AUSTRALIAN INTERNATIONAL BANKRUPTCY LAW

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1. INTRODUCTION

International financial transactions involving Australian and American parties have increased significantly in the past decade.¹ Many of these parties risk involvement with Australia's international bankruptcy law. During this period, Australia, like many countries (including the United States), has re-examined and changed its bankruptcy law as applied in the international context.²

This Comment describes the present state of Australia's international bankruptcy law and some of its consequences for United States debtors and creditors who may be subject to it. The term "bankruptcy law" for purposes of this Comment refers to the liquidation of individuals and partnerships³ and the involuntary winding-up⁴ of insolvent companies.⁵ The term does not include the rehabilitation of individuals.

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¹ See, e.g., 1987 DIRECTION OF TRADE STATISTICS Y.B. (Int'l Monetary Fund) 85; 1985 DIRECTION OF TRADE STATISTICS Y.B. (Int'l Monetary Fund) 85. These yearbooks indicate that between 1978 and 1986 exports from Australia to the United States rose from $1,632 million U.S. dollars to $2,389 million U.S. dollars (a 46% increase). During this same period, imports to Australia from the United States rose from $3,146 million U.S. dollars to $5,235 million U.S. dollars (a 66% increase).
² Two authors date the catalyst for this re-examination in the mid-1970s after several bankruptcies occurred having significant international implications. See Bogdan, International Bankruptcy Law in Scandinavia, 34 INT'L & COMP. L.Q. 49 (1985); Clougher, The Bankruptcy Reform Act of 1978: Section 304 Analysis, 2 INT'L PROP. INV. J. 607, 612-16 (1986).
³ Hereinafter, "individuals and partnerships" will be referred to as "individuals."
⁴ The terms "liquidation" and "winding-up" both refer to the process of collecting and realizing the cash value of an entity's assets for the purpose of discharging its liabilities. In Australia the term "liquidation" is used in the law of bankruptcy of individuals and the term "winding-up" in the law of companies. This article will maintain this terminology.
⁵ Voluntary and involuntary winding-up of solvent companies are beyond the scope of this Comment. There are considerable differences in Australian law in the treatment of a voluntary versus an involuntary winding-up and in the treatment of winding-up a solvent versus an insolvent company. See, e.g., B.H. McPherson, The Law of Company Liquidation, Being the Law Relating to Liquidation of Limited Liability Companies 26-39, 310-20 (J. O'Donovan 3d ed. 1987).
or companies. The Comment discusses the Australian bankruptcy law's international aspects — those proceedings involving foreign creditors, debtors or assets. It is limited to describing the fundamental principles of this law.

An important consideration throughout this discussion of Australia's international bankruptcy law is the tension between the principles of "universality" and "territoriality." These two principles lie at opposite ends of the spectrum in the context of international bankruptcy law. The principle underlying "universality" is that there should be a single bankruptcy proceeding against the debtor and that this proceeding should affect all of the debtor's assets wherever located. In contrast, the principle of "territoriality" presumes that a particular bankruptcy proceeding should affect only those assets of the debtor that are located in the adjudicating country. Compromise positions that incorporate elements of these two principles fill in the middle of this spectrum. Australia's international bankruptcy law is one such compromise.

Australia treats the bankruptcy of individuals under its Bankruptcy Act 1966-1973 ("Bankruptcy Act") and the winding-up of companies under its Companies Act 1981 ("Companies Code").

Hereinafter, the "involuntary winding-up of an insolvent company" will be referred to as the "winding-up of a company."

Thus, this Comment will not discuss the provisions of Australia's bankruptcy law that are analogous to chapters 11 and 13 of the United States Bankruptcy Code.

For a general discussion of these principles, see Bogdan, supra note 2, at 49-52.

Id. at 49-50.

Id. at 50.

Bogdan suggests that, to some extent, a compromise position is in fact the international bankruptcy policy for all countries. Id.


Companies Act 1981, AUSTL. ACTS P. (1981). There is no "federal" Australian companies law in the sense that a federal law preempts state legislation in this area. The Companies Act 1981 itself only applies in the Australian Capital Territory. The Australian federal government and all the states, however, have agreed upon a "national" system to govern companies. All the Australian states have enacted similar companies legislation based on the Companies Act 1981 with only slight modifications. (The Northern Territory has not enacted such legislation and is not part of this national system as are the other states and the Australian Capital Territory.) The national system is administered by a central body called the National Companies and Securities Commission. The Companies Act 1981 will be referred to as the Companies Code to indicate that it is referring to a "national" system. This Comment will cite only to the Companies Act 1981 — it will not explore the differences that may occur in the state statutes. See Orel v. Trafalgar Holdings Party Ltd., 8 A.C.L.R. 382 (1983) (discussion of the legislative structure between the states and federal government in

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These two laws have many similarities in their treatment of the bankruptcy of individuals and the winding up of companies in the international bankruptcy context. However, important differences do exist. This article will attempt to illustrate both the similarities and differences between these two laws while preserving their separate statutory framework.

This Comment, in addition, will examine Australia’s international bankruptcy law in two sections. The first section of this Comment examines Australia’s international bankruptcy law in the context of an Australian primary bankruptcy proceeding.18 First, it will examine to what extent this law attempts to have extraterritorial effects on foreign debtors or assets. That is, what conditions are sufficient to vest jurisdiction over a primary proceeding in an Australian court when a foreign debtor is involved. Then, it will discuss what extraterritorial effects these primary proceedings purport to have on the foreign assets of a debtor. The second section examines how the Australian bankruptcy law provides assistance to foreign primary bankruptcy proceedings that implicate Australian or foreign parties and their assets located in Australia. The discussion will focus on the conditions that must be satisfied before an Australian court will aid a foreign primary bankruptcy proceeding and the type of aid that it will provide.

2. AUSTRALIAN PRIMARY BANKRUPTCY PROCEEDINGS: EXTRATERRITORIAL EFFECTS AND THE TREATMENT OF FOREIGN CREDITORS

2.1. Generally

There are two ways for United States debtors and creditors to become involved with Australia’s international bankruptcy law in a jurisdictional context. First, an Australian court may exercise jurisdiction over the debtor or creditor in an Australian primary bankruptcy proceeding. Second, a foreign court (including a United States court) may exercise jurisdiction over the debtor or creditor in a primary bankruptcy proceeding and later request an Australian court to act in an ancillary proceeding. Note, however, that the creditor would only be-

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18 For purposes of this Comment, a “primary” bankruptcy proceeding is a proceeding where the domestic court is not responding to and acting in aid of a foreign court. The latter situation will be referred to as an “ancillary” proceeding. Foreign and domestic courts may also engage in “concurrent” proceedings where both courts engage in primary proceedings on the same matter.
come involved if she proved her debt before either the primary or ancillary proceeding took place.

This section examines the issues involved when an Australian court exercises jurisdiction over a foreign debtor in a primary bankruptcy proceeding or permits a foreign creditor to prove a debt in a primary proceeding. The following questions will be discussed: What conditions are sufficient to vest jurisdiction in an Australian primary bankruptcy proceeding over a foreign debtor? What extraterritorial effects does an Australian primary bankruptcy proceeding purport to have on the foreign assets of a debtor? What treatment will a foreign creditor receive in an Australian primary bankruptcy proceeding?

2.2. Australian Primary Bankruptcy Proceedings: Jurisdiction

A preliminary issue for any Australian primary bankruptcy proceeding over a foreign debtor is whether the Australian court has jurisdiction over the debtor. The conditions necessary to vest jurisdiction over a foreign debtor in an Australian court are critical for determining the risk of a debtor's actions. This issue should be of particular concern in the Australian international bankruptcy context because a foreign debtor's actions performed outside of Australia are sometimes sufficient to vest jurisdiction over the debtor in an Australian court.

2.2.1. Jurisdiction to Wind-Up Foreign Companies

The Companies Code vests jurisdiction to wind-up foreign companies in the Supreme Courts ("courts") of the participating states and territories. For purposes of determining when jurisdiction vests in the courts, it is important to recognize the distinctions that the Companies Code makes among foreign companies, registered foreign companies, recognized foreign companies, and non-recognized foreign companies. A foreign company is one that does not have its principal place of business in the particular Australian state or territory and is either incorporated outside Australia or is an unincorporated body that, under the laws of its place of formation, may sue or be sued. A registered for-

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15 For a discussion of these definitions, see B.H. McPherson, supra note 5, at 461.

eign company is a foreign company that is registered in the particular state or territory under Division 5, Part XIII of the Companies Code.\textsuperscript{17} A foreign company is required to register when it either establishes a place of business or carries on business within that particular state or territory.\textsuperscript{18} A recognized foreign company is a foreign company that is registered as a foreign company in one of the other participating states or territories under the provisions of the law of that state or territory that correspond to Division 5, Part XIII of the Companies Code.\textsuperscript{19} Thus, a United States company registered only in the state of Queensland is a registered foreign company in Queensland, but a recognized foreign company in any other participating state or territory. A non-recognized foreign company for purposes of this article means a foreign company that has not registered in either the particular state or territory or any of the other participating states or territories.

The Australian courts have interpreted the Companies Code as not granting jurisdiction to a particular state or territory's court to wind-up a recognized foreign company.\textsuperscript{20} The court of the state or territory in which this recognized foreign company is a registered foreign company, however, does have jurisdiction to wind-up the company.\textsuperscript{21} This interpretation facilitates the Companies Code's purpose of ensuring that there will be one winding-up proceeding of a recognized for-

\begin{itemize}
\item \textsuperscript{17} Id.\
\item \textsuperscript{18} Id. § 512. Note that § 510(3) of the Companies Code limits this application by stating that a foreign company shall not be deemed to have carried on business in the particular state or territory merely because it:
\begin{itemize}
\item (a) is or becomes a party to an action or suit or an administrative or arbitration proceeding or effects settlement of an action, suit or proceeding or of a claim or dispute;
\item (b) holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs;
\item (c) maintains a bank account;
\item (d) effects a sale through an independent contractor;
\item (e) solicits or procures an order that becomes a binding contract only if the order is accepted outside the [particular state or territory];
\item (f) creates evidence of a debt, or creates a charge on property;
\item (g) secures or collects any of its debts or enforces its rights in regard to any securities relating to such debts;
\item (h) conducts an isolated transaction that is completed within a period of 31 days, but not being one of a number of similar transactions repeated from time to time; or
\item (j) invests any of its funds or holds any property.
\end{itemize}
\item \textsuperscript{19} Id. § 5.
\item \textsuperscript{20} See, e.g., Nationwide News Party Ltd. v. Samalot Enters. Party Ltd., 4 A.C.L.C. 386 (1986); B.H. McPherson, \textit{supra} note 5, at 461-62. This does not mean, however, that this particular state or territory's court cannot act in an ancillary proceeding involving this company. \textit{See infra} notes 86-91 and accompanying text.
\end{itemize}
eign company throughout the participating states and territories.22 It is the act of registering that provides a basis for jurisdiction over the registered foreign company in the court of the state or territory where the company is registered. The act of registering is regarded as a submission to the jurisdiction of the court of that state or territory,23 although the statutory requirements of section 470(1)(c) must also be satisfied.24 With respect to non-recognized foreign companies, the vesting of jurisdiction in the particular state or territory's court over the non-recognized foreign company is conditioned on the satisfaction of certain common law as well as statutory requirements.25

There are two primary common law requirements that must be satisfied before jurisdiction vests in the courts to wind-up non-recognized foreign companies. First, there must be some possibility that a benefit will accrue to a petitioning creditor26 as a result of the winding-up.27 Second, at least one person who has an interest in the winding-up and who is willing to submit herself to the jurisdiction of the court must claim to be a creditor.28

The statutory requirements to wind-up non-recognized foreign companies and registered foreign companies are set forth in section 470(1)(c) of the Companies Code.29 This section specifies that a court

22 B.H. McPherson, supra note 5, at 461 n.11.
23 P. Nygh, supra note 2, at 408.
24 See infra note 29.
25 See P. Nygh, supra note 2, at 409-11. But see B.H. McPherson, supra note 5, at 463 (stating that the statutory requirements may be better thought of as grounds for winding-up rather than as defining conditions necessary for jurisdiction to wind-up).
26 This benefit is usually in the form of assets, but need not be. See B.H. McPherson, supra note 5, at 463-64; P. Nygh, supra note 2, at 410-11; E. Sykes & M. Pryles, Australian Private International Law 366-67 (2d ed. 1987).
28 Id.
29 Companies Act 1981, AUSTL. ACTS P. § 470(1)(c)(i-iv)(1981). The section states in full: § 470(1)(c) the circumstances in which the body may be wound-up are as follows:

   (i) if the body has been dissolved, has ceased to have a place of business in the [particular state or territory], has a place of business in the [particular state or territory] only for the purpose of winding-up its affairs or has ceased to carry on business in the [particular state or territory];
   (ii) if the body is unable to pay its debts;
   (iii) if the Court is of opinion that it is just and equitable that the body should be wound-up; or
   (iv) in the case of a foreign company, if the Commission has reported under Part VII that it is of opinion or an inspector appointed under that Part has reported that he is of opinion -
      (A) that the foreign company cannot pay its debts and should be wound-up; or
may wind-up non-recognized foreign companies or registered foreign companies when any one of four conditions have been met. These conditions are (1) when the company has been dissolved in its place of incorporation or has ceased doing business in the particular state or territory; (2) when the company is unable to pay its debts; (3) when the court believes it is just and equitable that the company should be wound-up; or (4) when the regulatory commission determines that the company cannot pay its debts or that it is in the public interest that the company be wound-up.\textsuperscript{30} The Companies Code explicitly permits, but does not require, a court to wind-up a non-recognized foreign company or registered foreign company even when the company is being wound-up, has been dissolved, or has ceased to exist under the laws where it was incorporated.\textsuperscript{31} The fact that a non-recognized or registered foreign company is not being wound-up in its place of incorporation is not a jurisdictional bar preventing the court from winding-up such a company.\textsuperscript{32}

For the majority of creditors, the \textit{most} important condition specified in section 470(1)(c) is the inability of the company to pay its debts.\textsuperscript{33} Section 470(2) specifies that a company shall be deemed to be unable to pay its debts for purposes of section 470(1) when any one of the following four conditions is met:\textsuperscript{34} (1) A creditor owed more than $1000 by the company serves the company a demand for payment and the company fails to pay the creditor within three weeks after service; (2) an action has been instituted against the company for any amount due and the company has been served and failed to make that payment within ten days or to stay the action; (3) the company does not satisfy the requirements of an order of a court in favor of a creditor; or (4) a court is otherwise satisfied that the company is unable to pay its debts.\textsuperscript{35}

\footnotesize{(B) that it is in the interests of the public, or of the shareholders or of the creditors of the foreign company, that the foreign company should be wound-up.}

\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{Id.} \S 470(3). This section states in full:

A body incorporated outside the [particular state or territory] may be wound-up under this Division notwithstanding that it is being wound-up or has been dissolved or has otherwise ceased to exist as a body corporate under or by virtue of the laws of the place under which it was incorporated.

\textsuperscript{32} See Mercantile Credits Ltd. v. Foster Clark (Austl.) Ltd., 112 C.L.R. 169 (1964); B.H. McPherson, \textit{supra} note 5, at 463.
\textsuperscript{33} See B.H. McPherson, \textit{supra} note 5, at 467.
\textsuperscript{35} \textit{Id.}
It is important to note that a court has considerable discretion in determining whether to exercise jurisdiction over a company, even when conditions are sufficient to vest this jurisdiction. Courts will consider such factors as the wishes of the creditors (both domestic and foreign), the desirability of ensuring a fair ratable division of assets to all creditors, the cost of performing the winding-up compared to the benefits derived from doing so, and the desirability of having a single winding-up take place in the place of incorporation.

2.2.2. Jurisdiction Over the Bankruptcy of Foreign Individuals

The Bankruptcy Act vests jurisdiction over bankruptcy matters in the Federal Courts of Bankruptcy, the Supreme Courts of four states, the Courts of Insolvency of two states, and the Supreme Court of the Northern Territory ("bankruptcy courts"). These bankruptcy courts, with the exception of the Supreme Court of the Northern Territory, have jurisdiction over bankruptcy matters throughout Australia.

The Bankruptcy Act makes it clear that the bankruptcy courts' jurisdiction over a debtor is not related to the citizenship of the debtor. Section 7(1) specifically defines a debtor as including non-Australian citizens. The jurisdiction of the bankruptcy courts does depend, however, on the satisfaction of the requirements of a petition by either a creditor or a debtor. The requirements of the creditor's petition will generally be of most concern to a foreign debtor. These requirements determine the scope of conduct in which a debtor may engage in order to avoid falling within the jurisdiction of a bankruptcy court.

When a creditor petitions a bankruptcy court to make a sequestra-

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36 Id. § 470(1). This section states in relevant part that "subject to this Division, a body to which this Division applies may be wound-up under this Part" (emphasis added). See also In re Hibernian Merchants Ltd., 1958 Ch. 76, 78 (1957); B.H. McPherson, supra note 5, at 468.

37 B.H. McPherson, supra note 5, at 468.

38 Bankruptcy Act 1966-1973, AUSTL. ACTS P. §§ 27, 28 (1966). These provisions cover all of the Australian states and territories except for the Australian Capital Territory. Since the Bankruptcy Act does not address the bankruptcy jurisdiction in the Australian Capital Territory, the federal Bankruptcy Court of this territory continues to have jurisdiction in bankruptcy matters as it did before the Bankruptcy Act was enacted. See E. Sykes & M. Pryles, supra note 26, at 730; see also P. Nygh, supra note 2, at 466. The bankruptcy jurisdiction of the Supreme Court of the Northern Territory is more limited than the other bankruptcy courts. Bankruptcy Act 1966-1973, AUSTL. ACTS P. § 28 (1966). The differences, however, are not material for purposes of this Comment and will not be discussed.


40 Id. § 7(1). This section states in relevant part that "this Act extends to debtors being . . . persons who are not Australian citizens."

41 Id. §§ 43, 55-56. See also P. Nygh, supra note 2, at 466-68.
tion order against a debtor, two requirements must be satisfied before jurisdiction vests with a bankruptcy court. First, section 43(1)(a) requires that the debtor have committed an act of bankruptcy as defined by section 40. This section is significant for foreign debtors because it expressly states that certain acts of bankruptcy may be committed outside of Australia. For example, section 40(1)(a) states that a debtor commits an act of bankruptcy "if in Australia or elsewhere he makes a conveyance or assignment of his property for the benefit of his creditors generally. . . ."

The second requirement for a creditor's petition that must be met before jurisdiction vests with a bankruptcy court concerns the relationship of the debtor to Australia at the time the debtor committed the act of bankruptcy. Section 43(1)(b) requires that, at the time the debtor committed the act of bankruptcy, she either:

43 Id. § 43(1)(a).
44 Id. § 40.
45 Id. § 40(1)(a). Other acts of bankruptcy defined in this section that may be committed outside of Australia are:

§ 40(1)(b): if in Australia or elsewhere -
(i) [the debtor] makes a conveyance, transfer settlement or other disposition of his property or of any part of his property;
(ii) [the debtor] creates a charge on his property or any part of his property;
(iii) [the debtor] makes a payment; or
(iv) [the debtor] incurs an obligation, that would, if [the debtor] became a bankrupt, be void as against the trustee;

§ 40(1)(c): if, with intent to defeat or delay his creditors -
(i) [the debtor] departs or remains out of Australia;
(ii) [the debtor] departs from his dwelling-house or usual place of business;
(iii) [the debtor] otherwise absents himself; or
(iv) [the debtor] begins to keep house;

§ 40(1)(g): if a creditor who has obtained against the debtor a final judgment or final order, being a judgment or order the execution of which has not been stayed, has served on the debtor in Australia or, by leave of the Court, elsewhere, a bankruptcy notice under this Act and the debtor does not -
(i) where the notice was served in Australia - within the time fixed by the Registrar by whom the notice was issued; or
(ii) where the notice was served elsewhere - within the time fixed for the purpose by the order giving leave to effect the service, comply with the requirements of the notice or satisfy the Court that he has a counter-claim, set-off or cross demand equal to or exceeding the amount of the judgment debt or sum payable under the final order, as the case may be, being a counter-claim, set-off or cross demand that he could not have set up in the action or proceeding in which the judgment or order was obtained . . . .
Where

(i) was personally present or ordinarily resident in Australia;
(ii) had a dwelling-house or place of business in Australia;
(iii) was carrying on business in Australia, either personally
or by means of an agent or manager; or
(iv) was a member of a firm or partnership carrying on busi-
ness in Australia by means of a partner or partners or of an
agent or manager . . . .

Again, this section is significant to the foreign debtor because of the
relative ease with which it applies to her. For example, section
43(1)(b)(iii) does not require the debtor to engage in a minimum
threshold level of business, but only to carry on business in Australia at
the time of committing the act of bankruptcy.

A debtor can also present a petition to a bankruptcy court against
herself and vest jurisdiction in the bankruptcy court. Where the debtor
is not a partnership, section 55 only requires that the debtor’s petition
and statement of affairs be in proper form before jurisdiction vests with
the bankruptcy court. Essentially, the debtor may voluntarily submit
herself to the jurisdiction of the bankruptcy court. Where the debtor
is a partnership, the Bankruptcy Act imposes additional requirements
before jurisdiction vests with the bankruptcy court. Specifically, sec-
tion 56 requires that a petition against a partnership be presented by a
majority of those partners who are residents of Australia on the date
that it is presented.

The jurisdiction of a bankruptcy court does not depend on whether
a foreign bankruptcy proceeding is in progress. The bankruptcy
courts have discretion to exercise concurrent jurisdiction. In fact, Aus-
tralian courts have been reluctant to decline jurisdiction when the re-
quirements of a creditor’s petition have been satisfied. There are
times, however, when the courts may refuse to exercise jurisdiction:
when the debtor is the petitioner, when the debtor has no assets in

48 See P. NYGH, supra note 2, at 468; E. SYKES & M. PRYLES, supra note 26, at 729.
50 Id. § 56(2)(a). In addition, a statement of affairs of each partner presenting the
petition and a statement of partnership affairs must accompany the petition and be
verified by affidavit. Id. § 56(2)(b).
51 P. NYGH, supra note 2, at 469-70; E. SYKES & M. PRYLES, supra note 26, at 730.
52 See P. NYGH, supra note 2, at 470; E. SYKES & M. PRYLES, supra note 26, at 730-31.
53 P. NYGH, supra note 2, at 470.
https://scholarship.law.upenn.edu/jil/vol12/iss1/5
Australia, and when the creditor’s petition is frivolous or vexatious. Bankruptcy courts also have the discretion to stay a proceeding or to rescind an order. A bankruptcy court may use these alternatives to aid in the determination of whether the foreign bankruptcy proceeding will eliminate the need for a domestic bankruptcy proceeding.

2.3. Australian Primary Bankruptcy Proceedings: Extraterritorial Effects on the Foreign Assets of a Debtor

2.3.1. Generally

Once an Australian court exercises jurisdiction over a debtor in a primary proceeding, the question arises as to whether that proceeding purports to affect the debtor’s assets located abroad. The answer to this question helps the debtor to determine the scope of risk to which its assets are exposed when it engages in an activity that may subject it to the jurisdiction of the Australian Court. A court in a jurisdiction that follows the territorial approach may attempt to affect only the debtor’s assets that are located in the jurisdiction. A court in a jurisdiction that follows the universal approach may attempt to affect any of the debtor’s assets wherever located.

When a court departs from the territorial approach and attempts to affect assets located abroad, additional questions arise concerning the ability of the court to compromise the foreign assets: What authority can the court exercise over the debtor to obtain control over those assets? What recognition will the foreign countries in which the assets are located give to the court’s actions? What assistance will the foreign countries provide? Although these additional questions are important, the following subsections will discuss only the initial question of whether the Australian primary proceedings can validly affect a debtor’s assets located abroad.

2.3.2. Extraterritorial Effects on the Foreign Assets of Companies in Winding-Up Proceedings

The Companies Code provides that the winding-up proceedings of registered foreign companies and non-recognized foreign companies are to be governed by the same provisions as those that govern winding-up

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64 Id.
65 E. Sykes & M. Pryles, supra note 26, at 731.
67 Id. § 37.
68 This is particularly true for foreign debtors who have substantial assets, only a relatively insignificant amount of which are located in Australia.
proceedings of domestic companies, with such adaptations as are necessary. The latter qualification may be important for determining how the foreign assets of foreign companies are treated as compared to those of domestic companies in Australian primary winding-up proceedings.

The Companies Code provides that once a court has made a winding-up order and appointed a liquidator, the liquidator shall take control of "all the property" to which the company is entitled. It does not, however, define "property", nor does it indicate if "property" includes assets located abroad. In the winding-up of domestic companies, the common law permits a liquidator to take control of property located in Australia and elsewhere. This interpretation is consistent with Australia's recognition that the court of the country where a company is incorporated should generally conduct the primary proceeding to wind-up the entire company and that other countries' courts should conduct ancillary proceedings to these primary proceedings. In order for the primary proceeding to accomplish the winding-up, it should purport to affect the company's property wherever located.

In the winding-up of foreign companies, however, the common law does not provide a clear answer to the question of whether the liquidator can take control of property located outside Australia. In fact, there is little authority on this issue. It is likely that the common law provides the court with the discretion to determine what property is affected but favors limiting its application to property located in Australia. This position is consistent with the common law requirement that assets of the company should be located in Australia before jurisdiction vests with the court. In addition, it is consistent with the policy that primary winding-up proceedings take place in the country where the company is incorporated. In the appropriate circumstances, however, a primary Australian winding-up proceeding may attempt to compromise the foreign company's assets located abroad. For instance,

60 Id. § 374(1).
62 See B.H. McPherson, supra note 5, at 311, 462-64; P. Nygh, supra note 2, at 409-11. The ability of the liquidator to take control of a company's foreign assets is limited by the laws of the foreign country in which those assets are located.
63 B.H. McPherson, supra note 5, at 464-65. However, this does not mean that Australian courts can not assume jurisdiction in a primary proceeding even when a court of the country where the company is incorporated has begun winding up proceedings against the company. See Companies Act 1981, Austl. Acts P. § 470(3)(1981).
64 See B.H. McPherson, supra note 5, at 462-64; P. Nygh, supra note 2, at 409-10.
65 See supra note 63 and accompanying text.
if the place of incorporation of the foreign company refused to initiate a winding-up proceeding or discriminated against Australian creditors in the distribution of assets, then the Australian court may attempt to compromise the company's assets located in other jurisdictions.

2.3.3. Extraterritorial Effects on the Foreign Assets of an Individual in Bankruptcy Proceedings

The Bankruptcy Act affects all of a debtor's assets regardless of whether the debtor is foreign or domestic.66 Section 58(1) states that, once bankrupt, a debtor's property vests in the Official Receiver in Bankruptcy (Official Receiver) and that any property acquired after this initial vesting also vests with the Official Receiver as soon as the bankrupt debtor acquires it.67 Section 5 defines property as "real or personal property of every description, whether situated in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property."68 Thus, a debtor risks all of her assets by engaging in an activity over which an Australian bankruptcy court has jurisdiction.

The Bankruptcy Act permits the bankruptcy courts to seek assistance from foreign countries. Section 29(4) states: "The [Bankruptcy] Court may request a court of an external Territory, or of a country other than Australia, that has jurisdiction in bankruptcy to act in aid of and be auxiliary to it in any matter of bankruptcy."69 Hence, the practicality of the effort will determine whether the court will request such aid. One important factor will be the expected extent of cooperation from the foreign courts. Such cooperation may vary from country to country.

2.4. Australian Primary Bankruptcy Proceedings: The Treatment of Foreign Creditors

2.4.1. Generally

The above subsections discussed the extraterritorial effects of an Australian primary bankruptcy proceeding on domestic and foreign debtors. This subsection discusses the treatment of foreign creditors in such proceedings. An important characteristic of the bankruptcy laws of

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66 See E. Sykes & M. Pryles, supra note 26, at 731-32.
68 Id. § 5(1).
69 Id. § 29(4).
any country is whether that country's bankruptcy law treats domestic and foreign creditors in a discriminatory manner or on an equal basis. A court in a jurisdiction that applies a territorial approach may not allow a foreign creditor to prove a debt in the proceedings; if the court does allow such an action, it may distribute assets to the foreign creditor only after the domestic creditors have been paid in full. A court in a jurisdiction that applies a universal approach may allow a foreign creditor to prove a debt in the proceedings and to receive a proportionate share of the available assets in the same way as a domestic creditor. This subsection discusses Australia's treatment of foreign creditors in the context of both Australian primary winding-up and bankruptcy proceedings.

2.4.2. The Treatment of Foreign Creditors in Winding-Up and Bankruptcy Proceedings

The Companies Code and the Bankruptcy Act do not define the term "creditor." These laws appear to proceed on the theory that a person entitled to prove a debt in these proceedings will be considered to be a creditor for purposes of the proceedings. A "person entitled to prove a debt" generally means any person to whom the company is indebted.

The common law rule is that foreign and domestic creditors are entitled to equal treatment in a winding-up proceeding. Thus, foreign creditors should not have any more difficulty than domestic creditors in establishing their status as creditors for purposes of these laws. The premise underlying this rule is that Australian creditors would not be hurt because they would be able to prove their debts in the foreign jurisdiction. This rationale may not be applicable in a case where the foreign creditors are from a foreign jurisdiction that would not treat Australian creditors equally. Nevertheless, it appears that the general rule of treating foreign and domestic creditors equally in an Australian winding-up proceeding still carries considerable force. Foreign creditors may prove their debts, apply for a winding-up or sequestration order, and receive a proportionate share of the assets on an equal basis as domestic creditors. In addition, the claims of foreign creditors will

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70 B.H. McPherson, supra note 5, at 365.
71 Id.
72 Id. at 482.
73 Id.
74 Id.
76 B.H. McPherson, supra note 5, at 483.
receive priority status under the same laws as the claims of domestic creditors.\(^7\)

3. **Australian Recognition of and Assistance to Foreign Primary Proceedings**

3.1. **Generally**

The previous section focused on Australian primary proceedings. This section focuses on how Australia's international bankruptcy law recognizes and assists foreign primary proceedings. The focus of the inquiry has thus shifted from examining how Australian law attempts to project itself into foreign countries to how it assists other countries attempting to project their laws into Australia.

One means by which Australia can assist foreign primary proceedings is to recognize the validity of the orders issued during those proceedings and the actions taken by the agents representing them. This can be done in whole or in part. In essence, Australia can recognize certain aspects of a foreign country's law as valid law within Australia. Australian courts need not become involved with the foreign proceedings until someone affected by foreign proceedings contests the validity of those actions within Australia. A second means by which Australia can assist foreign primary proceedings is to conduct ancillary proceedings that assist the primary proceeding. This alternative may be a more appropriate form of assistance when many of the debtor's assets or creditors are located in Australia.

This section examines how Australia provides these two forms of assistance. It will discuss when Australia recognizes the validity of a foreign court's proceeding over a debtor and some of the effects resulting from such recognition. It will also discuss how Australia provides for Australian courts to act in ancillary proceedings to assist the foreign proceedings. In examining both these forms of assistance, this section will describe how the assistance helps the foreign proceedings to control the debtor's assets located in Australia and to deny creditors the ability to seek claims or payments from the debtor in Australia.

3.2. **Australian Recognition of and Assistance to Foreign Primary Winding-Up Proceedings**

The recognition Australian courts give to foreign primary winding-up orders depends initially upon the connection between the foreign

\(^7\) Id., at 484.
court and the foreign company which has been wound-up. When the foreign court is located in the place of incorporation of the foreign company, Australian courts will generally recognize the validity of the order based on this connection.\textsuperscript{78} When, however, the foreign court is not from the place of incorporation of the foreign company, it is not clear what connection is required before an Australian court can recognize the foreign court’s winding-up order.\textsuperscript{79} Australia’s bankruptcy law of individuals requires that a “reasonable connection” exist between a foreign bankruptcy court and the debtor before an Australian court can recognize the foreign court’s order.\textsuperscript{80} An Australian court would probably require that a similar standard be met before recognizing a foreign court’s winding-up order.\textsuperscript{81}

The benefits derived from the Australian court’s recognition of the foreign court’s winding-up order, however, are limited. At present, Australian courts give little extraterritorial effect to the order.\textsuperscript{82} They maintain that the effects of foreign winding-up proceedings are essentially local to those proceedings.\textsuperscript{83} An important extraterritorial effect they will recognize is that a liquidator appointed in the foreign winding-up proceeding takes control over the company and its assets wherever located.\textsuperscript{84} This gives the foreign liquidator considerable control over the company’s assets located in Australia. The courts, however, have not been willing to stay proceedings brought in Australia against a company being wound-up abroad unless an Australian ancillary proceeding is in progress against the company.\textsuperscript{85}

The Companies Code provides a statutory framework whereby Australian courts give assistance to foreign primary winding-up proceedings through Australian ancillary winding-up proceedings. When a registered foreign company is being wound-up in the place of its incorporation and the liquidator from this proceeding requests the court’s assistance, section 518(11) provides that the court shall appoint a liquidator for the company who, in turn, shall assist in the local winding-up.\textsuperscript{86} When a recognized foreign company is being wound-up in the

\textsuperscript{78} E. Sykes & M. Pryles, supra note 26, at 363-64.
\textsuperscript{79} Id.
\textsuperscript{80} See infra note 93 and accompanying text.
\textsuperscript{81} Cf. E. Sykes & M. Pryles, supra note 26, at 364 (suggesting that Australian law follow Canadian law in recognizing a foreign court’s winding up order over a foreign company providing there is a real and substantial connection between the foreign court and the foreign company).
\textsuperscript{82} B.H. McPherson, supra note 5, at 470-71.
\textsuperscript{83} Id.; E. Sykes & M. Pryles, supra note 26, at 364-65.
\textsuperscript{84} B.H. McPherson, supra note 5, at 472.
\textsuperscript{85} Id. at 473-74.
participating state or territory where it is registered and the liquidator from this proceeding requests the court’s assistance, section 466 states that the court may provide the requested assistance.\(^87\) When a non-recognized foreign company is being wound-up in the place of incorporation and the liquidator from this proceeding requests the court’s assistance, section 470(1) provides that the court may wind-up the company as it would a domestic company, with such adaptations as are necessary.\(^88\) The appointment of a local liquidator to provide assistance in an ancillary proceeding would appear to be within the discretion of the court.\(^89\)

Once the Australian court has instituted these ancillary winding-up proceedings, the Companies Code provides that the local liquidator is to assist the court during primary winding-up proceedings in the collection and protection of local assets.\(^90\) It also provides that no actions or proceedings may be commenced against the company after the ancillary winding-up has begun, except as allowed by the court.\(^91\)

3.3. \textit{Australian Recognition of and Assistance to Foreign Primary Bankruptcy Proceedings}

The recognition Australian courts give to foreign primary bankruptcy orders depends initially upon the connection between the foreign court and the foreign debtor. When the foreign court is located in the debtor’s domicile, Australian courts will generally recognize the validity of the order based on this connection.\(^92\) Where the foreign court is not from the domicile of the debtor, Australian courts may recognize the validity of the foreign order where there is a reasonable connection between the foreign court and the debtor.\(^93\)

Once recognized, the foreign order generally acts as an assignment of the debtor’s movable property in Australia to the foreign trustee appointed by the foreign proceeding.\(^94\) Although the foreign order does not in itself affect the debtor’s immovable property in Australia, it does permit the foreign trustee to be appointed as a receiver of that immovable property by an Australian court.\(^95\)

The Bankruptcy Act also provides a statutory framework that per-

\(^87\) Id. § 466.
\(^88\) Id. § 470(1).
\(^89\) E. Sykes & M. Pryles, \textit{supra} note 26, at 368-69.
\(^90\) B.H. McPherson, \textit{supra} note 5, at 465.
\(^92\) Id. at 368-69.
\(^93\) Id. at 368-69.
\(^94\) E. Sykes & M. Pryles, \textit{supra} note 26, at 737-38.
\(^95\) P. Nygh, \textit{supra} note 2, at 474.
mits Australian courts to assist foreign primary bankruptcy proceedings through ancillary proceedings. In 1980, the Australian Parliament amended the Bankruptcy Act with respect to when Australian bankruptcy courts should give assistance to foreign bankruptcy courts requesting such assistance. The amendment provides that Australian bankruptcy courts shall give assistance to bankruptcy courts from the United Kingdom, Canada and New Zealand ("prescribed countries"), and may give assistance to bankruptcy courts from other countries.\footnote{Bankruptcy Act 1966-1973, \textsc{Austl. Acts} P. § 29 (1966). The relevant part of this section states:

§ 29 (1) All Courts having jurisdiction under this Act, the Judges of those Courts and the officers of or under the control of those Courts shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy.

(2) In all matters of bankruptcy, the Court -

(a) shall act in aid of and be auxiliary to the courts of the external Territories, and of prescribed countries, that have jurisdiction in bankruptcy; and

(b) may act in aid of and be auxiliary to the courts of other countries that have jurisdiction in bankruptcy.

(3) Where a letter of request from a court of an external Territory, or of a country other than Australia, requesting aid in a matter of bankruptcy is filed in the Court, the Court may exercise such powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction.

(5) In this section, 'prescribed country' means -

(a) the United Kingdom, Canada and New Zealand . . . .

\footnote{39 A.L.R. 129 (1981).}

\footnote{\textit{Id.}}

\footnote{Bankruptcy Act 1966-1973, \textsc{Austl. Acts} P. § 29(3)(1966).}

\footnote{https://scholarship.law.upenn.edu/jil/vol12/iss1/5}}

4. \textbf{Conclusion}

This Comment has discussed Australia’s international bankruptcy law as it operates in Australian primary proceedings as well as its role in recognizing and assisting foreign primary proceedings. In many re-
pects, Australian primary proceedings purport to exert extraterritorial effects by exercising jurisdiction over foreign debtors and by compromising debtors' assets located abroad. At the same time, foreign creditors may participate in these proceedings and receive the same treatment as domestic creditors. Foreign bankruptcy courts may request the assistance of Australian Courts by having courts conduct ancillary proceedings. As a result, United States debtors and creditors should be aware that they may be exposed to Australian bankruptcy law when engaging in international financial transactions with Australian parties.