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Catch me if you can: The effective service of bankruptcy documents in a changing world

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This article discusses some recent judicial decisions to assist legal practitioners to overcome some of the problems encountered when serving Bankruptcy Notices and Creditor's Petitions. Some of the issues covered in the discussion are: what the valid last-known address of the debtor can be; whether a Bankruptcy Notice can be validly served by email on a debtor who is located outside Australia; whether service of a Bankruptcy Notice is valid when the debtor is outside Australia when service on the debtor occurs in Australia; whether the creditor's failure to obtain leave for service of a Bankruptcy Notice can be excused; what can be done regarding personal service of a Creditor's Petition when a debtor is outside Australia; and whether the court can set aside a sequestration order. The article goes on to place the issues in the context of broader bankruptcy policies noting that effective service of bankruptcy documents is challenging in a world where mobility of debtors is global and new modes of communication ever changing.

INTRODUCTION

In an age where financial transactions are conducted worldwide and mobility of citizens throughout the world is common, lawyers seeking to serve bankruptcy documents (namely, Bankruptcy Notices and Creditor's Petitions) encounter many problems. It has long been recognised that the globalisation of bankruptcy practice has an impact on Australian law.¹ This article seeks to provide some practical assistance for those involved in the service of bankruptcy documents. The focus is on some of the difficulties arising in the service of Bankruptcy Notices and Creditor's Petitions and the practical solutions discussed in recent decisions of the Federal and Federal Magistrates Courts.

While the fact situation of every bankruptcy case will differ, recent decisions may assist lawyers in dealing effectively with bankruptcy matters in these changing times. For example, in an effort to serve bankruptcy documents, creditors have encountered situations where the debtor is no longer located in Australia so innovative methods have been used to effect service. Bankruptcy documents have been served in Australia, however, unbeknown to the creditor, the debtor was overseas. The validity of service in these cases has been considered by the courts. When an order for substituted service of bankruptcy documents outside Australia is sought by a creditor, what can be done when there is no specific bankruptcy provision or rule dealing with this? If service of the Creditor's Petition has been effected in compliance with an order for substituted service, when might a sequestration order be set aside? This article considers recent cases that have been decided on these issues. There is encouraging evidence of the court's willingness to adapt to the continuing globalisation of bankruptcy practice and changing modes of electronic communication and the legislation should follow suit, for both personal and corporate insolvency law.

In addition, the fundamental principles upon which both corporate and personal insolvency law is arguably based² are in many ways reinforced by these recent cases. In the United States,³ significant

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¹ Mason R, "Globalisation of Bankruptcy Practice – An Australian Perspective" (1997) 5 *Insolv LJ* 12.

² The Australian Law Reform Commission conducted an inquiry in 1988 that was guided by the many principles encapsulated in contemporary insolvency law: Australian Law Reform Commission, *General Insolvency Inquiry* Report Number 45 at [33] http://www.austlii.edu.au/au/other/alrc/publications/reports/45/45_vol1.pdf viewed 27 October 2010.

academic debate has developed on the underlying principles of insolvency law and these include the maximisation of recoveries for those with legal entitlements against financially distressed debtors,⁴ the attempt to reckon with a debtor's multiple defaults and to distribute the consequences among a number of different actors.⁵ Protagonists in the US debate differ over which of the underlying aims of insolvency (or bankruptcy) law dominate. On the one hand, Professors Baird and Jackson argue that "the only goal of bankruptcy is to enhance the collection efforts of creditors with State-defined property rights"⁶ while Professor Warren suggests that bankruptcy law encompasses a number of competing and arguably conflicting values in its attempt to distribute the consequences of default by the debtor.⁷ Alternatively, Professor Gross, an advocate of a "communitarian" approach, argues that the goal of the bankruptcy system should be to promote a "circle of responsibility" based on society's responsibility to individual parties in the bankruptcy case, the responsibility of parties to one another and the responsibility of individual parties to the community.⁸

Ultimately, no single principle, role or value dominates so that bankruptcy policy is, in reality, "a composite of factors that bear on a better answer to the question, 'How shall the losses be distributed?'"⁹ In the course of determining the distribution of losses, the courts have the unenviable job of balancing the interests of the creditor with those of the debtor. If the views of Gross are to be considered, then the interests of society at large might also be considered and might be expressed in judgments as public policy considerations. Assisted, or hindered, by the legislature's attempt to create the "rules of play" for the bankruptcy battle, justice must be served.

Accordingly, bankruptcy legislation recognises the interests of creditors to force a debtor to deal with their insolvency by enabling the creditor to serve a Bankruptcy Notice and Creditor's Petition. The bankruptcy legislation also recognises the interests of the debtor in this process by dictating specific steps that ensure the debtor is made aware of the Bankruptcy Notice and Creditor's Petition so as to respond and avoid bankruptcy. Arguably, bankruptcy legislation requires this because the impact of bankruptcy on the debtor can be personally devastating on the bankrupt's self-esteem, ability to obtain bank loans and secure specific employment and business positions. Indeed, impact of the bankruptcy may extend to the debtor's family members and friends and to creditors who may be unable to recover the full repayment of the debt. In this way, it is clear that losses, in its many forms, are distributed between the creditor, the debtor and the community.

Therefore, commencement of the insolvency process must balance the interests of the debtor, creditor and the community. Debtors avoiding service, creditors using innovative ways to effect service and the court's interpretation of legislation make for a dynamic environment of give and take, reflected in the recent cases, some of which are discussed below.

SERVICE OF THE BANKRUPTCY NOTICE

To obtain a Bankruptcy Notice from the Official Receiver (the Insolvency and Trustee Service Australia), the creditor, pursuant to s 41 of the *Bankruptcy Act 1966* (Cth) (the Act), must have obtained against the debtor, a final judgment or order "of a kind described in s 40(1)(g)" of the Act.

³ The debate on the true means and ends of bankruptcy law has been undertaken by a number of distinguished academics including Professor Charles W Mooney Jr, Professor Donald R Korobkin, Professor Douglas G Baird, Professor Elizabeth Warren, Professor Thomas H Jackson, Professor Homer Kripke, Professor Alan Schwartz, Professor Peter A Alces and Professor Karen Gross and the debate continues.

⁴ Mooney Jr CW, "A Normative Theory of Bankruptcy Law: Bankruptcy as (is) Civil Procedure" (2004) *Wash & Lee L Rev* 931 at 934.

⁵ Warren E, "Bankruptcy Policy" (1987) 54(3) *University of Chicago Law Review* 775 at 777.

⁶ Baird DG and Jackson TH, "Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy" 51 *University of Chicago Law Review* 97 at 103 cited in Warren, n 5 at 777.

⁷ Warren, n 5 at 777.

⁸ Gross K, *Failure and Forgiveness: Rebalancing the Bankruptcy System* (Yale University Press, New Haven, 1997) 197-198.

⁹ Warren, n 5 at 777.

Such a judgment or order is actually defined in s 40(3) of the Act to include awards made under a submission to arbitration, a judgment or order that is enforceable as a final judgment, a judgment or order by a court for payment of money pursuant to the Act and an order under the *Family Law Act 1975* (Cth) after the date the section commenced¹⁰ for the payment of arrears of maintenance.

The Bankruptcy Notice must be served within six months from the date on which the Bankruptcy Notice was issued or any further period that the Official Receiver allows.¹¹ The mode of service of a Bankruptcy Notice is provided by reg 16.01 of the *Bankruptcy Regulations* which includes when “sent by post, or by a courier service, to the person at his or her last-known address”.¹² Stephen Mullette advocates the necessity for certainty and clarity in the law governing the service of Bankruptcy Notices by post and concludes that difficulties, including the time and validity of service, currently exist.¹³ The following cases support Mullette’s contention.

In *Skalkos v T & S Recoveries Pty Ltd* (2004) 213 ALR 311 at [32]-[37], Sundberg, Finkelstein and Hely JJ considered whether a Bankruptcy Notice was validly served in compliance with reg 16.01(a) when sent by post to the debtor’s business address. In contention was whether the business address was the debtor’s last-known address. Their Honours considered *Robertson v Banham & Co* [1997] 1 WLR 446; [1997] 1 All ER 79 that had examined a number of earlier cases¹⁴ and concluded there could be such a degree of connection between the debtor and their place of business that the debtor’s last-known address could indeed be the person’s business address.¹⁵

More recently, Lucev FM in *Official Receiver for the Bankruptcy District (WA) v Amaro* (2009) 229 FLR 226; 109 ALD 577 said, “A person’s last known address need not be the person’s residential address: it is sufficient if there is a degree of connection such as to allow the address to meet, to the subject knowledge of the person serving the document, that description”.¹⁶ His Honour found that a sufficient degree of connection existed to establish the debtor’s last-known address where letters sent to the address elicited a formal response from solicitors acting on behalf of the debtor, where the debtor had an interest in the property and where a relative of the debtor acknowledged that the debtor lived at that address.¹⁷

Therefore, it appears that, provided the creditor has evidence to support the contention that, in all reasonable probability, delivery to the address will be effective in bringing knowledge of the proceedings to the debtor, a range of addresses for service can be used. This might assist when service of the Bankruptcy Notice is to be effected on a debtor who is outside Australia, as discussed below.¹⁸

Service of the Bankruptcy Notice by email

In the 2010 decision, *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 273-278 [15]-[37], Smith FM considered the validity of service of a Bankruptcy Notice by email. American Express Australia Ltd (AMEX) had sent a PDF electronic version of a Bankruptcy Notice by email to the debtor who was no longer present in Australia. The subsequent Creditor’s Petition alleged an act of bankruptcy arose from the failure of the debtor to comply with the requirement of the Bankruptcy Notice. Provision for service by email is made in reg 16.01(1)(e) of the *Bankruptcy Regulations*:

- (1) Unless the contrary intention appears, where a document is required or permitted by the Act or these Regulations to be given or sent to ... a person ... the document may be: ...

¹⁰ Section 40(3)(f) was inserted by s 13 of the *Bankruptcy Amendment Act 1985* (Cth) which commenced on 19 May 1986.

¹¹ Reg. 4.02A of the *Bankruptcy Regulations 1996* (Cth).

¹² Reg. 16.01(1)(a) of the *Bankruptcy Regulations 1996* (Cth).

¹³ Mullette S, “Secret Service” (2008) 16 *Insolv LJ* 195 at 198-199.

¹⁴ *R v Braithwaite* [1918] 2 KB 319; [1918]-[1919] All ER Rep 1145; *Morecombe and Heysham Borough v Warwick* (1958) 9 P&CR 307; *Stylo Shoes Ltd v Prices Tailors Ltd* [1960] Ch 396; [1959] 3 All ER 901; *Price v West London Investment Building Society* [1964] 1 WLR 616; [1964] 2 All ER 318; and *Drake v Stanton* [1999] FCA 1635.

¹⁵ *Skalkos v T & S Recoveries Pty Ltd* (2004) 213 ALR 311 at [37].

¹⁶ *Official Receiver for the Bankruptcy District (WA) v Amaro* (2009) 229 FLR 226; 109 ALD 577 at [24].

¹⁷ *Official Receiver for the Bankruptcy District (WA) v Amaro* (2009) 229 FLR 226; 109 ALD 577 at [24].

¹⁸ See discussion under the heading *Service of the Bankruptcy Notice When Debtor is Outside Australia*.

- (e) sent by facsimile transmission or another mode of electronic transmission:
- (i) to a facility maintained by the person for receipt of electronically transmitted documents;
or
 - (ii) in such a manner (for example, by electronic mail) that the document should, in the ordinary course of events, be received by the person.

In submissions to his Honour, AMEX provided evidence that Mr Michaels had a “facility” required under reg 16.01(1)(e)(i) “consisting of an email mail box on a Yahoo server which was frequently accessed by him”.¹⁹ His Honour was satisfied that Mr Michaels would receive emails “in the ordinary course of events”, pursuant to reg 16.01(1)(e)(ii). His Honour next considered the time and place at which the Bankruptcy Notice was taken to have been served by email.

Time of service of the Bankruptcy Notice

In relation to time of the service, his Honour accepted the submission by AMEX that “reg 16.01(2)(b) raises the presumption ... that the emailed bankruptcy notice was received by him at the time *when the document is ... transmitted*”.²⁰ However, the meaning of “transmitted” had previously been considered by his Honour in a migration matter²¹ where the ambiguity of the word could not be removed by simply interpreting it as “send” or “communicate”. Proving receipt by the debtor is more difficult than proving the email was sent.²² However, his Honour found that regs 16.01(1)(e) and 16.01(2)(b) raise a rebuttable presumption of receipt and a time of receipt of service being when the email is transmitted by its sender.²³

In addition, his Honour stated that, in relation to receipt and time of receipt, the bankruptcy provisions implicitly exclude the application of ss 14(3) and 14(4) of the *Electronic Transactions Act 1999* (Cth) (ETA).²⁴ Despite this finding, his Honour considered s 14 of the ETA which defines the time and place of dispatch and time of receipt of electronic communications²⁵ and said that he was unaware of any cases where the application of this provision has been considered in the context of service of a Bankruptcy Notice.²⁶ His Honour came to the same conclusion in relation to receipt and time of receipt, despite the uncertainties inherent in the legislation.²⁷ Those uncertainties included the definition of “information system”, despite this being defined in s 5 of the ETA, extending to the identification of the relevant “system” which is “designated” and “entered” for the purposes of s 14(3).²⁸ His Honour identified three significantly different approaches in relation to emailed document²⁹ but favoured the broadest: “the entire electronic mail system governing the dispatch and receipt of emails over the internet using recognised protocols for electronic ‘handshakes’ between email servers”.³⁰ The “information system” then includes the email facility used when irretrievably dispatching the document electronically “so that s 14(3) would locate the receipt and time of receipt of the email as occurring instantaneously at the time when it was dispatched by the sender, and thereby

¹⁹ *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 274, [17].

²⁰ *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 274, [20].

²¹ *Sainju v Minister for Immigration* [2009] FMCA 1206. This decision was upheld by the Federal Court in *Sainju v Minister for Immigration* (2010) 185 FCR 86.

²² *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 274-275, [21].

²³ *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 275-276, [23]-[24].

²⁴ *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 275-276, [23].

²⁵ *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 275, [22] and 276-277, [26]-[28].

²⁶ *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 274-275, [23].

²⁷ *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 276, [26].

²⁸ *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 276, [27].

²⁹ *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 276, [27].

³⁰ *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 276-277, [27]-[28]. His Honour stated that his view should be compared with Macready AJ in *Reed Constructions Pty Ltd v Eire Contractors Pty Ltd* [2009] NSWSC 678 at [29]-[31].

‘entered’ the global internet email system’.³¹ In this way the statutory presumption of service in the ordinary course of post applies which does not require proof of actual receipt.³²

Place of service of the Bankruptcy Notice

The place of service is relevant when considering the requirement under s 40(1)(g).³³ The Bankruptcy Notice must be “served on the debtor in Australia or, by leave of the Court, elsewhere”.³⁴ His Honour was reluctant to find that the Bankruptcy Notice was in fact served “elsewhere” than Australia without leave under s 40(1)(g), despite the fact that there was no evidence that either the debtor or his electronic mail box were located in Australia.³⁵

There is authority that s 40(1)(g) addresses the place of deemed service, including under a substituted service order, rather than the place where the notice actually came to the attention of the debtor (see *Battenberg v Restom* (2005) 223 ALR 692 at [11], upheld in *Battenberg v Restrom* (2006) 149 FCR 128 at [19]). On this construction, it is irrelevant whether Mr Michaels was actually present in Australia when he received the bankruptcy notice.³⁶

On my above opinion reg 16.01(2)(b) provides a presumption of receipt “when” the notice was transmitted, in the sense of dispatched in Australia by [AMEX]. If the regulation is construed as a code identifying not only a presumed time of receipt but also a place of receipt, then the notice was not served “elsewhere” than in Australia.³⁷

If it is necessary to apply ss 14(5) or (6) of the *Electronic Transactions Act* to determine a “place” of receipt, then on the balance of probabilities, I find that Mr Michaels’s receipt of the bankruptcy notice is deemed to have occurred in Australia, since this appears to be the site of his place of business having closest relationship to his relevant transactions with AMEX.³⁸

Of interest is his Honour’s statement that if he were wrong in finding that the Bankruptcy Notice is deemed to have been served on the debtor in Australia, this would not necessarily give rise to invalidity of the Bankruptcy Notice or the dismissal of the petition for a sequestration order because the granting of leave nunc pro tunc³⁹ would rectify this.⁴⁰ His Honour found that, in fact, the debtor had received the Bankruptcy Notice and no prejudice arising from any service of the Bankruptcy Notice outside Australia could be established.⁴¹ Accordingly, his Honour found that there had been no defect in relation to service so valid service of the Bankruptcy Notice had been established by AMEX.⁴²

³¹ *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 276-277, [28].

³² *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 276-277, [28].

³³ *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 274, [19].

³⁴ Section 40(1)(g) of the *Bankruptcy Act 1966* (Cth).

³⁵ *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 277, [31].

³⁶ *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 277, [32].

³⁷ *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 277, [33].

³⁸ *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 277, 277-278, [34].

³⁹ Nunc pro tunc is Latin meaning “now for then”. That is, a court may make an order which operates from a date earlier than the date on which it is actually made. Anon, *Concise Australian Legal Dictionary* (3rd ed, LexisNexis Butterworths, Australia, 2010) p 302.

⁴⁰ *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 278, [36].

⁴¹ *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 278, [36].

⁴² *American Express Australia Ltd v Michaels* (2010) 237 FLR 268 at 278, [37].

The case, together with similar cases in New Zealand⁴³ and the Australian Capital Territory (ACT),⁴⁴ provides some encouraging support for the use of modern modes of communication in this digital age. Michael Murray⁴⁵ believes that corporate insolvency law under the *Corporations Act 2001* (Cth) is more focused on proper service, time and place of service and cross-border issues than personal insolvency law.⁴⁶ Service of a statutory demand on a company, pursuant to s 459E of the *Corporations Act*, is analogous to serving a Bankruptcy Notice on an individual. Section 109X of the *Corporations Act* provides for service on a company by leaving the documents at, or posting the documents to, the registered office of the company. Section 29(1) of the *Acts Interpretation Act 1901* (Cth) defines the meaning of service by post as properly addressing, pre-paying and posting the document as a letter.

Delivering the documents personally to a director of the company who lives in Australia or in an external Territory⁴⁷ will also suffice, provided such service is effected in accordance with O 7 r 2 of the *Federal Court Rules* (Cth) (FC Rules) and, if the director lives outside the State in which the proceeding commenced, in accordance with ss 15 and 16 of the *Service and Execution of Process Act 1992* (Cth) and s 4 of the *Service and Execution of Process Regulations 1993* (Cth). Separate requirements exist if an administrator or liquidator has already been appointed to the company. The date of service when the document is sent by post is determined in accordance with s 29(1) of the *Acts Interpretation Act* which deems service to be in the ordinary course of post, unless the contrary is proved. If the document is sent to an address in Australia or an external Territory, the day on which the document is deemed to be received, unless the contrary is proved, is on the fourth working day after it has been posted.⁴⁸

The company will have 21 days from the date of service in which to either comply with the statutory demand or file an application with the court to have the statutory demand set aside.⁴⁹ If neither of these events occurs, s 459P of the *Corporations Act* permits the creditor to bring an application seeking a s 459A⁵⁰ order to wind up the company in insolvency. This application is analogous to the Creditor's Petition in personal insolvency. Like an individual who commits an act of bankruptcy if they fail to comply with a Bankruptcy Notice, the court must presume a company is insolvent if the company failed⁵¹ to comply with a statutory demand.⁵² Again, service of the application on the company must be in compliance with s 109X of the *Corporations Act*.

While sending a Bankruptcy Notice to a person's last-known address is similar to sending a statutory demand to a company's registered office, personal service of the Creditor's Petition requires the document to be served personally on the debtor, while service of the application seeking an order to wind up the company in insolvency is effected by simply posting it to the company's registered

⁴³ Clifford J in *Asteron Life Ltd v Franck* HC MAS CIV-2009-435-77 [2009] NZHC 450 (24 April 2009) granted the creditor leave to serve the Bankruptcy Notice outside New Zealand by way of email alone. In *Axe Market Gardens Ltd v Axe* HC WN CIV-2008-485-002676 (16 March 2009) which was not a bankruptcy case, substituted service had been permitted by way of both email and Facebook.

⁴⁴ The ACT Supreme Court in *MKM Capital Pty Ltd v Corbo & Poyser* (unreported, ACT Sup Ct, Master Harper, 12 December 2008) made an order for substituted service of a default judgment by way of a private message via Facebook.

⁴⁵ The Legal Director of Insolvency Practitioners Association of Australia.

⁴⁶ Murray M, "Insolvency Case Summaries" (2010) *Australian Insolvency Journal* (Jan-Mar) 47 at 50.

⁴⁷ Section 17(a) of the *Acts Interpretation Act 1901* (Cth) defines Australia to include the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands. No other external Territories are included. This is to be considered in relation to ss 17(pd) and 17(pe) of the *Acts Interpretation Act 1901* (Cth) where the internal Territories of the Australian Capital Territory, the Jervis Bay Territory and the Northern Territory are named.

⁴⁸ *Evidence Act 1995* (Cth), s 160(1).

⁴⁹ *Corporations Act 2001* (Cth), s 459F.

⁵⁰ *Corporations Act 2001* (Cth).

⁵¹ As defined in s 459F of the *Corporations Act 2001* (Cth).

⁵² *Corporations Act 2001* (Cth), s 459C(2)(a).

office. "It would assist insolvency practice if clear and consistent laws applied across personal and corporate insolvency to provide certainty and to avoid costly and time consuming disputes about these issues".⁵³

Service of the Bankruptcy Notice when debtor is outside Australia

In *Battenberg v Restom* (2005) 223 ALR 692; 3 ABC (NS) 346, the court considered a matter where the Registrar of the Federal Magistrates Court had made an order for substituted service of a Bankruptcy Notice. The Bankruptcy Notice was served in compliance with the order but the debtor was absent from Australia on the date of service. The debtor had also been out of Australia when the order had been made. The debtor sought to have the order set aside, or alternatively, a declaration that service in compliance with the order did not constitute valid service. Gyles J, found that the debtor was absent from Australia on 30 March 2005, the date of deemed service of the Bankruptcy Notice pursuant to the order for substituted service, and was probably outside of Australia from 9 March 2005 until that date. Immigration records suggested that the debtor left Australia on 11 February 2005 and returned on 9 May 2005. It was not suggested that the creditor knew that the debtor was, at any material time, absent from Australia.⁵⁴ His Honour concluded that:

The order for substituted service was properly made upon the evidence before the registrar. I am not satisfied that in this case the unknown absence of the applicant from the jurisdiction at the time of the order for substituted service and at the time of service is sufficient to warrant reversing the effect of that order, assuming there to be jurisdiction to do so. Branson J held in *Sheahan v Joye* (at 397-9) that the time at which presence in the jurisdiction is essential is the time of issue of the initiating process – in that case a summons to attend for examination about the examinable affairs of a corporation. I do not consider that s 40(1)(g) (or any other factor) leads to a different conclusion in relation to a bankruptcy notice. Therefore, the absence of the applicant from the jurisdiction at the time of the order and at the time of service is irrelevant for present purposes.⁵⁵

Upholding Gyles J's decision, the Full Federal Court in *Battenberg v Restrom* (2006) 149 FCR 128 considered service of Bankruptcy Notices and jurisdiction of the Federal Magistrates Court to make orders for substituted service. The court found that the Magistrates Court has jurisdiction to make an order for substituted service of a Bankruptcy Notice in appropriate circumstances and to grant leave to serve a Bankruptcy Notice outside of Australia pursuant to s 40(1)(g) of the Act.⁵⁶ Heerey, Dowsett and Conti JJ also considered the synergy of ss 40(1)(g), 43(1)(b) and 309(2) of the Act⁵⁷ and referred to *Re Mendonca; Ex parte Commissioner of Taxation* (1969) 15 FLR 256 at 261 where Gibbs J found that, under s 309(2), the court has power to order service outside Australia, despite the debtor having left Australia before the Creditor's Petition had been issued.⁵⁸ The presence of the debtor outside Australia at the time the Creditor's Petition is issued is discussed further below.⁵⁹ One of the criteria identified in s 43(1)(b)⁶⁰ must be present if it is an order for substituted service of a Creditor's Petition that is being sought, but none of these criteria need to exist if it is a Bankruptcy Notice that is to be served.⁶¹ Accordingly, the Full Court found that s 309(2) authorises an order for substituted service of a Bankruptcy Notice when the debtor is outside Australia.⁶²

In summary, *American Express Australia Ltd v Michaels* and *Battenberg v Restrom* were cases where the court determined the validity of service of a Bankruptcy Notice on a debtor who was

⁵³ Murray, n 46 at 50.

⁵⁴ *Battenberg v Restom* (2005) 223 ALR 692 at [7] and [11].

⁵⁵ *Battenberg v Restom* (2005) 223 ALR 692 at [11].

⁵⁶ *Battenberg v Restrom* (2006) 149 FCR 128 at 131, [12].

⁵⁷ *Battenberg v Restrom* (2006) 149 FCR 128 at 133-134, [19]-[20].

⁵⁸ *Battenberg v Restrom* (2006) 149 FCR 128 at 133, [18].

⁵⁹ Under the heading *Service of Creditor's Petition Outside Australia*.

⁶⁰ See below under the heading *Creditor's Petitions* for the provisions of s 43.

⁶¹ *Battenberg v Restrom* (2006) 149 FCR 128 at 133, [18].

⁶² *Battenberg v Restrom* (2006) 149 FCR 128 at 133, [19].

located outside Australia. While the debtors were located outside Australia, service was effected within Australia. In *American Express Australia Ltd v Michaels*, the Bankruptcy Notice was served by email and received at the location from which it was sent, that being in Australia. In *Battenberg v Restrom*, service of the Bankruptcy Notice at an address in Australia was valid despite the debtor being overseas at that time. However, when the debtor is located outside Australia and the creditor wants to serve the Bankruptcy Notice outside Australia, the creditor must seek leave of the court.⁶³ For example, if a debtor is located in Rome, Italy and the creditor has obtained a postal address in Rome at which the debtor is living, the creditor will require the court's leave to serve the Bankruptcy Notice on the debtor by posting the document to that address. Recent cases have considered this requirement for leave of the court.

Service of the Bankruptcy Notice outside Australia

Service of the Bankruptcy Notice outside Australia can raise a number of issues for the creditor. One of the main issues regarding such service centres on the requirements found in s 40(1)(g) of the Act.⁶⁴ Section 40(1)(g) appears to require that a Bankruptcy Notice served on a debtor elsewhere, that is, other than in Australia, be served by leave of the court. This issue was considered by Wilson FM in *Envee Energy Pty Ltd (in liq) v Stockford* [2007] FMCA 1426 when deciding whether the applicant's failure to obtain leave to serve the Bankruptcy Notice outside of Australia should be excused. His Honour stated that this question was "not subject to direct authority".⁶⁵ Leading into the decision, his Honour acknowledged the Full Federal Court's decision in *Battenberg v Restrom* (at [19]) that the court has power to grant leave to serve the Bankruptcy Notice outside Australia.⁶⁶ However, his Honour needed to determine whether failure to obtain leave to serve the Bankruptcy Notice outside Australia was fatal to the validity of the service.

The debtor was served personally with a Bankruptcy Notice in Thailand by a director of the creditor but leave had not been obtained to do this prior to the service, as required by s 40(1)(g) of the Act. The applicant creditor relied upon s 306(1) of the Act⁶⁷ and while Wilson FM was satisfied that the service of the Bankruptcy Notice was within the ambit of "proceedings under this Act", his Honour said that a traditionally strict view of the need for proper service of a Bankruptcy Notice has been applied because the act of bankruptcy defined by s 40(1)(g) of the Act depends upon service of the Notice.⁶⁸ In relation to the method of service of Bankruptcy Notices, his Honour stated that reg 16.01 of the *Bankruptcy Regulations* applies.⁶⁹

Regarding failure to obtain leave to serve the Bankruptcy Notice outside Australia, Wilson FM derived assistance⁷⁰ from the decisions of the High Court in *Emanuele v Australian Securities Commission* (1997) 188 CLR 114 and of the Full Federal Court in *Johnstone v Vintage Developments Pty Ltd* [2006] FCAFC 171. From those cases his Honour deduced that questions as to service of a Bankruptcy Notice can be dealt with under s 306(1) of the Act. His Honour considered this provision and said:

⁶³ Section 40(1)(g) of the *Bankruptcy Act 1966* (Cth).

⁶⁴ Section 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 specified in the notice; 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 ...

⁶⁵ *Envee Energy Pty Ltd (in liq) v Stockford* [2007] FMCA 1426 at [6].

⁶⁶ *Envee Energy Pty Ltd (in liq) v Stockford* [2007] FMCA 1426 at [10]-[11].

⁶⁷ "Proceedings under this Act are not invalidated by a formal defect or an irregularity, unless the court before which the objection on that ground is made is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by an order of that court."

⁶⁸ *Envee Energy Pty Ltd (in liq) v Stockford* [2007] FMCA 1426 at [13].

⁶⁹ *Envee Energy Pty Ltd (in liq) v Stockford* [2007] FMCA 1426 at [14].

⁷⁰ *Envee Energy Pty Ltd (in liq) v Stockford* [2007] FMCA 1426 at [15].

The most recent and authoritative discussion of the proper application of s 306(1) is the decision of the High Court of Australia in *Adams & Lambert* (2006) 80 ALJR 679. At [18] their Honours said:

The question whether the defect or irregularity is a formal defect or irregularity, and whether substantial injustice has been caused and cannot be remedied, are separate and distinct, the latter question arising only if the former is answered in the affirmative.

Therefore, it is not correct to argue in the present case that because no substantial injustice has been occasioned to the respondent the failure to obtain prior leave to serve the bankruptcy notice out of Australia must be a formal defect or irregularity.

At paragraphs [24]-[28] their Honours reason that deciding whether there is a formal defect or irregularity must be decided as a process of statutory construction, in the context of the Act as a whole, informed by the general purpose of the legislation and the particular purpose of the provision relating to bankruptcy notices. That is, one must look at the defect or irregularity against the scheme and purpose of the Act in order to see if there is a short coming in a matter made essential by the Act.⁷¹

Wilson FM considered this in relation to the matter at hand and decided that service of a Bankruptcy Notice does not confer jurisdiction on the court but is a step to the commission of an act of bankruptcy.⁷² The Bankruptcy Notice had been served personally on the debtor out of Australia. His Honour construed the purpose of service under the Act was to bring the Bankruptcy Notice to the attention of the debtor so as to allow him or her sufficient time to satisfy the debt.⁷³ His Honour decided that if leave had been sought, it would have been granted, so failure to obtain leave was an irregularity within the ambit of s 306(1) of the Act.⁷⁴ An order for leave to effect such service was granted *nunc pro tunc*.⁷⁵

Valid service of the Bankruptcy Notice, whether that service has been effected on the debtor inside or outside Australia, defines the time in which the debtor must comply with the terms of the Bankruptcy Notice. Failing satisfaction of those terms by the deadline, a Creditor's Petition may be sought by the creditor and, after a hearing before the court, a sequestration order may be granted, rendering the debtor bankrupt. Following expiry of the deadline after service of the Bankruptcy Notice, the debtor knows that personal service of the Creditor's Petition will be attempted by the creditor. Accordingly, some debtors try to make personal service of the Creditor's Petition extremely difficult for the creditor in an effort to avoid the sequestration order.

CREDITOR'S PETITIONS

Once the Bankruptcy Notice has been served and the deadline before which the debtor is required to comply with the Notice has passed, the creditor may file and serve a Creditor's Petition. To enable this to occur, the creditor must ensure that all the conditions required under s 44 of the Act have been met. The petition must be presented to the court within six months of the date on which the act of bankruptcy was committed.⁷⁶ To obtain a sequestration order, the creditor must satisfy the court of certain facts.

First, the debtor must have committed an act of bankruptcy. These acts of bankruptcy are specified in s 40 of the Act. One of the acts of bankruptcy is the failure to comply with the requirements of a Bankruptcy Notice.⁷⁷ Secondly, the court has jurisdiction to make sequestration orders pursuant to s 43 of the Act.⁷⁸ The requirements under s 43(1)(b) of the Act regarding

⁷¹ *Envee Energy Pty Ltd (in liq) v Stockford* [2007] FMCA 1426 at [19]-[21].

⁷² *Envee Energy Pty Ltd (in liq) v Stockford* [2007] FMCA 1426 at [22].

⁷³ *Envee Energy Pty Ltd (in liq) v Stockford* [2007] FMCA 1426 at [23].

⁷⁴ *Envee Energy Pty Ltd (in liq) v Stockford* [2007] FMCA 1426 at [24].

⁷⁵ *Envee Energy Pty Ltd (in liq) v Stockford* [2007] FMCA 1426 at [26].

⁷⁶ Section 44(1)(c) of the *Bankruptcy Act 1966* (Cth).

⁷⁷ As provided for under s 40(1)(g) of the *Bankruptcy Act 1966* (Cth).

⁷⁸ Section 43(1) Subject to this Act, where:

- (a) a debtor has committed an act of bankruptcy; and
- (b) at the time when the act of bankruptcy was committed, the debtor:

connection with Australia at the time when the act of bankruptcy was committed might present difficulty for a creditor in circumstances where the debtor is no longer located in Australia. In *Battenberg v Restrom*, discussed above, the Full Federal Court considered the debtor's connection with Australia in relation to the act of bankruptcy and found that only the first limb of the criterion in s 43(b)(i) of the Act contemplates the debtor being in Australia at the time of the act of bankruptcy.⁷⁹

The Full Court considered the proper construction of the Act and determined that the debtor's absence from Australia will not hinder a creditor's contention that there has been an act of bankruptcy. The Full Court stated:

There can be no doubt that it applies to debtors who are not Australian citizens (s 7(1)), that par 43(1)(b) contemplates commission by a debtor of an act of bankruptcy whilst out of Australia, and that he or she may be bankrupted upon that basis, subject only to par 43(1)(b). It must therefore have been intended that such a person be amenable to service of a bankruptcy notice, notwithstanding the fact that he or she was out of Australia.⁸⁰

Thirdly, at the hearing of the Creditor's Petition, in satisfying the requirements of s 52(1) of the Act, the court will require proof of service of the Creditor's Petition on the debtor before deciding whether or not to make the sequestration order.

Service of the Creditor's Petition

The Creditor's Petition, being a document regarded as an originating process, must be served personally on the debtor pursuant to O 7 r 1 of the FC Rules. If the debtor enters an appearance, files a defence or appears before the court in response to the Creditor's Petition, the document is taken to have been served personally on the debtor, unless personal service on an earlier day is established.⁸¹ Order 77, Div 4 of the FC Rules deals with Creditor's Petitions. In compliance with s 47 of the Act, O 77 rr 17 and 18 prescribe the information that must be contained within the affidavits accompanying the Creditor's Petition. Order 77 r 18A of the FC Rules specifies the other documents that must be served personally with the Creditor's Petition. The Creditor's Petition, together with the other required documents, must be served at least five days before the date appointed for hearing, unless the court otherwise orders.⁸² Compliance with these rules is critical to ensure personal service is valid.⁸³

A number of problems might arise in relation to personal service of the Creditor's Petition. In *Official Receiver for the Bankruptcy District (WA) v Amaro* many difficulties were encountered when attempting personal service. Despite the fact that in this case the process servers were attempting to serve a written notice under s 139ZQ of the Act, the case highlights some of the difficulties encountered when attempting personal service:

First process server:

- (a) Knocks on the door of the debtor's residence on six occasions but no one answers.

Second process server:

1. Knocks on the door of the debtor's residence on five occasions but no one answers.

-
- (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 business in Australia by means of a partner or partners or of an agent or manager;

the Court may, on a petition presented by a creditor, make a sequestration order against the estate of the debtor.

⁷⁹ *Battenberg v Restrom* (2006) 149 FCR 128 at 131, [10]. Section 43(b)(i) of the *Bankruptcy Act 1966* (Cth) states, "At the time when the act of bankruptcy was committed, the debtor was personally present or ordinarily resident in Australia".

⁸⁰ *Battenberg v Restrom* (2006) 149 FCR 128 at 133, [17].

⁸¹ *Federal Court Rules* (Cth) (FC Rules), O 7 r 1(3).

⁸² FC Rules, O 77 r 18A(2).

⁸³ The court in *Envee Energy Pty Ltd (in liq) v Stockford* [2007] FMCA 1426 at [27] invalidated service of the Bankruptcy Notice because a copy of the judgment was not attached. Section 306 of the *Bankruptcy Act 1966* (Cth) was also discussed in *American Express Australia Ltd v Michaels* (2010) FLR 268 at 279-280, [41]-[46] regarding the failure to include notes with information for the creditor in the Bankruptcy Notice.

2. On the sixth attendance, knocks at the door and is greeted by a relative of the debtor who confirms the debtor lives there but is momentarily absent.
3. The relative agrees to call the process server to arrange a time for service then doesn't.
4. Further ten attempts to elicit a response upon attendance at the debtor's residence were unsuccessful, despite many signs of life including clothing and towels on the clothes line, electric power consumed and process server's card previously wedged into a lock on the side gate had been removed.⁸⁴

When such difficulty in effecting personal service is experienced, creditors will often seek an order for substituted service. The granting of an order for substituted service, under s 309(2) of the Act, or O 7 r 9(1) of the FC Rules,⁸⁵ is discretionary and will not to be exercised lightly.⁸⁶ In relation to s 309(2) of the Act, the court must be satisfied that:

1. abnormal difficulty exists in effecting personal service of the creditors petition on the Respondents; and
2. there is a reasonable probability that the Respondents will be informed of the petition as a result of the form of service identified.⁸⁷

However, even when the orders for substituted service have been complied with and a sequestration order has been obtained, further difficulties can arise. In *Bank of Western Australia Ltd v Salmon* [2009] FMCA 1155, Driver FM decided that while the substituted service orders had been complied with, the documentation had not, in fact, come to the debtor's attention until after the sequestration order had been made and that procedural fairness required the debtor to be given the opportunity to respond to the petition before the court.⁸⁸ His Honour set aside the sequestration order made previously and then heard from the parties on the hearing of the petition.⁸⁹ His Honour concluded that the debtor had not provided any reason for the court to refrain from making a sequestration order, was satisfied that the formal requirements for the making of a sequestration order had been met and gave a sequestration order against the debtor's estate.⁹⁰

To reduce the chance of such a situation occurring, creditors should seek to obtain evidence that the debtor has actually received the Creditor's Petition, or that the Creditor's Petition has come to the attention of the debtor, prior to seeking a sequestration order. An example of the sort of evidence that might be sufficient can be found in *American Express Australia Ltd v Michaels* (at 274), discussed above, where the debtor had emailed the creditor regarding receipt of the Bankruptcy Notice.⁹¹ In this way the creditor can obtain a sequestration order with the security that, should the debtor fail to respond to the petition before the court, the likelihood of having the sequestration order set aside is reduced.

Service of the Creditor's Petition outside Australia.

In *Battenberg v Restrom* (FCR at 133-134, [18]-[20]) the Full Federal Court applied *Re Mendonca*. In *Re Mendonca* the creditor was seeking an order for service of the Creditor's Petition outside Australia. The debtor was a Portuguese national who was registered as an alien resident in Australia.⁹² Gibbs J stated that "It is not made a condition of jurisdiction that the debtor should be an Australian national

⁸⁴ Official Receiver for the *Bankruptcy District (WA) v Amaro* (2009) 229 FLR 226; 109 ALD 557; [2009] FMCA 567 at [10]-[12].

⁸⁵ FC Rules, O 7 r 9(1) provides, "Where for any reason it is impractical to serve a document in the manner set out in the Rules, the Court may by motion in an existing proceeding made ex parte order that, instead of service, such steps be taken as are specified in the order for the purpose of bringing the document to the notice of the person to be served".

⁸⁶ *Official Receiver for the Bankruptcy District (WA) v Amaro* (2009) 229 FLR 226; 109 ALD 557; [2009] FMCA 567 at [26].

⁸⁷ *Deputy Commissioner of Taxation v Barnes* (2008) 70 ATR 776 at 786, [71].

⁸⁸ *Bank of Western Australia v Salmon* [2009] FMCA 1155 at [3].

⁸⁹ *Bank of Western Australia v Salmon* [2009] FMCA 1155 at [3].

⁹⁰ *Bank of Western Australia v Salmon* [2009] FMCA 1155 at [3]-[7].

⁹¹ *American Express Australia Ltd v Michaels* (2010) FLR 268 at 277, [29].

⁹² *Re Mendonca; Ex parte Commissioner of Taxation* (1969) 15 FLR 256 at 256.

or domiciled in Australia. The Court has jurisdiction if, at the time when the act of bankruptcy was committed, the debtor was connected with Australia in one of the ways mentioned in s 43(1)(b).⁹³

His Honour further stated that “neither the *Bankruptcy Act 1966-1968* nor any Rules made thereunder makes any express provision permitting service outside the jurisdiction”.⁹⁴ His Honour considered s 309(2) of the Act and decided that the court has “ample power to order service outside the jurisdiction” and if the debtor has absconded from Australia, the court will normally order service of the Creditor’s Petition on the debtor out of the jurisdiction.⁹⁵ Finally, “a method of substituted service will not be allowed which will not in all reasonable probability be effective to bring knowledge of the proceedings to the debtor”.⁹⁶ The Creditor’s Petition together with the other necessary documents was ordered to be served on the debtor by ordinary prepaid airmail post to an address in Portugal. Service was to be deemed effective after six weeks from the date of posting, provided the documents were not returned unclaimed through the post.⁹⁷

In *Deputy Commissioner of Taxation v Barnes* (2008) 70 ATR 776 (*DCT v Barnes*) the respondents left Australia on 4 February 2007 to, in the view of the creditor, “defeat or delay creditors, that being an act of bankruptcy”.⁹⁸ The debtors, Mr and Mrs Barnes, had migrated to Australia from the United Kingdom in 1996 and became Australian citizens three years later. They spent portions of each year in both the UK and Australia and in 2007, riddled with debt to the Australian Taxation Office (ATO), the debtors left Australia, commenced a new business in Europe and transferred \$500,000 out of Australia. Towards the end of 2007 the debtors sold their property in Western Australia and approximately A\$1.656 million was remitted to the ATO to reduce their debt. However, by the time the Creditor’s Petition was presented in the Federal Magistrates Court, Mr Barnes’ debt was approximately A\$3.861 million and Mrs Barnes’ was approximately A\$3.631 million.

The creditor sought an order permitting service of the Creditor’s Petition on the debtors out of Australia. Lucev FM first considered whether a sequestration order could be granted based on the criteria required by the Act.⁹⁹ His Honour found that the creditor had established a prima facie case for a sequestration order¹⁰⁰ and went on to consider the application for service of the Creditor’s Petition. His Honour stated that “There is no specific bankruptcy provision or rule dealing with service outside the jurisdiction”¹⁰¹ but “There are however provisions which might be utilised: namely, s 309(2) of the *Bankruptcy Act* and O 8 of the *Federal Court Rules*”.¹⁰² In considering these, his Honour stated that “It would therefore appear to be a matter of discretion as to whether the Court utilises the provisions of O 8 or s 309(2) of the *Bankruptcy Act* to prescribe the means of service on a person outside of the jurisdiction (assuming that the relevant provisions of each can otherwise be complied with)”.¹⁰³

His Honour came to the conclusion that the creditor could not meet the requirements of O 8 because there was no evidence before the court as to whether the jurisdiction in which the debtors

⁹³ *Re Mendonca; Ex parte Commissioner of Taxation* (1969) 15 FLR 256 at 260. See n 78 above for a copy of s 43(1)(b).

⁹⁴ *Re Mendonca; Ex parte Commissioner of Taxation* (1969) 15 FLR 256 at 261.

⁹⁵ *Re Mendonca; Ex parte Commissioner of Taxation* (1969) 15 FLR 256 at 261.

⁹⁶ *Re Mendonca; Ex parte Commissioner of Taxation* (1969) 15 FLR 256 at 261.

⁹⁷ *Re Mendonca; Ex parte Commissioner of Taxation* (1969) 15 FLR 256 at 261.

⁹⁸ *Deputy Commissioner of Taxation v Barnes* (2008) 70 ATR 776 at 778, [2]. This is act of bankruptcy is pursuant to a s 40(1)(c) of the *Bankruptcy Act 1966* (Cth).

⁹⁹ Sections 40(1)(c)(i); 43(1)(a); 43(1)(b)(i) and 43(1)(b)(ii); 44(1)(a), 44(1)(a)(b) and 44(1)(a)(c) of the *Bankruptcy Act 1966* (Cth).

¹⁰⁰ *Deputy Commissioner of Taxation v Barnes* (2008) 70 ATR 776 at 784, [57].

¹⁰¹ *Deputy Commissioner of Taxation v Barnes* (2008) 70 ATR 776 at 784, [68].

¹⁰² *Deputy Commissioner of Taxation v Barnes* (2008) 70 ATR 776 at 784, [69]. FC Rules, O 8 relates to service outside Australia.

¹⁰³ FC Rules, O 8.

were located, the United Kingdom, was a convention or non-convention country.¹⁰⁴ If it was a convention country, a convention, agreement or treaty would exist regarding service of the Creditor's Petition outside Australia. The Federal Court's Practice Note CM 12 requires evidence of the appropriate method of transmitting documents for service in that country to support the application.¹⁰⁵ However, his Honour was satisfied that there had been abnormal difficulty effecting service of the Creditor's Petition on the debtors.¹⁰⁶ As a result, his Honour gave an order for substituted service in a manner that satisfied the court that there was a reasonable probability the debtors would be informed of the Creditor's Petition.¹⁰⁷ This included service on solicitors acting for the debtors, postal service on the debtors at a property at which they appeared to reside in Yorkshire, England, as well as at a post office box used by them in Perth.¹⁰⁸

In summary, service of Creditor's Petitions outside Australia will require a court order for substituted service. Regardless of the fact that the court has jurisdiction to grant the order, the creditor can assist the court by providing one or more modes of service that will, in all reasonable probability, be effective in bringing knowledge of the proceedings to the debtor. These modes of service might include postal service on the solicitors acting for the debtor or postal service on the debtors at a foreign address. With the increasing recognition by the courts of electronic modes of communication to effect valid service of Bankruptcy Notices, it may not be long before such modes of service are granted in an order for substituted service of Creditor's Petitions.

ISSUES, PRINCIPLES, POLICY AND REFORM

As discussed in the introduction above, the competing interests of creditors, debtors and the community that insolvency law attempts to balance, have influence on the legislature and the courts. As a consequence, legislation and judgments work together in an attempt to achieve an outcome that is regarded as acceptable to creditors, debtors and the community at large. While much debate continues as to what dominate principles, roles and values influence bankruptcy policy, some of these attributes have been evident in the recent decisions discussed above.

The interest of debtors

It can be perceived that bringing knowledge of the claim against the debtor is of fundamental importance in the execution of justice. Without ensuring that the debtor has received notice of the proceedings, the courts are reluctant to proceed with the petition, and even when an order for substituted service has been obtained and complied with, in some circumstances the courts will set the sequestration order aside and hear from the debtor. This principle of fairness was given priority in *Bank of Western Australia v Salmon* where the court set aside the sequestration order, heard from both the debtor and the creditor and then granted the sequestration order. Despite having the sequestration order granted against the debtor, justice was done.

However, the principles of maximising debt recovery and distribution of losses are confined within a legislative and legal framework that requires adherence to legislation and court rules that apply equally to all under the rule of law. This was reinforced in *Official Receiver for the Bankruptcy District (WA) v Amaro* when an order for substituted service was sought. Abnormal difficulty in effecting personal service must exist and a method of substituted service will not be allowed which will not, in all reasonable probability, be effective to bring knowledge of the proceedings to the debtor.

¹⁰⁴ FC Rules, O 8 r 2(3). Convention, in relation to a foreign country, means a convention, agreement, arrangement or treaty about service abroad of judicial documents to which the Crown in right of the Commonwealth or, where appropriate, in right of a State, and a foreign country are parties.

¹⁰⁵ http://www.fedcourt.gov.au/how/practice_notes_cm12.html viewed 13 August 2010. This information must be obtained from the Commonwealth Attorney-General's Department, Private International Law Section, <http://www.ag.gov.au/PIL> viewed 13 August 2010. Information about service in a large number of countries can be accessed at http://www.ag.gov.au/www/agd/agd.nsf/Page/Internationalcivilprocedure_ServiceofAustraliacourtprocessabroad-A-Zcountrylist# viewed 13 August 2010.

¹⁰⁶ *Deputy Commissioner of Taxation v Barnes* (2008) 70 ATR 776 at 786, [72].

¹⁰⁷ *Deputy Commissioner of Taxation v Barnes* (2008) 70 ATR 776 at 786, [73] and [75].

¹⁰⁸ *Deputy Commissioner of Taxation v Barnes* (2008) 70 ATR 776 at 786, [74].

These principles followed the decision in *Re Mendonca* to ensure that the interests of the debtor to be informed of the insolvency proceedings are not compromised by the interests of the creditor to have the Creditor's Petition heard. To be bankrupted without being alerted to the proceedings fails to balance the maximisation of recoveries by creditors with the just consequences of default by the debtor. In these cases, the courts are aware of the need to balance these interests and are reluctant to grant an order for substituted service unless the necessary elements are met.

On the other hand, in *Battenberg v Restom* the court was not concerned that, unbeknown to the creditor, the debtor was absent from Australia when the Bankruptcy Notice was served in accordance with the order for substituted service. Service was held to be valid, placing the onus on the debtor to manage their own affairs while they were temporary absent from Australia, rather than placing the onus on the creditor to ensure the debtor was in Australia at the time of service. Balancing the competing interests in these circumstances appears to ensure that unrealistic obligations are not imposed on either party.

The interest of creditors

Recently, the courts have been more willing to accept that a creditor may effect service of Bankruptcy Notices using modern modes of communication, such as email. This occurred in *American Express Australia Ltd v Michaels*. Apart from enabling the courts to make some claim that they are not being "left behind" in this digital age, this may be regarded as a way in which the courts have recognised the importance of minimising the costs of service in a world that is becoming more electronically connected and where people are becoming more globally mobile.

Debtors' freedom of movement throughout the world should not be to the detriment of creditors. For example, the ability for a debtor to "disappear" or to make personal service of the Creditor's Petition so difficult that no valid mode of substituted service is possible, might influence legislative reform in an effort to balance the interests of the parties more evenly. Together with a Tax File Number, each individual might be issued with an email account that is maintained by the ATO, notionally called the Tax File Email (TFE). The corresponding email address could be used by the ATO for distribution of notices or disclosed to creditors when entering into agreements, as a term of the agreement. The individual would be able to access the email account from anywhere in the world where internet access is possible. This TFE might be incorporated into amendments to bankruptcy legislation in relation to service of both Bankruptcy Notices and Creditor's Petitions. The amended legislation could deem service effective by use of the TFE. The ATO, through administration of the TFE, could provide certification that Bankruptcy Notices and Creditor's Petitions have been received from creditors. Likewise, the FC Rules could also deem valid service of Creditor's Petitions through use of the TFE. This would substantially lower the costs for creditors who would presently be seeking leave to serve a Bankruptcy Notice outside Australia or seeking an order for substituted service of a Bankruptcy Notice or Creditor's Petition, whether or not service is outside Australia. No such leave or orders would be necessary if these systemic and legislative changes occurred. In this way, debtors' freedom of movement throughout Australia and the world is not curtailed but their ability to avoid service is.

This freedom of movement is already inhibited to some degree by the legislative provision that deems the debtor to have committed an act of bankruptcy when they leave Australia to defeat or delay creditors, as discussed in *DCT v Barnes* (at 778, [2]).¹⁰⁹ In a similar way, the court, in *Envee Energy Pty Ltd (in liq) v Stockford*, has sought to balance the competing interests of the parties where leave to serve the Bankruptcy Notice outside Australia had not been sought by the creditor before effecting service. The interests of the creditor to recover the debt are promoted by the courts giving leave nunc pro tunc, particularly in circumstances where there is no question on the facts that the interests of the debtor to have notice of the insolvency proceedings have been satisfied.

¹⁰⁹ This is act of bankruptcy is pursuant to a s 40(1)(c) of the *Bankruptcy Act 1966* (Cth).

The interest of the community at large

In each of the cases discussed above the interests of the community in the distribution of loss is reflected in the decisions. Debtors are required to answer for the debts they owe but if they are unable to repay them or come to some agreement with creditors, insolvency proceedings result in the debtor becoming bankrupt. When this occurs the debtor suffers the loss of assets that are taken and sold by the trustee in bankruptcy who distributes the proceeds to the creditors in order of priority. If all debts are not fully repaid, the creditors sustain a loss. The community also experiences a loss, from the perspective that parties other than the debtor and creditor will also suffer loss. The ways in which bankruptcy touches the community beyond the debtors and creditors is “as vast as the array of human interactions”.¹¹⁰

Whether or not the fundamental principles of insolvency law are the maximisation of recoveries, distribution of losses, balancing of conflicting interests or forgiveness and rehabilitation, ultimately, the community must be assured that justice is achieved. In *Bank of Western Australia v Salmon*, where, despite the legislative requirements having been fully complied with and a sequestration order granted, the public policy considerations of a fair and equitable judicial system was achieved in the interests of the community as a whole. The court set aside the original sequestration order to hear the matter fully before granting the final sequestration order.¹¹¹ Amendment of bankruptcy legislation must acknowledge that, in achieving justice, the insolvency process must balance the interests of debtors, creditors and the community. Debtors avoiding service, creditors using innovative ways to effect service and the interpretation of legislation by the courts make for a dynamic environment of give and take, reflected in the recent cases discussed above.

CONCLUSION

In a world where nothing and no one stands still, service of Bankruptcy Notices and Creditor’s Petitions encounter an increasing number of problems. *American Express Australia Ltd v Michaels* and *Battenberg v Restrom* were cases where the court determined the validity of service of a Bankruptcy Notice on a debtor who was located outside Australia. While the debtors were located outside Australia, service was effected within Australia. However, when the creditor needs to serve the Bankruptcy Notice outside Australia, the creditor must seek leave of the court to effect service.¹¹² This issue was considered by Wilson FM in *Envee Energy Pty Ltd (in liq) v Stockford* when deciding whether the applicant’s failure to obtain leave to serve the Bankruptcy Notice outside Australia should be excused. His Honour decided that if leave had been sought, it would have been granted, so failure to obtain leave was an irregularity within the ambit of s 306(1) of the Act.¹¹³ An order for leave to effect such service was granted nunc pro tunc.¹¹⁴

In an effort to break down the barriers to effective service of bankruptcy documents worldwide, bankruptcy law should seek to recognise the use of modern modes of communication¹¹⁵ as valid

¹¹⁰ Gross K, *Failure and Forgiveness: Rebalancing the Bankruptcy System* (Yale University Press, New Haven, 1997) p 197.

¹¹¹ The principle of fairness underlying the decision of the Court is in many ways captured eloquently by William Shakespeare in *The Merchant of Venice*:

The quality of mercy is not strain’d,
It droppeth as the gentle rain from heaven
Upon the place beneath: it is twice bless’d;
It blesseth him that gives and him that takes:
'T is mightiest in the mightiest:
Portia, Act 4, Scene 1.

¹¹² Section 40(1)(g) of the *Bankruptcy Act 1966* (Cth).

¹¹³ *Envee Energy Pty Ltd (in liq) v Stockford* [2007] FMCA 1426 at [24].

¹¹⁴ *Envee Energy Pty Ltd (in liq) v Stockford* [2007] FMCA 1426 at [26].

¹¹⁵ For example, email, Short Message Service (SMS) also known as texting on mobile phones, Twitter, Facebook, LinkedIn, Skype and Blackberry.

personal service. *American Express Australia Ltd v Michaels*, together with similar cases in New Zealand¹¹⁶ and the ACT,¹¹⁷ provides support for the use of modern modes of communication in this digital age. The Creditor's Petition, being a document regarded as an originating process, must be served personally on the debtor pursuant to O 7 r 1 of the FC Rules. In *DCT v Barnes*, Lucev FM stated that "It would therefore appear to be a matter of discretion as to whether the Court utilises the provisions of O 8 or s 309(2) of the *Bankruptcy Act* to prescribe the means of service on a person outside of the jurisdiction (assuming that the relevant provisions of each can otherwise be complied with)".¹¹⁸ Accordingly, when seeking an order for substituted service of a Creditor's Petition, one or more modes of service that will, in all reasonable probability, be effective in bringing knowledge of the proceedings to the debtor should be included in the application.

In unison with the recognition of electronic modes of personal service, future bankruptcy legislation should seek to align the laws of both personal and corporate insolvency to provide uniform law that removes the expense and uncertainty of current service requirements.¹¹⁹ While sending a Bankruptcy Notice to a person's last-known address is similar to sending a statutory demand to a company's registered office, personal service of the Creditor's Petition requires the document to be served personally on the debtor. Service of the application seeking an order to wind up the company in insolvency is effected by simply posting it to the company's registered office. If both individuals and companies were required to have an electronic mailbox to which service of court documents would be deemed valid, court orders for substituted service could become unnecessary.

Recently, in a submission to the Productivity Commission,¹²⁰ the Insolvency Practitioners Association said it could assist in identifying areas where legislation for both personal and corporate insolvency could be harmonised.¹²¹ Should such a review be undertaken by the Federal Government, future legislation might reduce the requirement for judicial involvement in facilitating service of Bankruptcy Notices and Creditor's Petitions. Failing that, the common law will continue to evolve as the courts wrestle with the uncertainties of service of bankruptcy documents in a changing world.

¹¹⁶ Clifford J in *Asteron Life Ltd v Franck* [2009] NZHC 450 granted the creditor leave to serve the Bankruptcy Notice outside New Zealand by way of email alone. In *Axe Market Gardens Ltd v Axe* HC WN CIV-2008-485-002676 (16 March 2009) which was not a bankruptcy case, substituted service had been permitted by way of both email and Facebook.

¹¹⁷ The ACT Supreme Court in *MKM Capital Pty Ltd v Corbo & Poyser* (unreported, ACT Sup Ct, Master Harper, 12 December 2008) made an order for substituted service of a default judgment by way of a private message via Facebook.

¹¹⁸ *Deputy Commissioner of Taxation v Barnes* (2008) 70 ATR 776 at 786, [69].

¹¹⁹ Murray, n 46 at 50.

¹²⁰ Insolvency Practitioners Association (IPA), *Submission of the Insolvency Practitioners Association to the Productivity Commission: Regulatory Burdens – Business and Consumer Services* http://www.pc.gov.au/_data/assets/pdf_file/0011/95609/sub007.pdf viewed 25 August 2010. This submission was made to the Productivity Commission's Annual Review of Regulatory Burdens on Business: Business and Consumer Services, 2010.

¹²¹ IPA Submission, n 120 at [20].