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EDITORIAL 51

ARTICLES

The inherent equitable jurisdiction and the plenary power of the Supreme Court of New South Wales to order the winding up of companies – *Ashley K Ehlers*

Not all companies in Australia are amenable to a winding up order pursuant to the *Corporations Act 2001* (Cth). The Supreme Court of New South Wales has previously dealt with such winding up applications by apparently focusing on the inherent jurisdiction of the court to consider whether the court has jurisdiction to firstly consider the winding up application. This article proposes an original alternative paradigm: the plenary power provided to the court by s 23 of the *Supreme Court Act 1970* (NSW) can be utilised to initially attract the jurisdiction of the court and subsequently the inherent jurisdiction specifically utilising the equitable "just and equitable" ground is available to the court to consider and make such a winding up order if appropriate. Variation of such a paradigm may also be available to the court when considering the inherent jurisdiction in relation to corporation matters more generally. 52

A comparative analysis of the use of the UNCITRAL Model Law on Cross-border Insolvency in Australia, Great Britain and the United States – *Stewart Maiden*

UNCITRAL's Model Law on Cross-border Insolvency has been adopted by parliaments in 18 states across six continents. Each separate implementation departs from the archetype for various reasons, principally the necessity to tailor the Model Law to fit domestic law and policy. Model Law Art 8 requires courts to have regard to the international origin of the Model Law and the desirability of uniformity when interpreting local enactments of the Model Law. However, the nuances of the foreign texts, and differences between the suites of insolvency laws of which the texts form part, mean that a study of the text and context of any foreign implementation is required before its impact on the operation of the local enactment can properly be considered. For those reasons, this article compares the implementation of the Model Law in Australia, Great Britain and the United States. It also attempts to assist the reader to understand how courts in each of the three states are likely to deal with problems presented under the Model Law. 63

Section 588FA of the Corporations Act – change of wording but no change to meaning? – *Tina Hoyer*

One of the main elements to be established by a liquidator in order to successfully challenge a pre-liquidation transaction known as an unfair preference is contained in s 588FA(1)(b) of the *Corporations Act 2001* (Cth). This subsection provides that the transaction must result in the creditor receiving from the company more than the creditor would receive from the company if the transaction was set aside and the creditor was to prove for the debt in a winding up of the company. This wording is substantially different from that of the subsection's statutory predecessor. It was foreshadowed that despite the differences in the wording, the enactment of s 588FA would cause no fundamental change to the law with respect to unfair preferences. However, this article will demonstrate that there have been subtle, yet significant, changes to the way the court deals with unfair

preferences since the enactment of s 588FA. 77

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