of Maxwell Communications: is the time right for a multinational insolvency treaty?' (1993) 28 *Wake Forest Law Review* 161, 172. See also R Mason *Submission 3*.

201 There are some regional conventions and initiatives (such as the *European Union Convention on Insolvency Proceedings* and the NAFTA/ALI initiative) but these are not relevant to Australia.

202 See Law Reform Committee Singapore *Submission 19*.

203 Note also the relationship with formal protocols on jurisdiction and other issues. In both *In the Matter of Everfresh Beverages Inc* (unreported) Ontario Court of Justice 20 December 1995 and *In re Everfresh Beverages Inc and Sundance Beverages Inc* (unreported) Southern District of New York Bankruptcy Court 20 December 1995 the court ordered the approval and implementation of a Cross Border Insolvency Protocol. Another model on this point could be the protocol adopted by the various national courts in the Maxwell communications case, which led to the first truly worldwide reorganisation resulting from multinational insolvency proceedings: see American Law Institute *A brief description of the transnational insolvency project* American Law Institute Philadelphia 1994 and P Carrington & B Murphy 'Reconciling UK administration and US Chapter 11 after Maxwell' (1992) 11(7) *IFLR* 20. It has been suggested that it could have application to other litigation as well: T Pinos *Submission 38.*

204 See para 82 Report on 18th session of UNCITRAL Working Group on Insolvency.

205 See P Heath *Submission 39.*

206 R Mason *Submission 3*; CD Booth *Submission 21*; P St J Smart *Submission 17*.

207 See Corporations Law Pt 5.7B Div 2.
208 J Albrechtsen 'Extraterritorial implications of Australia's securities laws' in G Walker & B Fisse (eds) *Securities regulation in Australia and New Zealand* Oxford University Press Auckland 1994, ch 29.
209 Usually through the rules set out in the *World Bank Convention on the Settlement of Investment Disputes between States and Nationals of Other States* as administered by the International Centre for Settlement of Investment Disputes (ICSID).
210 R Bond & L Yan 'ICC arbitration in the Asia Pacific region' (1991) 2(1) *The ICC International Court of Arbitration Bulletin (Special Supplement)* 1. See also M Kusuma-Atmadja 'Legal aspects of regional cooperation *Paper* Legal Aspects of Regional Cooperation Seminar organised by the Office of the General Counsel, Asian Development Bank, Manila 29 April 1996.
211 ALRC Sydney Seminar *Consultation 22*; ALRC Melbourne Seminar *Consultation 24;* A Salgo *Consultation 7;* T de Fina *Consultation 20*; J Tucker *Consultation 27.*
212 (1995) 183 CLR 10.
213 T de Fina *Consultation 20.*
214 ibid.
215 MS Jacobs *Submission 12*; MS Jacobs *Consultation 31*.
216 The Commission understands that the International Arbitration Act is also to be reviewed by the Attorney-General's Department in relation to competition and related issues, and by the House of Representatives Standing Committee on Industry, Science and Tourism in relation to fair trading.
217 MS Jacobs *Consultation 31*.
218 In the European Union cross border practice has been liberalised to reflect the freedom to provide legal services across borders within the Union: E Godfrey (ed) *Law without frontiers* Kluwer Law International London 1995, 14-15. See also the legal service country profiles produced by the International Legal Services Advisory Council (ILSAC). Currently profiles are available in relation to the following countries: Singapore, Fiji, Papua New Guinea, Indonesia, Japan, China, Malaysia, Taiwan, Republic of Korea, Thailand, Hong Kong, Philippines, Australia, India, Vietnam, Cambodia and Laos.
219 Mallesons Stephen Jaques *Submission 42*; M Tobias *Submission 2, 4*.
220 L Street *Submission 10*.
221 L Street *Submission 10*; M Tobias *Submission 4*.
222 See ILSAC legal services country profiles.
223 Similar issues can arise in relation to other professional advisors, eg real estate agents: see Queensland Law Society *Submission 36*.
224 R Goode Payment obligations in commercial and financial transactions Sweet & Maxwell London 1983, 100.
225 Australian financial markets' Reserve Bank of Australian Bulletin May 1996, 1, 2-4.
226 B Geva International funds transfer: mechanisms and laws' in JJ Norton, C Reed & I Walden (eds) Cross-border electronic banking, challenges and opportunities Lloyd's of London Press London 1995, 1.
227 ibid.
228 B Geva International funds transfers: mechanisms and laws' in JJ Norton, C Reed & I Walden (eds) Cross-border electronic banking, challenges and opportunities Lloyd's of London Press London 1995, 6.
229 B Geva International funds transfers: mechanisms and laws' in JJ Norton, C Reed & I Walden (eds) Cross-border electronic banking, challenges and opportunities Lloyd's of London Press London 1995, 15-16.
230 The name derives from the liquidation of the small German bank, Bankhaus Herstatt, following the withdrawal of its banking licence in 1974. Just prior to the closure of this bank several of its counterparties had irrevocably paid Deutsche Mark to Herstatt on that day through the German payments system anticipating US dollar receipts later the same day in New York for certain maturing spot and forward transactions. When Herstatt was closed that afternoon in Germany it was mid morning in New York and the New York correspondent bank suspended outgoing US dollar payments from Herstatt's New York account resulting in losses to Herstatt's German counterparty banks as well as loss to depositors with Herstatt.
231 B Geva International funds transfer: mechanisms and laws' in JJ Norton, C Reed & I Walden (eds) Cross-border electronic banking, challenges and opportunities Lloyds of London Press London 1995, 7.
232 Swiss Bank Corporation v State Bank of NSW & Others (unreported) NSW Supreme Court 9 December 1992 and 30 April 1993, and State Bank of NSW v Swiss Bank Corporation (unreported) NSW Court of Appeal 8 September 1995.
233 GC Heinrich Funds transfers, payments and payments systems: international initiatives towards legal harmonisation' in JJ Norton, C Reed & I Walden (eds) Cross-border electronic banking, challenges and opportunities Lloyd's of London Press London 1995, 233.
234 R Bhala The inverted pyramid of wire transfer law' in JJ Norton, C Reed & I Walden (eds) Cross-border electronic banking, challenges and opportunities Lloyd's of London Press London 1995, 153.
235 Clarke T & Bruce R Trade Finance' in R Bruce, M McKern, I Pollard & M Skully (eds) Handbook of Australian corporate finance 4th ed Butterworths Sydney 1992.
236 Many credits issued by US banks incorporate the terms of the US Uniform Commercial Code rather than the UCP.
237 Bank for International Settlements Settlement risk in foreign exchange transactions Basle March 1996; Exchange Clearing House Ltd Summary of G10 Report Settlement risk in foreign exchange transactions': ECHO's role May 1996.
238 eg L Street Submission 10. See also M Hiscock The OECD proposal for a multilateral agreement on investments' Paper Twenty-Second International Trade Law Conference Canberra 27-28 October 1995.
239 A draft Model Bill on bills of lading incorporating considerations relevant to EDI was noted and approved by the Standing Committee of Attorneys-General in March 1996. The Ministers agreed at that meeting that the provisions would be implemented by State and Territory legislation as soon as practicable. On electronic bills of lading generally see D Faber Electronic bills of lading' [1996] Lloyds Maritime & Commercial Law Quarterly 232.
240 ALRC Sydney Seminar Consultation 22; D Bailey & Others Consultation 51.
241 See ALRC Interim Report No 64 Personal Property Securities ALRC Sydney 1993; see also American Law Institute Submission 22.
242 In Australia suspicious financial transactions are reported to AUSTRAC: AUSTRAC Consultation 14. For an examination of the links between banks and regulatory agencies on this topic in other jurisdictions see J Norton (ed) Banks: fraud and crime Lloyd's of London Press London 1994.
243 P Rowe & Others Consultation 28. See ASC Policy Statement 65: Foreign Collective Investment Schemes. The ASC recently approved the marketing in Australia of funds based in the offshore financial centre of Guernsey in the Channel Islands but taxation of foreign investment funds remains in place through Pt XI of the Income Tax Assessment Act to counter tax avoidance relating to the controlled foreign companies and trusts rules contained in Pt X.
244 See ch 8. Tracing is itself not a remedy but a process whereby a plaintiff traces what has happened to his property, identifies the persons who have handled or received it, and justifies his claim that the money which they handled or received (and if necessary which they still retain) can properly be regarded as representing his property: Boscawen v Bajwa [1995] 4 All ER 769, 776. See also G McCormack The eye of equity: identification principles and equitable tracing' [1996] Journal of Business Law 225.
245 See eg Barclays Bank v Glasgow City Council [1994] 4 All ER 865.

246 On English law see Polly Peck International v Nadir (No 2) [1992] 4 All ER 769. On Australian law see Consul Development Pty Ltd v DPC Estates Pty Ltd (1975) 132 CLR 373 expressly confirmed by Kirby P in Equiticorp Finance v Bank of New Zealand (1993) 32 NSWLR 50, 104.

247 See A Oakley Liability of a stranger as a constructive trustee: some English and Australian developments' in M Cope Equity: issues and trends Federation Press Sydney 1995.

248 This used to be an issue in relation to Switzerland. However, to combat money laundering, banks in Switzerland are now required to know the identity of their client and of the beneficial owner of the monies deposited with them: B Vischer Submission 28. See also D Campbell, International bank secrecy Sweet and Maxwell London 1992 and J Norton (ed) Banks: fraud and crime Lloyds of London Press London 1994.

249 For its impact on Australia, New Zealand, Hong Kong and Taiwan see F Chilton & S Cant 'Privacy and the Internet' (1996) IBL 168.

250 JM Berkvens Payment systems, data protection and cross border data flows' in JJ Norton, C Reed and I Walden (eds) Cross-border electronic banking, challenges and opportunities Lloyd's of London Press London 1995 121, 145.

251 I Walden Data security and document image processing: legal security for cross-border Electronic banking' in JJ Norton, C Reed and I Walden (eds) Cross-border electronic banking, challenges and opportunities Lloyd's of London Press London 1995, 29.

252 See eg s 147 Evidence Act 1995 (Cth).

253 International players take up cash card' Australian Financial Review July 22 1996, 23.

254 M Iwamura What to do about electronic money' Paper 14th LawAsia Biennial Conference Beijing 16-20 August 1995, 3. See also A Tyree Virtual cash - payments on the internet: Part 1' (1996) 7 JBFLP 35.

255 The Australian Commission For The Future is expected to release its detailed study into the social implications of smart cards in July 1996.

256 M Iwamura What to do about electronic money' Paper 14th LawAsia Biennial Conference Beijing 16-20 August 1995, 6. See also A Tyree Virtual cash - payments on the internet: Part 1' (1996) 7 JBFLP 6.

257 M Iwamura What to do about electronic money' Paper 14th LawAsia Biennial Conference Beijing 16-20 August 1995, 10. See also A Tyree Virtual cash - payments on the internet: Part 1' (1996) 7 JBFLP 10.

258 Global Derivatives Study Group Derivatives: practices and principles Group of Thirty Washington 1993, 22.

259 Global Derivatives Study Group Derivatives: practices and principles Appendix II Legal enforceability: Survey of 9 Jurisdictions: Enforceability Survey - Australia, Group of Thirty Washington 1.

260 CASAC Regulation of the OTC derivatives market: Discussion paper CASAC Sydney August 1995.

261 CASAC Regulation of the on-exchange derivatives market: Draft report CASAC Sydney June 1996.

262 R Cranston Introduction' in R Cranston (ed) Legal issues of cross border banking Bankers Books Ltd London 1989, 3.

263 S McCracken Submission 27.

264 ibid.

265 See PR Wood English and international set off Sweet and Maxwell London 1989, ch 24.

266 S McCracken Submission 27.

267 See ch 4.

268 eg Final Report of the Broadband Services Expert Group, December 1994, 67; House of Representatives Standing Committee on Legal and Constitutional Affairs In Confidence: a report of the inquiry into the protection of confidential personal and commercial information held by the Commonwealth AGPS Canberra 1995.

269 Guidelines on the Protection of Privacy and Transborder Flows of Personal Data OECD Paris 1981.

270 See F Chilton & S Cant Privacy and the Internet' (1996) IBL 168, 171 which notes that in the Asia Pacific only Hong Kong and Taiwan have introduced such transborder data protection regimes.

271 See A Burrows Understanding the law of restitution: a map through the thicket' (1995) 18 UQLJ 149.

272 ALRC Interim Report No 64.

273 eg R Buckeridge & T Cutler The online economy: maximising Australia's opportunities from networked commerce Cutler & Co Pty Ltd Melbourne 1995.

274 id 8.

275 id 25 (figure 1.24).

276 id, 31-32.

277 ibid. See also F Chilton & E Moloney Regulation of the Internet' (1996) IBL 172.

278 National Information Services Council, Agenda papers from the first meeting of the Council, 10 August 1995 AGPS 1995, 79. See, eg, R Buckeridge & T Cutler The online economy: maximising Australia's opportunities from networked commerce Cutler & Co Pty Ltd Melbourne 1995 (xi).

279 eg R Buckeridge & T Cutler The online economy: maximising Australia's opportunities from networked commerce Cutler & Co Pty Ltd Melbourne 1995 58. See also L Davies Internet and the elephant' (1996) IBL 150, 157.

280 See ASC Background Information Paper Electronic commerce in the financial service industry: challenges and opportunities ASC Sydney 6 May 1996.

281 The question of jurisdiction to determine a cause of action is separate from these jurisdictional issues and is not discussed in this report. It raises issues of substantive law that need to be considered separately.

282 *Voth v Manildra Flour Mills Pty Ltd and Another* (1990) 171 CLR 538.

283 *Ballabil Holdings Pty Ltd v Hospital Products Ltd* (1985) 1 NSWLR 155; *Yandil Holdings Pty Ltd v Insurance Company of North America* (1986) 7 NSWLR 571.

284 Else-Mitchell & JM Bennett The Charter of Justice of New South Wales - its significance in 1974' (1974) 48 *ALJ* 262.

285 *Supreme Court Act 1970* (NSW) s 22 which preserves the continuity of the original court and s 23 which gives the court all jurisdiction which may be necessary for the administration of justice in New South Wales'.

286 eg *Webster v Bread Carters' Union of NSW* (1930) 30 SR (NSW) 267; *Law Society of New South Wales v Weaver* [1974] 1 NSWLR 271; *North Sydney Municipal Council v Comfytex* [1975] 1 NSWLR 447, 450; *Designbuild Australia Pty Ltd v Endeavour Resources Ltd* (1980) 5 ACLR 610; examples include the removal of jurisdiction of the Supreme Court of NSW for environmental matters and consumer claims matters, see *Bathurst City Council v Saban* (1985) 2 NSWLR 704.

287 *Board v Board* [1919] AC 956, 962-963; *Re Totalisator Administration Board of Queensland* (1988) 80 ALR 73.

288 *Constitution Act 1902* (NSW) s 5; see *Robinson v Western Australian Museum* (1977) 138 CLR 283, 294.

289 *Morgan v Goodall* (1985) 2 NSWLR 655, 656; *Goliath Portland Cement Co Ltd v Bengtell and Another* (1994) 33 NSWLR 414, 430.

290 *Morgan v Goodall* (1985) 2 NSWLR 655, 658.

291 *Pearce v Florenca* (1976) 136 CLR 507, 518 cited with approval in *Goliath Portland Cement Co Ltd v Bengtell and Another* (1994) 33 NSWLR 414, 430 and *Union Steamship Co of Aust v King* (1988) 166 CLR 1.

292 *Bonser v La Macchia* (1969) 43 ALJR 275, 280, 295; *Iskra, Re: ex parte Mercantile Transport Co Pty Ltd* [1963] 63 NSWLR 1593, 1605; see also more recently the *Australia Act 1986* (UK) s 2.

293 *Morgan v Goodall* (1985) 2 NSWLR 655, 656.

294 *Re Caruchet* (1899) 9 QLJ 122, 123; see also *R v Robinson* [1976] WAR 155, 157.
295 DC Pearce & RS Geddes *Statutory interpretation in Australia* Butterworths Sydney 1996, 132.
296 The legislation as it relates to the States is the *Coastal Waters (State Powers) Act 1980* (Cth) and the *Coastal Waters (State Title) Act 1980* (Cth). Similar legislation exists for the Northern Territory. See also the *Interpretation Act 1987* (NSW) s 58-63.
297 Constitution s 77(i); *Federal Court of Australia Act 1976* (Cth) s 19.
298 eg from the Constitution s 51(i), (ii), (xvii), (xviii), (xx), (xxxv), 122.
299 *Thomson Australian Holdings Pty Ltd v TPC and Others* (1980-1981) 148 CLR 150, 161; *Federal Court of Australia Act 1976* (Cth) s 19. The Federal Court has authority to decide, subject to intervention by the High Court, whether a matter lies within a jurisdiction with which it is competent for Parliament to vest it: *R v Judges of the Federal Court of Australia and Another; ex parte Western Australian National Football League Incorporated and Another* (1979-1980) 143 CLR 190. Examples of vesting of jurisdiction by Federal Parliament include the *Trade Practices Act 1974* (Cth), *Administrative Appeals Tribunal Act 1975* (Cth), *Administrative Decisions (Judicial Review) Act 1977* (Cth), *Conciliation and Arbitration Act 1904* (Cth), *Corporations Law* and *Native Title Act 1993* (Cth).
300 *Parsons v Martin* (1984) 5 FCR 235, 241; *Jackson v Sterling Industries Ltd* (1986 - 1987) 162 CLR 612, 630. See also *Acts Interpretation Act 1901* (Cth) s 15C.
301 *Moorgate Tobacco Company Ltd v Phillip Morris Ltd* (1979 -1980) 145 CLR 457; *Fencott and Others v Muller and Another* (1982-1983) 152 CLR 570; *Stack v Coast Securities (No 9) Pty Ltd and Others* (1983-1984) 154 CLR 261.
302 *Federal Court of Australia Act 1976* (Cth) s 19, 22 and 32; Constitution *s 76(ii) and 77(i); Adamson v West Perth Football Club* (1979) 27 ALR 475.
303 Section 51(i) of the Constitution has been recognised as being capable of supporting extra-territorial legislation since *Crowe and Others v Commonwealth and Another* (1935) 54 CLR 69, 85-86, 90-91.
304 *R v Foster; ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256, 267.
305 *R v Foster; ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256.
306 s 15B, 15C. The territorial sea is that area up to the 12 nautical mile limit and includes the airspace over and the seabed and subsoil under that area.
307 Its jurisdiction to deal with a matter must be found in the statutory provisions giving jurisdiction to the court': *Donelan v Incorporated Nominal Defendant* [1973] VR 490, 496; *District Court Act 1973* (NSW) s 9.
308 See s 61(2) and s 58-63 generally.
309 *Coastal Waters (State Powers) Act 1980* (Cth) s 4.
310 ie the jurisdiction of the Supreme Court may be extended outside the territorial limits of the State by statute so long as the statute is for the peace order and good government' of the State and the exercise of the jurisdiction is ultimately referrable to the enforcement of the statute within the State.
311 *Goliath Portland Cement Co Ltd v Bengtell and Another* (1994) 33 NSWLR 414, 429-430. Note that this discussion relates to s 10(3) of the *Dust Diseases Tribunal Act 1989* (NSW).
312 *Laurie v Carroll* (1958) 98 CLR 310.
313 With the exception if the person is enticed into the jurisdiction for the purposes of service (*Laurie v Carroll* (1958) 98 CLR 310).
314 eg Supreme Court Rules (NSW) Pt 10 r 1(h).
315 Supreme Court Rules (NSW) Pt 10; Federal Court Rules O 8; *District Court Act 1973* (NSW) s 47.
316 Supreme Court Rules (NSW) Pt 10 r 2(1).
317 *Mackender v Feldia* [1967] 2 QB 590; *Contender 1 Ltd v Lep International Pty Ltd* (1988) 63 ALJR 26.
318 *Sheldon Pallet Manufacturing Co Pty Ltd v New Zealand Forest Productions Ltd* [1975] 1 NSWLR 141.
319 There are some concerns as to whether s 110D of the Corporations Law is constitutionally invalid because results of this kind point to a lack of territorial nexus with the relevant Australian State of incorporation: see J Albrechtsen Extraterritorial application of the Corporations Law - a case for reform' (1994) 12 *Company and Securities Law Journal* 476, 483.
320 Supreme Court Rules (NSW) Pt 9 r 2; District Court Rules (NSW) Pt 8 r 3; Federal Court Rules O 7 r 1.
321 Supreme Court Rules (NSW) Pt 9 r 3(1); District Court Rules (NSW)Pt 8 r 3(3); Federal Court Rules O 7 r 2(2).
322 Corporations Law s 220.
323 Corporations Law s 363(1).
324 Corporations Law s 363(3).
325 Corporations Law s 363(5).
326 Supreme Court Rules (NSW) Pt 9 r 10; *Amos Removals & Storage Pty Ltd v Small* [1981] 2 NSWLR 525.
327 Supreme Court Rules (NSW) Pt 9 r 11, District Court Rules (NSW) Pt 8 r 5(2), Federal Court Rules O 7 r 10; eg *WFM Motors Pty Ltd v Maydwell* (unreported) NSW Supreme Court 23 April 1993.
328 Supreme Court Rules (NSW) Pt 10 r 5; Federal Court Rules O 8 r 5; *BP Exploration Co (Lybia) Ltd v Hunt* [1980] 1 NSWLR 496, 501-502.
329 *Williams v Lips-Heerlen BV* (unreported) NSW Supreme Court 1 November 1991.
330 eg a convention has been entered into by Great Britain, Northern Ireland and the Netherlands on 31 May 1932 to which Australia acceded in April 1935. See *Williams v Lips-Heerlen BV* (unreported) NSW Supreme Court 1 November 1991.
331 Supreme Court Rules (NSW) Pt 10 Division 2; Federal Court Rules O 8 Division 2.
332 Supreme Court Rules (NSW) Pt 10 r 8, 9; Federal Court Rules O 8 r 7, 8.
333 Supreme Court Rules (NSW) Pt 10 r 10; Federal Court Rules O 8 r 9.
334 *Williams v Lips-Heerlen BV* (unreported) NSW Supreme Court 1 November 1991, 10.
335 Federal Court Rules O 8 Division 3.
336 *Esanda Finance Corporation Ltd v Wordplex Information Systems Ltd* (1990) 19 NSWLR 146, 154-155.
337 Supreme Court Rules (NSW) Pt 10 r 6A , Pt 11 r 8; Federal Court Rules O 8 r 11.
338 *Australian Iron & Steel Pty Ltd v Jumbo Scheepvaart Maatschappij (Curacao) MV* (1988) 14 NSWLR 507; *Pendal Nominees Pty Ltd v M & A Investments Pty Ltd* (1989) 18 NSWLR 383.
339 ie, the ground on which it is claimed that there is a right to serve the initiating process outside the jurisdiction. See *Williams v Lips-Heerlen BV* (unreported) NSW Supreme Court 1 November 1991.
340 *Supreme Court Act 1970* (NSW) s 81; *Federal Court Act 1976* (Cth) s 51; *District Court Act 1973* (NSW) s 159; *Leal v Dunlop Bio-Processes International Ltd* (1984) 1 WAR 874; *Camera Care Ltd v Victor Hasselblad Aktiebolaa* (1986) 1 FTLR 348, 354.
341 *Williams v Lips-Heerlen BV* (unreported) NSW Supreme Court 1 November 1991, 17.
342 *Golden Ocean Assurance Ltd and Another v Martin and Others (The Goldean Mariner)* (1990) 2 LLR 215.
343 *Voth v Manildra Flour Mills Pty Ltd and Another* (1990) 171 CLR 538, 564.
344 *Best Australian Ltd v Aquagas Marketing Pty Ltd* (1989) 63 ALR 217.
345 *Oceanic Sun Line Special Shipping Company Inc v Fay* (1987-1988) 165 CLR 197.
346 eg *National Mutual Holdings Pty Ltd and Others v Sentry Corporation and Another* [1989] 87 ALR 539; *Re Siromath Pty Ltd [No 3]* [1991] 25 NSWLR 25; *CSR Ltd v New Zealand Insurance Co Ltd* (1994) 36 NSWLR 138.

347 *National Mutual Holdings Pty Ltd and Others v Sentry Corporation and Another* [1989] 87 ALR 539; *Re Siromath Pty Ltd [No 3]* [1991] 25 NSWLR 25.
348 *Re Siromath Pty Ltd [No 3]* [1991] 25 NSWLR 25.
349 Bankruptcy Act s 29(4).
350 Bankruptcy Act s 29(4); see also *Re Clunies-Ross; ex parte Totterdell* (1988) 82 ALR 475, affirmed in *Clunies-Ross v Totterdell* (1988) 20 FCR 358.
351 *Re Clunies-Ross; ex parte Totterdell* (1988) 82 ALR 475, 483.
352 *Re Clunies-Ross; ex parte Totterdell* (1988) 82 ALR 475, 486.
353 *Re Clunies-Ross; ex parte Totterdell* (1988) 82 ALR 475, 486.
354 *Re Clunies-Ross; ex parte Totterdell* (1988) 82 ALR 475. In *Re Livesey; ex parte Richardson* (1946) 14 ABC 59 the letter of request sought assistance by way of the foreign court (High Court of Justice in England) appointing a local receiver to conduct local recovery proceedings and permittting and authorising' that person to remit recovered money to the receiver already appointed in Sydney.
355 *Pearce v Button* (1985) 8 FCR 40.
356 *Re Clunies-Ross; ex parte Totterdell* (1988) 82 ALR 475.
357 *Dallhold Estates (UK) Pty Ltd; Re Dallhold Investments Pty Ltd (In Liq) v Dallhold Estates (UK) Pty Ltd* (1991) 10 ACLC 1374, 1379.
358 s 5(3).
359 California, USA, Germany, Switzerland, Cook Islands, Indonesia and Vietnam.
360 P Nygh *Conflict of laws in Australia* 6th ed Butterworths Sydney 1995 ch 9. See also the discussion in ch 4 of this report.
361 s 5(3). There are other requirements, eg finality of judgment, however these are not of concern for the purposes of this discussion.
362 s 13.
363 NSW Supreme Court Rules Pt 41 r 15B.
364 Some of these jurisdictions include the Federal Republic of Germany, the Cook Islands, France, Hong Kong, India, Italy, Japan, Malaysia, New Zealand, Singapore, United Kingdom. The USA is not included.
365 Foreign Judgments Act s 15.
366 Note however an unusual exception in *Re Dunn & Edwards* [1936] QWN 14 where the Supreme Court of Queensland ordered that a sequestration order against two debtors, one located within the jurisdiction and the other located in England, be served on the debtor in England under a letter of request to the High Court of Justice, England.
367 *Boucher v Wiseman* (1595) 78 ER 680; *Horton v Ruesby* (1686) Comb 33.
368 *Herrick v United Claude Silver Mining Co* (1892) 13 ALT 252.
369 *General Steam Navigation Co v Guillion* (1843) 11 M&W 877.
370 *Baschet v London Illustrated Standard Co* [1900] 1 Ch 73.
371 eg *Phrantzes v Argenti* [1960] 2 QB 19.
372 *Minister of Public Works of Kuwait v Sir Frederick Snow and Partners* [1983] 1 WLR 818.
373 *Canadian Acceptance Corp Ltd v Matte* (1957) 9 DLR (2d) 304; *Sigurdson v Farrow* (1981) 121 DLR (3d) 183.
374 K Coleman The Foreign Evidence Act' (1995) 18(1) *UNSWLJ* 172, 176-179.
375 ibid.
376 id 187-191.
377 Supreme Court Rules (NSW) Pt 43, r 1(1); *District Court Act 1973* (NSW) s 90A, 91; *Local Courts (Civil Claims) Act 1970* (NSW) s 41(1).
378 Supreme Court Rules (NSW) Pt 45; *District Court Act 1973* (NSW) s 107-112; *Local Courts (Civil Claims) Act 1970* (NSW) s 58-62; Local Courts Rules (NSW) Pt 30.
379 Supreme Court Rules (NSW) Pt 45 r 4(3), 15-24; *District Court Act 1973* (NSW) s 109(b), 110-112; District Court Rules (NSW) Pt 36.
380 Supreme Court Rules (NSW) Pt 46; *District Court Act 1973* (NSW) s 97-106; *Local Courts (Civil Claims) Act 1970* (NSW) s 47(1).
381 Supreme Court Rules (NSW) Pt 46, r 5(2), 10A, *District Court Act 1973* (NSW) s 103, 97E, *Local Courts (Civil Claims) Act 1970* (NSW) s 52A.
382 Supreme Court Rules (NSW) Pt 46 r 3, 8.
383 *District Court Act 1973* (NSW) s 97(4); *Local Courts (Civil Claims) Act 1970* (NSW) s 47(3), 47(5).
384 *District Court Act 1973* (NSW) s 99; *Local Courts (Civil Claims) Act 1970* (NSW) s 49.
385 Supreme Court Rules (NSW) Pt 47. Such orders may be obtained in the lower courts be registering the relevant judgment in the Supreme Court.
386 *Supreme Court Act 1970* (NSW) s 67; Supreme Court Rules (NSW) Pt 29.
387 Bankruptcy Act s 44(1)(b)(i).
388 Bankruptcy Act s 40(1)(g).
389 Bankruptcy Act s 58(1)(b), 58(6), 115, 116, 122.
390 *Deputy Federal Commissioner of Taxation v Winter* (1988) 88 ATC 4144, 4146.
391 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612.
392 *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264; *Perth Mint v Mickelberg (No 2)* [1985] WAR 117; *Deputy Federal Commissioner of Taxation v Winter* (1988) 88 ATC 4144; *Southern Tableland Insurance Brokers Pty Ltd v Schomberg* (1986) 11 ACLR 333; *Pearce v Waterhouse* [1986] VR 603.
393 *Brereton v Milstein* [1988] VR 508.
394 *PCW (Underwriting Agencies) Ltd v Dixon* [1983] All ER 158; *TDK Tape Distributor (UK) Ltd v Videochoice Ltd* [1986] 1 WLR 141.
395 *Bekhor v Bilton* [1981] QB 923, 936.
396 *The Siskina v Distos Compania Naviera SA* [1979] AC 210, recently affirmed by the Privy Council in *Mercedes-Benz AG v Leiduck* [1995] 3 WLR 718.
397 See ch 4. For a criticism of this position see LA Collins '*The Siskina* again: an opportunity missed' [1996] 112 LQR 8.
398 This remedy has been used in both the Federal Court and the NSW Supreme Court.
399 *Distributori Automatici Italia SpA v Holford General Trading Co Ltd* [1985] 1 WLR 1066.
400 See *Anton Piller KG v Manufacturing Process Ltd* [1976] Ch 55, 62.
401 eg *Yousif v Salama* [1980] 1 WLR 1540.
402 *Anton Piller KG v Manufacturing Process Ltd* [1976] Ch 55, 61.
403 Bankruptcy Act s 50(1).
404 s 30(1)(b).
405 *Re Clunies-Ross; ex parte Totterdell* (1988) 82 ALR 475.
406 *Re Hepburn; ex parte Deputy Commissioner of Taxation* (unreported) Federal Court of Australia 10 July 1989.
407 See ch 6.
408 Supreme Court Rules (NSW) Pt 10 r 1A(1)(c).
409 Except for the substitution of the reference to 'State' with 'Commonwealth', Federal Court Rules O 8 r 1(aa), (ab).

410 s 47(a), (b).
411 *Entores Ltd v Miles Far East Corp* [1955] 2 QB 327.
412 See ch 4.
413 Bankruptcy Act s 43(1)(b).
414 *Re Taylor* (1992) 37 FCR 194.
415 *Re Bird v Inland Revenue Commissioner* [1962] 2 All ER 406.
416 Bankruptcy Act s 55(2), (3).
417 *Re Long* (1975) 6 ALR 638.
418 Bankruptcy Act s 309(2).
419 *Re Nelson* [1918] 1 KB 459.
420 *Re Smith* [1930] QWN 11.
421 *Re Trimbole* (1984) 59 ALR 625.
422 *Ginnane v Diners Club Ltd* (1993) 42 FCR 90.
423 *Re Artola Hermanos* (1890) 24 QBD 640.
424 RW Harmer 'Trans-border insolvency' in A Tay (ed) *Australian law and legal thinking between the decades* University of Sydney, Sydney 1990, 165, 174-175. Harmer refers to *Friedrich Goetze & Sons v Aders, Preyer & Co* (1874) 2 SC 150 in support of this proposition.
425 (1890) 24 QBD 640.
426 *Re Anderson* (1911) 1 KB 896 and *Re Temple* (1947) 1 Ch 345.
427 EI Sykes & MC Pryles *Australian private international law* 3rd ed Law Book Co Sydney 1991, 784. See the discussion on cross border insolvency in ch 4.
428 *National Australia Bank Ltd v Dessau* [1988] VR 521; *Coombes & Barei Constructions Pty Ltd v Dynasty Pty Ltd* (1986) 42 SASR 413; *Babanaft International Co SA v Bassatne* [1989] 1 All ER 433; *Derby & Co Ltd v Weldon* [1989] 1 All ER 469; *Ballabil Holdings Pty Ltd v Hospital Products Ltd* (1985) 1 NSWLR 155. Note that Part 10 Rule 1A(1)(o) of the NSW Supreme Court Rules does not apply to Mareva injunctions and hence the jurisdiction of the court to grant Mareva injunctions in relation to assets outside Australia depends on its inherent power to grant this kind of injunction.
429 Only two examples in the English Courts were located, *Altertext Inc v Advanced Data Communications Ltd* [1985] 1 All ER 395 and *Cook Industries Inc v Galliher* [1979] Ch 439. In *Altertext* it was held that an *Anton Piller* order would be provisional only against the foreign property of a foreign defendant and could not be executed until the foreign party had an opportunity to seek to set aside the order. In *Cook Industries* an order was made against the foreign premises of a foreign defendant but after the foreign defendant had been properly served in England, had entered an appearance and was represented by counsel.
430 *Altertext Inc v Advanced Data Communications Ltd* [1985] 1 All ER 395, 399.
431 *British South Africa Co v Companhia de Mocambique* [1893] AC 602.
432 *Penn v Lord Baltimore* (1750) 27 ER 1132; *Richard West & Partners v Dick* [1969] 2 Ch 424.
433 *Hall v Woolf* (1908) 7 CLR 207.
434 *Cockerell v Dickens* (1840) 13 ER 45.
435 *Re Clunies-Ross; ex parte Totterdell* (1988) 82 ALR 475, affirmed in *Clunies-Ross v Totterdell* (1988) 20 FCR 358.
436 Corporations Law s 459C(2)(a).
437 Corporations Law Pt 5.4 Div 2.
438 Corporations Law s 459E.
439 Corporations Law s 459C(2)(b).
440 Corporations Law s 459B.
441 *Re North Sydney Investment Co* (1892) 3 BC (NSW) 81.
442 *Re Redhead Coalmining Co Ltd* (1893) 3 BC (NSW) 50.
443 ibid.
444 *Re Rosenbach & Co Pty Ltd v Singh's Bazaar Pty Ltd* [1962] 4 SA 593.
445 Corporations Law s 461(k).
446 Jurisdiction depends on the existence of an application for the winding-up of the company: *Re A Company* [1973] 1 WLR 1566.
447 *Zempilas v J N Taylor Holdings Ltd (No 2)* (1990) 55 SASR 103; *Re J N Taylor Holdings Ltd* (1990) 3 ACSR 600; Corporations Law s 472(2).
448 *Re McLennan Holdings Pty Ltd* (1983) 7 ACLR 732; *Re Highfield Commodities Ltd* [1984] 3 All ER 884; *Pitt v Bachmann; Re Lockyer Valley Fresh Foods Co-operative* (1980) ACLC 40-671.
449 *Alessi v Original Australian Art Co Pty Ltd* (1989) 7 ACLC 595.
450 *Re Highfield Commodities Ltd* [1984] 3 All ER 884.
451 *Re Carpark Industries Pty Ltd* [1967] 1 NSWLR 337.
452 *Re Bayswood Pty Ltd* (1981) 6 ACLR 107; *Re Codisco Pty Ltd* (1974) ACLC 40-126; *Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* (1989) 19 NSWLR 434. See also s 447 of the Corporations Law which grants equivalent powers to provisional liquidators as those afforded to liquidators, subject of course to a court order invoking these powers.
453 See *Re Bridal Centre Co Ltd* (1985) 9 ACLR 381; *Re Nickel Mines Ltd* (1978) ACLC 40-448.
454 *Re A H Hodge & Sons Ltd* (1984) 2 ACLC 707.
455 Corporations Law s 9.
456 Corporations Law Part 5.7. See also the definition of 'Part 5.7 body' in Corporations Law s 9.
457 *Hyde v Sullivan and Others* [1956] SR (NSW) 113, 119.
458 *Smith v Capewell* [1979] 26 ALR 507, 512. See also *Hope v Bathurst City Council* [1980] 144 CLR 1, 8.
459 Corporations Law s 21(1), (2).
460 Corporations Law s 21(3).
461 eg *Luckins v Highway Motel (Carnarvon) Pty Ltd: re Australian Trailways Pty Ltd* (1975) WAR 85.
462 *Re Norfolk Island Shipping Line Pty Ltd* (1988) 6 ACLC 990, 991.
463 See Corporations Law s 350(14)(b) and s 582(3) which provides that a body incorporated outside Australia may be wound up notwithstanding that it is being wound up or has been dissolved or has otherwise ceased to exist as a body corporate under or by virtue of the laws of the place under which it is was incorporated. See also *Queensland Mercantile Agency Co* (1888) 58 LT 878; *Re Scottish Canadian Asbestos Co* (1890) 18 SCR 667; *Re Federal Bank (No 1)* (1893) 3 BC (NSW) 80.
464 *Mercantile Credits Ltd v Foster Clark (Aust) Ltd* (1964) 112 CLR 169. See also Corporations Law Pt 5.7.
465 Corporations Law s 581(2).
466 Corporations Regulations 5.6.74.
467 Corporations Law s 581(3). See *In re Suidair International Airways Ltd* [1951] Ch 165, 173.
468 *Re Jarvis Conklin Mortgage Co* (1895) 11 TLR 373. See also *Re New England Brewery Co Ltd* [1970] QWN 49.

469 P Nygh *Conflict of laws in Australia* 6th ed Butterworths Sydney 1995, 548.
470 Australia is also participating in the UNCITRAL Working Group on Insolvency Law however this has not yet developed into specific legal arrangements. See ch 4.
471 *Re Azoff-Don Commercial Bank* [1954] Ch 315.
472 Corporations Law s 350(15).
473 *Re Standard Insurance Co Ltd* [1968] Qd R 118.
474 eg *Re Australian Federal Life & Guarantee Assurance Co* [1931] VLR 317. On the distinction between universalist and territorial insolvency jurisdictions see the discussion on cross border insolvency in ch 4.
475 eg *Re Standard Insurance Co Ltd* [1968] Qd R 118; *Re Air Express Foods Pty Ltd* (1977) 2 ACLR 523.
476 Corporations Law s 581(4).
477 *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662, 673. There is some jurisprudential debate on this: see F H Lawson *Remedies of English law* Butterworths London 1980, 140-141 and A Burrows Understanding the law of restitution: a map through the thicket' (1995) 18 *UQLJ* 149.
478 *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 287.
479 R Goff & G Jones *The law of restitution* 4th ed Sweet & Maxwell London 1993, 3.
480 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96 where Mason J classifies the employer/employee relationship as an accepted category' of fiduciary relationship.
481 *Black v Freedman* (1910) 12 CLR 105.
482 *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.
483 J Glover *Commercial equity: fiduciary relationships* Butterworths Sydney 1995, 224.
484 J Glover *Commercial equity: fiduciary relationships* Butterworths Sydney 1995, 226-228.
485 J Glover *Commercial equity: fiduciary relationships* Butterworths Sydney 1995, 221-222. See *Stephenson v Barclays Bank Trust Co Ltd* [1975] 1 WLR 882, 891.
486 *Re Diplock* [1948] 1 Ch 465, 529-39. See also *Hewett v Court* (1983) 149 CLR 639.
487 *Docker v Somes* (1834) 39 All ER 1095.
488 *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488, 494.
489 *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, 32.
490 *Estate Realties Ltd v Wignall* [1991] 3 NZLR 482, 496.
491 *Docker v Somes* (1834) 39 All ER 1095, 1099; *Wallersteiner v Moir (No 2)* [1975] QB 373, 388, 39 & 406; *Re Dawson (dec'd)* [1966] 2 NSWLR 211, 217.
492 *Nixon v Furphy* (1926) 26 SR (NSW) 409, 418.
493 *Bayne v Stephens* (1908) 8 CLR 1, 24.
494 *Re Dawson (dec'd)* [1966] 2 NSWLR 211, 218.
495 eg *Seager v Copeydex (No 1)* [1967] 2 All ER 415; *Re Dawson (dec'd)* [1966] 2 NSWLR 211, 214-215; *Re Leeds & Hanley Theatre of Varieties* [1902] 2 Ch 809; *Nocton v Lord Ashburton* [1914] AC 932.
496 eg R Meagher, W Gummow & J Lehane *Equity: Doctrines and remedies* 3rd ed Butterworths Sydney 1992, 52-53, 649-650 & 887-889.
497 See the cases listed in J Glover *Commercial equity: fiduciary relationships* Butterworths Sydney 1995, 264-5.
498 *Tio v Waddell (No 2)* [1977] Ch 106, 238; *McKenzie v McDonald* [1927] VLR 134, 146.
499 *Caffrey v Darby* (1801) 31 ER 1159.
500 *Re Dawson (dec'd)* [1966] 2 NSWLR 211.
501 *Cook v Evatt (No 2)* [1992] 1 NZLR 676; *Norberg v Wynrib* (1992) 92 DLR (4th) 449, 505-7.
502 *Polly Peck International Plc v Nadir* (No 2) [1992] 4 All ER 769.
503 *A v C* [1981] QB 956; *Bankers Trust Co v Shapira* [1980] 1 WLR 1274.
504 *Bankers Trust Co v Shapira* [1980] 1 WLR 1274, 1282.
505 *A v C* [1981] QB 956, 959.
506 *Arab Monetary Fund v Hashim (No 5)* [1992] 2 All ER 911, 913.
507 *Re Diplock* [1948] 1 Ch 465. See also *Re Dover Pty Ltd* (1981) 6 ACLR 307.
508 eg *Pilcher v Rawlins* (1872) 7 Ch App 259.
509 *James Roscoe (Bolton) Pty Ltd v Winter* [1915] 1 Ch 62; *Re Joscelyne* [1963] Tas SR 4; *Lofts v MacDonald* (1974) 3 ALR 404; *Re Dover Pty Ltd* (1981) 6 ACLR 307.
510 *Re Diplock* [1948] 1 Ch 465, 521.
511 The nature of the mixing will be determined by the answers to questions such as : Were the funds mixed with the funds of the fiduciary? Were they mixed with other funds held on trust by the fiduciary? Were they mixed with the funds of an innocent volunteer? Were the funds mixed in an active and perpetuating bank account?
512 *Re Clayton's Case* (1817) 35 All ER 781. See also *Re Hallett's Estate* (1880) 13 Ch D 696.
513 *Ilich v The Queen* (1986) 162 CLR 110, 128.
514 *Banque Belge pour L'etranger v Hambrouck & Others* [1921] 1 KB 321.
515 *Moss v Handcock* [1899] 2 QB 111, 118. See also *R v Grant* [1979] 2 NSWLR 478, 487-488.
516 *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276, 298-299.
517 *Eagle Trust Plc v SBC Securities Ltd* [1992] 4 All ER 488.
518 *Stephens Travel Service International Pty Ltd v Qantas Airways Ltd* (1988) 13 NSWLR 331.
519 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373.
520 *Biala Pty Ltd v Mallina Holdings Pty Ltd* (1993) 11 ACSR 785, 832. Indeed, a third party accessory can be liable as constructive trustee even where the primary breach by the fiduciary is innocent or mistaken where the accessory knowingly and dishonestly assists in the breach of trust: *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3All ER 97 PC.
521 *Baden v Societe Generale* [1992] 4 All ER 161, 234.
522 *Wickstead v Browne* (1992) 30 NSWLR 1, 16.
523 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 412.
524 Supreme Court Rules (NSW) Pt 10 r 1A(a); Federal Court Rules O 8 r 1(a); *District Court Act 1973* (NSW) s 47(a).
525 *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458; *Jacobs v Australian Abrasives Pty Ltd* [1971] Tas SR 92; *My v Toyota Motor Co Ltd* [1977] 2 NZLR 113.
526 This lack of regulatory provision has been identified in L Aitken Transnational bank fraud' (1994) 68 *ALJ* 790, 791-792.
527 *Polly Peck International Plc v Nadir (No 3)* (unreported) Court of Appeal England 17 March 1993, 3.
528 Rogers CJ comments in *Swiss Bank Corp v State Bank of New South Wales* (unreported) NSW Supreme Court 9 December 1992 that where two or more systems of law are available as candidates for determining a claim for unjust enrichment, Australian law offers no authority and little guidance as to the principles to be applied in making a choice'.

529 See *Arab Monetary Fund v Hashim (No 9)* [1993] 1 Lloyds Rep 543.
530 In Australia it is arguable whether such an injunction can be obtained prior to the actual commencement of proceedings: see *Earthline Constructions Pty Ltd v State Rail Authority of New South Wales* (unreported) NSW Court of Appeal 26 October 1992.
531 See *Riley McKay Pty Limited v McKay* [1982] 1 NSWLR 264, 277; *Patterson v BTR Engineering (Australia) Limited* (1989) 18 NSWLR 319, 329-330; *Coxton Pty Limited v Milne* (unreported) NSW Court of Appeal 20 December 1985.
532 See IC Spry *The principles of equitable remedies* 4th ed Law Book Co Sydney 1990, 550-551.
533 See *Altertext Inc v Advanced Data Communications Ltd* [1985] 1 All ER 395.
534 *Nanus Asia Company Inc v Standard Chartered Bank* [1990] 1 HKLR 396, 410; *R v Grossman* (1981) 73 Cr App R 302.
535 *Nanus Asia Company Inc v Standard Chartered Bank* [1990] 1 HKLR 396, 410.
536 ibid.
537 See *Tournier v National Provincial & Union Bank* [1924] 1 KB 461.
538 [1990] 1 HKLR 277, 283.
539 ibid.
540 [1990] 1 HKLR 396.
541 See generally *Alfadda v Fenn* (1993) 149 FRD 28 and the discussion in L Aitken Transnational banking fraud' (1994) 68 *ALJ* 790, 800-804. For an analysis of Swiss secrecy laws on statutory disclosure requirements under the Corporations Law see *Australian Securities Commission v Bank Leumi Le-Israel* (1995) 18 ACSR 639.
542 eg the US Federal Court in *Minpeco SA v Conticommodity Services Inc* (1987) 116 FRD 517. The head office of the bank will invariably be located in the US therefore the consequences of contempt will be all the more real. See also LA Collins Extraterritorial provisional measures' in LA Collins *Essays in international litigation and the conflict of laws* Clarendon Press Oxford 1994, 91-92.
543 *Minpeco SA v Conticommodity Services Inc* (1987) 116 FRD 517, 524.
544 id 530.
545 *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd* (1936) 54 CLR 361.
546 *O'Connor v S P Bray Ltd* (1936) SR (NSW) 248.
547 *Luna Park (NSW) Pty Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286.
548 *Federal Court of Australia Act 1976* (Cth) s 51A; *Supreme Court Act 1970* (NSW) s 94; District Court Rules (NSW) Pt 31 r 13A.
549 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827.
550 *Chaplin v Hicks* [1911] 2 KB 786; *Howe v Teefy* (1927) 27 SR (NSW) 301.
551 *McRea v Commonwealth Disposals Commission* (1951) 84 CLR 377.
552 *Hungerfords v Walker* [1988] 171 CLR 125.
553 *Monarch SS Co Ltd v A/B Karlshamns Oljefabriker* [1949] AC 196; *Hadley v Baxendale* (1854) 156 All ER 145.
554 eg *Roper v Johnson* (1873) LR 8 CP 167; *T C Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 37 ALJR 289.
555 See *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428. The power to grant injunctive relief is also echoed in various statutory provisions; see *Supreme Court Act 1970* (NSW) s 66; *District Court Act 1973* (NSW) s 46; *Federal Court of Australia Act 1976* (Cth) s 23.
556 *Melbourne & Newcastle Minmi Colliery Co v McLean* (1864) 3 SCR (NSW) Eq 109; *Cook v Rogers* (1946) 46 SR (NSW) 229; *Aristoc Industries Pty Ltd v R A Wenham (Builders) Pty Ltd* [1965] NSWLR 581.
557 *Cook v Rogers* (1946) 46 SR (NSW) 229.
558 See *Supreme Court Act 1970* (NSW) s 75; *Federal Court of Australia Act 1976* (Cth) s 21(2).
559 *Johnco Nominees Pty Ltd v Albury Wodonga (New South Wales) Corporation* [1977] 1 NSWLR 43.
560 See Federal Court Rules O 8 r 1(a), (aa), (ab), (ae), (h); Supreme Court Rules (NSW) Pt 10 r 1A(a), (b), (c), (k), (n); *District Court Act 1973* (NSW) s 47.
561 *Cuban Atlantic Sugar Sales Corp v Compania de Vapores San Elefterio Lda* [1960] 1 QB 187; *Luke v Mayoh* [1920] SALR 391; *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725.
562 *Haldane v Johnson* (1853) 155 ER 1529; *Shallay Holdings Pty Ltd v Griffith Co-operative Society Ltd* (1982) 48 ALR 304.
563 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39; *The Registrar of Titles v Spencer* (1909) 9 CLR 641, 645.
564 *Piper v Darling* (1940) 67 Lloyd's Rep 419.
565 *Owners of Dredges Liesbosch v Owners of Steamship Edison* [1933] AC 449.
566 *Electricity Trust of South Australia v O'Leary* [1986] 42 SASR 26.
567 *Owners of Dredges Liesbosch v Owners of Steamship Edison* [1933] AC 449.
568 *Jones v Port of London Authority* [1954] 1 Lloyd's Rep 489.
569 *Moore v DER Ltd* [1971] 3 All ER 517.
570 *Millar v Candy* (1981) 58 FLR 145.
571 *Lamb & Cotogno* (1987) 164 CLR 1.
572 *Freudhofer v Poledano* [1972] VR 287.
573 *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71, 77.
574 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118.
575 *Midalco Pty Ltd v Rabenalt* [1989] VR 461.
576 *Baume v Commonwealth* (1906) 4 CLR 97.
577 *McKenna v Richey* [1950] VLR 360.
578 *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 2 All ER 321.
579 *Chapman v Hearse* (1961) 106 CLR 112.
580 *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty (The Wagon Mound) [No. 2]* [1967] 1 AC 617.
581 The relevant provision in the other Australian courts to be examined are Federal Court Rules O 8 r 1 and *District Court Act 1973* (NSW) s 47(1).
582 See also Federal Court Rules O 8 r 1 (ad).
583 See *Keevers v O'Neill* [1977] 1 NSWLR 587.
584 See *Darrell Lea Chocolate Shops Pty Ltd v Spanish-Polish Shipping Co Inc* (1992) 25 NSWLR 568; *Flaherty v Girgis* (1985) 4 NSWLR 248; *Brix-Neilsen v Oceaneering Australia Pty Ltd* [1982] 2 NSWLR 173; *Challenor v Douglas* [1983] 2 NSWLR 405.
585 *Darrell Lea Chocolate Shops Pty Ltd v Spanish-Polish Shipping Co Inc* (1992) 25 NSWLR 568.
586 ibid.
587 Federal Court Rules O 8 r 1 (ad).
588 *Thomas v Penna* (1985) 2 NSWLR 171.
589 *Breavington v Godleman* (1988) 169 CLR 41, 110-11. See also *Phillips v Eyre* (1870) 6 LR QB 1, 28-29.
590 This third requirement was added in *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1. See also *Stevens v Head* (1993) 176 CLR 433.
591 *Phillips v Eyre* (1870) 6 LR QB 1.

592 *Breavington v Godleman* (1988) 169 CLR 41, 110-111.
593 *D'Almeida Araujo Lda v Sir Frederick Becker & Co Ltd* [1953] 2 QB 329, 336; *Stevens v Head* (1992) 176 CLR 433, 457.
594 *Stevens v Head* (1993) 176 CLR 433, 457; *Breavington v Godleman* (1988) 169 CLR 41.
595 *Stevens v Head* (1993) 176 CLR 433, 457; *Breavington v Godleman* (1988) 169 CLR 41.
596 *Re Greene & Fawcett Ltd* [1942] Ch 304.
597 *CAC v Papoulias* (1990) 20 NSWLR 503; *Feil v Corporate Affairs Commission* (1991) 9 ACLC 811.
598 *Marchesi v Barnes* [1970] VR 434.
599 *Australian Growth Resources Corp Pty Ltd v Van Reesema* (1988) 13 ACLR 261; 6 ACLC 529.
600 *AWA Ltd v Daniels (t/as Deloitte Haskins & Sells)* (1992) 7 ACSR 759.
601 *Lister v Romford Ice & Gold Storage Co Ltd* [1957] AC 555.
602 See *Transvaal Lands Co v New Belgium (Transvaal) Land & Development Co* [1914] 2 Ch 488.
603 See *Jenkins v Enterprise Gold Mines NL* [1992] 6 ACSR 539. Such a director will also contravene the Corporations Law s 232A.
604 See *Re Dawson (dec'd)* [1966] 2 NSWLR 211.
605 eg *McKenzie v McDonald* [1927] VLR 134.
606 Corporations Law s 232(6B).
607 Corporations Law s 1317EB.
608 Corporations Law s 1317HA(2).
609 Corporations Law s 1317HA(3).
610 Corporations Law s 1317HA(1).
611 Corporations Law s 1317HB(1).
612 Corporations Law s 1317HA(2).
613 Corporations Law s 1317HD(1)(d).
614 ie there are no grounds under the Supreme Court Rules (NSW) Pt 10; Federal Court Rules O 8 or the *District Court Act 1973* (NSW) s 47.
615 Corporations Law s 232(4A).
616 Corporations Law s 232(4A).
617 Bilateral agreements exist with Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iraq, Israel, Italy, Laos, Lebanon, Lithuania, Montenegro, Netherlands, Norway, Poland, Portugal, Serbia, Slovac Republic, Spain, Sweden, Switzerland and Turkey. The status of treaty arrangements with Croatia, Bosnia Hercegovina and Slovenia is currently unclear. A treaty with Thailand is currently being negotiated.
618 *Consular Privileges and Immunities Act 1972* (Cth).
619 Agreements currently exist with New Zealand, some Canadian provinces (Alberta, British Columbia and Manitoba only), Bahamas, British Virgin Islands, Cayman Islands, Dominica, Falkland Islands, Fiji, France, Germany, Gibraltar, Grenada, Hong Kong, Israel, Italy, Japan, Malawi, Montserrat, Papua New Guinea, St Helena, St Kitts and Nevis, St Vincent and the Grenadines, Seychelles, Singapore, Solomon Islands, Sri Lanka, Tonga, Tuvalu, United Kingdom. Discussions are currently under way to establish bilateral treaties with Austria, Greece, the Netherlands, Spain, Switzerland and Thailand.
620 *Foreign Judgments Act 1991* (Cth) s 5(1), 5(3) and 5(6).
621 For example, the US, Vietnam and Indonesia.
622 *Agreement between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters 1990.*
623 New rules affect Australian, United Kingdom cases' (1990) 25(10) *Australian Law News* 12. See Article 2(2) of the Convention. Thus the UK courts agree to assist Australian parties recover compensation entitlements granted pursuant to s 10 of the *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth).
624 Other contracting countries are Argentina, Barbados, Czech Republic, Denmark, Finland, France, Germany, Israel, Italy, Luxembourg, Mexico, Monaco, Netherlands, Norway, Portugal, Singapore, Slovac Republic, Spain, Sweden, United Kingdom, US and Venezuela.
625 Article 26.
626 Article 27.
627 Article 1.
628 *Gourdain v Nadler* [1979] ECR 733.
629 T McEvoy The implications for Australia of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters' (1994) 68 *ALJ* 576, 577. Although note that the Convention will not apply where an initiating process is served on a person temporarily domiciled in the jurisdiction hearing the matter, whereas the courts in the United Kingdom and Ireland acknowledge jurisdiction in such cases.
630 Article 2.
631 Article 5.1.
632 Article 5.3.
633 Article 5.5.
634 Article 16(1).
635 Article 16(2).
636 See Supreme Court Rules (NSW) Pt 10 r 1A(e).
637 *Rösler v Rottwinkel* [1985] ECR 99.
638 H Van Houtte *The law of international trade* Sweet & Maxwell London 1995, 359.
639 T McEvoy The implications for Australia of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters' (1994) 68 *ALJ* 576, 577-580.
640 Article 25 states: For the purposes of this Convention, judgment' means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court'.
641 See the discussion in T McEvoy The implications for Australia of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters' (1994) 68 *ALJ* 576, 579-580 outlining the competing views in this area. Article 25 defines a judgment to which the Convention applies as being any decree, order, decision or writ of execution given by a court of a Contracting State.
642 eg Article 14 of the *French Civil Code* (1804) which grants the French courts unlimited jurisdiction over a defendant where the plaintiff is a French national. See the discussion in T McEvoy The implications for Australia of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters' (1994) 68 *ALJ* 576, 581-582.
643 Article 3.
644 T McEvoy The implications for Australia of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters' (1994) 68 *ALJ* 576, 582.

645 *Agreement between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters 1990.*

646 Articles 24 and 39. See generally the discussion in T McEvoy The implications for Australia of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters' (1994) 68 *ALJ* 576, 584-5.

647 Article 24.

648 *The Siskina* [1979] AC 210.

649 Note however that in England, eg, the effect of the Convention is limited to the matters involving other Contracting Parties only by virtue of s 25 of the *Civil Jurisdiction and Judgments Act 1982* (UK). This provision limits the change in the treatment of Mareva injunctions specifically to cases where proceedings have been commenced or are about to be commenced in other Contracting States. Nonetheless, see the discussion on the evolutionary nature of Mareva jurisprudence in T McEvoy The implications for Australia of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters' (1994) 68 *ALJ* 576, 584-585 and in JA Epp World-wide Mareva injunctions in common law Canada' (1996) 59 MLR 460.

650 Article IV does not apply in Germany.

651 eg Italy, Germany, France and the UK.

652 ie, the Hague Conference work on the potential for a multilateral judgments convention: see the discussion on enforcing Australian judgments outside Australia in ch 4.

653 Convention on the Accession of the Kingdom of Spain and the Portuguese Republic to the Convention on the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the Accessation of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the adjustments made to them by the Convention on the Accession of the Hellenic Republic.

654 Article 62(1).

655 Other Contracting States include Canada, China, Germany, France, Japan, the Netherlands and Switzerland.

656 eg the Commonwealth & Foreign Office in the UK, the Department of Justice in the US.

657 Articles 3-6.

658 Article 6.

659 Article 8.

660 Article 9.

661 Article 7.

662 Article 5(3).

663 The main difference is that the Hague Service Convention requires that documentation to be served need only be in French or English and not (as required in current treaties and Australian court rules) that a translation into the national language of the country of service accompanies the documents to be served. See Supreme Court Rules (NSW) Pt 10 r 8, 9 and Federal Court Rules O 8.

664 P Nygh Report on work towards a proposed Judgments Convention at the Hague' unpublished report supplied by author Sydney 1995.

665 ibid.

666 The Convention has been signed by Belgium, France, Germany, Greece, Italy, Luxembourg and Turkey but does not appear to have come into force as at the date of this report.

667 H Van Houtte *The law of international trade* Sweet & Maxwell London 1995, 376.

668 Thirty-two nations were represented including members of the European Union and the European Free Trade Association, as well as China, Japan, the US and Australia. The Australian delegation recommended that the Brussels/Lugano/San Sebastian Conventions be followed as closely as possible.

669 P Nygh Report on work towards a proposed Judgments Convention at the Hague' unpublished report supplied by author Sydney 1995, 3.

670 id 7.

671 id 9-11.

672 [1976] ECR 1735.

673 id 10.

674 id 7.

675 Supreme Court Rules (NSW) Pt 10 r 1A(e); Federal Court Rules O 8 r 1(ad).

676 P Nygh Report on work towards a proposed Judgments Convention at the Hague' unpublished report supplied by author Sydney 1995, 8.

677 Norfolk Island Act 1979 (Cth); Australian Antarctic Territory Act 1954 (Cth); Heard Island and McDonald Islands Act 1953 (Cth); Coral Sea Islands Act 1969 (Cth); Ashmore and Cartier Islands Acceptance Act 1933 (Cth); Cocos (Keeling) Islands Act 1955 (Cth); Christmas Islands Act 1958 (Cth).

678 Berwick Ltd v Gray, Deputy Commissioner of Taxation (1976) 133 CLR 603 (Mason J). See also Teori Tau v The Commonwealth (1969) 119 CLR 564 (Barwick CJ).

679 Berwick Ltd v Gray, Deputy Commissioner of Taxation (1976) 133 CLR 603 (Mason J). See also Teori Tau v The Commonwealth (1969) 119 CLR 564 (Barwick CJ).

680 See Lamshed v Lake (1978) 99 CLR 132, 142.

681 Acts Interpretation Act 1901 (Cth) s 17(a), (pd), (pe).

682 Norfolk Island Act 1979 (Cth) s 18(1); Australian Antarctic Territory Act 1954 (Cth) s 8(1); Heard Island and McDonald Islands Act 1953 (Cth) s 7(1); Coral Sea Islands Act 1969 (Cth) s 6(1); Ashmore and Cartier Islands Acceptance Act 1933 (Cth) s 8(1).

683 Generally regarded as the Australian Antarctic Territory, Ashmore and Cartier Islands, the Coral Sea Islands, and the Heard and McDonald Islands.

684 See also Cocos (Keeling) Islands Act 1955 (Cth) s 8E(1); Christmas Islands Act 1958 (Cth) s 8E(1). Examples include laws relating to income tax and liquor licensing.

685 Cocos (Keeling) Islands Act 1955 (Cth) s 8E(2); Christmas Islands Act 1958 (Cth) s 8E(2).

686 Cocos (Keeling) Islands Act 1955 (Cth) s 15AAB(1); Christmas Islands Act 1958 (Cth) s 14B(1).

687 Cocos (Keeling) Islands Act 1955 (Cth) s 15AAB(1); Christmas Islands Act 1958 (Cth) s 14B(3).

688 Cocos (Keeling) Islands Act 1955 (Cth) s 8; Christmas Islands Act 1958 (Cth) s 8. For the Cocos (Keeling) Islands the relevant current laws in force in the Territory are:

- Administration Ordinance 1975
- Companies Ordinance (of the Colony of Singapore in its application to the Territory)
- Courts Ordinance (of the Colony of Singapore in its application to the Territory)
- Interpretation Ordinance 1955
- Juries Ordinance 1989
- Supreme Court Ordinance 1955.

For Christmas Island the relevant current laws in force in the Territory are:

- Administration Ordinance 1968

— Casino Control Ordinance 1988
— Customs Ordinance 1958
— Interpretation Ordinance 1958
— Juries Ordinance 1987
— Lands Ordinance 1987
— Magistrates Court Ordinance 1958
— Supreme Court Ordinance 1958.

689 Cocos (Keeling) Islands Act 1955 (Cth) s 8A(1); Christmas Islands Act 1958 (Cth) s 8A(1).

690 Cocos (Keeling) Islands Act 1955 (Cth) s 8A(2)-(6); Christmas Islands Act 1958 (Cth) s 8A(2)-(6). See fn 12 for a list of a number of such Ordinances.

691 Cocos (Keeling) Islands Act 1955 (Cth) s 8C; Christmas Islands Act 1958 (Cth) s 8C.

692 Norfolk Island Act 1979 (Cth) s 19(2) outlines these limitations relating to the coining of money, maintaining an armed force, raising certain revenues etc.

693 Norfolk Island Act 1979 (Cth) s 23.

694 Norfolk Island Act 1979 (Cth) s 21(6). Schedule 3 matters include customs, immigration, social security and fishing.

695 Australia's internal territories are the Australian Capital Territory, the Jervis Bay Territory and the Northern Territory.

696 See Northern Territory (Self Government) Act 1979 (Cth) s 6; Australian Capital Territory (Self Government) Act 1988 (Cth) s 22.

697 Norfolk Island Act 1979 (Cth) s 21(6).

698 Norfolk Island Act 1957 (Cth) s 64.

699 Norfolk Island Act 1957 (Cth) s 29(1).

700 Norfolk Island Act 1957 (Cth) s 18(2).

701 The Supreme Court of Norfolk Island was established by the Norfolk Island Act 1957 (Cth) and continues in existence despite repeal of that Act. See Norfolk Island Act 1979 (Cth) s 52.

702 Australian Antarctic Territory Act 1954 (Cth) s 11; Heard Island and McDonald Islands Act 1953 (Cth) s 10; Coral Sea Islands Act 1969 (Cth) s 5; Ashmore and Cartier Islands Acceptance Act 1933 (Cth) s 9.

703 For the Australian Antarctic Territory, Heard Island and McDonald Islands the civil laws of the Australian Capital Territory and the criminal laws of the Jervis Bay Territory are taken to be in force: Australian Antarctic Territory Act 1954 (Cth) s 6; Heard Island and McDonald Islands Act 1953 (Cth) s 5 For the Ashmore and Cartier Islands the law of the Northern Territory is in force:Ashmore and Cartier Islands Acceptance Act 1933 (Cth) s 6. In the case of the Coral Sea Islands the laws of the Australian Capital Territory apply: Coral Sea Islands Territory Ordinance No 1 1973. Hearings of matters are to be conducted by the Norfolk Island Supreme Court: Coral Sea Islands Act 1969 (Cth) s 4, 8.

704 Australian Antarctic Territory Act 1954 (Cth) s 8(2); Heard Island and McDonald Islands Act 1953 (Cth) s 7(2); Coral Sea Islands Act 1969 (Cth) s 6(2); Ashmore and Cartier Islands Acceptance Act 1933 (Cth) s 8(2).

705 Australian Antarctic Territory Act 1954 (Cth) s 9; Heard Island and McDonald Islands Act 1953 (Cth) s 8; Ashmore and Cartier Islands Acceptance Act 1933 (Cth) s 7.

706 Australian Antarctic Territory Act 1954 (Cth) s 10; Heard Island and McDonald Islands Act 1953 (Cth) s 9; Coral Sea Islands Act 1969 (Cth) s 8; Ashmore and Cartier Islands Acceptance Act 1933 (Cth) s 12.

707 s 4.

708 Australia' is defined to include the external territories and s 7(1) of the Act states This Act extends to each external Territory'.

709 s 7(2).

710 s 5(1).

711 Corporations Law s 9.

712 ibid.

713 ibid.

714 See generally the Corporations Law s 232(4A).

715 But under the Norfolk Island Act 1979 (Cth) the Norfolk Island Legislative Assembly has power to make laws with respect to the registration of companies and business names: sch 2.

716 Bankruptcy Act s 27(1).

717 Bankruptcy Act 1966 s 29(2)(a).

718 Bankruptcy Act 1966 s 29(3).

719 Re Clunies-Ross; ex parte Totterdell (1988) 82 ALR 475.

720 Examples include the American Arbitration Association (AAA) and the China International Economic and Trade Arbitration Commission (CIETAC). See M Pryles 'Institutional international arbitrations' [1991] (November) *The Arbitrator* 127.

721 A Tompkins 'A practical guide to international commercial arbitration' [1991] *NZLJ* 274; JF Bourque 'Ten years of ICC arbitration (1983-1992): a statistical survey' (1993) 4(1) *ICC International Court of Arbitration Bulletin* 3.

722 Internet home page: http://www1.usa1.com/~ibnet/iccintro.html.

723 M Pryles 'Institutional international arbitration' [1991] (November) *The Arbitrator* 127, 136-143.

724 A Tompkins 'A practical guide to international commercial arbitration' [1991] *NZLJ* 274, 276. See also M Pryles 'International institutional arbitration' [1991] (November) *The Arbitrator* 127, 138-141.

725 S Bond & I Yan 'ICC Arbitration in the Asia/Pacific Region' (1991) 2(1) *The ICC International Court of Arbitration Bulletin (Special Supplement)* 1.

726 Australia became a party to the ICSID Convention in 1991.

727 M Pryles 'Institutional international arbitrations' [1991] (November) *The Arbitrator* 127.

728 J Paulsson 'Dispute resolution' in R Pritchard (ed) *Economic development, foreign investment and the law* Kluwer Law International London 1996, 218.

729 A Tompkins 'A practical guide to International Commercial Arbitration' [1991] *NZLJ* 274, 277-278.

730 LCIA Rules art 13.1(h).

731 LCIA Rules art 15.4.

732 LCIA Rules art 15.4.

733 K Coleman & B Sharp 'Arbitration within the Australian legal system' in A Bosch (ed) *Provisional remedies in international commercial arbitration* Walter de Gruyter Berlin 1994, 20.

734 Between 1981 and 1990 42 cases were submitted and reached a final hearing: H Uchida 'Practice & problems in international commercial arbitration in Japan' *Paper* Inter-Pacific Bar Association Conference Sydney 1992.

735 In 1993 CIETAC handled 504 cases, an increase of 88% over 1992. Many of these are substantial claims, involving sums of over $US100m. C Wang 'Arbitrating business disputes in Beijing - an examination focussing on CIETAC's new arbitration rules' (1994) 1 *Commercial Dispute Resolution Journal* 39.

736 However, the amounts in dispute in ICC arbitrations generally greatly exceed those claimed in CIETAC arbitrations.
737 S Mentschikoff 'Commercial arbitration' (1960) 61 *Columbia Law Review* 846.
738 WIPO Arbitration Rules.
739 J Paulsson 'Dispute resolution' in R Pritchard (ed) *Economic development, foreign investment and the law* Kluwer Law International London 1996, 232.
740 M Pryles 'Institutional international arbitrations' [1991] (November) *The Arbitrator* 127, 130-133.
741 K Coleman & B Sharp 'Arbitration within the Australian legal system' in A Bosch (ed) *Provisional remedies in international commercial arbitration* Walter de Gruyter Berlin 1994, 21.
742 M Pryles 'Legal issues concerning international arbitrations' (1990) 64 *ALJ* 470, 476.
743 MS Jacobs *International commercial arbitration law and practice* Law Book Co Sydney 1992, 21.20 cf M Pryles id 479-486.
744 Queensland does not have a Commercial Arbitration Act, however, the *Arbitration Act 1973* (Qld) s 10 gives the court power to grant a stay to enforce an arbitration agreement.
745 *Commercial Arbitration Act 1984* (NSW) s 53(2).
746 eg *Joy Manufacturing Co v AE Goodwin Ltd* (1969) 91 WN (NSW) 671, 674. See also discussion in M Pryles 'Legal issues concerning international arbitrations' (1990) 64 *ALJ* 470, 477-479.
747 id 479-486.
748 EI Sykes & M Pryles *Australian private international law* 3rd ed Law Book Co Sydney 1991, 181.
749 *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No. 3)* [1970] 1 Ch 506, 545-546.
750 The NSW Court of Appeal expressly left the question open in *O'Brien v Tanning Research Laboratories Inc* (1988) 14 NSWLR 601, 609. The case went on to the High Court but that Court was not called upon to deal with the issue: *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332.
751 *Commonwealth v Adelaide Steamship Industries Pty Ltd* (1974) 24 FLR 97; *Etrie Fans Ltd v NMB (UK) Ltd* [1987] 2 Lloyd's Rep 569.
752 D Bailey 'The New York Convention revisited' *Paper* Twenty-second International Trade Law Conference, Canberra October 1995.
753 News and Notes from the Institute for Transnational Arbitration, April, 1994 Vol 9 No 2, 1 referred to in D Bailey 'The New York Convention revisited' *paper*. Twenty-second International Trade Law Conference, Canberra October 1995.
754 D Bailey 'The New York Convention revisited' *Paper* Twenty-second International Trade Law Conference, Canberra October 1995, 137-138.
755 id 139.
756 *Norske Atlas Insurance Co Ltd v London General Insurance Co Ltd* (1927) 28 Ll L Rep 104. M Pryles 'Legal issues concerning international arbitrations' (1990) 64 *ALJ* 470, 491-492.
757 O Chukwumerije 'Enforcement of foreign awards in Australia: the implications of Resort Condominiums' (1994) 5 *ADRJ* 237.
758 EI Sykes & M Pryles *Australian Private International Law* 3rd ed Law Book Co Sydney 1991, 141-148.
759 id 144-160.
760 MS Jacobs *International commercial arbitration law and practice* Law Book Co Sydney 1992, 21.50.
761 *International Arbitration Act 1974* (Cth) s 21.
762 *Bank Mellat v Helliniki Techniki SA* [1983] 3 WLR 783, 799; M Pryles 'Legal issues concerning international arbitrations' (1990) 64 *ALJ* 470, 475.
763 MS Jacobs *International commercial arbitration law and practice* Law Book Co Sydney 1992, 21.80-21.170.
764 M Pryles 'Legal issues concerning international arbitrations' (1990) 64 *ALJ* 470.
765 MS Jacobs *International commercial arbitration law and practice* Law Book Co Sydney 1992, 21.100-21.110.
766 *Esso Australia Resources Limited & Others v Plowman & Others* (1995) 183 CLR 10.
767 id per Mason CJ, 30.
768 'The decision of the High Court of Australia in *Esso/BHP v Plowman*' (1995) 11 *Arbitration International* 231.
769 MS Jacobs 'Arbitration confidentiality in Australia' (1995) 10(7) *International Arbitration Report* 21.
770 D Mulino 'Confidentiality in arbitration' *Paper* Twenty-second International Trade Law Conference Canberra October 1995, 82.
771 *International Arbitration Act 1994* (Sing) s 22. Section 23 of that Act sets out restrictions on the reporting of proceedings heard otherwise than in open court.
772 Singapore and China are two jurisdictions whose legislation makes some provision for arbitral confidentiality. D Mulino 'Confidentiality in arbitration' *Paper* Twenty-second International Trade Law Conference Canberra October 1995, 84.
773 *Resort Condominiums International Inc v Bolwell & Another* (1993) 118 ALR 655.
774 M Pryles 'Interlocutory orders and convention awards: the case of *Resort Condominiums v Bolwell'* (1994) 10(4) *Arbitration International* 385.
775 O Chukwumerije 'Enforcement of foreign awards in Australia: the implications of *Resort Condominiums*' (1994) 5 *ADRJ* 237. See also MS Jacobs *Submission 12.*
776 O Chukwumerije 'Enforcement of foreign awards in Australia: the implications of *Resort Condominiums*' (1994) 5 *ADRJ* 237, 245.