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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

CROSS-BORDER INSOLVENCY BILL 2008

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for Superannuation and Corporate Law, Senator the Hon Nick Sherry)

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

Abbreviation	***Definition***
Bankruptcy Act	*Bankruptcy Act 1966*
CLERP	Corporate Law Economic Reform Program
COMI	Centre of Main Interest
Corporations Act	*Corporations Act 2001*
Model Law	The Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, set out in Schedule 1 to the Bill.
UNCITRAL	The United Nations Commission on International Trade Law

General outline and financial impact

Outline

Insolvency laws are among the most important laws governing market conduct. A well-designed insolvency regime will enhance certainty in the market and promote economic stability and growth, by allowing market participants to accurately assess credit risk. It will provide for restructuring of viable businesses, and the efficient closure and transfer of assets of failed businesses.

Cross-border insolvency is a term used to describe circumstances in which an insolvent debtor has assets and/or creditors in more than one country. Many businesses have interests stretching beyond their home jurisdictions. Firms are increasingly organising their activities on a global scale. With the advent of sophisticated communications and information technology, cross-border trade is no longer the exclusive preserve of large multi-national corporations.

A number of complex issues may arise in the context of cross-border insolvency. An insolvency administrator may have limited access to assets of the company that are located in another country. There may be special rules providing local creditors with access to local assets before funds go to a foreign administration. There may be limited or no recognition of foreign creditors. There may be inconsistency in the priority of creditors (particularly in relation to employee claims) across jurisdictions. There may be difficulties for foreign creditors seeking to enforce securities over local assets.

The additional complexities surrounding cross-border insolvencies necessarily result in uncertainty, risk and ultimately cost to businesses. It would be of overall benefit to businesses in all countries to have adequate mechanisms in place to deal efficiently and effectively with cross-border insolvencies. Reforms of this nature will facilitate international trade in goods and services and the integration of national financial systems with the international financial system.

Accordingly, in May 1997 UNCITRAL adopted a Model Law on Cross-Border Insolvency. The purpose of the Model Law is to provide effective and efficient mechanisms for dealing with cases of cross-border insolvency. The Model Law:

- sets out the conditions under which persons administering a foreign insolvency proceeding have access to local courts;
- sets out the conditions for recognition of a foreign insolvency proceeding and for granting relief to the representatives of such a proceeding;
- permits foreign creditors to participate in local insolvency proceedings;
- permits courts and insolvency practitioners from different countries to co-operate more effectively; and
- makes provision for co-ordination of insolvency proceedings that are taking place concurrently in different States.

The Model Law is not based on the principle of reciprocity between States. There is no requirement for a foreign representative seeking to rely upon the Model Law to have been appointed under the law of a State which has itself adopted the Model Law. Other States that have adopted the Model Law include: the United Kingdom, Colombia, Eritrea, Japan, Mexico, Montenegro, New Zealand, Poland, Romania, Serbia, South Africa and the United States of America.

Date of effect: The operative provisions of the Bill will commence on a single date to be fixed by proclamation. If proclamation does not occur within 6 months of Royal Assent, those provisions commence on the first day after the end of that period.

Proposal announced: Adoption of the Model Law by Australia was first canvassed in the CLERP 8 paper titled 'Cross-Border Insolvency' released in December 2002.

Financial impact: Nil.

Compliance cost impact: Adoption of the Model Law by Australia will impose minimal compliance costs on Australian businesses. Cooperation and coordination already occurs in cases of cross-border insolvency. The enactment will make arrangements for cooperation and coordination more certain and reduce the scope for costly litigation.

1 Chapter 1
The Cross-Border Insolvency Bill — adapting the Model Law for enactment as a law of Australia

Outline of chapter

.1 This chapter explains the objectives of the Bill, the scope of its application and the nature and extent of its implementation. The chapter also comments on the interaction between the Model Law and the Corporations Act (particularly Part 5.6 Division 9 and Part 5.7) and the interaction between the Model Law and section 29 of the Bankruptcy Act.

Context of amendments

.2 Schedule 1 to the Bill is the Model Law on Cross-Border Insolvency, as adopted by UNCITRAL. The purpose of the Model Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

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

.3 The Model Law provides for adopting States modifying or leaving out some of its provisions or including new provisions not contemplated by UNCITRAL. In order to promote harmonisation of cross-border

insolvency laws, UNCITRAL has recommended that States make as few changes as possible to the text when enacting the Model Law. A key advantage of this approach is that there is greater scope for Australia to benefit from international experience with the Model Law.

.4 The Bill adopts the Model Law with as few changes as are necessary to adapt it to the Australian context. It is expected that international jurisprudence on key concepts in the Model Law will assist Australian courts with any interpretative tasks that may arise in relation to the Cross-Border Insolvency Bill.

Summary of new law

.5 An important objective of the Bill is to provide access for the person administering a foreign insolvency proceeding (the foreign representative) to Australian courts to seek a temporary stay of proceedings against the assets of an insolvent debtor. This stay will allow the foreign representative and the courts to determine any relief or coordination that may assist in the administration of the affairs of the insolvent debtor. This stay will have the same scope and effect as if the stay arose under Chapter 5 of the Corporations Act (for a corporate debtor) or under the *Bankruptcy Act 1966* (for an debtor that is a natural person).

.6 The Bill will provide for a foreign representative commencing an insolvency proceeding in Australia in relation to a debtor that is subject to a foreign proceeding and will provide for a foreign representative participating in an Australian insolvency proceeding in relation to that debtor. The Bill will also provide that foreign creditors have the same rights regarding the commencement of, and participation in, insolvency proceedings occurring in Australia as creditors domiciled in Australia.

.7 The Bill applies the concept of 'centre of main interests' (COMI) to allow a court to determine whether a proceeding is a 'foreign main proceeding' or a 'foreign non-main proceeding'. The Bill does not seek to define COMI as a considerable body of common law exists in overseas jurisdictions in relation to that concept. It is expected that Australian courts will be guided by that body of law in considering the definition of COMI in the context of this Bill. Such an approach will ensure that Australian law is in harmony with that in other jurisdictions.

.8 The Bill will provide a legislative framework for cooperation and coordination between courts and insolvency practitioners of different jurisdictions. The Bill explicitly requires that the courts cooperate to the maximum extent possible with foreign courts or foreign representatives.

Detailed explanation of new law

Application of the Model Law

.9 The Corporations Act does not apply to the external Territories of Australia. The insolvency law applying in the external Territories is not always consistent with that applying within Australia. Given this lack of consistency, application of the Model Law to the external Territories would give rise to an unacceptable level of complexity in the interactions between the Model Law and the laws applying in those jurisdictions.

.10 The Bill provides that the Model Law is to have the force of law in Australia ***[Part 2, clause 6].*** The Bill applies the Model Law only to Australia, and not to its external Territories. The Bill defines Australia for the purposes of the Act to exclude the Territories of Christmas Island and the Cocos (Keeling) Islands ***[Part 2, clause 5].*** The Model Law includes a number of references to 'this State'. The Bill provides that a reference to this State is a reference to Australia ***[Part 2, subclause 7(1))].*** The Bill further clarifies that a reference to Australia in a geographical sense in the Model Law does not include a reference to an external Territory ***[Part 2, subclause 7(2)].***

Identifying Australian laws relating to insolvency and bankruptcy

.11 Australia's legal framework does not include a strict legal distinction between consumer debtors and business debtors. The main distinction in Australian law is between corporate insolvency, dealt with under the Corporations Act, and personal bankruptcy, dealt with under the Bankruptcy Act.

.12 The Bill applies the Model law to both personal and corporate debtors. As the mobility of labour across jurisdictions increases, and as advances in communications and information technology make it easier to invest in other jurisdictions, it is more likely that individuals will have personal assets in several jurisdictions. Cooperation between jurisdictions is equally important in cases of complex personal insolvencies as it is in corporate insolvencies.

.13 Many articles of the Model Law require an insertion for 'laws of the enacting State relating to insolvency' (or similar). It is intended that the Model Law will apply to collective judicial or administrative proceedings pursuant to a law relating to bankruptcy or corporate insolvency. As such, the relevant Australian laws are the Bankruptcy Act and Chapter 5 (other than Parts 5.2 and 5.4A) of the Corporations Act, and also section 601CL of the Corporations Act ***[Part 2, clause 8]***. Part 5.2 is excluded as receiverships and controllerships relate only to a debt owed to the

appointer, and as such cannot be said to be collective proceedings. Part 5.4A is excluded as these proceedings generally relate to winding up on grounds other than severe financial distress. Section 601CL is included as that section provides for the appointment of a liquidator to a registered foreign company.

Entities that are not covered by the Model Law

.14 Special insolvency arrangements apply to authorised deposit-taking institutions and insurance companies in the *Banking Act 1959*, the *Insurance Act 1973* and the *Life Insurance Act 1995*. The application of the Model Law to Australia should not disturb the insolvency arrangements for such entities. These classes of entity will be prescribed for the purposes of paragraph 2 of article 1 of the Model Law as institutions to which the Model Law does not apply. The Bill provides for this to occur by way of regulations ***[Part 2, clause 9].***

.15 Other jurisdictions have indicated that they are considering extending the Model Law to cover deposit-taking institutions and insurance companies. Extension of the Model Law to these classes of entity may also be raised for consideration in Australia at a later date. Excluding these entities from the operation of the Model Law by way of regulations provides flexibility to apply the Model Law to these entities should a decision be taken to that effect.

.16 It is possible that other classes of entity may emerge to which the Model Law should not apply, or that the Government might be made aware of undesirable consequences arising from the application of the Model Law to certain entities or classes of entity. The regulation making power in the Bill provides the flexibility to exclude entities from the operation of the Model Law if, and when, such issues emerge.

Courts competent to perform functions under the Model Law

.17 The Bill specifies the Federal Court of Australia for recognition of foreign proceedings and cooperation with foreign courts where functions referred to in the Model Law relate to proceedings where the debtor is an individual ***[Part 2, paragraph 10(a)].*** Where the debtor is a corporation, the specified courts are the Federal Court of Australia and the Supreme Court of a State or Territory ***[Part 2, paragraph 10(b)].***

Functions of the trustee and the registered liquidator

.18 The Model Law requires the title of the person or body administering a reorganization[1] or liquidation under Australian law to be specified. Under the Bankruptcy Act, the trustee is the person who administers the affairs of a bankrupt. Under the Corporations Act, a registered liquidator administers the affairs of a company under external administration. The Bill specifies the trustee and the registered liquidator as the titles of the persons responsible for a reorganization or liquidation under the Model Law ***[Part 2, clause 11].***

.19 A registered liquidator may be appointed to administer a range of different proceedings under Australian insolvency law. These include, for example, being appointed to act as an administrator of a company. It is intended that the reference to a registered liquidator in clause 11 of the Bill will enable persons registered in Australia under that title to exercise all functions and powers under the Model Law regardless of whether they are appointed as a liquidator in an Australian proceeding or in some other capacity.

Access of foreign creditors to Australian insolvency proceedings

.20 An important principle underlying the Model Law is that creditors should receive equal treatment irrespective of whether they are from the same jurisdiction as the debtor or from a different jurisdiction. The Bill gives effect to that principle by explicitly stating that foreign creditors have the same rights as Australian creditors. The Bill provides that foreign creditors may seek to commence, and participate in, proceedings that have already commenced, as if they were Australian creditors ***[Part 2, subclause 12(1))].***

.21 The ranking of claims according to established legal principles is an important element of Australian insolvency law. Where the debtor is a corporation, section 556 of the Corporations Act provides for certain unsecured debts and claims having priority over other unsecured debts and claims. The Bill does not seek to disturb the priorities established by these provisions. For the avoidance of doubt, the Bill states that foreign creditors are not to be ranked lower than the claims of other unsecured creditors solely due to their status as foreign creditors ***[Part 2, subclause 12(2)].*** An example of the application of this principle is that the claims of foreign employees of a company should rank equally with other persons employed by that company under paragraph 556(1)(e). In the

1 The term 'reorganization' is used in this Explanatory Memorandum for the purpose of consistency with the Model Law.

absence of any priority applying under the Corporations Act or Bankruptcy Act, foreign unsecured creditors would rank equally with Australian unsecured creditors.

Application for recognition of foreign proceeding

.22 Paragraph 3 of article 15 of the Model Law provides for any application for recognition being accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. The Bill extends this requirement to also require a statement identifying all proceedings under Australian insolvency law in respect of the debtor that are known to the foreign representative. The foreign representative must also include information about any appointment of a receiver, controller or managing controller in relation to property of the debtor in their statement ***[Part 2, clause 13]***.

.23 Providing the court with a statement of all local and foreign proceedings that relate to a debtor and are known to the foreign representative will ensure that the court has as complete a picture of the proceedings affecting that debtor as is possible. This will allow the court to make informed decisions in relation to whether the proceeding should be recognised as a foreign main proceeding or foreign non-main proceeding and in relation to any urgent relief that may be granted. The provision is not intended to limit the court to consider only information provided by the foreign representative in making such decisions. It is intended that the court may consider any other information that is relevant to its decisions about such matters.

Subsequent information

.24 Article 18 of the Model Law requires a foreign representative to inform the court promptly of any substantial change in the status of the recognised foreign proceeding, the status of the foreign representative's appointment and any other foreign proceeding regarding the same debtor that becomes known to the foreign representative. In accordance to the aforementioned modification to paragraph 3 of article 15, this requirement is extended to also require the foreign representative to promptly inform the court of any proceeding under Australian insolvency law that becomes known to the foreign representative, as well as the appointment of any receiver, controller or managing controller in relation to property of the debtor ***[Part 2, clause 14]***.

.25 The requirement to inform the court of any change in the status of the foreign representative's appointment and any change in proceedings against the debtor known to the representative ensures that the court is in a position to modify any recognition or relief granted in relation to an application from the foreign representative.

Relief that may be granted upon application for recognition of a foreign proceeding

.26 Article 19 of the Model Law has been set out in the same form as adopted by UNCITRAL. Paragraph 2 of article 19 provides for reference being made to provisions relating to notice of relief granted by a court. It is intended that the court rules and procedure will apply in the usual way to any notice to be provided in relation to decisions of a court to grant relief under the Model Law. As such, it is not proposed to add any reference here ***[Part 2, clause 15]***.

Effects of recognition of a foreign main proceeding

.27 Paragraph 2 of article 20 of the Model Law allows for the scope, and the modification or termination, of the stay that comes into effect upon recognition of a foreign proceeding to be made subject to provisions of the law of the enacting State. Chapter 5 of the Corporations Act provides for various exceptions and modifications to the rule that all actions and proceedings against a debtor are stayed upon the commencement of insolvency proceedings. There are also various common law rules that modify the stay of actions and proceedings upon the insolvency of a debtor.

.28 The stay that comes into effect when a foreign main proceeding is recognised is to be the same in scope and effect as if the stay or suspension arose under the Bankruptcy Act or under Chapter 5 of the Corporations Act, other than Parts 5.2 and 5.4A, as the case requires. It is left to the court to decide which stay should apply in any particular case, having regard to all the circumstances of the case ***[Part 2, clause 16]***.

Actions to avoid acts detrimental to creditors

.29 Article 23 of the Model Law provides for a foreign representative having standing to initiate actions to recover assets when actions have been taken that are detrimental to the interests of creditors. Under Australian law, these are the voidable transactions provisions in Division 2 of Part 5.7B of the Corporations Act and sections 120, 121, 121A, 122, 128B, 128C and Division 4A of Part VI of the Bankruptcy Act.

.30 The provisions listed for the purposes of article 23 of the Model Law relate to allowing for the reversal or avoidance of transactions that a debtor has entered into that prejudice the interests of creditors. The effect of enacting article 23 of the Model Law is that the foreign representative is not precluded from commencing such actions by the sole fact that the foreign representative is not the insolvency representative approved in Australia.

.31 Under the Division 2 of Part 5.7B of the Corporations Act the liquidator of a company is given standing to make an application in relation to voidable transactions. It is intended that the foreign representative will have the same standing as if they were a liquidator in relation to all provisions within Division 2 of Part 5.7B of the Corporations Act. The Bankruptcy Act provides for the trustee having certain rights in relation to transactions covered by the relevant sections. The foreign representative is to have the same rights as if they were the trustee in relation to those transactions ***[Part 2, clause 17]***.

Forms of cooperation

.32 Article 27 of the Model Law provides for various forms of cooperation that may occur with foreign courts and foreign representatives. The Bill provides, for the avoidance of doubt, that no additional examples of cooperation are specified where paragraph (f) of article 27 allows for such additional examples ***[Part 2, clause 18]***. It is not intended that this form of enactment should restrict other means via which courts may choose to cooperate, including, for example, under protocols that may be developed to facilitate communication and cooperation between courts.

References to laws/law of this State and courts of this State

.33 The Model Law refers throughout to the terms 'laws of this State', 'law of this State' and courts of this State. The Bill defines these terms for the purposes of the Model Law.

.34 Article 7 of the Model Law provides that the Model Law is not intended to limit the ability of a court or a person administering a reorganization or liquidation to provide additional assistance to a foreign representative. For the purpose of article 7 the term 'laws of this State' is defined broadly to include a law of the Commonwealth, a law of a State or a law of a Territory (other than an external Territory). This broad definition is intended to allow for the foreign representative being provided with any other assistance that might be available under laws other than the Model Law ***[Part 2, subclause 19(1)]***.

.35 For article 21 of the Model Law 'laws of this State' is a reference to the laws of the Commonwealth. Article 21 of the Model Law provides for relief being granted upon recognition of a foreign proceeding. The relevant laws under which relief may be granted are the Corporations Act and the Bankruptcy Act, both of which are laws of the Commonwealth ***[Part 2, subclause 19(2)]***.

.36 For articles 14, 21, 23, 28 and 29 of the Model Law 'the law of this State' is a reference to Commonwealth law. In each case the relevant

laws are the Corporations Act and the Bankruptcy Act, both of which are laws of the Commonwealth ***[Part 2, subclause 19(3)].***

.37 Article 24 of the Model Law includes a requirement that 'laws of this State are met' by the foreign representative. It is considered important that the foreign representative be required to comply with all Australian laws. The 'laws of this State' are, therefore, defined broadly for the purposes of article 24 to include all of Commonwealth, State and Territory laws ***[Part 2, subclause 19(4)].***

.38 Article 10 of the Model Law provides that a foreign representative is not subject to the jurisdiction of the courts in this State due to the fact of making an application under the Model Law. The foreign representative is not to be subject to the jurisdiction of any courts in Australia merely due to the fact of making an application under the Model Law. The Bill defines courts in this State to include a federal court, a court of a State and a court of a Territory ***[Part 2, subclause 19(5)].***

Application

.39 The Act applies to proceedings under the Bankruptcy Act, Chapter 5 of the Corporations Act (other than Parts 5.2 and 5.4A) and section 601CL of the Corporations Act commenced before, on or after the commencement of Part 2 of the Act. The Act applies to foreign proceedings commenced on or after the commencement of Part 2 of the Act ***[Part 2, clause 20].***

Interaction with other Acts

Bankruptcy Act 1966

.40 The Bill applies the Model Law to personal bankruptcy. This is because debtors who are natural persons may have creditors or property in a number of jurisdictions. If such debtors become bankrupt, it may be necessary to either seek assistance from, or provide assistance to, courts or relevant authorities of foreign jurisdictions.

.41 There is the potential for inconsistency between the Model Law and section 29 of the Bankruptcy Act (which deals with the provision of the court's assistance to foreign courts and relevant authorities).

.42 The Model Law imposes a mandatory obligation on the court to cooperate with courts or representatives of foreign jurisdictions. The words 'shall cooperate' are used in the relevant part of the Model Law

[article 25]. In contrast, section 29 of the Bankruptcy Act imposes a mandatory obligation on the court to assist only the courts of prescribed countries (subsection 29(5) of the Bankruptcy Act states what prescribed countries are) but permits the court to exercise its discretion as to whether it should assist other foreign courts.

.43 To address this potential inconsistency, the Bill provides that, if a provision of the Model Law or a provision of the Bill is inconsistent with section 29 of the Bankruptcy Act, the provision in the Model Law or provision of the Bill will prevail ***[Part 3, clause 21].***

Corporations Act 2001

.44 For similar reasons, article 25 of the Model Law may also give rise to potential inconsistencies with Division 9 of Part 5.6 of the Corporations Act (in particular section 581 of the Corporations Act) which concerns the provision of assistance to foreign courts.

.45 Section 581 of the Corporations Act imposes a mandatory obligation on the court to assist the courts of external territories and prescribed countries (prescribed countries are specified in regulation 5.3.74 of the *Corporations Regulations 2001*). In relation to other foreign courts, the court is permitted to exercise its discretion as to whether it should provide assistance.

.46 Another potential area of inconsistency with the Corporations Act arises in relation to Part 5.7 of the Corporations Act. Part 5.7 of the Corporations Act concerns the winding up of bodies other than companies. Part 5.7 of the Corporations Act provides for a separate insolvency administration in Australia and does not give recognition to any foreign insolvency proceeding. For example, subsection 582(3) of the Corporations Act provides that a body may be wound up despite, among other things, a concurrent winding up in a foreign jurisdiction.

.47 To address these potential inconsistencies, the Bill provides that, if a provision of the Model Law or a provision of the Bill is inconsistent with Division 9 of Part 5.6 of the Corporations Act or Part 5.7 of the Corporations Act, that provision in the Model Law or provision of the Bill will prevail ***[Part 3, clause 22].***

Regulation making power

.48 The Governor-General is provided with power to make regulations prescribing matters required or permitted by the Act to be prescribed and necessary or convenient to be prescribed for carrying out or giving effect to the Act ***[Part 3, clause 23].*** Most relevantly, it is envisaged that this

regulation making power would be used to prescribe insurance companies and banks as entities to which the Model Law does not apply.

2 Chapter 2
The UNCITRAL Model Law on Cross-Border Insolvency

Outline of chapter

.1 This chapter provides an article-by-article explanation of the UNCITRAL Model Law on Cross-Border Insolvency.

Background

.2 The increasing incidence of cross-border insolvencies reflects the continuing global expansion of trade and investment. However, national insolvency laws have by and large not kept pace with the trend, and they are often ill-equipped to deal with cases of a cross-border nature. This frequently results in inadequate legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation and hinder maximisation of the value of those assets. Moreover, the absence of predictability in the handling of cross-border insolvency cases impedes capital flow and is a disincentive to cross-border investment.

.3 Fraud by insolvent debtors, in particular by concealing assets or transferring them to foreign jurisdictions, is an increasing problem, in terms of both its frequency and its magnitude. The modern, interconnected world makes such fraud easier to conceive and carry out. The cross-border cooperation mechanisms established by the Model Law are designed to confront such international fraud.

.4 To the extent that there is a lack of communication and coordination among courts and administrators from concerned jurisdictions, it is more likely that assets would be dissipated, fraudulently concealed, or possibly liquidated without reference to other more advantageous solutions. As a result, not only is the ability of creditors to receive payment diminished, but so is the possibility of rescuing financially viable businesses and saving jobs. By contrast, mechanisms in national legislation for coordinated administration of cases of cross-border insolvency make it possible to adopt solutions that are sensible and in the best interest of creditors and the debtor; the presence of such mechanisms in the law of a

State is therefore perceived as advantageous for foreign investment and trade in that State.

.5 The Model Law takes into account the results of other international efforts, including the Convention on Insolvency Proceedings of the European Union, the European Convention on Certain International Aspects of Bankruptcy (1990), the Montevideo treaties on international commercial law (1889 and 1940), the Convention regarding Bankruptcy between Nordic States (1933) and the Convention on Private International Law (Bustamante Code) (1928). Proposals from non-governmental organisations that have been taken into account include the Model International Insolvency Cooperation Act and the Cross-Border Insolvency Concordat, both developed by Committee J of the Section on Business Law of the International Bar Association.

Chapter I — General provisions

Article 1 — Scope of application

.6 Paragraph 1 of article 1 outlines the types of issues that may arise in cases of cross-border insolvency and for which the Model Law provides solutions: inward requests for recognition of a foreign proceeding; outward requests from a court or administrator in the enacting State for recognition of an insolvency proceeding commenced under the laws of the enacting State; coordination of proceedings taking place concurrently in two or more States; and participation of foreign creditors in insolvency proceedings taking place in the enacting State.

.7 'Assistance' in paragraph 1, subparagraphs (a) and (b), is meant to cover various situations, dealt with in the Model Law, in which a court or an insolvency administrator in one State may make a request directed to a court or an insolvency administrator in another State. Some types of assistance are specified by the Model Law (for example article 19, subparagraphs 1 (a) and (b); article 21, subparagraphs 1 (a)-(f) and paragraph 2; and article 27, subparagraphs (a) and (e)), while other possible measures are covered by a broader formulation (for example article 21, subparagraph 1(g)).

.8 In principle, the Model Law was formulated to apply to any proceeding that meets the requirements of paragraph (a) of article 2, independently of the nature of the debtor or its particular status under national law. The only exceptions contemplated in the text of the Model Law itself are indicated in paragraph 2 of article 1.

Article 2 — Definitions

.9 Article 2 of the Model Law defines terms specific to cross-border scenarios.

.*10* By specifying required characteristics of the ‘foreign proceeding’ and ‘foreign representative’, the definitions limit the scope of application of the Model Law. For a proceeding to be subject to recognition under the Model Law, and for a foreign representative to be accorded access to local courts under the Model Law, the foreign proceeding and the foreign representative must satisfy the definitions in subparagraphs (a) and (d), respectively.

.11 The definitions in subparagraphs (a) and (d) also apply to an ‘interim proceeding’ and a representative ‘appointed on an interim basis’. In many countries insolvency proceedings are often, or even usually, commenced on an ‘interim’ or ‘provisional’ basis. Except for being labelled as interim, those proceedings satisfy the definition in subparagraph (a) of article 2. Such proceedings are often conducted for weeks or months as ‘interim’ proceedings under the administration of persons appointed on an ‘interim’ basis, and only some time later would the court issue an order confirming the continuation of the proceedings on a non-interim basis. The objectives of the Model Law apply fully to such ‘interim proceedings’ (provided the requisites of subparagraphs (a) and (d) are met); therefore, these proceedings should not be distinguished from other insolvency proceedings merely because they are of an interim nature.

.12 The definition of foreign proceedings avoids the use of expressions that may have different technical meanings in other legal systems and instead describe their purpose or function. This technique is used to avoid inadvertently narrowing the range of possible foreign proceedings that might obtain recognition. The expression ‘insolvency proceedings’ may have a technical meaning, but it is intended in subparagraph (a) to refer broadly to proceedings involving companies in severe financial distress.

.13 Subparagraph (c) requires that a ‘foreign non-main proceeding’ take place in the State where the debtor has an ‘establishment’. Thus, a foreign non-main proceeding susceptible to recognition under paragraph 2 of article 17 must be a proceeding commenced in a State where the debtor has an establishment within the definition established by subparagraph (f) of article 2.

.14 A foreign proceeding that satisfies the definition in subparagraph (a) of article 2 should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, in order to eliminate the need to refer to a foreign non-judicial authority whenever reference is made to a foreign

court, the definition of 'foreign court' in subparagraph (e) also includes non-judicial authorities.

.15 The definition of the term 'establishment' (subparagraph (f)) has been inspired by subparagraph (h) or article 2 of the European Union Convention on Insolvency Proceedings.

Article 3 — International obligations of this State

.16 Under this article, an obligation arising out of any treaty or other form of agreement to which Australia is a party with one or more other States prevails over any inconsistent provision of the Model Law.

.17 This article is likely to be of limited effect in Australia since a treaty has effect in domestic law only to the extent to which it has been implemented by an enactment. In a case where a treaty has been enacted, the usual principles of statutory interpretation are to apply to determine any questions of inconsistency that may apply between another enactment and the Model Law.

.18 To the extent that the Commonwealth may enter into other agreements with other States that may conflict with the Model Law, article 3 ensures that those agreements prevail over the Model Law.

Article 4 — [Competent Court or authority]

.19 Article 4 provides for courts that are competent to perform functions under the Model Law. Providing a list of courts within this article increases the transparency and ease of use of the Model Law for the benefit of, in particular, foreign representatives and foreign courts. It also allows the jurisdiction to be limited to courts with experience in the various forms of insolvency and bankruptcy proceedings that may be encountered under the Model Law.

Article 5 — Authorisation of [insert title of person or body administering reorganization or liquidation under the law of the enacting State] to act in a foreign State

.20 The intent of article 5 is to provide for administrators or other authorities appointed in insolvency proceedings commenced in the enacting State to act abroad as foreign representatives of those proceedings. Article 5 is formulated to make it clear that the scope of the power exercised abroad by the administrator would depend upon the foreign law and courts. Action that the administrator appointed in the enacting State may wish to take in a foreign country will be action of the type dealt with in the Model Law, but the authority to act in a foreign

country does not depend on whether that country has enacted legislation based on the Model Law.

Article 6 — Public policy exception

.21 Article 6 provides for a court refusing to take action that is contemplated under the Model Law if that action would be manifestly contrary to the public policy in that State. The purpose of the expression ‘manifestly’, used also in many other international legal texts as a qualifier of the expression ‘public policy’, is to emphasise that public policy exceptions should be interpreted restrictively and that article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.

Article 7 — Additional assistance under other laws

.22 Article 7 clarifies that the Model Law is not intended to prevent additional assistance being provided to a foreign representative. Enactment of the Model Law is not intended to displace provisions of other laws to the extent that they provide assistance that is additional to or different from the type of assistance dealt with in the Model Law.

Article 8 — Interpretation

.23 Article 8 provides that regard is to be had to the international origin of the Model Law, the need to promote uniformity in its application and the observance of good faith in interpretation of the Model Law. Article 8 has been modelled on paragraph 1 of article 3 of the UNCITRAL Model Law on Electronic Commerce. Australia has a particular interest in uniform interpretation of the Model Law. As a relatively small State it is likely to gain significantly from international jurisprudence on uniform provisions of the Model Law.

.24 Harmonised interpretation of the Model Law will be facilitated by the Case Law on UNCITRAL Texts (CLOUT) information system, under which the UNCITRAL secretariat publishes abstracts of judicial decisions (and, where applicable, arbitral awards) that interpret conventions and Model Laws emanating from UNCITRAL. It is expected that Australian courts will make use of international precedents in interpreting the provisions of the Model Law.

Chapter II — Access of foreign representatives and creditors to courts in this state

Article 9 — Right of direct access

.25 Article 9 expresses the principle of direct access by the foreign representative to courts of the enacting State, thus freeing the representative from having to meet formal requirements such as licences or consular action.

Article 10 — Limited jurisdiction

.26 Article 10 constitutes a ‘safe conduct’ rule aimed at ensuring that the court in the enacting State would not assume jurisdiction over all the assets of the debtor on the sole ground of the foreign representative having made an application for recognition of a foreign proceeding. The article also makes it clear that the application alone is not sufficient ground for the court of the enacting State to assert jurisdiction over the foreign representative as to matters unrelated to insolvency. The article responds to concerns of foreign representatives and creditors about exposure to all-embracing jurisdiction triggered by an application under the Model Law.

.27 The limitation on jurisdiction over the foreign representative embodied in article 10 is not absolute. It is only intended to shield the foreign representative to the extent necessary to make court access a meaningful proposition. It does so by providing that an appearance in the courts of the enacting State for the purpose of requesting recognition would not expose the entire estate under the supervision of the foreign representative to the jurisdiction of those courts. Other possible grounds for jurisdiction under the laws of the enacting State over the foreign representative or the assets are not affected. For example, a tort or misconduct committed by the foreign representative may provide grounds for jurisdiction to deal with the consequences of such an action by the foreign representative. Furthermore, the foreign representative who applies for relief in the enacting State will be subject to conditions that the court may order in connection with relief granted.

.28 It has been noted that article 10 may appear superfluous in States, such as Australia, where the rules on jurisdiction do not allow a court to assume jurisdiction over a person making an application to the court on the sole ground of the applicant’s appearance. UNCITRAL has indicated that enacting the article would be useful, however, as it would eliminate possible concerns of foreign representatives or creditors over the possibility of jurisdiction based on the sole ground of applying to the court.

Article 11 — Application by a foreign representative to commence proceedings under [identify laws of the enacting State relating to insolvency]

.29 Article 11 is designed to ensure that the foreign representative (of a foreign main or non-main proceeding) has standing for requesting the commencement of an insolvency proceeding in the enacting State. However, the article makes it clear (by the words 'if the conditions for commencing such a proceeding are otherwise met') that it does not otherwise modify the conditions under which an insolvency proceeding may be commenced.

.30 A foreign representative has this right without prior recognition of the foreign proceeding because the commencement of an insolvency proceeding might be crucial in cases of urgent need for preserving the assets of the debtor. Article 11 recognises that not only a representative of a foreign main proceeding but also a representative of a foreign non-main proceeding may have a legitimate interest in the commencement of an insolvency proceeding. Sufficient guarantees against abusive applications are provided by the requirement that the other conditions for commencing such a proceeding have to be met.

Article 12 — Participation of a foreign representative in a proceeding under [identify laws of the enacting State relating to insolvency]

.31 The purpose of article 12 is to ensure that, when an insolvency proceeding concerning a debtor is taking place in Australia, the foreign representative of a proceeding concerning that debtor will be given procedural standing to make submissions concerning issues such as protection, realisation or distribution of assets of the debtor or cooperation with the foreign proceeding. Article 12 is limited to giving the foreign representative standing and does not vest the foreign representative with any specific powers or rights.

Article 13 — Access of foreign creditors to a proceeding under [identify laws of the enacting State relating to insolvency]

.32 With the exception contained in paragraph 2, article 13 embodies the principle that foreign creditors, when they apply to commence an insolvency proceeding in Australia or file claims in such proceeding, should not be treated worse than local creditors.

.33 Paragraph 2 makes it clear that the principle of non-discrimination embodied in paragraph 1 leaves intact the provisions on the ranking of claims in insolvency proceedings.

Article 14 — Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency]

.34 The main purpose of notifying foreign creditors as provided in paragraph 1 of article 14 is to inform them of the commencement of insolvency proceedings and of the time-limit to file their claims. Furthermore, as a corollary to the principle of equal treatment established by article 13, article 14 requires that foreign creditors should be notified whenever notification is required for creditors in the enacting State.

.35 Paragraph 2 of article 14 in principle requires individual notification for foreign creditors but leaves discretion to the court to decide otherwise in a particular case (for example if individual notice would entail excessive cost or would not seem feasible under the circumstances). It is advisable for notifications to be effected by such expeditious means that the court considers adequate. The need for notification to be performed in a timely manner is the reason for the provision in paragraph 2 that 'no letters rogatory or other, similar formality is required'.

.36 Paragraph 3 of article 14 requires that notifications include basic information about the time and place for filing claims, whether secured creditors need to file claims and other information with which creditors located in the enacting State would be provided. This paragraph is intended to give recognition to the fact that foreign creditors may be relatively uninformed regarding local insolvency procedures. Provision of some basic information about the processes that foreign creditors are required to follow in order to establish any claim that they may have will ensure that they are able to effectively participate in such local insolvency proceedings.

Chapter III — Recognition of a foreign proceeding and relief

Article 15 — Application for recognition of a foreign proceeding and Article 16 — Presumptions concerning recognition

.37 Article 15 defines the core procedural requirements for an application by a foreign representative for recognition. Article 16 also establishes presumptions that allow the court to expedite the evidentiary process; at the same time they do not prevent, in accordance with the applicable procedural law, calling for or assessing other evidence if the conclusion suggested by the presumption is called into question by the court or an interested party. Article 15, in conjunction with article 16, provides a simple, expeditious structure to be used by a foreign representative to obtain recognition.

.38 The Model Law presumes that documents submitted in support of the application for recognition need not be authenticated in any special way, in particular by legalization[2]: according to article 16, paragraph 2, the court is entitled to presume that those documents are authentic whether or not they have been legalized. ‘Legalization’ is a term often used for the formality by which a diplomatic or consular agent of the State in which the document is to be produced certifies the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp on the document.

.39 It follows from paragraph 2 of article 16, (according to which the court ‘is entitled to presume’ the authenticity of documents accompanying the application for recognition) that the court retains discretion to decline to rely on the presumption of authenticity or to conclude that evidence to the contrary prevails. This flexible solution takes into account the fact that the court may be able to assure itself that a particular document originates from a particular court even without it being legalized, but that in other cases the court may be unwilling to act on the basis of a foreign document that has not been legalized, particularly when documents emanate from a jurisdiction with which it is not familiar. The presumption is useful because legalization procedures may be cumbersome and time-consuming (for example also because in some States they involve various authorities at different levels).

.40 In order not to prevent recognition because of non-compliance with a mere technicality (for example where the applicant is unable to submit documents that in all details meet the requirements of subparagraphs 2 (a) and (b) of article 15), subparagraph 2 (c) of article 15 allows evidence other than that specified in subparagraphs 2 (a) and (b) to be taken into account; that provision, however, does not compromise the court’s power to insist on the presentation of evidence acceptable to it. Paragraph 2 of article 16, which provides that the court ‘is entitled to presume’ the authenticity of documents accompanying the application for recognition, applies also to documents submitted under subparagraph 2 (c) of article 15.

.41 Paragraph 3 of article 15 requires that an application for recognition shall be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. That information is needed by the court not so much for the decision on recognition itself but for any decision granting relief in favour of the foreign proceeding. In order to tailor such relief appropriately and make sure that the relief is consistent with any other insolvency proceeding

2 The term ‘legalization’ is used in this Explanatory Memorandum for the purpose of consistency with the Model Law.

concerning the same debtor, the court needs to be aware of all foreign proceedings concerning the debtor that may be under way in third States.

.42 Paragraph 4 of article 15 entitles, but does not compel, the court to require a translation of some or all documents accompanying the application for recognition. If that discretion is compatible with the procedures of the court, it is useful since it allows the court, when it understands the documents, to shorten the time needed for a decision on recognition and reduces costs. Circumstances might be envisaged whereby the need for urgency in granting relief is so great that a court might overlook the fact that a document is provided in another language if that document is otherwise understood by the court.

Article 17 — Decision to recognise a foreign proceeding

.43 The purpose of article 17 is to indicate that, if recognition is not contrary to public policy, and if the application meets the requirements set out in the article, recognition will be granted as a matter of course.

.44 Apart from the public policy exception (see article 6), the conditions for recognition do not include those that would allow the court considering the application to evaluate the merits of the foreign court's decision by which the proceeding has been commenced or the foreign representative appointed. The foreign representative's ability to obtain early recognition (and the consequential ability to invoke in particular articles 20, 21, 23 and 24) may be essential for the effective protection of the assets of the debtor from dissipation and concealment. For that reason, paragraph 3 requires the court to decide on the application 'at the earliest possible time'.

.45 Paragraph 2 of article 17 makes a distinction between foreign proceedings categorised as the 'main' proceedings and those foreign proceedings that are not main proceedings, depending upon the jurisdictional basis of the foreign proceeding. The relief flowing from recognition may depend upon the category into which a foreign proceeding falls. For example, recognition of a 'main' proceeding triggers an automatic stay of individual creditor actions or executions concerning the assets of the debtor (article 20, subparagraphs 1 (a) and (b)) and an automatic 'freeze' of those assets (article 20, subparagraph 1 (c)), subject to certain exceptions referred to in article 20, paragraph 2.

.46 With regard to subparagraph 2 (b) of article 17*,* the Model Law does not envisage recognition of a proceeding commenced in a foreign State in which the debtor has assets but no establishment as defined in subparagraph (c) of article 2*.*

.47 A decision to recognise a foreign proceeding would normally be subject to review or rescission. Paragraph 4 of article 17 clarifies that the question of revisiting the decision on recognition, if grounds for granting it were fully or partially lacking or have ceased to exist is to be determined under the law of the enacting State. Modification or termination of the recognition decision may be a consequence of a change of circumstances after the decision on recognition, for instance, if the recognised foreign proceeding has been terminated or its nature has changed (for example, a reorganization proceeding might be transformed into a liquidation proceeding). Also, new facts might arise that require or justify a change of the court's decision, for example, if the foreign representative disregarded the conditions under which the court granted relief.

Article 18 — Subsequent information

.48 Paragraph (a) of article 18 takes into account the fact that technical modifications in the status of the proceedings or the terms of the appointment are frequent, but that only some of those modifications are such that they would affect the decision granting relief or the decision recognising the proceeding; therefore, the provision only calls for information of 'substantial' changes. It is possible that, after the application for recognition or after recognition, changes occur in the foreign proceeding that would have affected the decision on recognition or the relief granted on the basis of recognition. For example, the foreign proceeding may be terminated or transformed from a liquidation proceeding into a reorganization proceeding, or the terms of the appointment of the foreign representative may be modified or the appointment itself terminated.

.49 Paragraph 3 of article 15 requires that an application for recognition be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. Paragraph (b) of article 18 extends that duty to the time after the application for recognition has been filed. That information will allow the court to consider whether relief already granted should be coordinated with the insolvency proceedings that have been commenced after the decision on recognition (see article 30).

Article 19 — Relief that may be granted upon application for recognition of a foreign proceeding

.50 Article 19 deals with 'urgently needed' relief that may be ordered at the discretion of the court and is available as of the moment of the application for recognition (unlike relief under article 21, which is also discretionary but which is available only upon recognition).

.51 Relief may be urgently needed before the decision on recognition in order to protect the assets of the debtor and the interests of creditors. On the other hand, recognition has not yet been granted and, therefore, relief is restricted to urgent and provisional measures. The urgency of the measures is alluded to in the opening words of paragraph 1, while subparagraph 1(a) restricts the stay to execution proceedings, and the measure referred to in subparagraph 1(b) is restricted to perishable assets and assets susceptible to devaluation or otherwise in jeopardy. Otherwise, the measures available under article 19 are essentially the same as those available under article 21.

.52 Relief available under article 19 is provisional in that, as provided in paragraph 3, the relief terminates when the application for recognition is decided upon; however, the court is given the opportunity to extend the measure, as provided in article 21, paragraph 1(f). The court might wish to do so, for example, to avoid a hiatus between the provisional measure issued before recognition and the measure issued after recognition.

.53 Paragraph 4 of article 19 provides that, any relief granted in favour of a foreign non-main proceeding must be consistent (or should not interfere) with the foreign main proceeding if there is a foreign main proceeding on foot. In order to foster such coordination of pre-recognition relief with any foreign main proceeding, the foreign representative applying for recognition is required, by paragraph 3 of article 15, to attach to the application for recognition a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.

Article 20 — Effects of recognition of a foreign main proceeding

.54 While relief under articles 19 and 21 is discretionary, the effects provided by article 20 are not as they flow automatically from recognition of the foreign main proceeding. Another difference between discretionary relief under articles 19 and 21 and the effects under article 20 is that discretionary relief may be issued in favour of main and non-main proceedings, while the automatic effects apply only to main proceedings.

.55 The automatic consequences envisaged in article 20 are necessary to allow steps to be taken to administer an orderly and equitable cross-border insolvency proceeding. In order to achieve those benefits, the consequences of article 20 are imposed on proceedings even if the State where the centre of the debtor’s main interests is situated poses different (possibly less stringent) conditions for the commencement of insolvency proceedings or if the automatic effects of the insolvency proceeding in the country of origin are different from the effects of article 20. Recognition, therefore, has its own effects rather than importing the consequences of the foreign law into the insolvency system of the enacting State.

.56 By virtue of subparagraph (a) of article 2*,* the effects of recognition extend also to foreign 'interim proceedings'. That solution is necessary since interim proceedings should not be distinguished from other insolvency proceedings merely because they are of an interim nature. If after recognition the foreign 'interim proceeding' ceases to have a sufficient basis for the automatic effects of article 20, the automatic stay could be terminated, as provided for in paragraph 2 of article 20. (See also article 18, which deals with the obligation of the foreign representative 'to inform the court promptly of any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment').

.57 Notwithstanding the 'automatic' or 'mandatory' nature of the effects under article 20, it is expressly provided that the scope of those effects depends on exceptions or limitations that may exist in the law of the enacting State (see paragraphs 1.27-1.28).

.58 Paragraph 3 of article 20 authorises the commencement of individual action to the extent necessary to preserve claims against the debtor. Once the claim has been preserved, the action continues to be covered by the stay.

.59 Paragraph 4 of article 20 merely clarifies that the automatic stay and suspension pursuant to article 20 do not prevent anyone, including the foreign representative or foreign creditors, from requesting the commencement of a local insolvency proceeding and from participating in that proceeding. The right to apply to commence a local insolvency proceeding and to participate in it is in a general way dealt with in articles 11, 12 and 13. If a local proceeding is initiated, article 29 deals with the coordination of the foreign and the local proceedings.

Article 21 — Relief that may be granted upon recognition of a foreign proceeding

.60 The types of relief listed in paragraph 1 of article 21, are typical in insolvency proceedings; however, the list is not exhaustive and the court is not restricted in its ability to grant any type of relief that is available under the law of the enacting State.

.61 Paragraph 2 of article 21 provides the court with a discretion to entrust the distribution of all or part of the debtor's assets to the foreign representative. It should be noted that the Model Law contains several safeguards designed to ensure the protection of local interests before assets are entrusted to the foreign representative. Those safeguards include the following: the general statement of the principle of protection of local interests in paragraph 1 of article 22; the provision in paragraph 2 of article 21, that the court should not entrust the assets to the foreign

representative until it is assured that the local creditors' interests are protected; and paragraph 2 of article 22, according to which the court may subject the relief that it grants to conditions it considers appropriate.

.62 Paragraph 3 of article 21 provides that relief granted to a foreign non-main proceeding should be limited to assets that are to be administered in that non-main proceeding and that, if the foreign representative seeks information concerning the debtor's assets or affairs, the relief must concern information required in that proceeding. The objective is to alert the court that relief in favour of a foreign non-main proceeding should not give unnecessarily broad powers to the foreign representative and that such relief should not interfere with the administration of another insolvency proceeding, in particular the main proceeding.

.63 The proviso 'under the law of this State' reflects the principle underlying the Model Law that recognition of a foreign proceeding does not mean extending the effects of the foreign proceeding as they may be prescribed by the law of the foreign State. Instead, recognition of a foreign proceeding entails attaching to the foreign proceeding consequences envisaged by the law of the enacting State.

Article 22 — Protection of creditors and other interested persons

.64 The idea underlying article 22 is that there should be a balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief. This balance is essential to achieve the objectives of cross-border insolvency legislation.

.65 The reference to the interests of creditors, the debtor and other interested parties in paragraph 1 of article 22, provides useful elements to guide the court in exercising its powers under article 19 or 21. In order to allow the court to tailor the relief, the court is authorised to subject the relief to conditions (paragraph 2) and to modify or terminate the relief granted (paragraph 3). An additional feature of paragraph 3 is that it expressly gives standing to the parties who may be affected by the consequences of articles 19 and 21 to petition the court to modify or terminate any relief provided under those articles.

Article 23 — Actions to avoid acts detrimental to creditors

.66 The procedural standing conferred by article 23 extends only to actions that are available to the local insolvency administrator in the context of an insolvency proceeding, and the article does not equate the foreign representative with individual creditors who may have similar

rights under a different set of conditions. Such actions of individual creditors fall outside the scope of article 23.

.67 The Model Law expressly provides that a foreign representative has standing to initiate actions to avoid or otherwise render ineffective legal acts detrimental to creditors. The provision is drafted narrowly in that it does not create any substantive right regarding such actions and also does not provide any solution involving conflict of laws. The effect of the provision is that a foreign representative is not prevented from initiating such actions by the sole fact that the foreign representative is not the insolvency administrator appointed in Australia.

Article 24 — Intervention by a foreign representative in proceedings in this State

.68 The purpose of article 24 is to avoid the denial of standing to the foreign representative to intervene in proceedings that may otherwise occur merely because the procedural legislation may not have contemplated the foreign representative among those having such standing. The article applies to foreign representatives of both main and non-main proceedings.

Chapter IV — Cooperation with foreign courts and foreign representatives

Article 25 — Cooperation and direct communication between a court of this State and foreign courts or foreign representatives

.69 The ability of courts, with appropriate involvement of the parties, to communicate 'directly' and to request information and assistance 'directly' from foreign courts or foreign representatives is intended to avoid the use of time-consuming procedures traditionally in use. This ability is critical when the courts consider that they should act with urgency.

Article 26 — Cooperation and direct communication between the [insert title of a person or body administering a reorganization or liquidation under the law of the enacting State] and foreign courts or foreign representatives

.70 Article 26 deals with international cooperation between persons who are appointed to administer assets of insolvent debtors. It reflects the important role that such persons can play in devising and implementing cooperative arrangements.

Article 27 — Forms of cooperation

.71 Article 27 provides courts with an indicative list of the types of cooperation that are authorised by articles 25 and 26. This list of forms of possible cooperation is not intended to be exhaustive, and does not preclude other forms of cooperation.

Chapter V — Concurrent proceedings

Article 28 — Commencement of a proceeding under [identify laws of the enacting State relating to insolvency] after recognition of a foreign main proceeding

.72 Article 28, in conjunction with article 29, provides that recognition of a foreign main proceeding will not prevent the commencement of a local insolvency proceeding concerning the same debtor as long as the debtor has assets in the State. If the debtor has no assets in the State, there is no jurisdiction for commencing an insolvency proceeding.

.73 Ordinarily, the local proceeding of the kind envisaged in article 28 would be limited to the assets located in the enacting State. In some situations, however, a meaningful administration of the local insolvency proceeding may have to include certain assets abroad, especially when there is no foreign proceeding necessary or available in the State where the assets are situated (for example, where the local establishment would have an operating plant in a foreign jurisdiction, where it would be possible to sell the debtor's assets in the enacting State and the assets abroad as a 'going concern', or where assets were fraudulently transferred abroad from the enacting State). In order to allow such limited cross-border reach of a local proceeding, the article includes the words 'and ... to other assets of the debtor that ... should be administered in that proceeding'. Two restrictions have been included in the article concerning the possible extension of effects of a local proceeding to assets located abroad: firstly, the extension is permissible 'to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27'; and, secondly, those foreign assets must be subject to administration in the enacting State under the laws of the enacting State. Those restrictions are useful in order to avoid creating an open-ended faculty to extend the effects of a local proceeding to assets located abroad, a faculty that would generate uncertainty as to the application of the provision and that might lead to conflicts of jurisdiction.

Article 29 — Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] and a foreign proceeding

.74 Article 29 gives guidance to the court that deals with cases where the debtor is subject to a foreign proceeding and a local proceeding at the same time. The opening words of the provision direct the court that in all such cases it must seek cooperation and coordination pursuant to chapter IV (articles 25, 26 and 27) of the Model Law. The principle embodied in article 29 is that the commencement of a local proceeding does not prevent or terminate the recognition of a foreign proceeding. This principle is essential for achieving the objectives of the Model Law in that it allows the court in the enacting State in all circumstances to provide relief in favour of the foreign proceeding.

.75 However, the article maintains a pre-eminence of the local proceeding over the foreign proceeding. This has been done in the following ways: firstly, any relief to be granted to the foreign proceeding must be consistent with the local proceeding (article 29, subparagraph (a) (i)); secondly, any relief that has already been granted to the foreign proceeding must be reviewed and modified or terminated to ensure consistency with the local proceeding (article 29, subparagraph (b) (i)); thirdly, if the foreign proceeding is a main proceeding, the automatic effects pursuant to article 20 are to be modified and terminated if inconsistent with the local proceeding (those automatic effects do not terminate automatically since they may be beneficial, and the court may wish to maintain them) (article 29, subparagraph (b) (ii)); and fourthly, where a local proceeding is pending at the time a foreign proceeding is recognised as a main proceeding, the foreign proceeding does not enjoy the automatic effects of article 20 (article 29, subparagraph (a) (ii)). Article 29 avoids establishing a rigid hierarchy between the proceedings since that would unnecessarily hinder the ability of the court to cooperate and exercise its discretion under articles 19 and 21.

.76 Subparagraph (c) of article 29 incorporates the principle that relief granted to a foreign non-main proceeding should be limited to assets that are to be administered in that non-main proceeding or must concern information required in that proceeding. That principle is expressed in paragraph 3 of article 21, which deals in a general way with the type of relief that may be granted to a foreign representative, and is restated in article 29, which deals with coordination of local and foreign proceedings. Paragraph 4 of article 19, dealing with pre-recognition relief, and article 30, on coordination of more than one foreign proceeding, are inspired by the same principle.

Article 30 — Coordination of more than one foreign proceeding

.77 Article 30 deals with cases where the debtor is subject to insolvency proceedings in more than one foreign State and foreign representatives of more than one foreign proceeding seek recognition or relief in the enacting State. The provision applies whether or not an insolvency proceeding is pending in the enacting State. If, in addition to two or more foreign proceedings, there is a proceeding in the enacting State, the court will have to act pursuant to both article 29 and article 30.

.78 The objective of article 30 is similar to the objective of article 29 in that the key issue in the case of concurrent proceedings is to promote cooperation, coordination and consistency of relief granted to different proceedings. Such consistency will be achieved by appropriate tailoring of relief to be granted or by modifying or terminating relief already granted. Unlike article 29 (which, as a matter of principle, gives primacy to the local proceeding), article 30 gives preference to the foreign main proceeding if there is one. In the case of more than one foreign non-main proceeding, the provision does not a priori treat any foreign proceeding preferentially. Priority for the foreign main proceeding is reflected in the requirement that any relief in favour of a foreign non-main proceeding (whether already granted or to be granted) must be consistent with the foreign main proceeding (article 30, subparagraphs (a) and (b)).

Article 31 — Presumption of insolvency based on recognition of a foreign main proceeding

.79 Article 31 establishes, upon recognition of a foreign main proceeding, a rebuttable presumption of insolvency of the debtor for the purposes of commencing an insolvency proceeding in the enacting State. The presumption does not apply if the foreign proceeding is a non-main proceeding. The reason is that an insolvency proceeding commenced in a State other than the State where the debtor has the centre of its main interests does not necessarily mean that the debtor is to be subject to laws relating to insolvency in other States.

.80 Article 31 would have particular significance when proving insolvency as the prerequisite for an insolvency proceeding would be a time-consuming exercise and of little additional benefit bearing in mind that the debtor is already in an insolvency proceeding in the State where it has the centre of its main interests and the commencement of a local proceeding may be urgently needed for the protection of local creditors. Nonetheless, the court of the enacting State is not bound by the decision of the foreign court, and local criteria for demonstrating insolvency remain operative, as is clarified by the words ‘in the absence of evidence to the contrary’.

Article 32 — Rule of payment in concurrent proceedings

.81 The rule in article 32 (sometimes referred to as the hotchpotch rule) is a useful safeguard in a legal regime for coordination and cooperation in the administration of cross-border insolvency proceedings. It is intended to avoid situations in which a creditor might obtain more favourable treatment than the other creditors of the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions. For example, an unsecured creditor has received 5 per cent of its claim in a foreign insolvency proceeding; that creditor also participates in the insolvency proceeding in Australia, where the rate of distribution is 15 per cent; in order to put the creditor in the equal position as the other creditors in Australia, the creditor would receive 10 per cent of its claim from the Australian proceeding.

.82 Article 32 does not affect the ranking of claims as established by the law of the enacting State and is solely intended to establish the equal treatment of creditors of the same class. For example, to the extent claims of secured creditors are paid in full, those claims are not affected by the provision.