

LOCAL PROCEEDINGS IN A MULTI-STATE LIQUIDATION: ISSUES OF JURISDICTION

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[Following a brief description of multi-state insolvency theories and the different types of jurisdiction exercisable by a court, this article examines jurisdiction in corporate insolvency within Australia. It begins with the constitutional context and then addresses geographical jurisdiction, jurisdiction to prescribe conduct, and jurisdiction to adjudicate between parties. It briefly touches upon the notion of an inherent jurisdiction to adjudicate in liquidation and on jurisdiction for proceedings during the course of, rather than on the adjudication of, a liquidation. The discussion of jurisdiction to adjudicate in a multi-state liquidation in Australia addresses the winding-up of a foreign company under Part 5.7 of the Corporations Act 2001 (Cth), as well as topics such as forum non conveniens, lis alibi pendens, anti-suit injunctions, and the notion of discretion to exercise jurisdiction to wind up a company. The jurisdiction to provide aid and auxiliary assistance upon request from a foreign court is also touched upon briefly.]

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The Court's inherent jurisdiction, while broad, is not unlimited.¹

I INTRODUCTION

Fundamental to the winding-up of a company that is insolvent is that otherwise justified claims will remain unsatisfied. The phenomenon of the failed HIH Insurance Group brought home to many people who may previously have had little interest in insolvency that 'just' claims may well go unrewarded. For example, parties with actions in negligence against otherwise impecunious policy holders were suddenly faced with the reality that their 'someone should pay' expectation would be unmet, because there was no-one who 'could pay'. The combination of impecunious defendants and their insolvent insurers meant that claims would remain unrequited.

Yet the law, particularly in areas principally derived from statute, may contain lacunae that prevent applicants from receiving what they believe to be the 'just desserts' of a judgment in their favour. Drafters of legislation, in seeking to reify the wishes of the government and to 'flesh out' the bones of its policy, may choose words that do not cover the particular permutation or combination of facts that serendipitously evolved. Such a fate awaited Mr Lunn, apparently the sole traceable member of the Cardiff Coal Co ('Cardiff'). Mr Lunn unsuccessfully sought the moribund, albeit solvent, private trading corporation's winding-up as a Part 5.7 body under the *Corporations Act 2001* (Cth) ('*Corporations Act*').²

While the case of *Lunn [No 2]*³ involved local proceedings in a corporate insolvency, it was not a multi-state insolvency, in the sense of dealing with facts arising in more than one state or law area.⁴ Yet, as discussed below, the lack of this multi-state dimension was fatal to Mr Lunn's application.⁵ Gaps in the law may also arise where an insolvency crosses jurisdictional borders because the local legislators have not considered or have chosen not to address the 'foreign' implications of a multi-state insolvency.

The majority of companies in Australia derive their existence from the *Corporations Act* and as such, the provisions on external administrations to achieve

¹ *Lunn v Cardiff Coal Co [No 2]* (2003) 173 FLR 63, 71 (Barrett J) ('*Lunn [No 2]*').

² A winding-up order was finally made in *Lunn v Cardiff Coal Co [No 3]* (2003) 177 FLR 411: see below n 139 and accompanying text.

³ (2003) 173 FLR 63.

⁴ The term 'multi-state' is used to signify an insolvency that crosses borders between legal systems. Unless otherwise indicated, the term 'state' refers to a law area where one system of private law prevails: Edward I Sykes and Michael C Pryles, *Australian Private International Law* (3rd ed, 1991) 5. Thus, within the Australian federal system, it might refer to a state (or territory) where that is the relevant law area, or it may refer to the Commonwealth of Australia where the law area is federal. The term 'international' is not used because there may be intra-national insolvency issues in a federation. For a recent intra-national liquidation case, see *Maamari v Ringwood & Ply Pty Ltd* (2005) 187 FLR 477, where the Supreme Court of New South Wales made an order terminating a winding-up where a winding-up order had been made by the Supreme Court of Queensland. Having regard to *Corporations Act* s 58AA(2) and the definition of 'Court' in s 58AA(1), Barrett J held it was clear that the jurisdiction conferred by s 459A to make an order terminating a winding-up is exercisable by any one of the courts referred to in the definition: at 478.

⁵ See below Part III(D)(1).

their dissolution are also largely to be found in this statute. In the case of a multi-state insolvency, however, the statutory provisions are to be applied in the context of the (largely judge-made) principles of private international law. A range of laws may be relevant to determining issues in a corporate insolvency administration, as insolvency provisions may intersect not only with those regulating companies but also with laws on property, securities, and civil and criminal liability. Underpinning all of these are procedural laws which are often critical to the eventual outcome.

This article addresses local proceedings in a multi-state corporate insolvency, focusing specifically on liquidation. Following a brief description of multi-state insolvency theories, Part III classifies the different types of jurisdiction that a court may exercise. It then concentrates on jurisdiction in corporate insolvency within Australia, beginning with the constitutional framework and then addressing geographical jurisdiction, jurisdiction to prescribe conduct, and jurisdiction to adjudicate between parties. The last briefly touches on the notion of an inherent jurisdiction to adjudicate in liquidation and on jurisdiction for proceedings during the course of, rather than for the adjudication of, a liquidation. Parts IV and V provide a more detailed discussion on jurisdiction to adjudicate in a multi-state liquidation in Australia and address the winding-up of a foreign company under Part 5.7, as well as topics such as *forum non conveniens*, *lis alibi pendens*, anti-suit injunctions, and the notion of discretion to exercise jurisdiction to wind up a company. Finally, brief comments are made on the jurisdiction to provide aid and auxiliary assistance upon request from a foreign court.

II MULTI-STATE INSOLVENCY THEORIES

Analysis of multi-state insolvency (specifically bankruptcies or liquidations with multi-state dimensions) has traditionally been undertaken using the two theoretical extremes of ‘universality’ and ‘territoriality’. These terms are often used interchangeably with the terms ‘unity’ and ‘plurality’; however the distinct (though connected) issues require separation.⁶ ‘Unity’ and ‘plurality’ relate to jurisdiction and the number of courts which have jurisdiction to open insolvency proceedings over a debtor. ‘Universality’ and ‘territoriality’ relate to the multi-state effects⁷ of the insolvency proceedings.⁸

Under the principle of ‘unity’, there is one set of insolvency proceedings in respect of the one debtor, while ‘plurality’ means that there are multiple sets of proceedings in progress concurrently in different states. ‘Universality’ refers to

⁶ Ian M Fletcher, ‘Future Developments: Problems with International Insolvencies, Section 426 Co-operation Proceedings, Developments and MIICA’ (1991) 6 *Journal of International Banking Law* 89, 92.

⁷ The term ‘multi-state effects’ is used to describe, in general terms, both the recognition and enforcement of foreign orders. The specific term ‘recognition’ is used to refer to the conclusive or *res judicata* effect of a judgment. ‘Enforcement’ refers to the execution of a judgment — the defendant’s compliance with its terms. See T C Hartley, ‘The Recognition of Foreign Judgments in England under the Jurisdiction and Judgments Convention’ in K Lipstein (ed), *Harmonisation of Private International Law by the EEC* (1978) 103, 105.

⁸ Nicki Kayser, ‘A Study of the European Convention on Insolvency Proceedings’ (1998) 7 *International Insolvency Review* 95, 100.

the extraterritorial effect of one set of proceedings in every other jurisdiction, while ‘territoriality’ refers to the limitation of the effects of a set of proceedings to its place of origin.⁹

‘Territorialism’ addresses choice of forum by permitting a court to exercise jurisdiction over any debtor that satisfies local insolvency law requirements. Choice of law ‘follows the forum’, in that the law of the forum applies to all aspects of the insolvency. The strictly territorialist approach claims no extraterritorial reach to a local insolvency order. Thus, each state which accords itself jurisdiction over a debtor has authority to administer the debtor’s estate within its jurisdiction. However, there are few states that adhere to the strict territorialist approach.

‘Universalism’ involves two aspects. First, the ‘active’ aspect means that an insolvency proceeding, opened in the insolvent debtor’s domicile, place of incorporation or seat, claims to comprise all the assets of the debtor, including those located in other states. Second, the ‘passive’ aspect means that, if an insolvency proceeding is opened abroad in the insolvent debtor’s domicile, place of incorporation or seat, it will be given full local effect in each state that has adopted the universalist approach.¹⁰

Choice of forum under the universalist approach is based on the debtor’s country of domicile or, in the case of a company, its place of incorporation or seat. The doctrine accepts the universal extraterritorial effect of an insolvency adjudication made in such a forum. The law of the forum then governs the insolvency administration, including its foreign effects.¹¹ As with territorialism, choice of forum is therefore likely to be outcome-determinative because of the differences in states’ insolvency laws.¹²

Scholars have proposed various models that modify these theoretical extremes, some of which can be found in current state or convention practice. The qualifications often involve concurrent proceedings, which recognise home state¹³ insolvency administrations to a greater or lesser degree. In a multi-state insolvency, judicial orders are typically required in more than one state in order to control the debtor’s assets. These concurrent proceedings may take the form of ordinary civil litigation,¹⁴ enforcement of foreign judgments obtained during the

⁹ Ian F Fletcher, *The Law of Insolvency* (3rd ed, 2002) 684–5. Another author refers to ‘one set of proceedings (unity) effective in every jurisdiction (universality)’: Donna McKenzie, ‘The EC Convention on Insolvency Proceedings’ (1996) 4 *European Review of Private Law* 181, 182.

¹⁰ Ulrich Drobnig, ‘Cross-Border Insolvency: General Problems’ (1993) 19 *Forum Internationale* 9, 13. See also Louis Jacques Blom-Cooper, *Bankruptcy in Private International Law* (1954) 14: ‘A single adjudication depends for its efficacy upon acceptance of that adjudication by foreign countries, in order to allow the appointed trustee ... to collect all the assets, thereby bringing about an equal distribution amongst all the creditors.’

¹¹ This choice of law of the forum is an implicit assumption of universalism: Jay Lawrence Westbrook, ‘Global Insolvencies in a World of Nation States’ in Alison Clarke (ed), *Current Issues in Insolvency Law* (1991) 27.

¹² Jay Lawrence Westbrook, ‘Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum’ (1991) 65 *American Bankruptcy Law Journal* 457, 471.

¹³ ‘Home state’ is traditionally the state that comprises a corporate debtor’s place of incorporation or ‘seat’. This article presumes it to be the state that is a corporate debtor’s place of incorporation, unless its place of management control is established as being elsewhere.

¹⁴ This is often between the administrator of the debtor’s estate and various creditors or third parties holding property allegedly part of the debtor’s estate.

principal administration, specific aid and assistance for a foreign principal administration, or separate insolvency administrations.

Concurrent insolvency administrations often comprise liquidation adjudications that purport to be the ‘main’ administration¹⁵ and similar adjudications in other jurisdictions with lesser claims to significance in the debtor’s affairs. These ‘non-main’ administrations typically take one of two forms. First, such proceedings may primarily be intended to aid the main administration and therefore will not amount to a sequestration of the debtor’s assets. For example, they involve a local moratorium on creditor action and assistance to the foreign administrator in realising local assets. Second, local liquidation administrations may be instituted, albeit ones which recognise the main administration and cooperate to a greater or lesser extent with it.

Various terms are used for these forms of non-main administrations. In American terminology, the former are known as ‘ancillary proceedings’ and the latter are ‘parallel proceedings’.¹⁶ English and Australian case law,¹⁷ on the other hand tend instead to use the term ‘ancillary’ for local non-domiciliary (non-main) bankruptcy or liquidation administrations. Insolvency-related proceedings brought to assist a foreign administration, not being a local bankruptcy or liquidation, do not have an established nomenclature.

‘Modified universalism’ accepts the central premise of universalism — that there should be a single administration which collects and distributes assets on a worldwide basis. However, modified universalism alters this by reserving to the local forum the discretion ‘to evaluate the fairness of the [foreign home state] procedures and to protect the interests of the local creditors.’¹⁸ In the exercise of its discretion, the local forum is to consider whether ‘deferring to’ the single foreign home state administration would alter parties’ entitlements or offend the forum’s public policy.¹⁹ It is undertaken when a foreign administration is

¹⁵ There may be more than one administration which is claimed by each office-holder to be the debtor’s home state proceeding.

¹⁶ See the ‘Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases’, adopted by and promulgated in American Law Institute, *Transnational Insolvency: Principles of Cooperation among the NAFTA Countries* (2003) 115 (appendix B).

¹⁷ See the English and Australian cases cited in *Re Bank of Credit & Commerce International SA [No 10]* [1997] Ch 213.

¹⁸ In Jay Lawrence Westbrook, ‘Choice of Avoidance Law in Global Insolvencies’ (1991) 17 *Brooklyn Journal of International Law* 499, 517, Westbrook cites *Bankruptcy Code*, 11 USC §§ 304–6 (1991) as the leading example of this approach. Section 304 provided for a local proceeding which aids the court in the foreign main administration. However, local assistance was not automatic and depended on the US court’s assessment of what would best assure an economical and expeditious administration of the estate. Their assessment was to be guided by six factors ranging from comity through to the protection of US creditors against prejudice and inconvenience in the processing of their claims in the foreign proceedings: *Bankruptcy Code*, 11 USC § 304(c) (1991). See Mary Elaine Knecht, ‘The “Drapery of Illusion” of Section 304 — What Lurks Beneath: Territoriality in the Judicial Application of Section 304 of the *Bankruptcy Code*’ (1992) 13 *University of Pennsylvania Journal of International Business Law* 287; Charles D Booth, ‘Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of United States Courts’ (1992) 66 *American Bankruptcy Law Journal* 135; Douglas G Boshkoff, ‘Some Gloomy Thoughts concerning Cross-Border Insolvencies’ (1994) 72 *Washington University Law Quarterly* 931.

¹⁹ Lynn M LoPucki, ‘The Case for Cooperative Territoriality in International Bankruptcy’ (2000) 98 *Michigan Law Review* 2216, 2221.

claimed as the home state administration such that local proceedings should be stayed and all property and claims should be dealt with by the foreign office-holder. Local proceedings are therefore merely auxiliary proceedings. Where the discretion is exercised against assisting the foreign home state administration, then a local insolvency administration may be instituted. Local insolvency law will therefore apply.²⁰

‘Cooperative territorialism’ is a system in which each state administers the assets over which it has jurisdiction²¹ as a separate estate, distributing them under local insolvency law. None of the proceedings are principal, ancillary or auxiliary; rather each constitutes a separate administration.²² The system, however, acknowledges the multi-state dimension by providing for cooperation in the administration of the separate estates.

‘Secondary bankruptcy’²³ — or to use a broader term which would be applicable to companies as well as individuals, ‘secondary insolvency’²⁴ — is currently practised in various forms. Under municipal law, it is mandated in statute²⁵ and judge-made law,²⁶ and it also appears in various multilateral conventions and international solutions.²⁷ Until recently, scholars have typically described the phenomenon, rather than proposed it as a theory placed within the frameworks of universalism and territorialism.²⁸ In a secondary insolvency system, insolvency administrations proceed concurrently in each state in which a debtor has a substantial presence.²⁹ In common with modified universalism, it recognises a home state main administration with which other states cooperate. However, it differs in that the local proceedings are ancillary liquidations³⁰ rather than

²⁰ See the Australia–United States case of *Interpool Ltd v Certain Freights of M/V Venture Star*, 102 BR 373, 878 (Politan J) (DNJ, 1988).

²¹ Lynn M LoPucki argues that such jurisdiction depends upon having de facto power over the assets, including the exercise of such power through multi-state agreement with respect to intangibles. That is, it would only include property that the state had sovereign power to marshal without the assistance of other states: Lynn M LoPucki, ‘Cooperation in International Bankruptcy: A Post-Universalist Approach’ (1999) 84 *Cornell Law Review* 696, 743.

²² *Ibid* 742.

²³ *Ibid* 732.

²⁴ Kent Anderson, ‘The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach considering the Japanese Experience’ (2000) 21 *University of Pennsylvania Journal of International Economic Law* 679, 692.

²⁵ *Corporations Act* s 601CL(14).

²⁶ *Re Bank of Credit & Commerce International SA [No 10]* [1997] Ch 213.

²⁷ See *European Convention on Certain International Aspects of Bankruptcy*, opened for signature 5 June 1990, ETS 136 (not yet in force); *Council Regulations (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings* [2000] OJ L 160/1; *United Nations Commission on International Trade Law: Model Law on Cross-Border Insolvency*, 36 ILM 1386 (1997) (‘UNCITRAL Model Law’).

²⁸ Hans Hanisch, ‘Survey over Some Laws on Cross-Border Effects of Foreign Insolvency Procedures on the European Continent’ in Ian F Fletcher (ed), *Cross-Border Insolvency: Comparative Dimensions* (1990) vol 12, 159; Westbrook, ‘Choice of Avoidance Law in Global Insolvencies’, above n 18, 516. But see Jay Lawrence Westbrook, ‘A Global Solution to Multinational Default’ (2000) 98 *Michigan Law Review* 2276, 2276; Kent Anderson, above n 24.

²⁹ LoPucki, ‘Cooperation in International Bankruptcy’, above n 21, 732.

³⁰ For an example of an ancillary liquidation, see *Re Wayland as liq of ABC Containerline NV (in liq)* (2005) 52 ACSR 750.

auxiliary proceedings.³¹ Local assets are realised and distributed to locally secured and priority claims.³² Any remaining assets are then remitted to the primary administration for distribution.³³

These theories from multi-state insolvency literature assist with providing the insolvency law context for issues which are also dealt with in private international law scholarship on matters of jurisdiction. The following Part outlines the jurisdictional framework within which specific issues concerning company liquidation are subsequently addressed.

III CLASSIFICATION OF JURISDICTION

The term ‘jurisdiction’ encompasses both geographical jurisdiction and subject matter jurisdiction.³⁴ Geographical jurisdiction delimits the area with which a relevant connection (such as physical presence or the carrying on of business) with one or more of the parties is to be established. Geographical jurisdiction also defines the area within which the court’s judgments will prima facie be enforced or have direct or automatic effect.³⁵

Subject matter jurisdiction, a court’s authority to deal with disputes, itself comprises two elements: the jurisdiction to prescribe conduct and the jurisdiction to adjudicate between particular parties. Jurisdiction to prescribe — or ‘substantive jurisdiction’ — is satisfied where a court ‘has jurisdiction over the conduct complained of, in light of the *nature* of the conduct’.³⁶ Jurisdiction to adjudicate, or ‘personal jurisdiction’, is ‘the power a court has over a person because he or she is amenable to being served with the court’s initiating process in accordance with its rules.’³⁷ It comprises several categories of proceedings, each with its own special rules that, if met, enable the court to adjudicate between the particular parties. In order to hear a matter, a court must have both jurisdiction to prescribe and adjudicatory jurisdiction.

³¹ For an example of an auxiliary proceeding, see *Re Independent Insurance Co Ltd* (2005) 193 FLR 43.

³² Hans Hanisch, ‘“Universality” versus Secondary Bankruptcy: A European Debate’ (1993) 2 *International Insolvency Review* 151, 157; Kent Anderson, above n 24, 693.

³³ John Londot, ‘Handling Priority Rules Conflicts in International Bankruptcy: Assessing the International Bar Association’s Concordat’ (1996) 13 *Bankruptcy Developments Journal* 163, 173.

³⁴ Martin Davies, Sam Ricketson and Geoffrey Lindell, *Conflict of Laws: Commentary and Materials* (1997) 113.

³⁵ *Cookney v Anderson* (1862) 31 Beav 452, 462; 54 ER 1214, 1217–18 (Romilly MR) defines geographical jurisdiction as ‘the topographical limits within which the compulsory process of the Court operates to compel obedience to its orders and decrees.’ Enforceability in a foreign jurisdiction requires the foreign court to recognise and enforce the judgment.

³⁶ Michael Lennard, ‘Weaving Nets to Catch the Wind: Extraterritorial and Supra-Territorial Business Regulation in International Law’ (Paper presented at the 23rd International Trade Law Conference, Canberra, 29 May 1997) 1 (emphasis in original). Some courts, such as the Family Court and the Federal Court, have been vested with limited jurisdiction to prescribe, unlike the state and territory Supreme Courts: see Enid Campbell, ‘Inferior and Superior Courts and Courts of Record’ (1997) 6 *Journal of Judicial Administration* 249.

³⁷ Reid Mortensen, *Private International Law* (2000) 37.

A *Constitutional Framework for Bankruptcy and Insolvency Jurisdiction*

The constitutional allocation of legislative powers between the Commonwealth and state Parliaments has affected the legislative history of, and courts with jurisdiction over, personal bankruptcy and corporate liquidation in Australia. The colonial constitutions granted legislative authority in general terms to colonial (now state) Parliaments to pass laws for the ‘peace, order and good government’ of particular geographical areas (subject to certain powers of the Imperial Parliament).³⁸ Upon federation, legislative authority was redistributed between the Commonwealth and the states. ‘Bankruptcy and insolvency’³⁹ was one of the specific powers granted to the Commonwealth to be exercised concurrently with the states.⁴⁰

The colonies’ personal bankruptcy and insolvency laws⁴¹ continued in existence until being made otiose by comprehensive Commonwealth bankruptcy legislation.⁴² Although the grant of power to the Commonwealth to legislate on ‘insolvency’ was wide enough to extend to the liquidation of companies,⁴³ the English approach of including the regulation of corporate insolvency in the general corporations’ legislation was followed in Australia. Thus, the colonies — and later, the states — continued to legislate on the winding-up of trading companies and other associations in various Companies Acts.⁴⁴

The *Australian Constitution* granted the Commonwealth limited concurrent power over corporations, specifically to make laws with respect to ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’.⁴⁵ Despite the constitutional limitations imposed by the words ‘trading’, ‘financial’ and ‘formed’, a move towards uniform corporate regulation in Australia began in 1961 through essentially standard state legislation.⁴⁶ An attempt was made in 1989 to legislate federally for Australia-wide comprehensive companies’ regulation. However, this was struck down as unconstitutional by the High Court.⁴⁷

³⁸ See, eg, *Constitution Act 1889* (WA) s 2; see also *Constitution Act 1902* (NSW) s 5 (‘peace, welfare and good government’); *Constitution Act 1867* (Qld) s 2 (‘peace, welfare and good government’).

³⁹ *Australian Constitution* s 51(xvii).

⁴⁰ Where federal and state laws conflict, federal laws prevail: *Australian Constitution* s 109.

⁴¹ The colonies had laws based on the *Bankruptcy Act 1883*, 46 & 47 Vict, c 52, except Queensland and Tasmania whose laws were based on the *Bankruptcy Act 1869*, 32 & 33 Vict, c 71.

⁴² *Bankruptcy Act 1924* (Cth), repealed by *Bankruptcy Act 1966* (Cth).

⁴³ Justice R S French, ‘Federal Jurisdiction — An Insolvency Practitioner’s Guide to the Labyrinth’ (2000) 8 *Insolvency Law Journal* 128, 129, citing *Victoria v Commonwealth* (1957) 99 CLR 575, 612 (Dixon J). See also *Victoria v Commonwealth* (1957) 99 CLR 575, 624 (McTiernan J), 658 (Kitto J).

⁴⁴ Andrew Keay, *McPherson: The Law of Company Liquidation* (4th ed, 1999) 20–3.

⁴⁵ *Australian Constitution* s 51(xx). See also H A J Ford, R P Austin and I M Ramsay, *Ford’s Principles of Corporations Law* (12th ed, 2005) 42.

⁴⁶ Uniform Companies Acts of 1961–62, followed by the Companies Acts of 1981, although strict uniformity was not achieved. For more detailed background material, see *Bills Digest No 140 2000–01: Corporations Bill 2001* (2001).

⁴⁷ *New South Wales v Commonwealth* (1990) 169 CLR 482.

As a consequence of this lack of a Commonwealth power ‘to enact a comprehensive corporations law’,⁴⁸ the Commonwealth, states and the Northern Territory negotiated a national scheme of cooperative legislation. In 1990, the states and the Northern Territory introduced their own statutes applying federal legislation passed for the Australian Capital Territory to regulate companies, grant national regulatory powers to the Australian Securities Commission (now the Australian Securities and Investments Commission (‘ASIC’)) and cross-vest jurisdiction between the federal, state and territory courts.⁴⁹

In 1999, the cross-vesting scheme⁵⁰ was held by the High Court to be constitutionally invalid insofar as it attempted to cross-vest state jurisdiction in the federal courts.⁵¹ Soon afterwards, another High Court decision⁵² raised concerns about the continued viability of the cooperative scheme insofar as it involved Commonwealth officers and authorities (for example, the Director of Public Prosecutions or ASIC) performing functions conferred under state law. Subsequently, based on this decision, a challenge was made to the capacity of ASIC to incorporate companies under state law.⁵³ After a period of significant uncertainty that adversely affected national commerce and foreign investment, agreement was finally reached between the various governments to put national corporations’ regulation on a firmer constitutional foundation. Through state referral of powers to the Commonwealth,⁵⁴ in addition to the Commonwealth’s pre-existing constitutional powers, comprehensive federal legislation was passed in the form of the *Corporations Act* and the *Australian Securities and Investments Commission Act 2001* (Cth) (‘ASIC Act’).⁵⁵

⁴⁸ French, above n 43, 130.

⁴⁹ Despite this interlocking ‘national’ scheme, the geographical jurisdiction of the state and territory courts was prima facie the relevant state or internal territory of Australia.

⁵⁰ *Corporations Act 1989* (Cth); *Corporations Act (New South Wales) 1990* (NSW); *Corporations Act (Northern Territory) 1990* (NT); *Corporations Act (Queensland) 1990* (Qld); *Corporations Act (South Australia) 1990* (SA); *Corporations Act (Tasmania) 1990* (Tas); *Corporations Act (Victoria) 1990* (Vic); *Corporations Act (Western Australia) 1990* (WA). See also, by implication, the general cross-vesting scheme under the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) and state equivalents.

⁵¹ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511. The vesting of the applicable state jurisdiction in the other state Supreme Courts remained valid. The conferral of jurisdiction on the Federal Court with respect to civil matters arising under the *Corporations Law* of the Australian Capital Territory and Northern Territory, based on *Australian Constitution* s 122, was valid.

⁵² *R v Hughes* (2000) 202 CLR 535.

⁵³ See Transcript of Proceedings, *GPS First Mortgage Securities Pty Ltd v Lynch; Ex parte A-G (Cth)* (High Court of Australia, Callinan J, 23 June 2000) where his Honour referred the matter for hearing before the full High Court on whether relevant provisions of the *Corporations Law* of Queensland, relating to the registration of companies, in combination with *Australian Securities Commission Act 1989* (Cth) s 11(7), empowered ASIC to incorporate companies and whether there was any inconsistency between such state and Commonwealth legislative provisions under *Australian Constitution* s 109.

⁵⁴ *Australian Constitution* s 51(xxxvii).

⁵⁵ The states agreed to refer powers to the Commonwealth to enact the *Corporations Bill 2001* (Cth) and the *Australian Securities and Investments Commission Bill 2001* (Cth) in so far as they contained matters that are within the legislative competence of the states. They also referred power to make express amendments to the *Corporations Act* or the *ASIC Act* in relation to formation, corporate regulation and the regulation of financial products and services. The references last for five years but may be terminated earlier or may be extended by proclamation. The referral of powers has been extended since 2001.

B *Geographical Jurisdiction in Liquidation*

Corporate insolvency law is contained in federal legislation and, while the cooperative scheme with all states referring the relevant powers to the Commonwealth is in operation, one Commonwealth Act applies across a single national jurisdiction.⁵⁶ The Act confers civil jurisdiction,⁵⁷ as well as vesting and cross-vesting criminal jurisdiction,⁵⁸ in the relevant federal, state and territory courts. The courts with primary jurisdictional competence under the *Corporations Act* are the Federal Court and the state and territory Supreme Courts.⁵⁹ State and territory lower courts may determine certain civil claims, such as debt recovery and monetary compensation matters, subject to their general jurisdictional limits as to the amounts and value of property with which they may deal.⁶⁰

The geographical area of competence of federal courts depends on the terms of the statute conferring the jurisdiction.⁶¹ The *Corporations Act* applies to all of Australia's states and internal territories. Certain chapters, including Chapter 5 (external administrations),⁶² apply according to their tenor in relation to all natural persons, bodies corporate, unincorporated bodies and acts and omissions 'outside this jurisdiction', which includes places outside Australia.⁶³ Certain sections specify their territorial application. For example, of possible relevance during a multi-state liquidation, s 186 states that ss 180–4 (officer liability) do not apply to an act or omission by a director or other officer or employee of a foreign company unless there is one or more specified jurisdictional connection.⁶⁴

The territorial boundaries of the state and territory courts,⁶⁵ when acting in corporations matters remain unaffected. However, there is precedent for the Supreme Court of South Australia to sit outside the geographical territory of

⁵⁶ The purpose of *Corporations Act* pt 1.1A is to clarify that the Commonwealth does not intend to cover the field in relation to certain aspects of corporations legislation and therefore to ensure the validity of state and territory law. For example, if states impose additional obligations or liabilities on directors, the *Corporations Act* is not intended to exclude or limit concurrent operation unless there is a direct inconsistency between the Commonwealth legislation and the state or territory law: *Corporations Act* s 5E. Section 5G(8) means that ch 5 of the Act does not apply to the winding-up of a pt 5.7 body to the extent that the winding-up is carried out in accordance with a provision of a law of a state: Explanatory Memorandum, Corporations Bill 2001 (Cth) 23.

⁵⁷ *Corporations Act* pt 9.6A div 1.

⁵⁸ *Corporations Act* pt 9.6A div 2.

⁵⁹ *Corporations Act* s 1337B. These courts and their officers must severally act in aid of, and be auxiliary to, each other in civil matters under the corporations legislation: *Corporations Act* s 1337G.

⁶⁰ *Corporations Act* s 1337E.

⁶¹ Australian Law Reform Commission, *Legal Risk in International Transactions*, Report No 80 (1996) 145.

⁶² This includes insolvency administrations.

⁶³ See *Corporations Act* ss 9, 102B(2). Section 3(3) states that the operation of the Act outside Australia is based, amongst other things, on the Commonwealth Parliament's external affairs power under *Australian Constitution* s 51(xxix).

⁶⁴ For example, the act or omission occurred in connection with the foreign company carrying on business within the jurisdiction.

⁶⁵ The sovereign and legislative territorial limit for state Supreme Courts in geographic terms is described in Australian Law Reform Commission, above n 61, 144.

Australia in a corporate insolvency case.⁶⁶ It arose out of the liquidator's overseas investigations into the collapse of Bond Corporation Holdings Ltd, subsequently renamed Southern Equities Corporations Ltd ('SEC'). In *England v Smith*,⁶⁷ the English Court of Appeal granted the assistance requested by the Supreme Court of South Australia. It ordered an English resident to attend before a Master of the Supreme Court of South Australia sitting in England and to be examined in accordance with Australian law and procedure.⁶⁸

C Jurisdiction to Prescribe Conduct in Liquidation

Jurisdiction to prescribe conduct is satisfied where a court has substantive jurisdiction (that is, jurisdiction over the conduct complained of due to the nature of the particular conduct).⁶⁹ In corporate insolvency matters, the jurisdiction to prescribe conduct is vested in the Federal Court and state and territory Supreme Courts. Following the referral of the states' corporations powers to the Commonwealth, the *Corporations Act* enacted a single federal jurisdiction in such matters, including external administration of companies. As federal courts have 'exclusive jurisdiction' in bankruptcy,⁷⁰ many of the issues which arise in personal insolvency matters⁷¹ are not of concern in corporate insolvency because jurisdiction may be exercised concurrently by the relevant federal, state and territory courts.

Jurisdiction in liquidation involves a wide range of matters with which a court may be involved in a winding-up context. In *Gould v Brown*, Brennan CJ and Toohey J noted that the ordering and conduct of examinations of directors constituted the exercise of judicial power.⁷² Even though the functions of courts in the judicial management of the property of bankrupts may involve a large element of discretion, they have nevertheless been upheld as a proper exercise of their judicial powers.⁷³

⁶⁶ See *Supreme Court Act 1935* (SA) s 45(2): 'The court may sit at any place (either within or outside the State).' Provisions with regards to sitting at any place may be found in *Supreme Court of Queensland Act 1991* (Qld) s 56(3); *Supreme Court Civil Procedure Act 1932* (Tas) s 19; *Supreme Court Act 1986* (Vic) s 7; *Supreme Court Act 1935* (WA) s 38. Cf *Supreme Court Rules 1970* (NSW) r 1A.1(1), which states that sittings shall be held at such places 'as are appointed for that year or from time to time by the Chief Justice.'

⁶⁷ [2001] Ch 419.

⁶⁸ Ibid 425–6, 433–4 (Morritt LJ) pursuant to *Corporations Law* pt 5.9 div 1.

⁶⁹ Lennard, above n 36, 1.

⁷⁰ *Bankruptcy Act 1966* (Cth) s 27(1).

⁷¹ See, eg, *Sutherland v Brien* (1999) 149 FLR 321; *GEIA v Palm Island Aboriginal Council* (2001) 1 Qd R 245; *Scott v Bagshaw* (2000) 99 FCR 573; *Denby v Shum* [2002] QSC 117 (Unreported, Muir J, 3 May 2002).

⁷² (1998) 193 CLR 346, 388, citing *R v Davison* (1954) 90 CLR 353, 367–8 (Dixon CJ and McTiernan J) that to wind up companies may involve many orders, comprising the exercise of both typical judicial and non-judicial powers, but all of which have long fallen on the courts of justice.

⁷³ James Crawford and Brian Opeskin, *Australian Courts of Law* (4th ed, 2004) 31–2, which refers to bankruptcy, although by analogy this comment would also apply to a liquidation.

D *Jurisdiction to Adjudicate between Parties in a Liquidation*

Jurisdiction to adjudicate between parties is determined according to the category of dispute to be resolved. Three categories have been identified: actions in personam, actions in rem and a category for proceedings that do not fall within either of the foregoing.⁷⁴

The most important category is the action in personam. This is brought against a person essentially to compel them to do a particular thing or to cease to do something. A judgment in such an action only binds the parties, and their privies, to the action.⁷⁵ At common law, jurisdiction to adjudicate in a particular action in personam requires valid service of the originating process on the defendant or the defendant's submission to the court's jurisdiction.⁷⁶

Service within the court's geographical jurisdiction is typically by actual physical service on the defendant.⁷⁷ This is an example of power theory⁷⁸ underpinning adjudicatory jurisdiction:

The root principle of the English law about jurisdiction is that the judges stand in the place of the Sovereign in whose name they administer justice, and that therefore whoever is served with the King's writ and can be consequently compelled to submit to the decree made, is a person over whom the Courts have jurisdiction.⁷⁹

In certain circumstances, the plaintiff may obtain leave to serve a defendant by local substituted service. This may occur where the applicant can establish that personal service is impracticable and other means of service, such as by post, or by leaving the relevant document with a third party, are likely to bring the document to the respondent's attention.⁸⁰

Statutory extensions to this jurisdiction, dating back to the *Common Law Procedure Act 1852*, 15 & 16 Vict, c 76, provide for service out of the jurisdiction 'where, speaking generally, there is some link between the forum and the subject matter involved.'⁸¹ In Australia, the rules of the High Court, Federal Court, and the state and territory Supreme Courts permit service of process

⁷⁴ Sykes and Pryles, above n 4, 20–1.

⁷⁵ *Ibid.* Actions in personam consist of actions in tort and contract, as well as suits in equity for relief, such as specific performance, injunction, rescission, and rectification: Peter Nygh and Martin Davies, *Conflict of Laws in Australia* (7th ed, 2002) 45–6.

⁷⁶ Nygh and Davies, above n 75, 45–6.

⁷⁷ *Ibid.* 46.

⁷⁸ Arthur Taylor von Mehren, 'Adjudicatory Jurisdiction: General Theories Compared and Evaluated' (1983) 63 *Boston University Law Review* 279.

⁷⁹ *Laurie v Carroll* (1958) 98 CLR 310, 323 (Dixon CJ, Williams and Webb JJ), citing *John Russell & Co Ltd v Cayzer, Irvine & Co Ltd* [1916] 2 AC 298, 302 (Viscount Haldane). On adjudicatory jurisdiction, see von Mehren, above n 78, 285–6.

⁸⁰ See eg, *Federal Court Rules 1979* (Cth) O 7 r 9(1); *Supreme Court Rules 1937* (ACT) O 10 r 2; *Uniform Civil Procedure Rules 2005* (NSW) r 10.14; *Supreme Court Rules* (NT) r 6.09; *Uniform Civil Procedure Rules 1999* (Qld) r 116; *Supreme Court Rules 1987* (SA) r 14.01; *Supreme Court Rules 2000* (Tas) r 141; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 6.10; *Rules of the Supreme Court 1971* (WA) O 72 r 4.

⁸¹ *Re Sherlock* (1991) 5 ACSR 229, 230 (Lockhart J). Typical examples include where the relevant contract was broken within the jurisdiction or the relevant tort was committed within the jurisdiction.

outside the jurisdiction.⁸² Leave prior to service may be required. Where it is not, the court considers the manner of service where the plaintiff seeks to obtain judgment by default.⁸³

The second category of dispute is that of the action in rem.⁸⁴ This involves jurisdiction over a thing (*res*), typically in the context of admiralty, as well as property interests therein.⁸⁵ Jurisdiction to adjudicate is based on the presence of the *res* within the court's geographical jurisdiction.⁸⁶ This jurisdiction permits the court to determine title, rights or claims to the *res* and its resulting judgment is binding against the whole world.⁸⁷

Although jurisdiction in bankruptcy has been described as being a form of in rem jurisdiction over the property comprising the divisible 'estate',⁸⁸ others have placed it in a category of proceedings that neither fall within actions in personam nor actions in rem, but rather are the subject of special jurisdictional rules.⁸⁹ The major subcategories are proceedings in individual bankruptcy and corporate liquidation,⁹⁰ matrimonial proceedings, probate and administration actions, and proceedings in lunacy.

These proceedings involve matters of status and, accordingly, they potentially affect a party's relations with others.⁹¹ Therefore, for example, bankrupt status

⁸² See, eg, *High Court Rules 2004* (Cth) r 9.07.1; *Federal Court Rules 1979* (Cth) O 8; *Supreme Court Rules 1937* (ACT) O 12; *Uniform Civil Procedure Rules 2005* (NSW) r 11.2; *Supreme Court Rules* (NT) O 7; *Uniform Civil Procedure Rules 1999* (Qld) pts 6, 7; *Supreme Court Rules 1987* (SA) rr 18.02–21.08; *Supreme Court Rules 2000* (Tas) rr 147–53; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 7; *Rules of the Supreme Court 1971* (WA) O 10.

⁸³ Further, the defendant, even though outside the jurisdiction, may have submitted to the local jurisdiction through a jurisdiction clause in a contract: Richard Garnett, 'The Enforcement of Jurisdiction Clauses in Australia' (1998) 21 *University of New South Wales Law Journal* 1, 2.

⁸⁴ See *Re Hayward* [1997] Ch 45 on jurisdiction in the context of the *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, opened for signature 27 September 1968, 8 ILM 229 (entered into force 1 February 1973) ('*Brussels Convention*'). A trustee applied for an order entitling him, as trustee, to what had been the debtor's share in a villa in Spain and for a declaration that the debtor's interest in the villa formed part of the bankrupt estate. The English court dismissed the application on the basis that the bankruptcy exemption under art 1(2) of the Convention was not relevant and so the Convention applied. It held that, although the trustee's claim could not have existed but for the bankruptcy, its principal subject matter was not the bankruptcy. Instead, the claim was essentially to recover assets, which were said to belong to the debtor's bankruptcy estate and therefore to be vested in the trustee in bankruptcy, from a third party. As the trustee's claim had as its object a right in rem in immovable property in Spain, the Spanish court had exclusive jurisdiction under art 16 of the Convention. The Convention is scheduled to the *Civil Jurisdiction and Judgments Act 1982* (UK) c 27.

⁸⁵ The *Foreign Judgments Act 1991* (Cth) has a category which comprises actions in rem, actions in admiralty and actions in which the title or possession of property is in issue.

⁸⁶ Another example of the power theory for adjudicatory jurisdiction is specific jurisdiction limited by the value of the property: von Mehren, above n 78, 285.

⁸⁷ Sykes and Pryles, above n 4, 21.

⁸⁸ That is, under the English tradition: Ralph Brubaker, 'One Hundred Years of Federal Bankruptcy Law and Still Clinging to an *In Rem* Model of Bankruptcy Jurisdiction' (1999) 15 *Bankruptcy Developments Journal* 261, 263.

⁸⁹ Blom-Cooper, above n 10, 46–7; Sykes and Pryles, above n 4, 21.

⁹⁰ These accord with the exclusions from the definition of 'actions in personam' in *Foreign Judgments Act 1991* (Cth) s 3 of 'proceedings in connection with ... (c) bankruptcy or insolvency; or (d) the winding up of companies'.

⁹¹ A sequestration order 'effects a change in the status of a debtor [and] it affects the rights of the general body of creditors.': *Re Kassab; Ex parte Federal Commissioner of Taxation* (1994) 55 FCR 305, 309 (Black CJ, Sweeney and Sheppard JJ).

affects one's capacity to manage a corporation or to incur credit;⁹² marital status may affect one's capacity to (re)marry; and mental competence may affect one's capacity to contract. Another common theme to several of these proceedings is their impact on the administration of a person's property or estate.⁹³

As Louis Jacques Blom-Cooper stated:

[Bankruptcy] is neither wholly *in personam* nor wholly *in rem*. It is therefore considered that bankruptcy jurisdiction cannot be based entirely upon theories relating to other branches of Private International Law with regard to jurisdiction.⁹⁴

Special statutory jurisdictional rules apply to indicate whether a court will order the bankruptcy or liquidation of an insolvent debtor.⁹⁵ These rules are subject to the court's discretion to decline to exercise its jurisdiction over a foreign debtor. They are also subject to the court's statutory discretion when exercising the jurisdiction to decline to make such an order.⁹⁶

The special rules on adjudicatory jurisdiction in liquidation are described below.⁹⁷ Meanwhile, two preliminary issues are discussed: the possibility of an inherent jurisdiction in liquidation and jurisdiction in respect of matters during the course of a liquidation.

1 *Inherent Jurisdiction to Adjudicate in Liquidation*

Occasionally, judges have made reference to the possibility of courts having inherent jurisdiction to wind up a company. It is not surprising that there is no comment on an inherent jurisdiction to bankrupt an individual debtor's estate⁹⁸ because of the significant impact of such an order on the debtor and on a range of other parties' interests. There has been some discussion of inherent jurisdiction in relation to corporate insolvency, perhaps because the origins of general company law are linked with the law of partnerships.

Prior to the *Joint Stock Companies Winding Up Act 1844*, 7 & 8 Vict, c 111, unless incorporated by specific statute or charter, companies were deed of settlement companies and were treated as enlarged partnerships.⁹⁹ Partnership

⁹² 'One of the main incidents of bankruptcy is the capacity to act (or inability to act)': Blom-Cooper, above n 10, 10.

⁹³ Property may sometimes be affected in an ancillary fashion, such as orders in respect of matrimonial property in the context of divorce or annulment proceedings.

⁹⁴ Blom-Cooper, above n 10, 46.

⁹⁵ *Bankruptcy Act 1966* (Cth) s 43 (refers to specific connections); *Corporations Act* ss 459A, 459B, 461, 583, 601CL(14) (relies on the definition of entity, that is, 'company', 'Part 5.7 body', 'registered foreign company'). That is subject to any judge-made requirement for any additional connection: *Re Norfolk Island Shipping Line Pty Ltd* (1988) 6 ACLC 990; see below n 177 and accompanying text for further discussion.

⁹⁶ *Bankruptcy Act 1966* (Cth) s 43; *Corporations Act* ss 467, 581, 583. This statutory discretion does not apply to an ancillary liquidation of a registered foreign company that is being or has been wound up in its place of incorporation, as a court 'shall' order a liquidation in the circumstances set out in *Corporations Act* s 601CL(14).

⁹⁷ See below Part IV.

⁹⁸ As opposed to the inherent jurisdiction of a court to set aside a sequestration order: *Pollock v Deputy Federal Commissioner of Taxation* (1994) 94 ATC 4148, 4152 (Carr J).

⁹⁹ Insolvency Law Review Committee, United Kingdom, *Report on Insolvency Law and Practice*, Cmnd 8558 (1982) 24, describing joint stock companies prior to the 19th century reforms of

law therefore applied to their winding-up, which largely comprised the taking of accounts between partners and the adjustment of the rights of contributories.¹⁰⁰ Modern winding-up law recognises the interests of members (and officers) in the winding-up process — something which is not relevant to bankruptcy law for individual debtors. Modern partnership law¹⁰¹ entitles every partner, on the dissolution of a partnership, to apply to the court to wind up the business and affairs of the firm. This legislative history may have influenced some courts' willingness to look beyond the 'procedural codes' of statute in the case of winding up a company to administer justice between all interested parties.

There are two comparable situations in which a Supreme Court may act to appoint an external administrator of an entity or property. The first derives from the Supreme Court Acts and the second from a Supreme Court's inherent jurisdiction.

The state and territory Supreme Courts have authority under the various Supreme Court Acts to appoint a receiver where the court considers it 'just or convenient' to do so.¹⁰² As the 'court will not appoint a receiver otherwise than at the instance of a party who is before the court',¹⁰³ the court must already be exercising jurisdiction over a dispute between the plaintiff and the company. This discretionary power to appoint a receiver arises 'where it is practicable and the interests of justice require it.'¹⁰⁴ The main situations where it may be invoked are:

- 1 where the plaintiff's security is enforceable (and a private appointee would have limited powers);
- 2 where the plaintiff's security is in jeopardy;¹⁰⁵

company law as 'really large unincorporated partnerships'. As to the use of management trusts, see Paul L Davies (ed), *Gower's Principles of Modern Company Law* (6th ed, 1997) 29.

¹⁰⁰ Keay, above n 44, 11.

¹⁰¹ *Partnership Act 1891* (Qld) s 5(2) states that 'partnership' under the Act does not apply to 'the relation between members of any company or association which is (a) [a registered company under corporations' legislation]; or (b) formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter'.

¹⁰² See, eg, *Supreme Court Act 1970* (NSW) s 67: 'The Court may, at any stage of proceedings, on terms, appoint a receiver by interlocutory order in any case in which it appears to the Court to be just or convenient so to do.' See also *Supreme Court Act 1995* (Qld) s 246:

a receiver [may be] appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just.

See also *Supreme Court Act 1933* (ACT) s 34A ('just to do so'); *Supreme Court Act 1935* (SA) s 29(1) ('just or convenient'); *Supreme Court Civil Procedure Act 1932* (Tas) s 11(12) ('just and convenient'); *Supreme Court Act 1986* (Vic) s 37 ('just and convenient'); *Supreme Court Act 1935* (WA) s 25(9) ('just or convenient'). Cf *Federal Court of Australia Act 1976* (Cth) s 57 ('just or convenient'). Note that in Victoria, the court may appoint a receiver by an interlocutory or final order: *Supreme Court Act 1986* (Vic) s 37.

¹⁰³ *Lawbook Co, Company Receivers and Administrators*, vol 2 (at 47) [19.1260], citing *McMeckan v Aitken* (1895) 21 VLR 65, 69 (Holroyd J).

¹⁰⁴ *Edwards & Co v Picard* [1909] 2 KB 903, 907 (Fletcher Moulton LJ).

¹⁰⁵ This is to protect secured property in jeopardy even though the plaintiff's charge is not yet enforceable.

- 3 where the plaintiff is seeking to protect other property in the possession of the company;¹⁰⁶ and
- 4 where a receiver is sought by way of equitable execution to obtain payment of a judgment debt.¹⁰⁷

The Federal Court may also appoint a receiver by interlocutory order in any case in which it appears to the court to be just or convenient so to do.¹⁰⁸ An instance where this occurred in the context of a respondent company's questionable solvency is the case of *Mercator Property Consultants Pty Ltd v Christmas Island Resort Pty Ltd*.¹⁰⁹ Circumstances considered relevant by the court included: evidence that the major asset of the company, its casino licence, was in danger of being revoked; the strong possibility that the company's affairs were being conducted for the benefit of the major shareholders rather than the company as a whole; and the existence of debts, including unpaid wages, in excess of \$2 million owed to creditors.

Under succession law, a Supreme Court may exercise inherent jurisdiction to appoint receivers in the administration of deceased estates. Where there is local property, but the legal personal representative is outside the jurisdiction, a Supreme Court, in the exercise of its inherent jurisdiction, may appoint a receiver of the local assets in order to protect the property from deprivation and loss.¹¹⁰ A receiver may also be appointed over assets outside the jurisdiction if there is no foreign administrator.¹¹¹

Nevertheless, in a number of cases, courts have refused to achieve the same outcomes as a liquidation through court-appointed receivers or through schemes of arrangement.¹¹² In *Re Swallow Footwear Ltd*,¹¹³ Roxburgh J reviewed the appointment of a receiver and manager upon the application of an unsecured creditor in respect of a non-judgment debt. His Honour held that the order was made without jurisdiction, and that it amounted, in effect, to an irregular substitute for an order to wind up the company.¹¹⁴ Courts will not approve a scheme of

¹⁰⁶ 'A receiver may be appointed in aid of a *Mareva* injunction granted prior to judgment in order to prevent the dissipation of the assets of the defendant company': Lawbook Co, above n 103, [19.560]. See *Ballabil Holdings Pty Ltd v Hospital Products Ltd* (1985) 1 NSWLR 155.

¹⁰⁷ Legal execution cannot apply to property of the judgment debtor that is outside the jurisdiction. Neither will equitable execution be permitted unless there is some local property which can be applied towards discharging the debt: Lawbook Co, above n 103, [19.1210], citing *Edwards & Co v Picard* [1909] 2 KB 903.

¹⁰⁸ *Federal Court of Australia Act 1976* (Cth) s 57(1).

¹⁰⁹ [1998] FCA 3017 (Unreported, Nicholson J, 29 July 1998).

¹¹⁰ Nygh and Davies, above n 75, 675.

¹¹¹ *Ibid*, citing *Dryden v Dryden* (1878) 4 VLR (E) 202.

¹¹² Keay, above n 44, 2–3. For an example of an unsuccessful scheme of arrangement to achieve a similar outcome, see *Re Tillers Pty Ltd* [1970] 3 NSWLR 202. See also *Re Island Air Pty Ltd* (1983) 7 ACLR 844.

¹¹³ (1956) 222 LT Jo 229, as cited in Keay, above n 44, 2.

¹¹⁴ See *Bond Brewing Holdings Ltd v National Australia Bank Ltd* (1990) 1 ACSR 445 on the reluctance of the court to exercise ex parte its inherent jurisdiction to appoint a receiver and manager to a company.

arrangement that purports to exclude or replace the winding-up procedures laid down in the corporations legislation.¹¹⁵

The view that jurisdiction to make liquidation orders derives solely from statute is supported by the limited circumstances in which courts have invoked their inherent jurisdiction. They arise when it is necessary for the court or tribunal in question to be able to manage its activities appropriately.¹¹⁶ Inherent jurisdiction is limited to circumstances where it is necessary to ensure convenience and fairness in legal proceedings, to prevent steps being taken that would render judicial proceedings inefficacious, and to prevent abuse of process.¹¹⁷ For example, where liquidators have already been appointed upon substantive jurisdictional grounds, courts have given directions to liquidators as part of their inherent jurisdiction to supervise and guide the activities of their own officers.¹¹⁸

According to Martin Dockray, inherent powers arise at common law, independently of the statutes that create the substantive jurisdiction of the courts.¹¹⁹ The relationship between inherent jurisdiction and substantive jurisdiction, derived from statute, has been described by Menzies J of the High Court as follows:

Inherent jurisdiction is not something derived by implication from statutory provisions conferring particular jurisdiction; if such a provision is to be considered as conferring more than is actually expressed that further jurisdiction is conferred by implication according to accepted standards of statutory construction and it would be inaccurate to describe it as 'inherent jurisdiction', which, as the name indicates, requires no authorizing provision.¹²⁰

So far as actual decisions on an inherent jurisdiction to order a liquidation are concerned, the matter has arisen both in respect of local and foreign companies. In *Re Kalblue Pty Ltd*,¹²¹ a case concerning a local company, Young J held that the former general law remedy of winding-up available to courts exists where it is 'just and equitable' that a company be wound up. His Honour also relied upon *Supreme Court Act 1970* (NSW) s 23, which states that the Supreme Court 'shall have all jurisdiction which may be necessary for the administration of justice in New South Wales'. The case concerned *Kalblue Pty Ltd* ('Kalblue'), which had

¹¹⁵ *Brian Cassidy Electrical Industries Pty Ltd (in prov liq) v Atalex Pty Ltd* [1984] 3 NSWLR 52. On the argument that a proposed deed of company arrangement is a winding-up by another name, see *Young v Sherman* (2002) 20 ACLC 149, 168 (Austin J).

¹¹⁶ Martin Dockray, 'The Inherent Jurisdiction to Regulate Civil Proceedings' (1997) 113 *Law Quarterly Review* 120, 127. See also passing comments in *R v Crown Court at Norwich; Ex parte Belsham* [1992] 1 All ER 394, 404–6 (Watkins LJ).

¹¹⁷ The other set of circumstances is to act in aid of superior courts and in aid or control of inferior courts and tribunals: see Keith Mason, 'The Inherent Jurisdiction of the Court' (1983) 57 *Australian Law Journal* 449; Justice Paul de Jersey, 'The Inherent Jurisdiction of the Supreme Court' (1985) 15 *Queensland Law Society Journal* 325.

¹¹⁸ *Re J W Murphy & P C Allen* (1996) 19 ACSR 569, 570 (McLelland CJ). The inherent jurisdiction of the court over its own officers enables it to deny to a court-appointed liquidator rights and remedies, to which the liquidator is entitled by law, where the exercise of those rights or remedies would, in the opinion of the court, be unfair or inequitable: Roy Goode, *Principles of Corporate Insolvency Law* (2nd ed, 1997) 10, citing *Re Condon; Ex parte James* (1874) LR 9 Ch 609.

¹¹⁹ Dockray, above n 116, 123.

¹²⁰ *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1, 7.

¹²¹ (1994) 12 ACLC 1057 ('Kalblue').

been struck off the register by the administrative action of the Australian Securities Commission. The liquidator of another company, W J McNamara Pty Ltd ('McNamara'), wished to challenge a transaction by which Kalblue purportedly obtained some security over McNamara's assets. If this were successfully challenged, then the assets would be available to satisfy the creditors of McNamara. The Commission appeared before the court to oppose the application to reinstate the registration of Kalblue unless it was placed under some sort of management, the controllers of Kalblue now being out of the jurisdiction. In the circumstances, there was no applicant who satisfied the requirements of *Corporations Law* s 462.¹²²

Young J stated that Part 5.4 of the *Corporations Law* did not operate as a code in New South Wales. His Honour referred to a pre-1844 remedy that existed under the general equitable jurisdiction of the Court of Chancery to wind up companies. This was based on treating the companies as enlarged partnerships. 'It is clear that the [*Joint Stock Companies Winding Up Act 1844*, 7 & 8 Vict, c 111] did not abolish the former general law remedies, though after the Act it would be seldom that there would need to be resort to such remedies.'¹²³

Subsequently, in *Horwath Corporate Pty Ltd v Huie*,¹²⁴ a case concerning a local unit trust, one of the questions raised was whether the trust may be wound up as a Part 5.7 body under *Corporations Law* s 583. In passing, Young J again referred to the circumstances surrounding the 1844 legislation:

Although one can argue with [the] proposition [in J O'Donovan, *McPherson: The Law of Company Liquidation* (3rd ed, 1987) 2, that liquidation can take place only pursuant to, and in accordance with, the terms of the relevant statute], logically it does seem to accord both with the historical practice of Courts of Equity and with the authorities such as they are. ...

There does not appear to be any reported case before the English *Joint Stock Companies Winding Up Act 1844*, when many companies adopted the structure of a deed of settlement with the property held by trustees, where there was a winding up of the enterprise by the court. However, it may be that more extensive research will find some, or it may be the answer was that because of the rule that all 'shareholders' should be parties it was just impractical to bring such proceedings.¹²⁵

Despite *Kalblue*, Master Bredmeyer of the Supreme Court of Western Australia in *Western Interstate Pty Ltd v Deputy Federal Commissioner of Taxation*, considered that *Corporations Law* ss 462(5) and 459P(5) — both of which stated that '[e]xcept as permitted by this section, a person cannot apply for a company to be wound up in insolvency' — have ousted any inherent jurisdiction to wind up a local company.¹²⁶ Subsequently, in *Re Botar-Tatham Pty Ltd*,

¹²² While the *Corporations Law* references are retained where that was the relevant law at the time, the same sections are found in the *Corporations Act*.

¹²³ *Kalblue* (1994) 12 ACLC 1057, 1058.

¹²⁴ (1999) 32 ACSR 413.

¹²⁵ *Ibid* 415.

¹²⁶ (1995) 13 WAR 479, 481. Young CJ in Eq agrees that the corporations legislation does not confer on the court any *sua sponte* jurisdiction to order a winding-up: *Re Botar-Tatham Pty Ltd* (2001) 52 NSWLR 680, 682.

Young CJ in Eq noted these changes to the *Corporations Law*, yet repeated his views on inherent jurisdiction under the *Supreme Court Rules 1970* (NSW).¹²⁷

There have also been a few references to inherent jurisdiction in cases concerning foreign companies where they are not registered locally and it is unclear whether they are carrying on business locally. As such, if companies do not qualify as Part 5.7 bodies, to which the liquidation provisions of Part 5.7 may apply,¹²⁸ then the question of any other basis for jurisdiction to wind them up becomes critical. In *Davidson v Global Investments International Ltd*, Acting Master Chapman held that the ‘jurisdiction to wind up a company is a purely statutory one’¹²⁹ under the corporations legislation. Accordingly, because the particular foreign company was neither registered nor carrying on business locally, the Supreme Court of Western Australia lacked jurisdiction to order its winding-up. No other law would vest the necessary jurisdiction in the Court on the facts as they were presented.

This is to be contrasted with a passing comment by Young J in *Re New Cap Reinsurance Corporation Holdings Ltd*, in the context of an application to appoint a provisional liquidator to an unregistered foreign company which carried on business within the jurisdiction:

I put aside the probability that this court may have some inherent power to appoint a provisional or final liquidator in respect of the assets of a foreign corporation which is not a Part 5.7 body. I merely mention this in case it be thought that I had excluded this possibility.¹³⁰

*Lunn [No 2]*¹³¹ also concerned an application for winding-up under *Corporations Act* s 583, although it required determination of whether it was a Part 5.7 body, not based on it being a foreign company, but rather on whether it was a registrable Australian body.¹³² Cardiff was incorporated in 1863 under its own incorporation Act prior to the general *Companies Act 1874* (NSW) which introduced incorporation of companies by registration. Cardiff had been dormant for many years, but in 1989, proceedings were instituted which resulted in the appointment of a receiver in 1996. At that stage, it appeared that no directors were validly in office, although there were considerable assets resulting from a sale of land. It also appeared that Mr Lunn was the only member who could be

¹²⁷ (2001) 52 NSWLR 680, 683. The equivalent provision in the *Supreme Court of Queensland Act 1991* (Qld) s 8(1) was repealed in 2001. There is no such equivalent provision in South Australia, Tasmania, Victoria or Western Australia.

¹²⁸ Further, not being registered locally, *Corporations Act* s 601CL(14) cannot apply even if it were being wound up in its place of incorporation.

¹²⁹ (1995) 125 FLR 409, 418, citing *Re Lloyd Generale Italiano* (1885) 29 Ch D 219, 220 (Pearson J). The court distinguished English cases and *Re Kailis Groote Eylandt Fisheries Pty Ltd [No 3]* (1977) 17 SASR 35 on the basis of different statutory provisions: first, s 583(c)(i) confines carrying on business or having a place of business to Australia; and second, the English legislation referred to unregistered companies whereas the Australian legislation refers to a pt 5.7 body. In *Re Lloyd Generale Italiano* (1885) 29 Ch D 219, the court refused a winding-up order of a foreign company with no branch office or assets in England; rather it had only carried on business through agents. Note that in addition to corporations’ legislation, there may be special legislation on winding up entities such as insurance companies or banks.

¹³⁰ (1999) 32 ACSR 234, 236.

¹³¹ (2003) 173 FLR 63.

¹³² *Ibid* 69 (Barrett J).

traced. Although the circumstances were such that the Supreme Court of New South Wales accepted that a case had been made out for winding up Cardiff on the ‘just and equitable ground’, it was necessary to consider whether the Court had jurisdiction to do so.¹³³

The Court held (for reasons that will be discussed below)¹³⁴ that it had no jurisdiction to make the order under *Corporations Act* s 583 as Cardiff was not a Part 5.7 body. It also concluded that no other provision in the *Corporations Act* conferred jurisdiction upon the Supreme Court of New South Wales or any other ‘Court’ (as defined by that Act) to make a winding-up order in respect of Cardiff.

A further ground argued by Mr Lunn was that a court of equity may, in the exercise of its inherent jurisdiction, wind up or dissolve corporations. Barrett J noted that, while a court might dissolve an unincorporated joint stock company through the exercise of general equitable jurisdiction, now reflected in the *Partnership Act 1892* (NSW), it would, in such circumstances, in effect be dissolving a bond ‘that the parties themselves [had] created.’¹³⁵ His Honour went on to say:

But once Parliament has caused such a company or body of proprietors to be incorporated as ‘one body politic and corporate’, a new and separate bond is superimposed by the legislature and it is for the legislature alone to provide the means of putting an end to the perpetual succession it thereby creates.¹³⁶

His Honour distinguished the *Kalblue* decision, noting that the court in that case was making ‘an order of the kind clearly envisaged by the legislation in respect of a body squarely within its contemplation, even though the order had not been sought by anyone competent under the legislation to seek it.’¹³⁷ Barrett J concluded that:

The Court’s inherent jurisdiction, while broad, is not unlimited. In particular it does not permit the Court to do things which, expressly or by necessary implication, parliament has precluded. ...

Conscious as I am that this outcome is unsatisfactory for Mr Lunn as apparently the sole traceable member of a corporation in respect of which a case for winding up on the just and equitable ground has been shown, I regret that no winding up order can be made.¹³⁸

Cardiff was finally wound up pursuant to ss 469 and 470 of the *Companies (New South Wales) Code* (as continued in force by the *Corporations (New South Wales) Act 1990* (NSW)) and based on circumstances existing before 1 January 1991, that made it just and equitable for the company to be wound up.¹³⁹

¹³³ Ibid 65 (Barrett J).

¹³⁴ See below Part IV.

¹³⁵ *Lunn [No 2]* (2003) 173 FLR 63, 69.

¹³⁶ Ibid 69–70.

¹³⁷ Ibid 70. At 70, his Honour continued: ‘Whether or not that decision was correct (and I note that it was not followed in *Western Interstate Pty Ltd v Deputy Commissioner of Taxation* (1995) 13 WAR 479), it has no bearing on the present case.’

¹³⁸ *Lunn [No 2]* (2003) 173 FLR 63, 71.

¹³⁹ *Lunn v Cardiff Coal Co [No 3]* (2003) 177 FLR 411.

2 *Jurisdiction in Proceedings during the Course of a Liquidation*

In the case of an involuntary insolvency administration, the threshold issue is whether a court will make an order for the winding-up of a company and simultaneously appoint a liquidator. The special jurisdictional rules for such proceedings are discussed in more detail in the next Part¹⁴⁰ and do not apply to proceedings discussed here, which concern litigation arising during the course of an insolvency administration.

Collective insolvency administrations often involve court proceedings. Some are matters for which the insolvency is merely incidental, whereas others are necessarily linked with a liquidation.¹⁴¹

Incidental matters include the debtor's pre-insolvency rights and liabilities, the validity of which should be differentiated from questions of the impact of insolvency law on those rights and interests.¹⁴² The preservation and realisation of property may raise issues of the validity of creditors' alleged 'security', the proper ownership of property held by debtor-related parties, and the validity of devices such as *Romalpa* clauses, resulting trusts, constructive trusts and equitable liens. The adjudication on claims may require determination of their validity under contract, tort, or industrial law.

In an early 19th century English case, *Halford v Gillow*, Shadwell V-C stated:

the jurisdiction in bankruptcy has authority to deal only with that which is the bankrupt's estate; but has no power to determine what *is* the bankrupt's estate. If the question be a legal one it must be tried at law; and if it be an equitable one, it must be decided in this Court. But when you have determined what is the property of the bankrupt, the whole administration of it falls under the jurisdiction of the Court in bankruptcy.¹⁴³

Thus Ralph Brubaker refers to a bifurcation of jurisdiction in respect of bankruptcy matters in English law between: (1) bankruptcy jurisdiction over the property comprising the divisible estate and its administration for the benefit of the bankrupt's creditors; and (2) the jurisdiction to determine whether property belonged in the bankrupt's estate. The latter required an ordinary suit in the appropriate court.¹⁴⁴

Those proceedings for which an insolvency administration is a prerequisite are diverse and may occur at any stage in the administration. In a liquidation, proceedings that may arise solely because of the insolvency administration

¹⁴⁰ See below Part IV.

¹⁴¹ *Gourdain v Nadler* (C-133/78) [1979] ECR 733 held that to qualify for the exemption under *Brussels Convention*, opened for signature 27 September 1968, 8 ILM 229, art 1(2) (entered into force 1 February 1973) proceedings 'must derive directly from the bankruptcy or winding-up and be closely connected with [such] proceedings'. A court must distinguish 'between proceedings which can only arise as a consequence of a bankruptcy from those which may exist independently of bankruptcy, but arise out of the circumstances of one': Alan Dashwood, Richard Hacon and Robin White (eds), *A Guide to the Civil Jurisdiction and Judgments Convention* (1978) 77.

¹⁴² Goode, above n 118, 498, 502; Jay Lawrence Westbrook and Donald Trautman, 'Conflict of Laws Issues in International Insolvencies' in Jacob Ziegel (ed), *Current Developments in International and Comparative Corporate Insolvency Law* (1994) 661.

¹⁴³ (1842) 13 Sim 44, 50; 60 ER 18, 20 (emphasis in original).

¹⁴⁴ Brubaker, above n 88, 263–4.

include summons to examine directors and others associated with a company about its examinable affairs.¹⁴⁵ The preservation and realisation of the divisible property may result in litigation initiated by the liquidator to claw property back into the estate through setting aside voidable transactions¹⁴⁶ or to claim compensation from company officers for insolvent trading. Even in the distribution phase, the court may be called upon to resolve disputes over proof of claims or priority of payments.¹⁴⁷

If the court has jurisdiction to make an order commencing a local liquidation, then jurisdiction to initiate proceedings during the course of the administration should follow.¹⁴⁸ It may well be that the respondent in such proceedings is outside the jurisdiction — for example a director to be summonsed for examination — whereas the insolvent company is clearly subject to the jurisdiction and hence to being wound up locally.¹⁴⁹ The local court has jurisdiction to issue the summons and it becomes a matter of local practice and procedure whether to permit service of the summons outside the jurisdiction.¹⁵⁰

IV JURISDICTION TO ADJUDICATE IN A MULTI-STATE LIQUIDATION

In the case of company liquidations, an Australian court, exercising jurisdiction under the *Corporations Act*, has adjudicatory authority to wind up a company incorporated within Australia.¹⁵¹ The jurisdictional requirements for a company incorporated outside the jurisdiction are not as clear as those for bankruptcy proceeding. In the case of the involuntary winding-up of insolvent foreign companies, there is no specific section in the *Corporations Act*.¹⁵²

An Australian court has jurisdiction under the *Corporations Act* to wind up a foreign company under Part 5.7 (the central provision being s 583), and under s 601CL(14) where a registered foreign company is already being wound up in

¹⁴⁵ *Gould v Brown* (1998) 193 CLR 346, 388 (Brennan CJ and Toohey J) where their Honours note that the incidental character of the function of a court in conducting an examination and the traditional supervision exercised by the court in performing it are sufficient to stamp it with a judicial character.

¹⁴⁶ *Staff Engineered Membranes Pty Ltd (in liq) v Synflex Industries (International) Inc* [1984] 2 NSWLR 116.

¹⁴⁷ *Corporations Act* s 1321.

¹⁴⁸ Hague Conference on Private International Law, *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* (2000) <<http://www.hcch.net/upload/wop/jdgmpl1.pdf>> does not apply to 'insolvency, composition and analogous proceedings' (art 1(2)(e)) and so the question arises as to whether such disputes would be covered by such a convention. See also *Hague Convention on Choice of Court Agreements*, opened for signature 30 June 2005, 44 ILM 1294, art 2(2)(e) (not yet in force).

¹⁴⁹ Service out of the jurisdiction of an examination summons under *Corporations Act* s 596B was ordered where the respondent had knowledge of the issue of proceedings prior to leaving the jurisdiction: *Joye v Sheahan* (1996) 62 FCR 417.

¹⁵⁰ On local orders to examine officers abroad, see *Re Sherlock* (1991) 102 ALR 156; *Re Absolutely Fabulous Exhibitions & Events (Management) Pty Ltd* (1997) 25 ACSR 577; *Fiorentino v Irons* (1997) 79 FCR 327. See also *Re Seagull Manufacturing Co Ltd (in liq)* [1993] Ch 345.

¹⁵¹ Incorporation signifies formation and registration. This differs from the registration of a foreign company incorporated elsewhere.

¹⁵² This is also the case in England: Philip Smart, *Cross-Border Insolvency* (2nd ed, 1998) 93.

its place of origin. It may arguably also make a winding-up order under s 581 as a result of a request from a foreign court for assistance.¹⁵³

Under Part 5.7, the jurisdiction of an Australian court to wind up a foreign company requires:

- (i) its local registration under Chapter 5B; or
- (ii) the fact that it carries on business in Australia under s 21.¹⁵⁴

The relevance of local registration under Chapter 5B lies in the exhaustive s 9 definition of a ‘Part 5.7 body’:

- (a) a registrable body that is a registrable Australian body and:
 - (i) is registered under Division 1 of Part 5B.2; or
 - (ii) is not registered under that Division but carries on business¹⁵⁵ in this jurisdiction and outside its place of origin; or
- (b) a registrable body that is a foreign company and:
 - (i) is registered under Division 2 of Part 5B.2; or
 - (ii) is not registered under that Division but carries on business in Australia; or
- (c) a partnership, association or other body (whether a body corporate or not) that consists of more than 5 members and that is not a registrable body.

In *Lunn [No 2]*, the Supreme Court of New South Wales found that Cardiff was a ‘registrable body’ and a ‘registrable Australian body’.¹⁵⁶ As it was in fact not registered, it was necessary to consider whether it carried on business and, if so, in which jurisdiction or jurisdictions. Barrett J held that ‘[o]n the whole and in light of the specifications of s 21, the better view must be that, as it has assets which are apparently being administered by the receiver, it does carry on business.’¹⁵⁷ However, Cardiff did not carry on business ‘outside its place of origin’,¹⁵⁸ being New South Wales, and so it did not satisfy any of paras (a), (b) or (c) of the definition. If in fact Cardiff had been a multi-state corporation, then it may well have been wound up under Part 5.7.¹⁵⁹

The issue of whether a company has been carrying on business in Australia has been the subject of a number of recent cases. *Australian Securities and Invest-*

¹⁵³ But see *Dick v McIntosh* [2001] FCA 1008 (Unreported, Cooper J, 31 July 2001) [22], where the Federal Court held that the equivalent *Bankruptcy Act 1966* (Cth) s 29 does not provide for the granting of a second sequestration order.

¹⁵⁴ For a discussion of the introduction of this requirement into the English *Companies Act 1862*, 25 & 26 Vict, c 89, see K Lipstein, ‘Jurisdiction To Wind Up Foreign Companies’ (1952) 11 *Cambridge Law Journal* 198, 201–4.

¹⁵⁵ The concept of ‘carrying on business in Australia’ is elaborated in *Corporations Act* s 21. For example, it involves having a place of business in Australia (which includes establishing a share registration office or dealing with property situated in Australia: s 21(2)(a)) and does not necessarily follow from the events listed in s 21(3) (such as being a party to legal proceedings or holding property in Australia).

¹⁵⁶ (2003) 173 FLR 63.

¹⁵⁷ *Ibid* 68.

¹⁵⁸ *Corporations Act* s 9.

¹⁵⁹ *Lunn [No 2]* (2003) 173 FLR 63, 68 (Barrett J).

ments Commission v International Unity Insurance (General) Ltd,¹⁶⁰ involved an application under s 583 to wind up International Unity Insurance (General) Ltd ('International Unity'), a subsidiary of a Solomon Islands company. International Unity was found to be 'a foreign company not registered under Division 2 of Part 5B.2 of the Act and a corporation that has carried on business, but has now ceased to carry on that business, in Australia.'¹⁶¹ Lander J held that 'a company does not cease to be a Part 5.7 body when it ceases to carry on business at least for the purposes of s 583'.¹⁶² In particular, his Honour noted that the application to wind up International Unity relied in part on the ground in s 583(c)(i) that the Part 5.7 body had ceased to carry on business.¹⁶³

The question of the effect of a foreign company having ceased to carry on business was also considered by McMurdo J in *Australian Securities and Investments Commission v Edwards*,¹⁶⁴ which concerned a number of companies alleged to be operating unregistered managed investment schemes. One of the companies, Carsworthy Ltd ('Carsworthy'), was incorporated outside Australia. Although it was a foreign company and a registrable body, it was not registered under Division 2 of Part 5B.2 and thus, to qualify as a Part 5.7 body, it had to carry on business in Australia.¹⁶⁵ Carsworthy's business was to operate a scheme, the so-called 'Car Club'. Its conduct involving a Mr Robinson was found to satisfy the *Luckins v Highway Motel (Carnarvon) Pty Ltd*¹⁶⁶ definition of 'a succession of acts designed to advance some enterprise of the company pursued with a view to pecuniary gain'.¹⁶⁷ However, the scheme no longer operated and there was no evidence that the company still carried on business in Australia.

Unlike *International Unity*, the application for winding-up did not rely upon the ground that Carsworthy had ceased to carry on business in Australia (s 583(c)(i)) but that it was just and equitable that it should be wound up (s 583(c)(ii)). The court held that, whichever ground was relied upon, Carsworthy was a Part 5.7 body for which a winding-up order could be made. As McMurdo J stated:

Once a registrable body that is a foreign company becomes registered under Div 2 of Pt 5B.2 or carries on business in Australia, it becomes a Pt 5.7 body which is thereafter susceptible to an order for winding up, regardless of whether it subsequently becomes deregistered or ceases to carry on business in Australia. Once it becomes a Pt 5.7 body it has effectively submitted to the jurisdiction conferred by the Act for its winding up.¹⁶⁸ Such an interpretation of the definition of a Pt 5.7 body is clearly beneficial to the operation of Pt 5.7. The contrary interpretation would enable a foreign company, which carried on business here illegally by being unregistered, to avoid an order for winding up

¹⁶⁰ [2004] FCA 1060 (Unreported, Lander J, 19 August 2004) ('*International Unity*').

¹⁶¹ *Ibid* [17].

¹⁶² *Ibid* [20].

¹⁶³ *Ibid* [22].

¹⁶⁴ (2004) 22 ACLC 1469 ('*Edwards*').

¹⁶⁵ *Corporations Act* s 9.

¹⁶⁶ (1975) 133 CLR 164.

¹⁶⁷ *Ibid* 178 (Gibbs J).

¹⁶⁸ Citing Ron Harmer, 'Report for Australia' in Ian F Fletcher (ed), *Cross-Border Insolvency: Comparative Dimensions* (1990) 46, as quoted in Keay, above n 44, 688.

in Australia by ceasing its business here just ahead of a winding up application. Especially where an expressed circumstance for winding up is the cessation of business in Australia, it is difficult to see that such a limitation upon the operation of Pt 5.7 was intended.¹⁶⁹

Both *International Unity* and *Edwards* were considered recently in *Campbell v Gebo Investments (Labuan) Ltd.*¹⁷⁰ This case concerned a company, LifeWealth 8 Ltd ('LifeWealth'), which was incorporated under a Malaysian federal statute and not registered in Australia. An application was brought to set aside an order appointing a provisional liquidator of the company on the basis that it was not a body in respect of which the court had jurisdiction under the *Corporations Act* to make the order.

The applicants argued that both *International Unity* and *Edwards* were wrongly decided because of a 'misplaced emphasis on the reference in s 583(c)(i) to the power to make a winding up order where the body "has ceased to carry on business in this jurisdiction".¹⁷¹ This was argued to overlook

the fact that one species of Part 5.7 body is a foreign company registered under Div 2 of Pt 5B.2. Once so registered, a foreign company remains a Part 5.7 body whether or not it carries on business in Australia. In the case of a Part 5.7 body not so registered, the applicants emphasise, carrying on of business in Australia is an essential ingredient of the Part 5.7 body status.¹⁷²

Nevertheless, Barrett J determined that LifeWealth 'may become the subject of a winding up order under s 583 if it has, at any time, carried on business in Australia. The jurisdiction to appoint a provisional liquidator rests on the same foundation.'¹⁷³ Moreover, s 582(3) (winding-up of a dissolved foreign company)

clearly recognises that the carrying on of business within the jurisdiction at the time of the making of the winding up order under that section is not an essential component of the power to make the order. And, particularly in light of s 601CL(14), s 582(3) cannot be regarded as confined to bodies registered under Div 2 of Pt 5B.2.¹⁷⁴

Further, Barrett J stated that he was not of the opinion that the decisions of the courts exercising coordinate jurisdiction were plainly wrong and so as a first instance judge deciding a matter under a Commonwealth statute creating a national scheme of regulation, he should follow the decisions of *International Unity* and *Edwards*:¹⁷⁵

I accept that the link coming from a concluded course of carrying on business is sufficient in principle, and as a matter of statutory interpretation, to make

¹⁶⁹ *Edwards* (2004) 22 ACLC 1469, 1480.

¹⁷⁰ (2005) 190 FLR 209. An interesting dimension to the facts surrounding the company's alleged 'carrying on of business' was that it involved so-called ecommerce — some 2000 people, resident in Australia, had responded to LifeWealth's website and become licensees for the purposes of a stimulated stock market activity by making credit card payments by means of the website.

¹⁷¹ *Ibid* 217 (Barrett J).

¹⁷² *Ibid*.

¹⁷³ *Ibid* 218.

¹⁷⁴ *Ibid* 217.

¹⁷⁵ This would also be in accordance with his Honour's observations in *Re Wayland as Liquidator of ABC Containerline NV (in liq)* (2005) 52 ACSR 750.

available the s 583 jurisdiction for reasons given in the two cases [*International Unity* and *Edwards*]. It cannot be accepted that a foreign company that has carried on business in Australia, with all the consequences that that entails (including, in most cases, incurring debts payable to Australian residents) is put beyond the reach of Australian winding up simply by retreating to its homeland. If, in reality, it has left no legacy requiring administration in Australia (assuming grounds for winding up are shown), any application for a winding up order is likely to be refused on discretionary grounds. But if matters cognisable in an Australian winding up have been left behind, the jurisdiction to wind up is, in my view, ongoing: cf *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* (1950) 66 TLR (PT 1) 1147. I respectfully adopt and endorse, in particular, the statements in [41] of McMurdo J's judgment in *ASIC v Edwards*.¹⁷⁶

Even if these technical statutory requirements are satisfied, questions arise on whether some additional jurisdictional connection is required from the perspective of private international law principles. The authorities have until recently been unclear on whether the connecting factors go to the *existence* of jurisdiction or whether they are relevant to the *exercise* of such jurisdiction (that is, the declining thereof).¹⁷⁷

*Re Norfolk Shipping Line Pty Ltd*¹⁷⁸ concerned a company incorporated in Norfolk Island for the purpose of providing a shipping service between Sydney, Lord Howe Island, Norfolk Island and New Zealand. Its only asset was a ship situated in Auckland Harbour at the time of hearing. It had never been registered in New South Wales as a foreign company, nor did it have an office in that jurisdiction. At all material times, its affairs had been administered in New South Wales by its agent, a New South Wales company. Apart from loans from shareholders, the company owed approximately \$1 million to creditors in New South Wales.

As the company had no office or place of business in New South Wales, the question arose as to whether it was carrying on business there. The Supreme Court of New South Wales held on the facts that it was carrying on more than isolated transactions and, in all the circumstances, it was pursuing activities with a view to pecuniary gain in New South Wales,¹⁷⁹ and thus the company was held to have been carrying on business in New South Wales.¹⁸⁰ Accordingly, the Court had jurisdiction insofar as the company was required to be registered.

Nevertheless, Young J questioned whether additional links to the jurisdiction were required before he had power to wind up the Norfolk Island company. Reference was made to English¹⁸¹ and Australian¹⁸² cases and, although they referred to similar, not identical legislation, the Court held that:

¹⁷⁶ *Campbell v Gebo Investments (Labuan) Ltd* (2005) 190 FLR 209, 218. For McMurdo J's comments, see also above n 169 and accompanying text.

¹⁷⁷ In *Re Norfolk Island Shipping Line Pty Ltd* (1988) 6 ACLC 990, 991, Young J distinguished English cases on the basis of legislative differences such that some of the factors they referred to 'do not go to jurisdiction but go to discretion'.

¹⁷⁸ (1988) 6 ACLC 990.

¹⁷⁹ See *Luckins v Highway Motel (Carnarvon) Pty Ltd* (1975) 133 CLR 164, 178 (Gibbs J).

¹⁸⁰ *Re Norfolk Island Shipping Line Pty Ltd* (1988) 6 ACLC 990, 991 (Young J).

¹⁸¹ *Re Compania Merabello San Nicholas SA* [1973] Ch 75 (the sole English asset was a claim for indemnity against its English insurers for which the petitioning creditor had a right of subroga-

The law as to whether assets negligible or not are absolutely required as a *basis of jurisdiction* is not yet certain. It may be that a Judge in this Court could say that so long as there is some commercial advantage in making a winding up order in New South Wales, an order may be made. On the other hand, no case has gone further than ... requiring 'negligible assets' in the jurisdiction.¹⁸³

Given that there were no assets in New South Wales, Young J expressed doubts as to whether he had jurisdiction in the matter. Finally, his Honour justified the appointment of a provisional liquidator on the basis of the Commonwealth cross-vesting legislation with Norfolk Island.¹⁸⁴

Richard Fisher argues that all that is required to establish jurisdiction to wind up a foreign company is the satisfaction of the statutory requirements of registration or business activity within the jurisdiction:

Once that connection [carrying on business] is established, the Court may exercise the same powers and is subject to the same constraints as though it were considering an application to wind up a company incorporated or taken to be incorporated under the Law.¹⁸⁵

In 1937, John Bray¹⁸⁶ stated that with the enactment of a specific provision to wind up an unregistered company,¹⁸⁷ an implied power to do so no longer existed and the whole extent of the power to wind up foreign companies was contained in that section. Yet, 40 years later, as Bray CJ in *Re Kailis Groote Eylandt Fisheries Pty Ltd [No 3]*,¹⁸⁸ his Honour referred to a provision in the *Companies Act 1962 (SA)*¹⁸⁹ for winding up foreign companies, defined as those 'incorporated outside the State',¹⁹⁰ and commented:

Undoubtedly this company is such a company. It by no means follows, however, that this Court has jurisdiction to wind it up. Clearly it cannot, under the ordinary rules of private international law, order any company in the world to be wound up. There must be a sufficient nexus with [the forum]. ...

[Counsel's] argument treats the absence of local assets as a matter going to discretion rather than to jurisdiction. I do not so regard it.¹⁹¹

tion in the event of the company's winding-up); *Re a Company (No 00359 of 1987)* [1988] Ch 210 (the only asset and possible benefit to creditors derived from actions against the directors).

¹⁸² *Re Kailis Groote Eylandt Fisheries Pty Ltd [No 3]* (1977) 17 SASR 35; *Re Buildmat (Australia) Pty Ltd* (1981) 5 ACLR 689.

¹⁸³ *Re Norfolk Shipping Line Pty Ltd* (1988) 6 ACLC 990, 991 (Young J) (emphasis added).

¹⁸⁴ See *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth). See also *Re Atlantic Isle Shipping Co Inc* (1988) 14 ACLR 232.

¹⁸⁵ Richard Fisher, 'Cross-Border Insolvencies: An Australian Perspective' in Bruce E Leonard and Christopher W Besant (eds), *Current Issues in Cross-Border Insolvency and Reorganisations* (1994) 153, 158. See also Geoff Sutherland, 'Issues in Cross-Border Insolvency Law in Australia' (1998) 12(2) *Commercial Law Quarterly* 7, 9–10.

¹⁸⁶ John Bray, *Bankruptcy and the Winding Up of Companies in Private International Law* (LLD Thesis, The University of Adelaide, 1937) 55, referring to *expressio unius est exclusio alterius*.

¹⁸⁷ *Companies Act 1934 (SA)* s 346.

¹⁸⁸ (1977) 17 SASR 35.

¹⁸⁹ *Companies Act 1962 (SA)* s 315, a precursor to *Corporations Act* s 583.

¹⁹⁰ *Companies Act 1962 (SA)* s 314(1) defined 'unregistered company' to include 'foreign company' for the purposes of the div V (which included s 315), and s 5 defined 'foreign company' as a company 'incorporated outside the State'.

¹⁹¹ (1977) 17 SASR 35, 38–44.

In the chapter on ‘Private International Law’ in the fourth edition of *McPherson: The Law of Company Liquidation*,¹⁹² reference was made to the arguments by Richard Fisher¹⁹³ (based on legislative change since the earlier Australian and English cases) and Ron Harmer¹⁹⁴ (that registration or the carrying on of business indicates the foreign company has submitted to the local jurisdiction and that presence or absence of assets goes to discretion rather than jurisdiction) that nothing more was required to establish jurisdiction:

However, this area still awaits a decision by a bold Australian spirit who is prepared to go further than *Re Norfolk Island Shipping Line Pty Ltd*. Although it may be argued that Australia takes a broad approach to matters of jurisdiction [under the doctrine of *forum non conveniens*], it is submitted that a local winding up order will be refused unless certain other factors are also present, even where statutory conditions are fulfilled.¹⁹⁵

The requirement of a sufficient connection with the jurisdiction has also been noted in Australian private international law texts.¹⁹⁶ Yet, recent case law indicates this is no longer required. Such a position is consistent with the Australian approach to *forum non conveniens*.¹⁹⁷

The question was noted, but left unanswered, in *Kintsu Co Ltd v Peninsular Group Ltd*,¹⁹⁸ where Santow J at first instance commented that as the defendant was both registered as a foreign company and had assets and creditors in New South Wales, whether it had sufficient connection with the jurisdiction of New South Wales under private international law principles did not arise as a live issue.¹⁹⁹

In *Edwards*, McMurdo J referred to the suggestion in an earlier edition of *McPherson: The Law of Company Liquidation* that there are other essential conditions of the court’s jurisdiction beyond the statutory requirements.²⁰⁰ His Honour distinguished the earlier cases on the basis that they did not prescribe a nexus between the company and the place governed by the statute, whereas the *Corporations Act* contains a nexus in the definition of the Part 5.7 body, holding that:

¹⁹² Rosalind Mason, ‘Private International Law’ in Andrew Keay, *McPherson: The Law of Company Liquidation* (4th ed, 1999) 680.

¹⁹³ Fisher, above n 185, 158: ‘Once that connection [carrying on business] is established, the Court may exercise the same powers and is subject to the same constraints as though it were considering an application to wind up a company incorporated or taken to be incorporated under the Law.’ See also Sutherland, above n 185, 7, 9–10.

¹⁹⁴ Harmer, above n 168, 46.

¹⁹⁵ Rosalind Mason, ‘Private International Law’, above n 192, 688 (citations omitted).

¹⁹⁶ See, eg, Nygh and Davies, above n 75, 664; Sykes and Pryles, above n 4, 402–3. On the English courts’ requirement for a sufficient connection, see Kate Dawson, ‘Foreign Companies and Extraterritorial Aspects of the *Insolvency Act 1986*’ (1999) 8 *International Insolvency Review* 49, 52.

¹⁹⁷ See below Part V(B).

¹⁹⁸ (1998) 27 ACSR 679.

¹⁹⁹ This matter was not addressed in the Court of Appeal decision: *Peninsular Group Ltd v Kintsu Co Ltd* (1998) 44 NSWLR 534.

²⁰⁰ (2004) 22 ACLC 1469, 1480, citing J O’Donovan, *McPherson: The Law of Company Liquidation* (3rd ed, 1987) 463.

Once it is determined that a foreign company is a body so defined, there is jurisdiction to order its winding up upon proof of a relevant ground. Matters such as the presence or otherwise of assets or creditors within this jurisdiction are relevant considerations to the exercise of the discretion to order winding up, but they do not go to jurisdiction. That is how they were characterised by Young J in *Re Norfolk Island Shipping Line Pty Ltd* (1988) 6 ACLC 990; (1988) 14 ACLR 229 and by Santow J in *Re The Peninsula Group Ltd* (1998) 16 ACLC 985 at 991–992; (1998) 27 ACSR 679 at 686.²⁰¹

As commented above on the jurisdiction to adjudicate between parties in a liquidation, special statutory jurisdictional rules apply to whether a court will order the liquidation of an insolvent debtor.²⁰² These rules are subject to the court's discretion to decline to exercise jurisdiction in the case of a foreign debtor and to the court's statutory discretion when exercising the jurisdiction to decline to make such an order.

V THE EXERCISE OF JURISDICTION IN A MULTI-STATE LIQUIDATION

A Part 5.7 Liquidation

Subject to any necessary adaptation, pursuant to Part 5.7 of the *Corporations Act*, a foreign company which is a Part 5.7 body may be wound up in accordance with Chapter 5.²⁰³ In fact, a Part 5.7 body may be wound up even if it is being wound up, or has ceased to exist, in its place of incorporation.²⁰⁴

The circumstances in which a foreign company may be wound up are listed in s 583(c), and include its dissolution and its ceasing to carry on business in Australia.²⁰⁵ Perhaps the most common situation in which a winding-up order is made occurs where a company is unable to pay its debts. This inability to pay debts is deemed by s 585 to occur, inter alia, where there is failure to comply with a statutory demand²⁰⁶ or an unsatisfied execution or other enforcement of an Australian or foreign judgment.²⁰⁷

In *Peninsular Group Ltd v Kintsu Co Ltd*,²⁰⁸ the New South Wales Court of Appeal considered the impact of the introduction of the detailed statutory demand provisions of Part 5.4 on Part 5.7 — in particular s 585(a) and its reference to noncompliance with a demand. The Court held that the comprehensive terms of ss 583 and 585 meant that the Part 5.4 provisions did not apply where a party sought to wind up a body other than a company, such as a foreign company, under Part 5.7.

²⁰¹ *Edwards* (2004) 22 ACLC 1469, 1481.

²⁰² See above Part III(D)(1).

²⁰³ One exception is that it may not be voluntarily wound up: *Corporations Act* s 583(b).

²⁰⁴ *Corporations Act* s 582(3).

²⁰⁵ *Corporations Act* s 583(c)(i).

²⁰⁶ *Corporations Act* s 585(a).

²⁰⁷ *Corporations Act* s 585(c).

²⁰⁸ (1998) 44 NSWLR 534.

The significance of a winding-up under Part 5.7 was central to a s 480 application for the release of a liquidator appointed under s 583 in *Re Wayland as Liquidator of ABC Containerline NV (in liq)*.²⁰⁹ ABC Containerline NV ('ABC') was incorporated under the laws of Belgium, where it was ordered to be wound up on 5 April 1996. Prior to that time, ABC had been carrying on business in Australia, albeit as an unregistered foreign company. On 21 June 1999, an order was made by the Supreme Court of New South Wales pursuant to s 583 to wind up the company and to appoint a liquidator. Even though the winding-up was concurrent with a prior administration in ABC's place of incorporation, Barrett J held it was not an ancillary administration as it would have been if the order had been made pursuant to s 601CL(14).²¹⁰

During the course of the local liquidation, an investigation of potential claims against a third party had been undertaken; however, it appeared that the Judge-Commissioner in the Belgian administration had decided not to pursue it. Since there appeared to be no local assets, the liquidator sought release under s 480. While 17 Australian creditors had lodged proofs of debt with the Belgian trustees, the local liquidator had received no proofs of debt and appeared not to have identified any contributories.²¹¹

Prior to the liquidator's release, the Court required the local creditors to be notified of the s 480 application, as well as a brief advertisement of the application to alert other creditors (if any) within the jurisdiction. It noted that the effect of the release was a form of absolution conferred by s 481(3).²¹²

On the nature of the winding-up, Barrett J held:

Although the winding up ordered by this court is, in reality of [an] ancillary kind, it is not, by the terms of the winding-up order (or any legislative provision), made subsidiary to the Belgian administration. The liquidator appointed by this court is subject to the full range of duties and responsibilities attaching to the office of liquidator, subject to any direction that the court itself may see fit to make: see *Re Hibernian Merchants Ltd* [1958] Ch 76; [1957] 3 All ER 97. As a general principle, therefore, the local liquidator should proceed in the manner stated by Lowe J in *Re Australian Federal Life and General Assurance Co Ltd* [1931] VLR 317 at 320; (1931) 37 ALR 291:

The purpose of the ancillary winding up is to secure the local assets, and the rights of the local creditors; and the duties of the liquidators accordingly are to collect the local assets, to settle a list of the local contributories and also, it would seem, to determine the claims of local creditors.

The fact that Mr Wayland's appointment was procured, in substance, by the Belgian trustees in bankruptcy (in that they caused ABC to make the application for the winding-up order) does not mean that he is, or may regard himself as, merely an instrumentality of or assistant to those trustees. As a liquidator appointed by this court, he is an officer of the court and makes decisions which

²⁰⁹ (2005) 52 ACSR 750.

²¹⁰ *Ibid* 753. Such liquidations only apply to foreign companies registered in accordance with *Corporations Act* pt 5B.2 div 2.

²¹¹ *Ibid* 756–7 (Barrett J).

²¹² *Ibid* 758 (Barrett J).

are, in effect, made under the authority of the court itself: *Duffy v Super Centre Development Corp Ltd* [1967] 1 NSW 382.²¹³

In a multi-state insolvency, a debtor may well have connections with a number of states and differing insolvency, and other laws may provide an incentive for creditors to seek an insolvency administration in more than one forum. In considering the manner in which jurisdiction should be exercised where there are concurrent insolvency administrations, the doctrines of *forum non conveniens* and *lis alibi pendens* are also relevant, as they help regulate the manner in which courts may defer to proceedings in another state. Anti-suit injunctions have also been a feature of the commercial litigation arising out of significant multi-state insolvencies. Finally, insolvency jurisdiction has the fundamental element that a bankruptcy or liquidation order is a matter of discretion for a court and, in certain circumstances, has been declined.

B Forum Non Conveniens

The doctrine of *forum non conveniens* is concerned with the exercise, rather than the existence, of jurisdiction.²¹⁴ The successful plea of *forum non conveniens* — where on first principles the forum has jurisdiction, but declines to exercise it — may arise in two types of cases.

The first is where the defendant is outside the jurisdiction and the plaintiff must seek leave of the court to serve out of the jurisdiction.²¹⁵ The onus is then on the plaintiff to show that, although the defendant is not present, the local forum is not a ‘clearly inappropriate forum’.²¹⁶ An insolvency example of where leave of the court may be required to serve a summons outside the jurisdiction is where a liquidator seeks to examine company directors who are outside the jurisdiction. In *Fiorentino v Irons*,²¹⁷ the Federal Court granted extempore an Australian liquidator leave to serve a summons to attend an examination upon a person residing outside Australia. As the material before the Court satisfied the requirements of the relevant rules on originating process, orders were made to serve a summons personally upon an examinee in England.²¹⁸

The second may arise in proceedings for a stay. In such proceedings, a defendant who has been served either within the jurisdiction or outside it, without the

²¹³ Ibid 755–6.

²¹⁴ Michael Pryles, ‘Judicial Darkness on the Oceanic Sun’ (1988) 62 *Australian Law Journal* 774.

²¹⁵ For example, leave to serve other than an originating process: see, eg, *Federal Court Rules 1979* (Cth) O 8 r 2; *Supreme Court Rules 1937* (ACT) O 12 rr 4–5; *Uniform Civil Procedure Rules 2005* (NSW) r 11.5; *Supreme Court Rules* (NT) r 7.06; *Uniform Civil Procedure Rules 1999* (Qld) r 127; *Supreme Court Rules 1987* (SA) r 18.07; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 7.06; *Rules of the Supreme Court 1971* (WA) O 10 r 1.

²¹⁶ Michael Pryles, ‘Forum Non Conveniens — The Next Chapter’ (1991) 65 *Australian Law Journal* 442, 450.

²¹⁷ (1997) 79 FCR 327.

²¹⁸ Ibid 330 (Foster J) where his Honour determined that the original application for the issue of the summons was a proceeding of the court and the extant application by notice of motion for leave for its service outside Australia was a proceeding incidental to the original application or one relevantly in connexion with it. Accordingly *Federal Court Rules 1979* (Cth) O 8 rr 1, 2 applied.

need for prior leave of the court,²¹⁹ bears the onus of proof to establish that the forum is clearly inappropriate.²²⁰

Under the approach taken in *Voth v Manildra Flour Mills Pty Ltd*,²²¹ an Australian court, which otherwise has jurisdiction, may decline to exercise it if it considers itself to be a ‘clearly inappropriate forum’ for the determination of a dispute.²²² In *Voth*, the High Court chose not to follow the English approach in *Spiliada Maritime Corporation v Cansulex Ltd*,²²³ where the House of Lords had considered which was the ‘more appropriate forum’.²²⁴ That is, under the English approach, a stay is granted

where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the *interests* of all the parties and the ends of justice.²²⁵

Describing the impact of the *Spiliada* test in England upon multi-state insolvency, Ian F Fletcher notes that the *forum non conveniens* cases dealt with international litigation between directly interested parties, whereas insolvency proceedings are collective in nature with a ‘broader spread of interests and policy considerations’.²²⁶

Nevertheless, the welcome infusion of a more magnanimous, and internationally sensitive spirit of approach towards the exercise of international jurisdiction by English courts, from the highest level downwards, ... could not fail to

²¹⁹ Under the rules of the Supreme Courts of New South Wales, the Northern Territory, Queensland, South Australia, Tasmania and Victoria, there is no need to obtain leave in certain circumstances prior to service of the writ for certain proceedings: see, eg, *Uniform Civil Procedure Rules 2005* (NSW) r 11.2; *Supreme Court Rules* (NT) r 7.01; *Uniform Civil Procedure Rules 1999* (Qld) r 124; *Supreme Court Rules 1987* (SA) r 18.02; *Supreme Court Rules 2000* (Tas) r 147A; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 7.01. Leave, however, would be required before proceeding to judgment, see, eg, *Uniform Civil Procedure Rules 2005* (NSW) r 11.4; *Supreme Court Rules* (NT) r 7.04; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 7.04. In these cases, the defendant would be making an application to set aside the service of the originating process outside the jurisdiction on the grounds, for example, that service outside the jurisdiction was not authorised by the rules or that the forum was not a convenient forum for trial of the proceeding: see, eg, *Supreme Court Rules* (NT) r 7.05; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 7.05.

²²⁰ There is also a legislative test of *forum non conveniens* under *Uniform Civil Procedure Rules 2005* (NSW) r 11.7, which provides that a court may set aside a service of process outside the jurisdiction on the ground that the court is ‘an inappropriate’ or not a convenient forum for the trial of the proceedings. See Wendy Harris, ‘Life After *Voth*: The Application of *Forum Non Conveniens* by Australian Courts in Transnational Proceedings’ (1992) 22 *Queensland Law Society Journal* 21, 30–1.

²²¹ (1990) 171 CLR 538 (*‘Voth’*).

²²² *Ibid* 554 (Mason CJ, Deane, Dawson and Gaudron JJ). That is, the forum will be clearly inappropriate if the local proceedings are vexatious, oppressive or an abuse of the court’s process. In *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 521 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), the High Court declined to revisit the doctrine of *forum non conveniens* and held that the decisive consideration was that the defendants had not established that a trial in New South Wales would be ‘oppressive or vexatious’ to them in any relevant sense.

²²³ [1987] AC 460 (*‘Spiliada’*).

²²⁴ See *ibid* 477, 483 (Lord Goff).

²²⁵ *Ibid* 476 (Lord Goff) (emphasis added), applying *Sim v Robinow* (1892) 19 R 665, 668 (Lord Kinnear).

²²⁶ Ian F Fletcher, *Insolvency in Private International Law* (2nd ed, 2005) [2.47].

exert some influence upon the mode of decision when questions concerning the exercise of insolvency jurisdiction arise in subsequent cases.²²⁷

In *Re Harrods (Buenos Aires) Ltd [No 2]*,²²⁸ the court applied the *Spiliada* test and declined to exercise jurisdiction to wind up a company (albeit not in insolvency).²²⁹ According to Fletcher, although the material considerations would be different in the context of an insolvent company, ‘the spirit of openness and objectivity with which the question of appropriate venue was addressed [in the *Harrods* case] could well serve as a basis for useful development in the future.’²³⁰

In determining appropriateness, the Australian and English approaches apply the same connecting factors listed by Lord Goff in *Spiliada* which relate to the legal and substantive relationships existing between the dispute and the state.²³¹ So, a different outcome would only be likely to occur under these two approaches where the court considers another forum to be more appropriate, even though the local forum is not clearly inappropriate.

An example to highlight the difference between the Australian and English approaches would be where a creditor’s winding-up petition is presented in the company’s place of incorporation, although the company’s headquarters are in another state. Under the Australian *forum non conveniens* approach, the place of incorporation would not be determinative, and so the court may exercise principal jurisdiction unless it considers itself to be a ‘clearly inappropriate forum’. However, applying the English approach in *Spiliada*, parties may seek to prove that another state is a ‘more appropriate forum’, such as the place of its centre of management control.

In *Re a Company (No 00359 of 1987)*,²³² an application was made to wind up a foreign company in England where the only local asset and possible benefit to creditors derived from actions against the directors, which only became available upon liquidation of the company. In the course of his judgment, Gibson J stated: ‘It is also appropriate for the court to consider whether any other jurisdiction is more appropriate for the winding up of this admittedly insolvent company.’²³³ Other jurisdictions considered were Liberia, with which the company appeared to have had nothing to do after its incorporation there, and Greece. The connections with Greece were that the company’s single asset, a bulk carrier, flew the Greek flag and various notices under credit facilities were required to be sent to the company care of an address in Greece. The High Court was satisfied that the company had a sufficiently close connection with England where, amongst other

²²⁷ *Ibid.*

²²⁸ [1992] Ch 72 (*‘Harrods’*).

²²⁹ Although the company was incorporated locally, the central management control and business of the company was in a foreign state. The foreign state would not have given effect to a local order for the winding-up of the company.

²³⁰ Ian F Fletcher, *Insolvency in Private International Law*, above n 226, [3.56].

²³¹ For example, the ‘residence and availability of witnesses; the residence and places of business of the parties; the law of the cause; and any “legitimate jurisdictional advantage” to the plaintiff’: Mortensen, above n 37, 67.

²³² [1988] Ch 210.

²³³ *Ibid* 226.

things, it had carried on business,²³⁴ and there were no other jurisdiction more appropriate for the winding-up of the company, which plainly ought to be wound up.²³⁵

The English Court of Appeal again considered whether there was a ‘more appropriate forum’ in *Re a Company (No 003102 of 1991)*; *Ex parte Nyckeln Finance Co Ltd*,²³⁶ finding England was the more appropriate forum in which to wind up the company. The winding-up process in Guernsey, Channel Islands, the place of incorporation, was considered by the Court to be outmoded and Portugal was not an appropriate jurisdiction since, although the company had assets there, it had no other connection with the country.²³⁷ The English jurisdiction was held to be appropriate on the basis that the individual who ran the company was present and resident in England and the petitioner was also present in England.²³⁸

The fact that there may be concurrent insolvency proceedings and that these may be treated as principal and ancillary proceedings may affect the question of the most appropriate forum. In *Re Wallace Smith Group Ltd*,²³⁹ Nugee DJ stated that the question of whether there was a ‘more appropriate jurisdiction’ cannot be an essential factor in determining jurisdiction to wind up a foreign company.²⁴⁰ There are cases in which the local court will make a winding-up order, which is ancillary to a winding-up in the place of incorporation and, in such a case, it cannot be said that local court was the more appropriate jurisdiction.²⁴¹ His Honour viewed appropriateness as a matter for the exercise of the discretion to make the order rather than to exercise jurisdiction.²⁴²

In the Bank of Credit & Commerce International Group insolvency, the English liquidation of Bank of Credit & Commerce International SA (‘BCCI’) was held to be ancillary to the Luxembourg adjudication in the place of incorporation. In dealing with an application by a group of creditors soon after BCCI was placed in provisional liquidation, and before the petition to wind it up was decided, Browne-Wilkinson V-C held:

The second delicate aspect is the relationship between this court and the court of Luxembourg. BCCI is incorporated in Luxembourg, which prima facie is the court where the prime winding up proceedings, if it ever gets that far, will have to be conducted as being the law of the country of incorporation. Some suggestions have been made that in some way it is inappropriate that that should be the primary administration were a winding up order to be made. That is not a view with which I concur in any way. There is nothing to indicate that the court

²³⁴ The company incurred the debt on which the petitioning creditor, an English company, relied under an English loan agreement negotiated and executed in England and requiring performance in England: *ibid*.

²³⁵ *Ibid* 226–7 (Gibson J).

²³⁶ [1991] BCLC 539.

²³⁷ *Ibid* 541 (Harman J).

²³⁸ *Ibid*.

²³⁹ [1992] BCLC 989.

²⁴⁰ *Ibid* 1007.

²⁴¹ *Ibid*.

²⁴² His Honour noted that, although it was not an essential factor, it was nevertheless an important one for the court to consider in deciding how to exercise its discretion as to whether to wind up a foreign company: *ibid*.

of Luxembourg would be in some way regarded as inappropriate, if otherwise under the general law that is the right court to administer the matter.²⁴³

The Australian *forum non conveniens* approach provides a broad basis for jurisdiction, under which an Australian court, which otherwise has jurisdiction, may decline to exercise that jurisdiction if it considers itself to be a ‘clearly inappropriate forum’ for the determination of a dispute. This expansive approach to the exercise of jurisdiction is consistent with the decisions in *International Unity*,²⁴⁴ *Edwards*²⁴⁵ and *Campbell v Gebo Investments (Labuan) Ltd*²⁴⁶ regarding the jurisdiction to adjudicate upon the winding-up of the various unregistered foreign companies.²⁴⁷

C Lis Alibi Pendens

Concurrent proceedings indicate the potential relevance of the doctrine of *lis alibi pendens* to the exercise of jurisdiction in a multi-state insolvency. A court may order a stay on local proceedings where proceedings have already commenced and are pending in a foreign forum and the interests of justice would not be well served by having two courts in different jurisdictions giving judgment in the same case.²⁴⁸

In *Henry v Henry*,²⁴⁹ a matrimonial proceedings case, the majority of the High Court of Australia held that application of the *Voth*²⁵⁰ test of ‘clearly inappropriate forum’ was intended to avoid simultaneous proceedings in different countries with respect to the same controversy. It is ‘prima facie vexatious and oppressive, in the strict sense of those terms, to commence a second or subsequent action in the courts of this country if an action is already pending with respect to the matter in issue.’²⁵¹

Correspondence of subject matter is an important issue where proceedings are pending in another jurisdiction. *Henry* involved identical parties and the same subject matter (the parties’ marital relationship), whereas different claims were being made in the United States and New South Wales in *CSR Ltd v Cigna Insurance Australia Ltd*.²⁵² Where the issues are not the same, the test is not

²⁴³ This comment was cited in *Re Bank of Credit & Commerce International SA [No 10]* [1997] Ch 213, 225 (Scott V-C).

²⁴⁴ [2004] FCA 1060 (Unreported, Lander J, 19 August 2004).

²⁴⁵ (2004) 22 ACLC 1469.

²⁴⁶ (2005) 190 FLR 209.

²⁴⁷ Such an approach was adopted on the basis that the foreign companies in these cases all satisfied the statutory definition of a pt 5.7 body.

²⁴⁸ *The Abidin Daver* [1984] AC 398, 412 (Lord Diplock). On negative declarations in general, see Andrew Bell, ‘The Negative Declaration in Transnational Litigation’ (1995) 111 *Law Quarterly Review* 674.

²⁴⁹ (1995) 185 CLR 571 (*‘Henry’*).

²⁵⁰ (1990) 171 CLR 538.

²⁵¹ *Henry* (1995) 185 CLR 571, 591 (Dawson, Gaudron, McHugh and Gummow JJ). Courts should strive, to the extent permitted by *Voth*, to avoid a situation of *lis alibi pendens*, however, there is a risk that parties may thereby be encouraged to participate in a ‘race to the filing counter’: Peter Nygh, ‘*Voth* in the Family Court Re-Visited: The High Court Pronounces *Forum Conveniens* and *Lis Alibi Pendens*’ (1996) 10 *Australian Journal of Family Law* 163, 170.

²⁵² (1997) 189 CLR 345 (*‘CSR’*). The different claims arose out of a dispute over indemnities with respect to asbestos-related claims in the United States.

whether the Australian court is a ‘clearly inappropriate forum’ for the litigation of the issues involved in the Australian proceedings, but rather whether, having regard to the controversy as a whole, the Australian proceedings are vexatious or oppressive (in the *Voth* sense of those terms).²⁵³

The possibility of concurrent bankruptcies or liquidations has long been recognised in insolvency law and managed through primary and ancillary administrations, rather than staying a local proceeding.²⁵⁴ A leading bankruptcy case on this issue is *Re Artola Hermanos; Ex parte Châte*.²⁵⁵ The debtors were members of a partnership with its head office in Paris. The firm was declared bankrupt in Paris under the laws of France and a syndic appointed under the provisions of the *Code de Commerce* to administer the estate.²⁵⁶ There were considerable debts and assets in England, where the court appointed the official receiver as an interim receiver. The English Court of Appeal upheld the appointment, expressing doubts as to the standing of the syndic before the Court,²⁵⁷ as well as stating that the prior foreign bankruptcy was no ground to stay the local proceedings.²⁵⁸

Fry LJ described three potential approaches to concurrent bankruptcy proceedings.²⁵⁹ First, each forum is to administer the assets locally situated within its jurisdiction.²⁶⁰ Second, every other forum should yield to the forum of the domicile, acting only as accessory in aid of the forum of the domicile.²⁶¹ Third, the forum of the country in which the debtor has assets, and in which a court first adjudicates him or her bankrupt (whether or not it is the forum of the domicile), is entitled to claim foreign assets.²⁶²

Of the three possibilities, Fry LJ rejected the third and, of the other two, appeared to prefer the approach of concurrent territorial administrations, as ‘it may be that [its] inconveniences are less than the inconveniences of any other course’.²⁶³ Commentators have agreed upon this as the correct approach and have identified the reluctance of the courts to decline jurisdiction.²⁶⁴

²⁵³ Ibid 400–1 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). The negative declaration sought locally was to prevent the respondent parties from pursuing remedies available in the United States but not in the local proceedings and were thus stayed as being oppressive.

²⁵⁴ There may also be concurrent administrations in a probate context: Nygh and Davies, above n 75, 677–8.

²⁵⁵ (1890) 24 QBD 640.

²⁵⁶ Argument by counsel referred to expert evidence that French law vested the whole administration of the bankrupt’s property in the syndic. It did not act as an assignment of all the bankrupt’s property to the syndic: *ibid* 641.

²⁵⁷ See, eg, *ibid* 644 (Lord Coleridge CJ), 647 (Fry LJ).

²⁵⁸ See, eg, *ibid* 646 (Lord Coleridge CJ), 649 (Fry LJ).

²⁵⁹ *Ibid* 648–9.

²⁶⁰ *Ibid* 648.

²⁶¹ *Ibid*.

²⁶² *Ibid* 649.

²⁶³ *Ibid* 648.

²⁶⁴ See, eg, Nygh and Davies, above n 75, 639; Sykes and Pryles, above n 4, 784.

Yet in an Australian case, *Radich v Bank of New Zealand*,²⁶⁵ a local sequestration order was set aside where there was a concurrent New Zealand bankruptcy. It was argued that there were juridical advantages in instituting a local bankruptcy in order to bring local after-acquired movable property into the estate.²⁶⁶ Nevertheless, the Federal Court refrained from exercising jurisdiction, even though the statutory grounds were satisfied to establish jurisdiction. It found that recognition of the foreign order and assistance to the foreign trustee achieved the required outcome.²⁶⁷

Similarly, in corporate insolvency, there are often concurrent proceedings with primary and ancillary liquidations. Exclusive jurisdiction is not accorded any particular state in respect of winding up companies.²⁶⁸ Section 582(3) of the *Corporations Act* states that a winding-up may occur under Part 5.7 even though the foreign company is being wound up elsewhere or has ceased to exist under the laws of its place of origin.²⁶⁹ A winding-up order under *Corporations Act* s 601CL requires a winding-up order to have commenced or been completed in the registered foreign company's place of origin. Any winding-up granted by way of assistance under *Corporations Act* s 581 must necessarily follow an external administration being instituted in another jurisdiction.

In *Re Bank of Credit & Commerce International SA [No 10]*,²⁷⁰ a critical issue in the distribution of local assets was the significance of the local liquidation being ancillary to the liquidation in the place of incorporation. Scott V-C, who undertook an extensive review of the authorities, held that:

Where a foreign company is in liquidation in its country of incorporation, a winding up order made in England will normally be regarded as giving rise to a winding up ancillary to that being conducted in the country of incorporation.²⁷¹

Where a stay based on *lis alibi pendens* is sought in insolvency proceedings, it is not a simple matter to identify whether an identical issue or controversy is being litigated in different states. On the one hand, it could be argued that all proceedings arising out of the debtor's insolvency administration are part of the

²⁶⁵ (1993) 45 FCR 101. Until moving to Queensland in 1988, Radich had lived in New Zealand where he was declared bankrupt on 4 February 1991. In June 1992, an Australian court granted a sequestration order upon the application of the same petitioning creditor and based on the same debt and commercial circumstances. Radich opposed the order. An extension of his status as a bankrupt would have prejudiced his income and capacity to work as a solicitor.

²⁶⁶ See *ibid* 105 (Einfeld J).

²⁶⁷ *Ibid* 114 (Einfeld J), 115 (Foster J), 126 (Drummond J).

²⁶⁸ Cf *Air Nauru v Niue Airlines Ltd* [1993] 2 NZLR 632. An application to wind up Niue Airlines Ltd was brought by the Republic of Nauru, trading as Air Nauru, alleging a failure to pay monies under an agreement. The contract granted the Supreme Court of Nauru exclusive jurisdiction over any legal action or proceedings under the agreement. Master Kennedy-Grant of the High Court of New Zealand held the New Zealand court was an appropriate forum noting in passing that as it was the only court that could properly be seized of the proceedings to wind up the defendant, a New Zealand company.

²⁶⁹ This provision was first introduced into English company legislation in 1928 to deal with Russian banks which had been dissolved in the 1917 revolution, but which still had assets in England: see *Russian & English Bank v Baring Brothers & Co Ltd* [1936] AC 405; *Dairen Kisen Kabushiki Kaisha v Shiang Kee* [1941] AC 373.

²⁷⁰ [1997] Ch 213.

²⁷¹ *Ibid* 246.

same controversy — that is, to do with the bankrupt or liquidated status of the debtor.²⁷² Thus, the local court should stay any local proceedings if the foreign proceedings would be recognised locally.²⁷³

On the other hand, it could be argued that the particular proceedings do not concern the same controversy. Many of the multifaceted issues that arise during a local administration concerning assets, creditors, company officers and others (and which involve local insolvency and other laws) may not be the subject of litigation in the foreign insolvency proceedings. This squarely raises the issue discussed in *Henry* and *CSR* about what comprises ‘the controversy as a whole’.²⁷⁴

Insolvency adjudications are in a unique category, different to other civil and commercial judgments. Such an adjudication initiates a complex procedure that arguably has an inherent integrity through the unity of the debtor’s estate being realised and distributed. In the administration, the private rights of debtors and creditors vis-a-vis each other are transformed into participatory rights in a collective process, which also takes into account state interests. The complex interaction of a range of laws during an administration and the embedding of insolvency law in a state’s commercial, financial and societal culture underpin the unique character of insolvency adjudications. A potential unifying factor to identify the extent of the controversy is involvement by the principal liquidator representing the interests of the debtor’s estate.

D *Anti-Suit Injunctions*

The High Court in *CSR* stated that:

The counterpart of a court’s power to *prevent* its processes being abused is its power to *protect* the integrity of those processes once set in motion. And in some cases, it is that counterpart power of protection that authorises the grant of anti-suit injunctions.²⁷⁵

Anti-suit injunctions are sought to restrain litigants from continuing with litigation in another jurisdiction.²⁷⁶ In insolvency proceedings, this has arisen not so much in respect of the threshold winding-up petition, but rather where there

²⁷² For example, the majority in *Henry* (1995) 185 CLR 571, 591 (Dawson, Gaudron, McHugh and Gummow JJ), saw that ‘[t]he marital relationship lies at the heart of all proceedings between husband and wife with respect to their marital status’. While the marriage was still subsisting, the proceedings for judicial separation, divorce and property proceedings all had, as their subject, the marital relationship, and were part of the same controversy with respect to that relationship.

²⁷³ *Ibid.* For example, a foreign domiciliary bankruptcy or liquidation order would be recognised locally.

²⁷⁴ *CSR* (1997) 189 CLR 345, 400–1 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). See also *Henry* (1995) 185 CLR 571, 592 (Dawson, Gaudron, McHugh and Gummow JJ).

²⁷⁵ *CSR* (1997) 189 CLR 345, 391 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (citations omitted) (emphasis in original).

²⁷⁶ See generally Trevor U Hartley, ‘Comity and the Use of Antisuit Injunctions in International Litigation’ (1987) 35 *American Journal of Comparative Law* 487; Elizabeth Vuong, ‘Anti-Suit Injunctions — A Development of Principles in *CSR Limited v Cigna Insurance Australia Limited & Ors*’ (1998) 20 *Sydney Law Review* 169.

have been related proceedings during the course of the local (or foreign) insolvency administration.²⁷⁷

For example, where an insolvency administration is instituted locally, a court may grant an anti-suit injunction to prevent a person from seeking to obtain the sole benefit of certain foreign assets through foreign proceedings.²⁷⁸ A creditor may seek to prevent a liquidator from issuing proceedings to set aside a voidable transaction in another jurisdiction. In *Barclays Bank plc v Homan*,²⁷⁹ several banks sought an injunction in England to prevent the administrators from taking recovery action in the US. The English Court of Appeal refused the injunction and upheld the primary judge's decision that where the foreign proceedings were not vexatious or oppressive, it was for the foreign court to decide whether or not it was the appropriate forum.

A local liquidator may seek to prevent a creditor from issuing proceedings in a foreign court. *New Cap Reinsurance Corporation (Bermuda) Ltd v Chase Manhattan Bank [No 2]*²⁸⁰ concerned an insurance company which was incorporated in Bermuda and, while not registered in Australia, was carrying on business in New South Wales and Victoria. The Supreme Court of Bermuda had appointed a provisional liquidator over New Cap Reinsurance (Bermuda) Ltd on the application of the Bermudan Registrar of Companies, and the Supreme Court of New South Wales had appointed a local provisional liquidator over the company.²⁸¹ The Bermudan provisional liquidator sought to restrain creditors from pursuing an action in Bermuda which challenged the provisional liquidator's request to the Bermudan court for aid from the Australian court.²⁸²

The court's power to grant anti-suit injunctions derives both from its inherent jurisdiction and its equitable jurisdiction. The inherent power to grant an anti-suit injunction is to be exercised when the administration of justice demands it — for example where it is necessary to protect the court's own proceedings and processes.²⁸³ A court's equitable jurisdiction includes the power to make orders to restrain unconscionable conduct or the unconscientious exercise of legal rights — for example, because they are vexatious or oppressive.²⁸⁴ In the latter case, the local court must first apply the *Voth* test to decide if it is not a 'clearly inappropriate forum' to determine the matter in issue before considering whether to grant an anti-suit injunction or to require the applicant to seek a stay of the

²⁷⁷ In *Chapman v Travelstead* (1998) 86 FCR 460, the Federal Court refused to set aside an order to serve outside the jurisdiction and to stay local contractual proceedings where the defendant had entered into foreign bankruptcy proceedings.

²⁷⁸ See *Société Nationale Industrielle Aerospatiale v Lee* [1987] AC 871, 892 (Lord Goff).
²⁷⁹ [1993] BCLC 680.

²⁸⁰ [1999] NSWSC 808 (Unreported, Austin J, 4 August 1999).

²⁸¹ *Re New Cap Reinsurance Corporation Holdings Ltd* (1999) 32 ACSR 234.

²⁸² See also *New Cap Reinsurance Corporation (Bermuda) Ltd v Chase Manhattan Bank [No 2]* [1999] NSWSC 808 (Unreported, Austin J, 4 August 1999) [22].

²⁸³ In such a case, no question arises as to whether the court is an appropriate forum for the resolution of that issue because it is the only court with any interest in the matter: *CSR* (1997) 189 CLR 345, 398 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

²⁸⁴ *Ibid* 392 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). That is, the conduct must be vexatious or oppressive according to the local dictates of equity and good conscience, rather than in the sense that they are an abuse of the foreign court's processes or even in the sense that they should be stayed by the foreign court on *forum non conveniens* grounds.

foreign proceedings.²⁸⁵ The courts exercise the power to grant anti-suit injunctions with caution for reasons of comity. This applies whether the injunction is sought in the exercise of the inherent or equitable jurisdiction.²⁸⁶

It is uncertain whether a foreign liquidation order will operate as a local stay on dealings with the debtor's assets, either by the debtor itself or by the debtor's creditors. In fact, in *Mercantile Credits Ltd v Foster Clark (Australia) Ltd*, the High Court commented that: 'One of the strongest reasons there can be for making a winding-up order is that thereby one of a number of creditors will be stopped in an attempt to get more than his proper share out of assets that are insufficient to satisfy all.'²⁸⁷

Injunctive relief in the context of insolvency was recently sought in *Re Independent Insurance Co Ltd*,²⁸⁸ in which a letter of request was directed by the High Court of Justice of England and Wales to the Supreme Court of New South Wales under *Corporations Act* s 581.²⁸⁹ The plaintiff company and its provisional liquidators applied ex parte for a declaration recognising a petition to wind up the company presented to the foreign court in June 2001, as well as recognising the appointment of the provisional liquidators. In addition, they sought orders that, unless leave was granted by the foreign court and subject to such terms as it may impose,

the continuation or commencement of any action or proceeding against the Company or its property in Australia shall be restrained while the joint provisional liquidators are appointed to the Company or after a winding up order has been made in relation to the Company.²⁹⁰

Barrett J noted that the Court was being asked

to award remedies that are general equitable remedies. This is in line with cases in which the equitable remedy of appointment of a receiver has been granted by a court exercising auxiliary jurisdiction in support of a foreign insolvent administration: see, eg *Re A Debtor (Order in Aid No 1 of 1979)* [1981] Ch 384; *Dick as Trustee in Bankruptcy v McIntosh* [2001] FCA 1008. ... Such provisions [ss 581(2)(a) and 581(3)] do not augment the jurisdiction except in a geographic sense.²⁹¹

The claim for injunctive relief was being advanced apart from any *lis inter partes* and sought 'an order expressed to be binding on the whole world in the manner of legislation'.²⁹² Barrett J noted that Australia had not yet enacted laws adopting recognised international measures for the administration of cross-border insolvencies, although it referred to well-advanced moves to

²⁸⁵ Ibid 397–8 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

²⁸⁶ Ibid 396 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

²⁸⁷ (1964) 112 CLR 169, 175 (Kitto, Taylor and Windeyer JJ).

²⁸⁸ (2005) 193 FLR 43.

²⁸⁹ For more detailed discussion on this provision, see below Part V(F).

²⁹⁰ *Re Independent Insurance Co Ltd* (2005) 193 FLR 43, 46 (Barrett J).

²⁹¹ Ibid 50.

²⁹² Ibid 51 (Barrett J), citing his own judgment in *Re AFG Insurances Ltd* (2002) 20 ACLC 1588, 1593.

incorporate the *UNCITRAL Model Law*²⁹³ into Australian law. In that context, Barrett J concluded:

In the meantime, in a case such as the present involving a corporate insolvency in the United Kingdom, the only special jurisdiction this court has is that conferred by s 581 of the *Corporations Act*. And, insofar as that section empowers the court to deploy its general equitable jurisdiction in aid of a United Kingdom court in a way that territorial limitations would otherwise not allow, the jurisdiction is to be exercised in accordance with principles of general application.²⁹⁴

Although the order as requested in general terms was not made, Barrett J emphasised that, by virtue of s 581, the Court had jurisdiction to restrain the initiation or continuation of any specific proceedings against the company or affecting its property, as well as jurisdiction to stay certain proceedings.²⁹⁵

E Discretion in the Exercise of Jurisdiction

Even when exercising its jurisdiction to make a liquidation order, an Australian court may determine not to make the order. The *Corporations Act* states that the court ‘may’ make the sequestration or liquidation order upon proof of the statutory requirements.²⁹⁶ Section 467 of the *Corporations Act* is worded permissively so that a court is not required to make an order merely upon proof of a ground for winding-up.²⁹⁷ This discretion to refuse an order is not necessarily exercised merely because the company has no property.²⁹⁸ Alternatively, the court may, having made a liquidation order, order a stay of those proceedings.²⁹⁹

In *Re New England Brewing Co Ltd*³⁰⁰ a petition was presented to wind up a New South Wales company which was registered as a foreign company in Queensland. Subsequently, a winding-up order was made in the place of its incorporation. The evidence disclosed that there were local creditors in Queensland and matters requiring investigation during a winding-up.³⁰¹ Apart from this, the Supreme Court of Queensland saw no reason to incur the extra expense of a Queensland liquidation. It would only be an ancillary administration and there was no reason to suppose that the New South Wales liquidator would not adequately carry out his duties under the *Companies Act 1961* (NSW).³⁰² Accordingly, Lucas J decided to exercise his discretion against making a winding-up order at that stage.³⁰³ The petition was adjourned to a date to be

²⁹³ See above n 27.

²⁹⁴ *Re Independent Insurance Co Ltd* (2005) 193 FLR 43, 61 (Barrett J).

²⁹⁵ *Ibid.*

²⁹⁶ *Corporations Act* ss 459A, 459B, 467.

²⁹⁷ Keay, above n 44, 92. See at 103–4 on abuse of process as a ground for dismissal.

²⁹⁸ *Corporations Act* s 467(2)(b).

²⁹⁹ *Corporations Act* s 482.

³⁰⁰ [1970] QWN 49.

³⁰¹ There were alleged breaches of company law in relation to the allotment of shares and the issue of a prospectus.

³⁰² *Re New England Brewing Co Ltd* [1970] QWN 49, 124 (Lucas J).

³⁰³ *Ibid.* 125.

fixed in case circumstances were disclosed during the liquidation which would appear to justify a local ancillary liquidation.³⁰⁴

F *Jurisdiction under the 'Aid and Auxiliary' Provisions*

As already foreshadowed, courts may exercise jurisdiction in a multi-state corporate insolvency through the mutual aid and assistance provisions of the *Corporations Act*.³⁰⁵ Section 581(2) of the *Corporations Act* states:

In all external administration matters, the Court:

- (a) must act in aid of, and be auxiliary to, the courts of:
 - (i) external Territories; and
 - (ii) States that are not in this jurisdiction;³⁰⁶ and
 - (iii) prescribed countries;that have jurisdiction in external administration matters; and
- (b) may act in aid of, and be auxiliary to, the courts of other countries that have jurisdiction in external administration matters.

A distinction is drawn between the degrees of cooperation afforded to courts in 'prescribed countries' and those in other countries. The former are listed in *Corporations Regulation 2001* (Cth) reg 5.6.74 as: Jersey; Canada; Papua New Guinea; Malaysia; New Zealand; Singapore; Switzerland; the United Kingdom; and the United States of America.

Under s 580, 'external administration matter' means a matter relating to:

- (a) winding up, under this Chapter, a company or a Part 5.7 body; or
- (b) winding up, outside Australia, a body corporate or a Part 5.7 body; or
- (c) the insolvency of a body corporate or of a Part 5.7 body.

The Federal Court in *Joye v Beach Petroleum NL* held:

any step taken by a liquidator in getting in the assets of the corporation is a step taken in the winding up; and this is so whether or not the step taken involves litigation aimed at recovery of the assets. If litigation is necessary, the conduct of that litigation is, in our view, a 'matter' that 'relates to' the 'winding up'.³⁰⁷

³⁰⁴ Ibid.

³⁰⁵ In *Smith as Liquidator of TC Coombs & Co (in liq) v Australian Securities Commission* (1995) 16 ACSR 424, the High Court of Justice of England and Wales received assistance from the Supreme Court of Victoria to recover Australian assets which were beneficially owned by a company in liquidation in England. The assets were shares formerly held by a subsidiary of the English company, which had been deregistered in Australia and whose shares vested in the Australian Securities Commission. The Supreme Court ordered that the Australian Securities Commission transfer the shares listed in the High Court order to the English liquidator. However, in respect of excess shares not listed in the request, the Supreme Court of Victoria indicated it would need to reinstate the Australian company prior to any order to transfer such property to the English liquidator: at 428–9 (Hayne J).

³⁰⁶ This provision is required in the event that some states do not continue to refer their corporations power to the Commonwealth.

³⁰⁷ (1996) 67 FCR 275, 287–8 (Beaumont and Lehane JJ). Their Honours approved the definition of 'winding-up' by McPherson SPJ in *Re Crust 'n' Crumb Bakers (Wholesale) Pty Ltd* [1992] 2 Qd R 76, 78: 'Winding up is a process that consists of collecting assets, realising and reducing them to money, dealing with proofs of creditors by admitting or rejecting them, and distributing the net proceeds, after providing for the costs and expenses, to the persons entitled':

The notion of ‘external administration matter’ was further explored in *Re AFG Insurances Ltd*,³⁰⁸ where the Supreme Court of New South Wales declined to issue a letter of request to a foreign court seeking aid and assistance in respect of a voluntary administration. The applicants sought recognition of the status and authority of the voluntary administrators and their agents to act on behalf of the company and an order that proceedings not be commenced or continued against the company in England, except by leave of the Supreme Court of New South Wales or the administrators. The judgment referred to the effect of the s 580 definition of ‘external administration matter’,³⁰⁹ especially para (c) (‘the insolvency of a body corporate or of a Part 5.7 body’), and s 581(4) (courts that have jurisdiction in an ‘external administration matter’³¹⁰). Barrett J held:

A Pt 5.3A administration is not a regime imposed by or arising from an order of this court or any other court. No court has the general superintendence or control of such an administration. ... No particular court covers the field, although in a practical sense one may come to do so just because all applications happen to be made to it.

This makes me think that, in the administration context (much more, perhaps, than in the case of a winding up ordered by the court), a foreign court can be regarded as acting in aid of or as auxiliary to this court only where this court has become seised of a particular proceeding relevant to the administration and the full and effective exercise of this court’s jurisdiction will be assisted by some ancillary order of a foreign court.³¹¹

In the subsequent case of *Re AFG Insurances Ltd (admin apptd)*,³¹² the Supreme Court of New South Wales made declarations that the company had become subject to voluntary administration on a certain date and that the two administrators had been appointed on the same day. In such circumstances,³¹³ the Court was prepared to request the English court make such orders, as it would be open to the Court to make those orders within the latter’s jurisdiction.³¹⁴

Arguably, a court may make a winding-up order under s 581 as a result of a request from a foreign court for assistance. In *New Cap Reinsurance Corporation (Bermuda) Ltd v Chase Manhattan Bank [No 2]*,³¹⁵ the provisional liquidator of a Bermudan company successfully sought the appointment of an Austra-

Joye v Beach Petroleum NL (1996) 67 FCR 275, 287. In *Re HIH Insurance Ltd (in liq)* [2004] NSWSC 454 (Unreported, Barrett J, 21 March 2004), the court held that a s 596B examination in a winding-up fell within para (a) of ‘external administration’.

³⁰⁸ (2002) 20 ACLC 1588.

³⁰⁹ *Ibid* 1590 (Barrett J).

³¹⁰ *Ibid*.

³¹¹ *Ibid* 1592.

³¹² (2002) 43 ACSR 60.

³¹³ The Court was also satisfied with the additional evidence produced to establish the company’s insolvency: *ibid* 61 (Barrett J).

³¹⁴ An order requesting the assistance of the Supreme Court of British Columbia in a voluntary administration was granted in *Re Federation Group Ltd* (2005) 223 ALR 68, in which declarations on commencement of the voluntary administration and the appointment of the administrators were also made.

³¹⁵ [1999] NSWSC 808 (Unreported, Austin J, 4 August 1999).

lian provisional liquidator to the company which was not registered as a foreign company but had been carrying on business in Australia. It did so in order that:

an Australian provisional liquidator could locate and get in Australian assets and corporate records, make investigations and take other steps to protect the company's Australian assets, and deal with the company's bankers (The Chase Manhattan Bank in Sydney) whom [the provisional liquidator] had attempted to contact without success.³¹⁶

VI CONCLUSION

This article has addressed various issues concerning jurisdiction and local proceedings in a multi-state corporate insolvency. It has sought to place the issues within the context of both multi-state insolvency theories, as well as private international law principles on jurisdiction. In so doing, it has aimed to provide wide-ranging discussion of the issues that may face a local court in exercising jurisdiction in a multi-state corporate insolvency.

This article returns to basics to outline Australian courts' geographical jurisdiction, as well as their jurisdiction to prescribe conduct and jurisdiction to adjudicate between parties, in an insolvency context. In the process, it highlights a range of issues peculiar to insolvency for courts called upon to determine questions of jurisdiction in local proceedings in a multi-state liquidation.

The *Australian Constitution* specifically allocates power in respect of 'bankruptcy and insolvency' to the Commonwealth³¹⁷ to be exercised concurrently with the states. However, the legislative history is such that bankruptcy and insolvency for individuals are dealt with by a comprehensive statute,³¹⁸ whereas insolvency for companies is addressed as part of the comprehensive corporations' legislation with its attendant constitutional limitations.

In addition, this history has affected the allocation of jurisdiction to prescribe conduct in respect of bankruptcy and insolvency. Statute allocates 'exclusive jurisdiction' in bankruptcy to federal courts, whereas corporate insolvency jurisdiction is vested concurrently in federal, state and territory courts. Thus potential jurisdictional issues for state and territory courts as to what constitutes bankruptcy proceedings are avoided for liquidation proceedings. However, analogous issues may arise during the course of the liquidation, whether they are incidental or intrinsic to the insolvency.³¹⁹

The jurisdiction to adjudicate in a multi-state liquidation is addressed primarily by *Corporations Act* s 583, although ss 601CL(14) and 581 are also potentially relevant. The major issue regarding the existence of a local jurisdiction to

³¹⁶ Ibid [3]. This case concerned a dispute over a substantial assets held in an Australian bank account.

³¹⁷ *Australian Constitution* s 51(xvii).

³¹⁸ See *Bankruptcy Act 1966* (Cth) pt IV div 6 (compositions or arrangements with creditors); pt VI (administration of property for insolvent debtors); pt IX (debt agreements by insolvent debtors); pt X (personal insolvency agreements by insolvent debtors).

³¹⁹ See above nn 141–8 and accompanying text, in particular the discussion on the implications of the bankruptcy and winding-up exemption in the *Brussels Convention*, opened for signature 27 September 1968, 8 ILM 229 (entered into force 1 February 1973).

adjudicate under s 583 derives from the definition of a ‘Part 5.7 body’, to which that section applies. This raises questions as to a foreign company’s local registration or whether it carries (or has carried) on business in Australia.

The exercise of jurisdiction to adjudicate in a multi-state liquidation raises a number of issues. First, the local court may decline to exercise the jurisdiction, determining itself to be a clearly inappropriate forum for the determination of the dispute. Second, where local jurisdiction has been exercised, a court may, in the context of concurrent proceedings, nevertheless order a stay on local proceedings under the doctrine of *lis alibi pendens*. In an insolvency however, it may be difficult to identify whether the local proceedings comprise the identical controversy being litigated in the foreign state. Alternatively, the local court may grant an anti-suit injunction to restrain litigants from continuing the foreign concurrent proceedings. These last two issues are more likely to arise in respect of proceedings during the course of a liquidation rather than on the threshold issue of winding up the company, given the courts’ willingness to adjudicate in favour of concurrent liquidations, albeit nominating one as principal and the other(s) as ancillary.³²⁰

Next in exercising its jurisdiction to wind up a company, the court may decline to make the order, as the provisions concerning a Part 5.7 body³²¹ are permissive rather than obligatory.³²² This contrasts with the mandatory provision in respect of a locally registered foreign company being wound up in its place of incorporation.³²³

Finally, local jurisdiction to adjudicate in a multi-state liquidation includes auxiliary jurisdiction to provide aid and assistance upon request from a foreign court.

It is timely to raise these jurisdictional issues surrounding local proceedings in a multi-state liquidation. In October 2005, the federal government announced it would be proceeding with an integrated package of reforms to improve the operation of Australia’s corporate insolvency laws.³²⁴ One aspect of these reforms will be the adoption of the *UNCITRAL Model Law*.³²⁵ The reforms will provide mechanisms for dealing with cases of cross-border insolvency and will adopt the approach detailed in the Corporate Law Economic Reform Program Proposals for Reform, Paper No 8 (2002) (‘CLERP 8’).³²⁶

³²⁰ *Re Bank of Credit & Commerce International SA [No 10]* [1997] Ch 213.

³²¹ *Corporations Act* s 583.

³²² *Corporations Act* ss 459A, 459B, 461. See also *Corporations Act* s 467.

³²³ *Corporations Act* s 601CL(14).

³²⁴ Australian Government Treasury, *Corporate Insolvency Reform* (2005) <http://www.treasury.gov.au/documents/1022/PDF/Corporate_Insolvency_Reform_attachment.pdf>.

³²⁵ For a more detailed discussion on the *UNCITRAL Model Law*, see Rosalind Mason, ‘Cross-Border Insolvency: Adoption of CLERP 8 as an Evolution of Australian Insolvency Law’ (2003) 11 *Insolvency Law Journal* 62.

³²⁶ The Joint Committee on Corporations and Financial Services recommended that Australia adopt the *UNCITRAL Model Law* as proposed by CLERP 8: Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Insolvency Laws: A Stocktake* (2004) xxxvi <http://www.aph.gov.au/Senate/committee/corporations_ctte/completed_inquiries/2002-04/ail/report/ail.pdf>. See also Joint Committee on Corporations and Financial Services, *Improving Australia’s Corporate Insolvency Laws: Issues Paper* (2003).

Significantly, the *UNCITRAL Model Law* does not allocate jurisdiction to wind up a company, unlike the *Council Regulation (EC) No 1346/2000 on Insolvency Proceedings*.³²⁷ Instead it provides for judicial cooperation between states as well as rights of access for foreign insolvency administrators and recognition of foreign insolvency proceedings by participating states. Nevertheless, it does provide for an automatic stay on local proceedings flowing from recognition of a 'foreign main proceeding'.³²⁸ As such, it may affect the courts' approach to issues raised above, such as the doctrine of *lis alibi pendens* and the granting of anti-suit injunctions.

CLERP 8 proposes enacting the *UNCITRAL Model Law* as a separate enactment of the Commonwealth Parliament.³²⁹ Further, it does not recommend the repeal of current *Corporations Act* provisions relevant to multi-state liquidations. It proposes to retain s 601CL(14)–(16) to address circumstances that fall outside the scope of the *UNCITRAL Model Law* or where the *UNCITRAL Model Law* is not invoked.³³⁰ Part 5.7 is to be retained, but with such changes as are necessary to ensure it operates harmoniously with the *UNCITRAL Model Law* and consistently with the remainder of Chapter 5 of the *Corporations Act*.³³¹ Sections 580–1 dealing with cooperation between courts are also to be retained in relation to external administration matters arising under the *Corporations Act*.³³²

As this article indicates, a substantial jurisprudence surrounds the local exercise of jurisdiction in multi-state corporate insolvencies. This is unlikely to be swept away by the adoption of this multilaterally developed approach to improved international cooperation. In particular, the Commonwealth proposals to retain these provisions of the *Corporations Act* on multi-state liquidations will ensure the relevance of this jurisprudence. This elaboration on a range of issues in the context of multi-state insolvency theories and private international law scholarship on jurisdiction provides a framework for considering the complex issues that are likely to arise in multi-state liquidations independently of the *UNCITRAL Model Law* and its proposed adoption.

³²⁷ [2000] OJ L 160/1, art 3(1): 'The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings.'

³²⁸ *UNCITRAL Model Law* art 20. A 'foreign main proceeding' is defined as 'a foreign proceeding taking place in the State where the debtor has the centre of its main interests': *UNCITRAL Model Law* art 2(a). 'In the absence of proof to the contrary, the debtor's registered office ... is presumed to be the centre of [a corporate] debtor's main interests.': *UNCITRAL Model Law* art 16(3).

³²⁹ CLERP 8 (2002) 25.

³³⁰ *Ibid* 28. *Corporations Act* s 601CL shall not operate in derogation of the *UNCITRAL Model Law* where the *UNCITRAL Model Law* is invoked: at 28.

³³¹ CLERP 8 (2002) 29.

³³² *Ibid* 30.