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**INTERNATIONAL ORGANISATIONS' INVOLVEMENT AND EFFECT ON  
AUSTRALIAN INSOLVENCY LAW**

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## Introduction

The significance of innovation as a way of promoting growth has long been a priority for the government. This is because the drilling boom, which has been the backbone of the economy for the last two decades, is winding down, and there is widespread agreement that the boom has concealed a general loss in national productivity. The way a country fosters and controls risk are crucial to its innovation results. On the one hand, the regulations must find a balance between encouraging risk-taking and minimising the likelihood that risk safeguards may lead to corporate misuse and irresponsible behaviour (the moral hazard issue). Insolvency laws are a key market mechanism that governments use to achieve this equilibrium. There are two types of insolvency laws<sup>1</sup>. Those who prefer a company's liquidation over its reorganisation fall into the first category. These think that insolvency is the consequence of corporate malfeasance and, as a result, put a larger focus on creditor protection. The second set of laws reflects a "rescue culture," which permits financially distressed businesses to restructure rather than be pushed into liquidation. These think that insolvency is not the result of intentional misconduct and that giving the firm another opportunity would benefit creditors in the long run. Major issue with the insolvency law in Australia indicates that, "A person is solvent if, and only if, the person is able to pay all of the person's obligations as and when they become due and payable," according to the "Corporations Act 2001." As a result, "everyone who is not solvent is insolvent<sup>2</sup>."

The research aims to explore the international organisations' involvement and effect on Australian insolvency law. The findings include cross-border insolvency's underlying aspects, "Model Law on Cross-Border Insolvency" adopted by the Australia, Australia reforming its insolvency laws and comparing US and the UK.

## Findings

A bankrupt business or individual has several options:

- Liquidation, deliberate administration, and insolvency are the highly frequent corporate insolvency processes for an insolvent corporation.

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<sup>1</sup> Michael Weiss, 'Bridge over Troubled Water: The Revised Insolvency Regulation' (2015) 24(3) *International Insolvency Review* 192.

<sup>2</sup> Edouard Adelus, 'Global Law-Making in Insolvency Law: The Role for the United Nations Commission for International Trade Law' (2019) 24(1) *Uniform Law Review* 175.

- Bankruptcy and personal bankruptcy contracts are two personal insolvency treatments accessible to an insolvent individual<sup>3</sup>.

ASIC only supervises bankrupt businesses; it does not handle personal insolvency. To learn more about bankruptcy and personal insolvency arrangements, go [here](#).

### **Cross-border insolvency's underlying aspects**

The “universal approach and the territorial approach” are the two primary methods that nations have taken in emerging legislation and structures to regulate cross-border liquidation presidencies<sup>4</sup>.

#### Universal approach

The universal approach presumes that a single insolvency happening will be acknowledged in all countries where the company has assets or does business. If appropriate, the court or the administrator will administer the assets of the insolvent firm in line with the laws of the place of inclusion. All creditors must make claims in the rolling up via the court or administrator. When the assets of an insolvent corporation are located in other countries, the court has the right to request aid from the courts of other countries<sup>5</sup>.

A revised form of this method is employed when a major process at the place of integration is supplemented with “secondary or ancillary actions” in other countries where the insolvent firm's assets are situated. The surplus is transferred to the principal administrators after favouring creditors and making other agreed-upon payments. This improved universal method is manifested in part of Australia's current legal system (Corporations Act, section 601CL).

#### Territorial approach

The “territorial approach” presumes that each nation will have limited authority over a certain debtor's bankruptcy and those distinct processes will be conducted for each country under the laws of that country. There is no recognition for ongoing or finished procedures in other jurisdictions. One of the fundamental drawbacks of the “territorial approach to cross-border

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<sup>3</sup> Samantha Bewick, ‘The EU Insolvency Regulation, Revisited’ (2015) 24(3) *International Insolvency Review* 172.

<sup>4</sup> Mary Wyburn, ‘Debt Agreements for Consumers under Bankruptcy Law in Australia and Developing International Principles and Standards for Personal Insolvency’ (2014) 23(2) *International Insolvency Review* 101.

<sup>5</sup> Martin Davies et al, *Nygh's Conflict of Laws in Australia* (Chatswood, Nsw Lexisnexis Butterworths, 2020).

bankruptcy” is that distinct insolvency procedures may be initiated in each state where the debtor's assets are situated, with the cost of such actions eventually being paid by creditors. Inefficiencies and duplication are encouraged by the high cost and time required in multiple processes. Debtors and creditors may take benefit of time interruptions and various regulations regarding rescindable deals and favoured creditors to limit any damages arising from the debtor's failure to pay all obligations. Part of Australia's existing legal framework reflects the territorial approach to cross-border insolvencies<sup>6</sup>.

#### Model Law on Cross-Border Insolvency adopted by Australia

"The Cross-Border Insolvency Act was formally adopted by Australia's Federal Parliament," elevating the "United Nations Commission on International Trade Law's Model Law on Cross-Border Insolvency" to domestic law, a structure of philosophies coordinating "cross-border bankruptcy and insolvency cases" that has now been espoused in some form by 15 countries or territories. As described in this report, the Act will have a considerable influence on the management and supervision of "international insolvencies" including Australia.

Corresponding to the "Act's explanatory memorandum, the Model Law" intends to address "cross-border insolvencies," expedite international commodity and service trade, and integrate national and international financial institutions<sup>7</sup>. In practise, the Act would make it easier for Australian courts to deal with insolvent companies that have assets or liabilities in Australia and internationally. It is strictly practical in nature, with no aim of altering Australia's fundamental bankruptcy laws<sup>8</sup>.

The Model Law, contrasting several other worldwide treaties, such as the "New York Convention on International Commercial Arbitration," does not reliant on mutuality to function — creditors and councils of creditors (for instance, liquidators) who live in a country that has not ratified the "Model Law" are not barred from using the Act as a result, even though creditors in Australia cannot assume the similar treatment in other countries. Only the "United States (which approved Chapter 15 of the Bankruptcy Code in 2005), South Korea, Japan, and New Zealand have adopted the Model Law in the Asia-Pacific region<sup>9</sup>."

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<sup>6</sup> Reinhard Bork, 'Hamisch Anderson: The Framework of Corporate Insolvency Law Ian F. Fletcher: The Law of Insolvency Look Chan Ho: Cross-Border Insolvency' (2018) 79(3) *Zeitschrift für Insolvenzrecht* 306.

<sup>7</sup> Kazuhiko Yamamoto, 'New Japanese Legislation on Cross-Border Insolvency as Compared with the UNCITRAL Model Law' (2002) 11(2) *International Insolvency Review* 67.

<sup>8</sup> Reinhard Bork, 'The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency' (2017) 26(3) *International Insolvency Review* 246.

<sup>9</sup> Felicity Deane and Rosalind Mason, 'The UNCITRAL Model Law on Cross-Border Insolvency and the Rule of Law' (2016) 25(2) *International Insolvency Review* 138.

The court's determination of the most relevant location (and hence jurisdiction) to the bankruptcy will be essential to the intent of accelerating the handling of international insolvencies. This court must determine whether international procedures are "foreign main proceedings" or "foreign non-main proceedings," which necessitates a fortitude of the insolvency's "centre of major interest" ("COMI")<sup>10</sup>.

Apart from establishing a rebuttable assumption that the firm's registered office is its COMI, the Act offers no direction to the court on how to determine COMI. "The "Honourable J.J. Spigelman, Chief Justice of New South Wales," lately stated that Australian courts will consider how other countries have perceived this notion, such as the rationality espoused by "US bankruptcy judge Burton R. Lifland in *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*" "In Provisional Liquidation, 374 B.R. 122." The court decided that verifying COMI was a concern for the court, not the parties, in that case. (Despite the fact that the debtor "hedge funds" had no links to the "Cayman Islands," the interested parties consented to a "COMI in the Cayman Islands, where the registered office was also located.)" The court decided that the insolvent company's COMI was the United States, not the Cayman Islands, for reasons primarily linked to Bear Stearns' management. Centred on that determination, the US bankruptcy court declined to recognise the "Cayman Islands liquidation proceedings" as either major or nonmain international records under "Chapter 15 of the US Bankruptcy Code." On appeal, a federal district court upheld the judgement in May 2008<sup>11</sup>.

### **The Act's Impact in Australia**

Subject to specific exceptions (primarily affecting insurance firms and "deposit-taking" organizations (i.e., banks), if a foreign case is recognised as the foreign primary progressing on the use of the "foreign creditor" (or its agent), the Australian courts will be required to:

- Stay any steps taken compared to the debtor in Australia
- Stay the implementation against the debtor's Australian assets.
- Reschedule the debtor's ability to sell, hinder, or else discard of his or her assets; and

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<sup>10</sup> ANKEETA GUPTA, 'Insolvency and Bankruptcy Code, 2016: A Paradigm Shift within Insolvency Laws in India' (2019) 36(2) *The Copenhagen Journal of Asian Studies* 75.

<sup>11</sup> Shuai Guo, 'A "Model Law" for Cross-Border Insolvency and Resolution of Financial Institutions' [2021] *SSRN Electronic Journal*.

- Allow for the commencement (or continuation) of actions in Australia only if the debtor has holdings in Australia and the dealings are limited to those assets<sup>12</sup>.

If the debtor's COMI is Australia, the Act has a number of significant implications for the debtor's international creditors, including the (i) ability for foreign creditors to begin and join in Australian court actions. (ii) Unsecured overseas creditors have the same rights as unpaid domestic creditors, including the right to a share of a debtor's liquidation profits; and (iii) The court has wide powers to stay or prohibit proceedings if essential to safeguard the debtor's assets or creditors' preferences. Irrespective of the COMI, the Act mandates Australian courts to engage with foreign courts and representations to the "greatest degree feasible" (i.e., insolvency experts and agents of those practitioners). Foreign creditors may anticipate the following types of cooperation:

- The court may offer immediate temporary remedy to preserve assets of the debtor residing in Australia from the moment an application to recognise foreign proceedings is filed, such as fixing the assets or halting implementation opposed to the assets<sup>13</sup>.
- Australian courts will be allowed to commend a creditor's overseas deputy with the management or realisation of all or part of the "debtor's assets" situated in Australia, as well as assisting in the coordination of the "debtor's assets and dealings."
- The court has the authority to compel witnesses to testify, evidence to be taken, and data about the debtor's affairs to be given. The court has the authority to speak effectively with the foreign court or administration and to supply data to that court or representation; and
- If the same debtor is involved in both domestic and overseas processes, they must be coordinated.
- The Model Law's enactment in Australia will be of great value to overseas creditors with defaulters in Australia. This support will most likely be most valuable to "foreign creditors whose debtor's COMI is in a foreign authority," but it will also aid foreign creditors in their recovery proceedings against debtors whose COMI is in Australia<sup>14</sup>.

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<sup>12</sup> Keith D Yamauchi, 'Should Reciprocity Be a Part of the UNCITRAL Model Cross-Border Insolvency Law?' (2007) 16(3) *International Insolvency Review* 145.

<sup>13</sup> Primrose ER Kurasha, 'A COMPARATIVE ANALYSIS of the UNCITRAL MODEL LAW on CROSS-BORDER INSOLVENCY and EU INSOLVENCY REGULATION 2017, against the BACKGROUND of VARIOUS SOURCES of CROSSBORDER INSOLVENCY LAW' [2017] (11) *Pretoria Student Law Review*.

<sup>14</sup> Yeon Ju Lee, 'New EU Regulation on Insolvency Proceedings - Focused on the International Insolvency Proceedings of Multinational Enterprises -' (2018) 24(1) *Korea Private International Law Journal* 349.

### **Australia reforming its insolvency laws**

Throughout the globe, the COVID-19 outbreak has developed to be a tremendous prospect for national commercial streamlining framework modification. In the “Fourth Quarter 2020 edition of International Restructuring Newswire,” has recent changes in a variety of financial restructuring instruments available in the “United Kingdom, Germany, and the Netherlands” all of which were intended to integrate some of the assistances of restructuring existing under “Chapter 11 in the United States.” Australia is being focused in this issue, and the anticipated amendments to its restructuring legislation, which took effect in January 2021<sup>15</sup>.

“The Corporations Amendment (Corporation Insolvency Reforms) Act 2020 (Cth) (Legislation)” is the most substantial change to Australia's commercial insolvency structure in almost 30 years, and it is the most recent in a series of reactions to the pandemic's economic impact. The main purpose of the Act is to facilitate “Australia's SMEs” overcome the pandemic's “economic, financial, and operational disputes.” The amendments also acknowledge that Australia's current insolvency processes have been undermined or rendered impractical in the SME sector for a variety of reasons<sup>16</sup>.

The legislation focuses on the implementation of two new insolvency and restructuring courses for small businesses, including an abridged “debtor-in-possession” reorganisation process, a basic insolvency trail, and additional “complementary measures” intended to increase the number of “insolvency practitioners” accessible to oversee the new developments. The new reorganisation procedure borrows some of the “debtor-in-possession” provisions of “Chapter 11 of the US Bankruptcy Code” and creates a new procedure for qualified companies to work with specialist reorganisation practitioners to rearrange present obligations under a creditor-accepted reorganisation strategy<sup>17</sup>.

Qualified small businesses have had access to the Act that establishes the framework for insolvency changes from January 1, 2021. The provisions regulating the execution of the new

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<sup>15</sup> Meng Seng Wee, ‘The Belt and Road Initiative, China’s Cross-Border Insolvency Law, and the UNCITRAL Model Law on Cross-Border Insolvency’ (2020) 8(1) *The Chinese Journal of Comparative Law* 116.

<sup>16</sup> Jeffery Black and Tim Mornane, ‘Insolvency Law Reform in Australia’, <https://www.nortonrosefulbright.com/en/knowledge/publications/2021/q1> (January 2021) <<https://www.nortonrosefulbright.com/en/knowledge/publications/cd46e9a1/insolvency-law-reform-in-australia>>.

<sup>17</sup> Stacey Steele, Ian Ramsay and Miranda Webster, ‘Insolvency Law Reform in Australia and Singapore: Directors’ Liability for Insolvent Trading and Wrongful Trading’ (2019) 28(3) *International Insolvency Review* 363.

streamlined processes are incorporated in subservient law. The legislation's regulations (Regulations) and rules (Rules) were released on December 21, 2020, only ten days before the new processes went into effect.

## Context

It's vital to assess the context in which new laws will be implemented while contemplating legislation changes. Two major challenges have driven revisions in Australia: (1) the significance of the SME sector to the Australian financial system, and (2) the present legal framework's preparedness and competence to deal with the disturbance triggered by the epidemic.

SME insolvency rules are significant since SMEs are so important to the Australian economy. To that end, it's worth mentioning that “97.5 percent of Australian firms have less than 20 employees (i.e. are small businesses).” In Australia, small businesses utilize “4.7 million people, or 44 percent of the total private non-economic sector employment.” SMEs have been mainly hard hit by the outbreak. As a consequence of the outbreak, many SMEs may be compelled to reorganise their operations and finances, while others may fall out of business entirely. As a consequence, it's no surprise that the Australian government has given SMEs top priority in its proposed insolvency legislation amendments<sup>18</sup>.

While the pandemic spurred Australia to pass the laws, the government has long faced pressure to change its "one size fits all" method to bankruptcy law. Voluntary administration, which comprises the approval and execution of a lease of business arrangement under “Part 5.3A of the Corporations Act 2001 (Cth) (Corporations Act),” is the current statutory rescue procedure for insolvent businesses in Australia (DOCA). The voluntary management method takes a "one-size-fits-all" method to financial troubles, with a bankrupt café being subjected to the same laws and processes as Virgin Australia's bankruptcy.

As a consequence, the Australian Securities and Investments Commission's (ASIC) most current annual corporate insolvency data show:

- SMEs dominate external administrators' reports.

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<sup>18</sup> Jeffery Black and Tim Mornane, ‘Insolvency Law Reform in Australia’, <https://www.nortonrosefulbright.com/en/knowledge/publications/2021/q1> (January 2021) <<https://www.nortonrosefulbright.com/en/knowledge/publications/cd46e9a1/insolvency-law-reform-in-australia>>.



- External administration was used by 85 percent of businesses with assets of less than \$100,000, 76 percent with “fewer than 20 employees, and 38 percent with liabilities of less than \$250,000.”
- 96 percent of creditors in this category got a compensation of 0–11 cents in the dollar as a consequence of the external supervision, indicating the asset/liability structure of SME bankruptcies.

## Overview of Legislation

*Restructuring procedure:* “Chapter 11 of the United States Bankruptcy Code” inspired the “restructuring” procedure. Its purpose is to give a “simple, inexpensive, and faster” debt restructuring alternative than the present system to “financially challenged but viable” small businesses.

The “debtor-in-possession model” is being implemented into “Australian insolvency law,” with corporate owners maintaining to control under a moratorium while drafting a reform plan utilising an independent “small business restructuring practitioner” (and ultimately certified by) (SBRP)<sup>19</sup>. After that, the streamlining plan is submitted to the firm's creditors for approval within “20 days and within a further 15 business days.” The firm must reimburse its employee privileges before the creditor vote. The Act will offer a transitional period to enable practitioners to get acquainted with the new procedure and register. This will facilitate a corporation to assert its desire to participate in the procedure, which will allow existing bankruptcy relief to be extended for up to three months while a practitioner is appointed.

*Streamlining the liquidation process:* the “simplified liquidation route” is a modernized version of Australia's current liquidation system. The key distinction is that for “straightforward” small business liquidations without evidence of director malfeasance, the liquidator's statutory criteria are decreased<sup>20</sup>.

These include (i) deleting the responsibility to disclose misbehaviour except there are good reasons to assume misconduct has arisen (ii) removing the necessity to summon creditor

<sup>19</sup> Benhadj Shaaban Masoud, ‘The Context for Cross-Border Insolvency Law Reform in Sub-Saharan Africa’ (2014) 23(3) *International Insolvency Review* 181.

<sup>20</sup> Paul J Omar, ‘The Landscape of International Insolvency Law’ (2002) 11(3) *International Insolvency Review* 173.

meetings (iv) streamlining the “dividend and proof of debt” processes. The rules are meant to decrease small firms' costs of handling the liquidation procedure (which can enforce an organizational obligation without commensurate assistance to creditors). The new procedure aims to increase the profits paid to small business borrowers<sup>21</sup>.

Both processes will include "safeguards," such as independent practitioner administration, preservation of key creditors' rights, such as tenable creditors with "all asset" security, and a seven-year ban on the similar firm or supervisors consuming the method in the reformation process; a practitioner's ability to halt the process if misbehaviour is discovered<sup>22</sup>. Creditors have the opportunity to elect on the planned reorganization plan throughout the liquidation method:

- The creditors' procedure for converting the bankruptcy into a "full" liquidation
- Company directors who want to use the method must certify that their firm is qualified and has not engaged in illegal "phoenixing"<sup>23</sup>.

### **Additional actions**

The law would contain inducements to boost the accessibility of practitioners to take appointments, in order to accommodate the expected increase in the number of enterprises wishing to use the new processes<sup>24</sup>. They include:

- Until June 30, 2022, the government will waive registration fees for registered liquidators to persuade them to enter or re-join the market.
- Changes aimed at giving insolvency practitioners greater registration flexibility.
- Creating a new kind of practitioner who is only focused on the new restructuring process

### **Comparing United States and the United Kingdom**

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<sup>21</sup> S Chandra Mohan, 'Cross-Border Insolvency Problems: Is the UNCITRAL Model Law the Answer?' (2012) 21(3) *International Insolvency Review* 199.

<sup>22</sup> Paul J Omar, 'The Landscape of International Insolvency Law' (2002) 11(3) *International Insolvency Review* 173

<sup>23</sup> Philipp Paech, 'Close-out Netting, Conflict of Laws and Insolvency' [2014] *SSRN Electronic Journal*.

<sup>24</sup> Jeffery Black and Tim Mornane, 'Insolvency Law Reform in Australia', <https://www.nortonrosefulbright.com/en/knowledge/publications/2021/q1> (January 2021) <<https://www.nortonrosefulbright.com/en/knowledge/publications/cd46e9a1/insolvency-law-reform-in-australia>>.

In the “United States and the United Kingdom,” identical legislation has recently been introduced, and the law is comparable. In the United States, the Small Business “Reorganization Act of 2019 (US) (SBRA) was approved in August 2019 and took impact in February 2020.” The SBRA complemented a new “Subchapter V to Chapter 11 of the US Bankruptcy Code” to focus on shortcomings in the present procedure for SMEs, such as exorbitant expenses, monitoring issues, and procedural barriers. The present restructuring procedure in Australia and Subchapter V have quite different qualifying rules, with the Australian requirements being far more demanding. Finally, the new restructuring method will only be open to incorporated Australian businesses; nevertheless, any organisation may seek Subchapter V relief (so long as 50 percent of their liabilities represent business debt).

In Australia, the new methods are only accessible to SMEs with debts of less than "AUD \$1 million (which the Australian government claims represents 76 percent of businesses insolvent today); in the United States, Subchapter V had a debt ceiling of USD \$2.7 million (approx. AUD \$3.8 million), but the US Congress raised it to USD \$7.5 million (approx. AUD \$10.6 million)" in reaction to the expected heightened demand engendered by the epidemic<sup>25</sup>.

Associated-party loans are not included in “Subchapter V's debt ceiling,” which may be important in the present economic context; nonetheless, related-party debt seems to count in the direction of the "AUD \$1 million" level in Australia, according to the Regulations<sup>26</sup>. The Act does not fully execute all of the rights granted to a “debtor-in-possession under Subchapter V.” Certain aspects of “Subchapter V” that are not currently covered by the law, such as the capability to refuse expensive contracts and pay managerial costs throughout the course of the reorganizing plan, might be beneficial to Australian SMEs and may be the subject of future legislation.

In June 2020, the “UK's Corporate Insolvency and Governance Act 2020 (UK) (CIGA)” comes into effect. As part of the UK's reaction to the epidemic, CIGA implements a slew of "debtor-friendly" amendments to English reform and bankruptcy law. The broad moratorium, which enables directors to apply to the Court for a “20-day enforcement moratorium,” which

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<sup>25</sup> Australia Parliament., *Improving Australia's Corporate Insolvency Laws : Issues Paper* (The Committee, 2003).

<sup>26</sup> Jeffery Black and Tim Mornane, ‘Insolvency Law Reform in Australia’, <https://www.nortonrosefulbright.com/en/knowledge/publications/2021/q1> (January 2021) <<https://www.nortonrosefulbright.com/en/knowledge/publications/cd46e9a1/insolvency-law-reform-in-australia>>.

can be prolonged for another “20 days without creditor consent or perpetuity” with creditor agreement while a streamline is exchanged, is a key feature of the CIGA's restructuring measures. A multitude of issues are covered by the moratorium, including the execution of landlord and secured creditor claims<sup>27</sup>.

On the other hand, the new Australian method seems to keep the possibility of secured creditors enforcing against crucial corporate assets in a rescue operation open. The unwillingness to entangle opposing opinions secured creditors to a proposal succumbed to creditors, as well as the evident inadequate nature of the moratorium whereas a strategy is being primed under the new laws, may limit the ability of the SME rescue option to substantially spread the number of fruitful debt reorganisations for small industries.

### **Other important considerations**

*Eligibility:* The revised criteria of the Legislation be appropriate to qualifying integrated SMEs with total "liabilities" of less than AUD \$1 million, as previously indicated.

The term "liabilities" is described widely in the Laws. When overdue “rent, tax debt, employee entitlements, and bank” or other funding are all factored in, SMEs' total liabilities are expected to approach, if not surpass, the AUD \$1 million threshold in many cases. Furthermore, under the final Regulations, contingent liabilities are not excluded from the calculation of “debts and claims for the AUD \$1 million limit.” This is a significant shift from the previous Policies, which eliminated dependent obligations from the description of an eligible debt or claim for determining eligibility. For a number of insolvent SMEs, the existing criterion acts as a "barrier to entrance."

*Secured creditors:* According to the idea, “secured creditors” will only be accountable for the amount of their indiscreet debt. If their debt is fully secured (i.e., the value of their deposit security is equivalent to or more than the amount of their debt), the procured creditor may only be obliged by the plan if it agrees to be compelled by it. Additionally, it is recommended that the presence of a streamlining plan would not preclude a “secured creditor” from understanding or else trading with their safety concern until the Court creates instructions to

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<sup>27</sup> Jeffery Black and Tim Mornane, ‘Insolvency Law Reform in Australia’, <https://www.nortonrosefulbright.com/en/knowledge/publications/2021/q1> (January 2021) <<https://www.nortonrosefulbright.com/en/knowledge/publications/cd46e9a1/insolvency-law-reform-in-australia>>.

that impact or the “secured creditor” accepts the plan's proposal (i.e., "voted" in approve of the plan).

As a consequence, it has the same status as a secured creditor in a voluntary administration business arrangement. SBRPs will also be prohibited from selling company property that is matter to a security concern except the sale is undertaken in the conventional course of business, with the secured party's written consent, or with the Court's permission. Small businesses may find it challenging to effectively reorganise under the new method because of these difficulties.

*Remuneration:* Only a specified fee for the new procedure may be collected by the SBRP, which must be approved upon by the board preceding to the SBRP's appointment. When an SBRP incurs expenses connected to defending legal actions taken by third parties, the Rules allow an exception from charging just a set fee agreed upon with the board by requiring the board to agree on a mechanism for determining the SBPR's compensation in the case of legal actions. The SBPR's compensation is split into the following categories:

- A specific fee agreed upon by the board for the overall restructuring
- Additional income for restructuring plan efforts, estimated as a percentage of payments made to creditors

#### Takeaways and Key Issues

In Australia, the small company insolvency legislation revisions have received mixed reviews. Some insolvency practitioners and attorneys have challenged the new subclass of liquidators licenced simply to act as SBRPs for having insufficient credentials, experience, and licencing criteria. Their fear is that people who will be eligible for licensure may lack adequate knowledge of Australia's bankruptcy process to perform their jobs successfully.

Other important challenges that have arisen as a result of the changes include:

- Obligations accrued after the SBRP's appointment take precedence over unsecured debts accumulated previous to the restructuring. Employees and contractors will have no assurance that their liabilities would be paid before prevailing “unsecured creditors,” making it challenging for small enterprises to maintain workers and preserve connections with crucial suppliers throughout the streamlining process.
- SBRPs' responsibilities and obligations are out of proportion to their function, authority, and compensation. Once appointed, SBRPs are considered as "officers" of

the firm, subjecting them to director obligations under the “Corporations Act 2001,” as well as theoretically substantial obligations under workplace or professional health and welfare, and ecological legislation. In a "debtor in possession" type procedure, SBRPs have little authority over the firm, which remains in the hands of the administrators. Despite the overview of "Regulation 5.3B.42 to the Corporations Regulations 2001," which safeguards SBRPs from liability for conduct "in good faith and without negligence," this means that SBRPs may be revealed to probable accountabilities that are out of proportion to their comparatively limited responsibilities.

- "Section 453A of the Corporations Act 2001 and Regulation 5.3B.02 of the Corporations Regulations 2001" define the restructuring period as the time between the appointment of an SBRP and the filing of a restructuring plan that is authorised by creditors. It is worth noting that it excludes the time when the reform plan is really executed. It persists to be seen how successful this will be in safeguarding that creditors' authorised reorganization plans are effectively and competently executed<sup>28</sup>.
- It's still unclear if Australia's expected "tidal wave" of insolvencies will result in pervasive implementation of the federal government's new small-business restructuring methods. No companies have used the new reorganisation process as of January 25, 2021, and only five organisations had stated their intention to utilise the transitory reorganisation support period from "January 1, 2021, to March 31, 2021"<sup>29</sup>."

These new types of restructuring and bankruptcy proceedings in Australia should be understood by financiers, banks, and unsecured creditors. Creditors should be willing to be active if debtors launch a new reorganisation procedure or streamlined liquidation due to the absence of creditor monitoring and shortened time limitations.

### **Recommendations**

Australia must also consider whether art 21(2)'s 'sufficient protection' clause authorises asset transfers overseas if the foreign policy of dissemination varies from the Australian system. In HIH, the UK had to deal with this problem and approved a shift of assets to Australia, despite

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<sup>28</sup> Gerard McCormack and Anil Hargovan, 'McCormack, Gerard; Hargovan, Anil --- "Australia and the International Insolvency Paradigm" [2015] SydLawRw 18; (2015) 37(3) Sydney Law Review 389', *classic.austlii.edu.au* (2015) <<http://classic.austlii.edu.au/au/journals/SydLawRw/2015/18.html>>.

<sup>29</sup> Jeffery Black and Tim Mornane, 'Insolvency Law Reform in Australia', <https://www.nortonrosefulbright.com/en/knowledge/publications/2021/q1> (January 2021) <<https://www.nortonrosefulbright.com/en/knowledge/publications/cd46e9a1/insolvency-law-reform-in-australia>>.

the fact that Australian law benefited some creditors in a fashion that had no parallel in the UK at the time. It would be strange if Australia was legally prohibited from reciprocating the preference<sup>30</sup>. The Federal Court prudently avoided reaching any general judgments on the implication of 'appropriate protection' in art 21 since the circumstances of the case were so severe — full rejection of the Australian allegation below the law of the main trials — (2)<sup>31</sup>.

In specific cases, Australia must consider whether it is allowed to employ foreign insolvency legislation. Another point of controversy is the execution of foreign money judgments entered during bankruptcy processes, although this presents difficulties that go beyond insolvency law. It seems a stretch to interpret the Model Law's concept of "cooperation" to include the execution of money judgments<sup>32</sup>.

A tendency towards undogmatical, compliant, and problem-focused on mutual acknowledgement and collaboration in bankruptcy [was] curving the globe 15 years ago, according to one of the drafters of the "EU Insolvency Law."

This prognosis seems to have been a little early, but he was on firmer basis when he said that the desolate option of bankruptcy's universality or territoriality had virtually dropped its significance. Chief Justice Spigelman (as he was then) continued the issue by acknowledging that courts and councils are seldom forced to choose among "universalism and territorialism." The discussion must move past dry theological assumptions and into a new practical framework for international bankruptcy cooperation, acknowledging, of course, that cooperation exists on a continuum with shades of grey. There is a demand for a new pragmatism that recognises that complicated issue solutions are usually nuanced and seldom straightforward. The learner hope that this report has laid the groundwork for new contributions for international bankruptcy assistance in Australia<sup>33</sup>.

## Conclusion

The full impact of reforms of insolvency law on Australia's SME sector will take some time to manifest. To begin, the 'first wave' of qualified organisations that go through the new

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<sup>30</sup> Iain Ramsay, 'Towards an International Paradigm of Personal Insolvency Law? A Critical View' (2017) 17(1) *QUT Law Review* 15.

<sup>31</sup> Rebecca Parry and Nan Gao, 'The Future Direction of China's Cross-Border Insolvency Laws, Related Issues and Potential Problems' (2018) 27(1) *International Insolvency Review* 5.

<sup>32</sup> c=au;o=Australian Government;ou=Australian Government Australian Securities and Investments Commission, 'Insolvency | ASIC - Australian Securities and Investments Commission', *Asic.gov.au* (2018) <<https://asic.gov.au/regulatory-resources/insolvency/>>.

<sup>33</sup> SFG Rammeloo, 'EU Law Reform: Cross-Border Civil and Commercial Procedural Law and Cross-Border Insolvency Law' (2014) 2(2) *The Dovenschmidt Quarterly*.

procedure must be examined to determine their accomplishment (or else). Second, as with any new legal framework, it is envisaged that the courts will be called upon to explain or expand the legislation in appropriate ways. Third, the Australian administration recognises that adopting and testing these changes will take time for “directors, accountants, and other experts.” Authorized SMEs will be competent to indicate their intent to employ the new method, after which the firm's executives will be allowed more provisional support in connection with the illogical exclusion provision (for up to six months). In times of bigger change, the Australian government is said to be exploring significant business and bankruptcy law changes as part of its 2021 economic recovery plan.

This may be achieved by undertaking a "root and branch" examination of our current legislation, with observers predicting that key areas to explore include (i) a “cross-class cram down mechanism under a DOCA or a creditors' scheme” of arrangement (ii) an enthusiastic Court-authorized procedure for super-precedence debtors prior to the beginning of formal insolvency reports. Insolvency legislation in Australia does not reflect an insolvent company's long-term expectations, effectiveness, assets, or brand value, and is focused towards its closure and liquidation as soon as possible. It excludes the prospect of the firm returning to profitability and protecting creditors' interests by any kind of restructuring or support.

It can be concluded that; with the ratification of the “CrossBorder Insolvency Act,” Australia made a significant step forward, but the moves might have been bolder and more coordinated. The “aid and auxiliary stipulations in Section 581 of the Corporations Act,” as well as the ancillary winding up process in “Section 601CL,” remained true to form (14). Rather of rethinking the foundation for international bankruptcy assistance, the “Australian legislature” chose piecemeal addition, implanting a new set of rules onto the current legislative framework via a distinct legislation called the “CrossBorder Insolvency Act.” Prevailing clauses were left intact, resulting in overlapping rules, complexity, the opportunity for misunderstanding, and, as a consequence, the potential for additional expenditures. A legislative revision will aid in the seamless and effective functioning of international insolvency cooperation. The blueprints for reform have been laid forth in the previous parts of this article: a cohesive, integrated collection of obligations, with the “UNCITRAL Model Law” as the cornerstone and supplementing where needed.



The legislative reform allows Australia to recognise that each state has a reasonable interest in protecting its tax collections and, as a result, to admit the validity of overseas tax allegations as evidence in an Australian bankruptcy. It also allows for a reconsideration of the refusal of some financial corporations from the “Cross-Border Insolvency Act,” acknowledging the importance of “cross-border cooperation” in financial catastrophe declaration.

Assignments Help Provider

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