THE PROBLEMS OF GOING GLOBAL

legal risk in international transactions

As Australian firms globalise their business interests, they are increasingly exposed to legal problems that are costing them money and inhibiting opportunities. *Legal Risk in International Transactions* (ALRC 80) a report released by the Australian Law Reform Commission (ALRC) on 8 October 1996, examines these risks in detail and canvasses legal and non-legal remedies.

In this article, ALRC Commissioner **Michael Ryland** provides an overview of the report.

This inquiry arose out of concerns about the effectiveness of the legal remedies available when commercial transactions cross international borders. Attention had been drawn to cross border issues by a number of high profile insolvencies, in particular those relating to the interests of Alan Bond, Christopher Skase and Abraham Goldberg. At a broader level it was recognised that the growing involvement of the Australian economy in regional and international trade and investment was creating challenges that the Australian legal system, like all other national legal systems, was having difficulty meeting and that these difficulties would persist.

The ALRC was given the terms of reference for this inquiry in the second half of 1995, by the then federal Attorney–General, Michael Lavarch. Consultations — by means of seminars, private meetings and the circulation of background papers and other publications — focused on the business, government and professional communities most involved in trade and investment.

The submissions we received indicated that disputes involving the laws or courts of more than one country are characterised by intolerable levels of cost, complexity and delay. In many cases the law fails to provide the support Australian firms need and seek in their international commercial transactions. This may be, for example, a failure to provide certainty of ownership or compensation for loss or a lack of facilities to order and process transactions. Australian businesses are currently coping through pricing or other arrangements, but these problems are a source of inefficiencies, delays and increased costs and they are set to increase in volume and significance.

To ensure that its work would be cost effective and of practical significance the ALRC took an Australian business perspective as the touchstone for this inquiry. This involved placing legal issues in the wider context, as well as examining non–legal remedies such as new technologies or commercial arrangements.

At the heart of the inquiry is cross border civil litigation. This is only one part of the legal backdrop. It usually occurs only when a transaction has gone badly wrong and there is enough money at stake for the parties to seek redress through the courts. But it is important because it is where the law bites. It sets the ground rules for commercial negotiations, describing the possible outcomes if parties in dispute are unable to reach a settlement.

For most business activities, however, the law is more useful where it supports risk management. This helps in avoiding disputes and in creating business opportunities. It requires a focus on substantive laws — laws for example, which limit the scope for damage from international transactions, such as the prudential safeguards applying to financial markets, and which create opportunities for increasing the speed and volume of trade, such as standard terms and conditions for routine international transactions.

Local and international solutions

One of the aims of the inquiry was to identify what sort of initiatives should be given priority when dealing with cross border legal issues. Many of the initiatives to date have focused on the international harmonisation of laws through multilateral conventions or the adoptions of model laws or standard terms. This is logical. Cross border legal risks and the exposures and lost opportunities they create are common to all firms trading or investing outside their own country, not just Australian firms. In general it is in the commercial interests of all countries to reduce these risks.

However in the ALRC's view multilateral conventions are only effective as tools in managing cross border legal risk in narrow circumstances. Current conditions suggest that more emphasis should be put on bilateral negotiations and on implementing existing conventions.

Another component in the development of the law in this area is the approach taken to issues of sovereignty and the extra territorial application of laws. As Australia's markets and commerce stretch beyond national borders there are growing pressures to reduce the emphasis on national sovereignty and to have an impact beyond Australia's geographic limits. When a cross border legal issue arises it is often in the context of a firm's frustration at its inability to enforce an Australian legal right outside Australia, or in the context of a firm's difficulties in adjusting a regional or international business to meet separate national regulations.

There is a natural tendency to try and solve these problems by extending the extra–territorial effect of Australian laws or court orders, or by creating a supra–national authority or regulatory regime to overcome the inefficiencies of separate national regulation.

In the ALRC's view this type of solution should be treated with some caution. It will only be appropriate in limited circumstances. Often it will be more effective, and will better suit Australian business interests, to maintain territorial limits and seek greater cooperation in applying local laws quickly and cheaply.

What happens next?

In essence the ALRC's report, *Legal risk in international transactions*, is a feasibility study. It does not recommend specific changes to the law. Instead we have reviewed an area of law not previously considered as a separate topic and reported on the scope for law reform in this area. The further work recommended in the report can be divided into five areas:

1. *The International Commercial Law Advisory Committee*

Systematic reform on cross border legal issues will require a mix of business and government input. The priorities, timing and options considered should be driven by Australian business requirements and perspectives. However, since it is law reform, it will be primarily government work. It will stretch across a number of portfolios, including the Attorney–General's Department, the Treasury and the Department of Foreign Affairs and Trade.

To obtain the right inputs and focus, the Commission has recommended that an advisory committee, in the report called the International Commercial Law Advisory Committee, be established to put an agenda and recommendations for reform to the government. It should be comprised entirely of business leaders, have a three year term and be supported by a small, secretariat. This will be a key element in ensuring that cross border legal issues are addressed promptly and effectively and with the right priorities from an Australian business perspective.

2. *Short term cross border litigation reform*

There are a number of litigation reforms that could be reviewed and settled by mid 1997. They are essentially technical and include proposals relating to the commencement of proceedings, service and jurisdiction, obtaining evidence abroad and the enforcement of Australian judgments outside Australia. These reforms will require only limited further consultation, primarily with legal practitioners and the courts.

3. *Long term cross border litigation reform*

There is another set of litigation reforms that should be considered in the context of more extensive consultation with the legal profession, the courts and the business community (including the advisory committee). They include issues such as measures to enhance cooperation with other jurisdictions, protective orders regarding offshore assets or the detention of absconding defendants and the investigation and management of international insolvencies.

4. Finance law reform

Finance law is a high priority for cross border legal initiatives. Banks and the financial markets underpin much of Australia's international trade and investment. They create and support practical techniques for dealing with many of the risks in international commerce. Finance law helps banks and others in the financial markets to do so, principally by confirming the allocation of financial risks and by requiring prudential safeguards. This means that the particular remedy issues faced by financiers have implications for other participants in international commerce.

The Commission has found that there are a range of interrelated finance law issues that need attention. They are partly systemic, such as those relating to payments systems, and partly directed at the impact of laws on particular transactions, such as the issues relating to bank confidentiality and tracing.

5. Electronic commerce and the 'safe haven' project

There has been much discussion over the last few years about the opportunities that are expected to arise from electronic commerce; ie business transactions on, or using facilities provided by, electronic networks as well as non-transactional interchanges such as electronic mail and personal entertainment. Electronic commerce is currently generating new content industries, the reaching of new markets and the re-engineering of business operations and service deliveries.

The lack of legal support, for example to guarantee electronic payment systems, is hindering the ability of Australian businesses to take advantage of these new technologies. However legislative over-reaction could also have adverse consequences if it leads to business being stifled by legal straight-jackets. Key issues such as intellectual property rights, privacy and data security, liability, defamation and censorship need to be addressed.

The Commission has recommended a comprehensive review of the legal implications of electronic commerce, and also a supplementary project, to design and test a 'safe haven' model for the development of on-line electronic trading and investment facilities. The model would, with respect to certain classes of electronic commerce, provide both exemptions from certain types of regulatory control as well as setting out rules to supplement current law on use and liability issues. The recommendation for the 'safe haven' project recognises that time is a critical factor in this area and that a quicker, more flexible, response is needed than is possible through traditional forms of international legal initiative.

Conclusion

It seems that so far Australian firms have tended to put cross border legal issues into the 'too hard' basket. A number commented during the inquiry that they were pleasantly surprised that something was being done about them. A major benefit of systematic reform in this area, at both national and international levels, is that it will bring these issues out of the too hard basket and provide an Australian business perspective on how to deal with them.

Copies of 'Legal risk in international transactions' (ALRC 80) are available at a cost of $25 (plus $5 for postage). To order please telephone the ALRC on (02) 9284 6333. The report can also be accessed through the ALRC's homepage at — http://uniserve.edu.au/alrc/