THE HISTORICAL DEVELOPMENT OF INSOLVENCY LAW

FRANCIS FORBES SOCIETY FOR AUSTRALIAN LEGAL HISTORY

INTRODUCTION TO AUSTRALIAN LEGAL HISTORY TUTORIALS

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Introduction

1. Insolvency law is perhaps not the most thrilling or hilarious good fun other legal subjects are rumoured to be. In fact some say the subject is so dry that there are no insolvency law jokes other than insolvency law itself. The subject can however lay claim to being arguably one of the oldest.

2. Many of today's key insolvency principles, such as collective and rateable administration, stem from historical events and influences that are over 2000 years old. Other current principles are reflective of substantial shifts in policy over time. For example, the attitude towards debtors and creditors, and court or government regulators. Then again there are some enduring themes of insolvency law (like courts with competing jurisdictions and the tensions between private rather than official administrations).

3. I hope in today's lecture to give you a taste of these three lenses in which the history of insolvency law can be viewed, by principally looking chronologically at the key "watershed" moments in insolvency law.

[*] I express my thanks to my researcher, Miss Madeline Hall, for her assistance in the preparation of this paper.

Etymology: the meaning of "bankruptcy" and "insolvency"

4. Before commencing however, a word needs to be said about terminology. Such a digression is particularly useful in the case of insolvency, as a simple tracking of the different meanings given to the terms "bankruptcy" and "insolvency" over time, mirrors the field's developments.

5. Today, "insolvency" refers to a situation when a person or company cannot pay its debts as they become due and payable. The term "bankruptcy" refers to the insolvent estates of individuals, while "liquidation" or "corporate insolvency" refers to the insolvent estates of companies. However this was not always the case.[1]

6. It is believed the term "bankruptcy" stems from the Italian word "banca" (or "banco") and "rotta" (or "rotto"). The literal translation of these words being "broken bench". This supposedly is a reference to the Italian money lenders who conducted business on the banks of the Arno River in Florence and who used small benches to rest their documents upon.[2] If the money lender could not fulfil their obligations, the angry customer would break the bench over their head.[3] If applied on Wall Street today, such a practice could certainly bring a new meaning to hot-desking. In all seriousness however, no one seems able to explain why violence was inflicted upon the unfortunate money lender, rather than the borrower. Presumably, this was a rudimentary method of deterring inappropriate lending.

7. Commentators have also cited the Latin words "bancus ruptus" or the French for "banque" and "route" as possible sources of the term "bankruptcy".[4] Given the danger of Latin experts lurking in the room I am hesitant to offer my thoughts on the translation of these terms.

[1] Levinthal, 'The Early History of Bankruptcy Law', (1918) 66(5) *University of Pennsylvania Law Review* 223, 224.
[2] Quilter, 'The Quality of Mercy-The Merchant of Venice in the Context of the Contemporary Debt and Bankruptcy Law of England' (1998) 6 *Insolvency Law Journal* 43, 49.
[3] Hayek, *Principles of Bankruptcy in Australia* (University of Queensland Press, 1962), 5.
[4] Levinthal, 'The Early History of English Bankruptcy', (1919) 67 *University of Pennsylvania Law Review* 1, 2.

8. Instead, I'll safely move to where the word "bankruptcy" first appears in the English legal system; that being in the title (but not body) of the 1542 act of Parliament: *An Act Against Such Persons as Do Make Bankrupt*.[5] It is noteworthy that here the word is used as an act or thing not as a description of a legal status held by someone. The latter use is not apparent until the legislation of Elizabeth I in 1571.[6]

9. However, as I'll say in more detail shortly, the legislation of the 16th century with respect to "bankruptcy" was limited in its application to tradesmen.[7] The term therefore was not synonymous with our use of it today, but rather referred to the laws which set out a special process "for the collection and proportional distribution of a trader's assets between all creditors".[8]

10. The term "insolvency" stems primarily from legislation passed in the 18th century, specifically targeted to insolvent non-traders.[9] It emerged when gentlemen were increasingly part of this large group and it was simply unthinkable for the up-stairs likes of Lord Grantham to be mentioned in the same sentence as a word, previously used for lowly tradesman. Presumably it was from this need for a softer alternative to "bankruptcy" that "insolvency", a term amenable to the ears of the upper classes, came into existence.

11. It was not until the distinction between tradesmen and non-traders was removed in 1861 by the consolidation of the bankruptcy and insolvency laws, that insolvency came to have its current general meaning, and bankruptcy its more limited application to personal insolvencies.[10]

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[5] (1542) 34 & 35 Henry VIII, c 4.

[6] See the Acts entitled *An Act Touching Orders for Bankrupts* (1571)13 Eliz I, c 7 and *An Act against Fraudulent Deeds, Alienations* (1571) 13 Eliz I, c 5.

[7] This was in common with the laws across the continent. For instance, Italy, France and Spain (up until 1881) only allowed "commercial debtors" to enter into bankruptcy. (See Levinthal, above n 1, 224).

[8] Allsop and Dargan, 'Chapter 16 The History of Bankruptcy and Insolvency Law in England and Australia' in Gleeson, Watson and Peden, *Historical Foundations of Australian Law Volume II 'Commercial common law'* (The Federation Press, 2013) 415, 417.

[9] See below n 64 and 67.

[10] *An Act to Amend the Law relating to Bankruptcy and Insolvency in England* (1861) 24 & 25 Vic, c 134 and Allsop and Dargan, above n 8, 417.

12. To briefly fast forward to today, I should note that the term "insolvency" appears to be increasingly out of fashion. For instance the Insolvency Practitioners Association is now the Australian Restructuring, Insolvency and Turnaround Association. Preference for the term "restructuring" is also being mirrored now with law firms' re-branding their insolvency teams. This reflects a broader emphasis in the 21st century away from resignation and punishment, and towards instead the salvation of insolvency situations and those responsible for them.

Bankruptcy in ancient civilisations: execution against the person to execution of the property

13. To turn now to chronological events. Historians are of the opinion that given the absence of credit, indebtedness was in ancient societies "regarded as an anomaly".[11] Despite this, there is certainly more than a smattering of historical accounts of ancient civilisations dealing with failures to pay debts, often using principles not seen again in English law until the 18th or 19th centuries. For instance, the Old Testament provides for the discharge of debtors. Deuteronomy Chapter 15 verse 1 to 3 states that after a period of 7 years, debts were to be cancelled because "the Lord's time for cancelling debts has been proclaimed".

14. It is clear from the records across ancient societies that early on insolvency was enforced by the sentiment of the community rather than by any rule of law. For example in Ireland there was a practice of "fasting on", in which the creditor would stay at the debtor's doorway to compel payment. The logic was that other members of the society would not allow the debtor to let the creditor die of exhaustion or starvation at the debtor's door.[12] I personally am sceptical as to whether creditors today would have the necessary fortitude to recover under these old rules. All the same, these situations show insolvency was as much a question of morality and spirituality, as a legal transgression. The role of morality has perhaps still not faded. At least in the 19th century bankruptcies were still said to be, not random events, "but the logical outcome of sin".[13]

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[11] Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (John Murray, 9th ed, 1883), 321.
[12] Levinthal, above n 1, 229.
[13] Hilton, *The Age of Atonement: The influence of Evangelicalism on Social and Economic Thought, 1785-1865* (Oxford University Press, 1988), 132-133.

15. Despite the proclaimed rarity of the event, and perhaps in part due to the close link insolvency had with questions of morality, the vast majority of civilisations had a particularly barbaric attitude towards debtors.[14] Hindu law in particular, was fairly comprehensive. The creditor could seize the debtor, compel him to labor, kill or maim him, confine his wife, sons or cattle, or besiege him in his home.[15] Under Roman law, a creditor was entitled, after thrice inviting someone to pay for the debtor and waiting 60 days, to regard the debtor as his slave.[16] More alarmingly, and as anyone familiar with Shakespeare would know, if there was more than one creditor, the debtor "could be hacked in pieces proportionate to the amounts owed".[17]

16. Importantly, apart from this providing a rather gory illustration of early conceptions of collective and proportionate distribution between creditors, these remedies reveal a principle of recourse or execution against the debtor (sometimes quite literally entailing execution *of* the debtor).

17. The contemporary approach of execution against a person's property is said to have originated in Egypt, where creditor's claims on the debtor's person were considered to be subordinated to the state's claim, primarily for military purposes.[18] This concept is then believed to have been imported into ancient Greek society by Solon.[19]

18. However, the notion of execution of property did not appear in Roman law until c. 105BC, when Publius Rutilius allowed for proprietary execution to satisfy a private debt.[20] This was achieved through the action, "bonorum emptio or venditio", in which the entire estate of the debtor was sold for the satisfaction of

[14] However, generalizations should not be too readily made. For instance the Code of Hammurabi (c. 1795-1750 BCE) allowed for the life and freedom of a debtor made insolvent by misfortune and exemptions were allowed to honest debtors under Islamitic law (Levinthal, above n 1, 237).
[15] Ibid, 230.
[16] Buckland, *A Text Book of Roman Law from Augustine to Justinian* (Cambridge University Press, 3rd ed, 1963), 1 with reference to the *Twelve Tables*.
[17] Keeton, *Shakespeare's Legal and Political Background* (Pitman & Sons, 1967), 110-111.
[18] Levinthal, above n 1, 231.
[19] Allsop and Dargan, above n 8, 419.
[20] Levinthal, above n 1, 232.

all creditors. The “bonorum venditio” was only granted when one of several acts had occurred. For instance the debtor’s absconding or hiding from creditors.[21] This process was gradually replaced with the action of “bonorum distracto”, where a “curator bonorum” was appointed and disposed of the debtor’s assets, paying the creditors pro rata.[22]

19. Alternatively, what was essentially a voluntary composition of creditors, called “cession bonorum” could be formed in the case of honest debtors, who thereby avoided imprisonment.[23] Further, not dissimilar to administrations today, Roman law allowed creditors to vote on whether to proceed at once to essentially liquidate the debtor’s estate, or take their chances and allow the debtor a period, not exceeding 5 years, in which to pay the outstanding debts.[24]

20. In the case of fraudulent debtors, Roman law had “elaborate provisions for vitiating fraudulent transfers of property”.[25] Many of these are identical, if not in form then in substance, with the current sections 120(1)(b) and 121 of the *Bankruptcy Act*, which relate to transactions without consideration and transfers to defeat creditors. [26]

21. All of this makes clear that by the time of the Romans there were at least developed concepts of: execution of property not against the debtor, acts of bankruptcy, collective administration, rateable distribution, voidable transactions and a distinction between honest and fraudulent debtors.

22. This casts some shadow on historical accounts that seek to simplify the history of insolvency to a straight progressive path of “death, to enslavement, to imprisonment and, finally, to release of the debtor in acknowledgement of the inevitable vicissitudes of commercial life”.[27]

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[21] Ibid, 235.
[22] Ibid, 236.
[23] Ibid, 238.
[24] Ibid, 238.
[25] Ibid, 239.
[26] *1966* (Cth) (***Bankruptcy Act 1966***).
[27] Allsop and Dargan, above n 8, 460.

Bankruptcy in the middle ages: the emergence of relation back

23. Following the breaking up of the Roman Empire and ensuing general economic depression and decline of trade, many of the intricacies the Romans and other civilisations had for dealing with insolvencies seem to have faded. However, I should briefly mention Italian bankruptcy law in the middle ages.

24. It was then that the notion of relation back emerged.[28] Italian statutes gradually started to consider actions by a debtor while on the verge of insolvency to be void or voidable.[29] Statutes at first focused on events a week before the time of bankruptcy; however these gradually lengthened and in Australia today can extend four years back from the date of insolvency.[30]

25. Italian law however was not alone in having the concept of relation back. For instance, bankruptcy regulations promulgated by the Jewish Council of the Four Lands in Poland, had a provision that meant any dowry paid by a bankrupt father up to a year before he became bankrupt could be clawed back from the son-in-law.[31] The mind boggles at the awkwardness in enforcing that provision.

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[28] Levinthal, above n 1, 242.
[29] Ibid, 242.
[30] See for instance *Corporations Act 2001* (Cth) (***Corporations Act***), s 588FE.
[31] Extract from the *Pincus* of the Council of the Four Lands, found in an old rabbinical treatise entitled '*Sefer Mamar Kadishin*' published in 1776 and extracted in Levinthal, above n 1, 249.

Early English bankruptcy law: the re-emergence of imprisonment

26. To move now to England, where naturally much of our insolvency law derives. It was "not a little remarkable"[32] that prior to 1283, the English common law "knew no process whereby a man could pledge his body or liberty for payment of a debt".[33] Regrettably, English bankruptcy took a long step backwards with the advent of the Crusades in the 11th century and the subsequent increase in trade and need for credit. In this context the lack of any established expeditious process to recover debts, caused increasing concern that merchants were avoiding trading in England.[34]

27. Consequently in 1283 and 1285 legislation was passed providing for the imprisonment of the debtor after acknowledgement of a debt and a failure to pay.[35] "No time was given, no allowance made. Honest or dishonest, refractory or unfortunate, the debtor was to be instantly imprisoned".[36]

28. However, in 1311 it was clarified that this law only applied to tradesmen.[37] Regrettably, this did not mean insolvent non-traders were in a better position. From 1350 a writ of "capias ad respondendum" could be obtained with respect to an action for debt.[38] This writ directed the sheriff to imprison the debtor before and until the trial of action. After obtaining a judgment debt, a writ of "capias ad satisfaciendum" could then be used to hold the debtor in prison until repayment.[39]

29. Although it may seem harsh, imprisonment was considered necessary in large part due to the inadequacies of the writs used for debt recovery at common law; namely "fieri facias" and "levari facias". For instance, the former only allowed the seizing of chattels (not choses in action or goods, such as jewellery).[40] A creditor in the 1300s was therefore in a far worse position than a creditor today who has

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[32] LexisNexis Butterworths, *Encyclopedia of the Laws of England* Vol 2 (3rd ed), 80-83 as extracted in the Clyne Committee, Parliament of Australia, *Report of the Committee Appointed by the Attorney General of the Commonwealth to Review the Bankruptcy Law of the Commonwealth* (1962), 9.
[33] Ibid.
[34] Allsop and Dargan, above n 8, 422
[35] *Statute of Acton-Burnell* (1283) 11 Edw I and *State of Merchants* (1285) 13 Edw I.
[36] Levinthal, above n 4, 8.
[37] (1311) 5 Edw II, c 33.
[38] (1350) 25 Edw III, c 17.
[39] Rose, *Lewis' Australian Bankruptcy Law* (LBS Information Services, 11th ed, 1999), 9.
[40] Allsop and Dargan, above n 8, 424.

access to far broader types of property.[41] To make things worse, each individual creditor would have to enforce its debts by separate writs. This lead essentially to a first in time system of administration, where creditors could easily disadvantage fellow creditors. Imprisonment was therefore seen as an effective way of forcing a debtor to co-operate expeditiously with his creditors.

30. And before too much judgment is levelled against the laws of early England, I should note that the writ of "capias ad satisfaciendum" was available in New South Wales until 1970 and in Queensland until 1995.[42] Similarly, imprisonment before trial was available in Queensland at least until 1995 and is still available in Victoria in certain situations.[43]

Bankruptcy law during the Tudor and Stuart periods: collective administration, rateable distribution and limited discharge

31. One of the key epochs in the history of insolvency law was the emergence, or perhaps given what I have said about ancient civilisations I should say re-emergence, of the concept of collective administration and rateable distribution. This occurred in 1542 with the introduction of *An Act against Such Persons as Do Make Bankrupt*.[44] In the typical verbose Tudor style, the act was directed to persons "as do make Bankrupt" by "chiefly obtaining into their hands great substance of other men's goods and do suddenly flee to parts unknown or keep their houses."

32. The 1542 Act deemed such conduct as acts of bankruptcy, which they are still considered today.[45] The act also explicitly stated that the distribution of assets was to be "rate and rate alike according to the quantity of [creditor's] debts".

33. From an administrative point of view the 1542 Act also was significant in that it granted the power to summon and examine persons associated with the suspected concealing of a debtor's property.

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[41] *Bankruptcy Act 1966*, s 116.
[42] *Supreme Court Act 1970* (NSW), ss 10 and 98 and *Supreme Court Act 1995* (Qld), s 94.
[43] *Supreme Court Act 1995* (Qld), s 90 and *Supreme Court Act 1986* (Vic) s 87.
[44] (1542) 34 & 35 Henry VIII, c 4 (**1542 Act**).
[45] *Bankruptcy Act 1966*, s 40(1)(c).

34. However, some commentators have been critical of the act's practical effect as, despite the introduction of fundamental insolvency principles, the act did not specify how and by what powers the Chancellor and officials were allowed to "take order" of the insolvent estates.[46] Another more obvious criticism is the glaring absence of any method for the discharge of the bankrupt. That was not to re-emerge, and even then only in highly curtailed circumstances, until the 1700s.

35. The 1542 Act was followed by two acts in 1571, the *Statute of Elizabeth* and the *Fraudulent Conveyances Act*.[47] The *Statute of Elizabeth* specifically confined the operation of the bankruptcy laws as commenced by the 1542 Act, to tradesmen. It also introduced the concept of bankruptcy as a legal status and listed the "acts of bankruptcy".[48] The *Fraudulent Conveyances Act* rendered transactions conducted with the intent to defraud or delay creditors, to be void unless the purchaser acted bona fide. This was the embryo of the current section 121 in today's *Bankruptcy Act* and section 37A in the *Conveyancing Act*.[49]

36. The acts of 1571 also empowered creditors, called "commissioners", with the administration of the debtor's estate. It was subsequently confirmed by the courts that the commissioners' powers extended to seizing property acquired after the debtor became a bankrupt and that the spirit of the legislation rendered void transactions in which the declared bankrupt paid one creditor over the others. This marked the commencement of the doctrine of unfair preferences, which was to continue to be enforced through the common law and without statutory articulation until 1869.[50]

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[46] Levinthal, above n 4,15.
[47] *An Act Touching Orders for Bankrupts* (1571) 13 Eliz I, c 7 and *An Act against Fraudulent Deeds, Alienations* (1571) 13 Eliz I, c 5.
[48] Allsop and Dargan, above n 8, 426.
[49] *Bankruptcy Act 1966*, *Conveyancing Act 1919* (NSW).
[50] *Smith v Mills* (1590) 2 Co Rep 25a; 76 ER 441 and *Bankruptcy Act 1869* (UK) (32 & 33 Vic, c 71), s 92.

37. The advent of commissioners set in motion one of the ongoing themes I sought to address in this lecture; namely the "oscillation in the mode of administration between the opposite principles of private and of official administration".[51]

38. Despite the general development of principles, it would be fair to say that bankruptcy law in the Tudor and Stuart periods was still focused on creditor recovery rather than debtor rehabilitation.[52] In the 1600s debtors were still treated harshly, facing the punishment of standing in the pillory and losing an ear if they failed to show their bankruptcy was due solely to misfortune.[53]

39. Earlier on in 1551, Chief Judge Montague articulated the attitude of the times when commenting on a debtor who had borrowed £40.00 and failed to repay. He stated:

    "neither the plaintiff nor the sheriff is bound to give him meat or drink, no more than if one distrains cattle…he ought to live off his own goods…and if he has no goods he shall live off the charity of others, and if others will give him nothing, let him die in the name of God…and impute the cause of it to his own fault, for his presumption and ill behaviour brought him to that imprisonment."[54]

40. Some relief was brought about in 1705 when *honest* insolvent *tradesmen* were allowed to be discharged.[55] The possibility of discharge however was only granted upon the trader obtaining, to quote the statute, 4/5th of creditors' consent.[56] It was therefore a small step, but a step nonetheless in the gradual shift towards debtor rehabilitation. This development reflected the recognition in society at the time that extending credit inherently involves risk,[57] and debtors using credit were doing a service to the burgeoning British Empire.[58]

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[51] Above n 32.
[52] Murray and Harris, *Keay's Insolvency Personal and Corporate Law and Practice* (Thomson Reuters, 7th ed, 2011), 7.
[53] (1623) 21 James I, c 19.
[54] *Dive v Maningham* (1551) 75 ER 96, 108-109.
[55] (1705) 4 & 5 Anne, c 17 and (1711) 10 Anne, c 15.
[56] (1706) 5 Anne, c 22.
[57] Levinthal, above n 4, 19.
[58] Allsop and Dargan, above n 8, 431 and Low, 'The Adventures of Bentham in Van Diemen's Land: Sir Alfred Stephen and the Insolvency Act' (2003) 22 *University of Tasmania Law Review* 164,176.

41. Of course, for insolvent non-traders, discharge and relief from imprisonment were still a long way off. Society still considered "it to be an unjustifiable practice, for any person but a trader to encumber himself with debts of any considerable value."[59]

The 19th century: The emergence of insolvency law and the eradication of imprisonment

42. From the late 18th and into the early 19th century there was a concerted effort to reform bankruptcy law. On a philosophical level this has been attributed to movements including utilitarianism, social liberalism and evangelicalism.[60] Reports of a debtor being imprisoned for 40 days for a debt of one shilling and sixpence were in conflict with many of these philosophical ideas.[61]

43. On a practical level, reform was probably the result of both a gradual increase in bankruptcies (itself due to the increasing use of credit and commercialisation from industrialisation) and also gradual awareness of the horrors attendant upon debtors that were imprisoned.

44. Awareness of the plight of imprisoned debtors was particularly aided by a 1729 parliamentary committee, which reported that in the infamous Marshalsea prison, debtors were tortured and starved. Allegedly during spring, 8 to 10 people died every 24 hours.[62] Awareness was further disseminated by cultural depictions as in Dickens' *Little Dorritt*, which was originally entitled *Nobody's Fault*. This alludes to the Marshalsea prison where allegedly Dickens' own father was imprisoned.

45. The injustice of the imprisonment system was laid bare when contrasted with the "Master's side" of Marashalsea and "The Rules", an area surrounding the Fleet and King's Bench prison. In these areas rich debtors, most commonly insolvent gentlemen, could live in luxury, safe in the knowledge that remedies under the

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[59] Blackstone, *Commentaries* Vol II (Young and Small, 1803), 473-474.
[60] Allsop and Dargan, above n 8, 434 and Low, above n 58.
[61] Low, above n 58, 178.
[62] White, 'Pain and Degradation in Georgian London: Life in the Marshalsea Prison' (2009) 68(1) *History Workshop Journal* 69 with reference to the 1729 *Report from the Committee Appointed to enquire into the State of the Goals of this Kingdom*.

common law would be a long time coming to their creditors.[63] The situation became so notorious that it was "almost a matter of public embarrassment" by the time of the 19th century.[64]

46. Reform by way of the introduction of insolvency laws occurred in 1813 when legislation was passed establishing the Insolvent Debtors' Court.[65] This allowed for the release of honest insolvent non-traders after three months from the conclusion of proceedings and satisfaction of the Court. However, the debtor was not discharged, and future property remained liable.[66] Commentators have viewed this as a return of the principle of "cession bonorum" in Roman law.[67]

47. More legislation providing greater protections to insolvent non-traders soon followed.[68] For instance in 1842 legislation provided for debtors' petitions by insolvent non-traders.[69] The ability for an insolvent tradesmen to declare himself bankrupt had already been granted 17 years earlier in 1825.[70]

48. Considering how late insolvency law emerged, its operation quickly began to catch up with bankruptcy laws. Thus in 1838 imprisonment before proceedings was abolished for bankruptcy, and in the case of insolvent non-traders they could petition for their release after three months.[71] Imprisonment on final process was eventually abolished, in 1869.[72]

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[63] In fact some bankrupts sought compensation (which could then have been used to pay of their debts) for being falsely imprisoned in the "wrong" part of prisons (see for example *Yorke v Chapman* (1839) 10 Ad & E 207; 113 ER 80).
[64] Allsop and Dargan, above n 8, 437.
[65] *An Act for the Relief of Insolvent Debtors in England* (1813) 53 Geo III, c 102.
[66] Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth-Century England* (Clarendon Press, Oxford, 1995), 95.
[67] Duffy, *Bankruptcy and Insolvency in London during the Industrial Revolution* (Garland Publishing, New York, 1985), 88.
[68] *Insolvent Debtors (England) Act* (1813) 53 Geo III, c 102; *Insolvent Debtors (England) Act* (1826) 7 Geo IV, c 57; *Judgments Act* (1838) 1 & 2 Vic, c 110 and *Insolvent Debtors Act* (1842) 5 & 6 Vic, c 116.
[69] *Insolvent Debtors Act* (1842) 5 & 6 Vic, c 116.
[70] *An Act to amend the Laws relating to Bankrupts* (1825) 6 Geo IV, c 16.
[71] *An Act for abolishing Arrest on mesne Process in Civil Actions, except in certain Cases; for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in England* (1838) 1 & 2 Vic, c 110.
[72] *Debtors' Act* (1869) 32 & 33 Vic, c 62 (**1869 Act**).

49. Perhaps in part due to the increasing overlap between insolvency and bankruptcy laws, in 1861 the two were consolidated and the distinction of tradesmen and non-trader was abolished.[73] This removed the need for the increasingly technical law that had sprung up around the definition of "tradesmen" (which incidentally included bankers and brokers but not in-keepers or drovers).[74] As a result of the consolidation, the Insolvent Debtor's Court was abolished and all matters moved to the Court of Bankruptcy, which had been created in 1831.[75]

50. The 19th century also saw changes in the balance struck between private and official administrations. In 1831 legislation was passed establishing an official assignee, who was supervised by the courts and effectively limited the powers of creditor assignees.[76] In a similar trend towards court administration and away from creditor administration, in 1842 the ability to discharge insolvent tradesmen was removed from creditors and left to the discretion of the court.[77] This shift was in part prompted by the instances of corruption amongst the creditor commissioners. In one case in 1817, a firm of shipwrights sought to bankrupt the client for whom they had built a ship and had not been paid. The petition was refused as an abuse of process because the solicitors, barrister and commissioners were all shareholders in the firm of shipwrights.[78]

51. However by 1869, the pendulum in favour of official administration had swung back and the Court's discretionary discharge of a debtor was made conditional upon the debtor having at least paid 10 shillings in the pound to creditors, or the creditors consenting to the discharge.[79] Essentially, official assignees were abolished, and the system returned to one similar to that of the private commissioners in the 17th century.

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[73] *An Act to Amend the Law relating to Bankruptcy and Insolvency in England* (1861) 24 & 25 Vic, c 134.
[74] Allsop and Dargan, above n 8, 442.
[75] *An Act to Establish a Court in Bankruptcy* (1831) 1 & 2 Will IV, c 56.
[76] *An Act to Establish a Court in Bankruptcy* (1831) 1 & 2 Will IV, c 56.
[77] *An Act for the Amendment of the Law of Bankruptcy* (1842) 5 & 6 Vic, c 122.
[78] *Ex parte Story* (1817) 1 Buck's Reports 70.
[79] 1869 Act, s 48. This situation partly swung back in favour of official administration again in 1883.

Informal insolvency arrangements

52. Consistent with this emphasis on private rather than official administrations, the 19th century also saw developments in the informal resolution of insolvencies.

53. In 1825 deeds of arrangement were made legal.[80] Prior to this "any adjustment of the rights between an insolvent and his creditors outside the statutory framework was considered an evasion of the law."[81] Further, due to the rules pertaining to consideration, contracts for compromise sums of a debt were only enforceable if signed as a deed.[82]

54. Upon legalisation, arrangements and compositions began to emerge.[83] This reflected a discernable shift where the settlement of debts was regarded by businessmen as a moral obligation to repay, which should be enforceable as part of general commercial ethics".[84] Lawyers were said to be "utterly unqualified to meddle with bankruptcy legislation".[85] An opinion I know shared by some contemporaries of this century.

Companies: their emergence and effect in insolvency law

55. Before turning to insolvency law in the Australian colonies, I do first need to briefly mention the ramifications that the emergence of companies had on insolvency law.

56. Prior to 1844, when a company went insolvent individual accountability was maintained as when the firm failed, although companies had been granted separate personality, "its members were treated as partners."[86] However, the notion of accountability was somewhat hindered by the fact that the dissolution of

[80] *An Act to Amend the Laws Relating to Bankrupt* (1825) 6 Geo IV, c 16, s 4.
[81] Allsop and Dargan, above n 8, 428.
[82] Due to the principles of consideration set out in *Pinnel's Case* (1600) 5 Co Rep 117a; 77 ER 237.
[83] Rose, above n 39, 19.
[84] McQueen, *A social history of company law Great Britain and the Australian Colonies 1854-1920* (Ashgate Publishing Limited, 2009), 106.
[85] Ibid, citing a Registrar of a District Court of Bankruptcy as reported in the 1847 *Observations on the Law and the Present Practice on Bankruptcy and Insolvency* in Liverpool.
[86] Taylor, *Boardroom Scandal: The Criminalization of Company Fraud in Nineteenth –Century Britain* (Oxford University Press, 2013), 94 citing Lobban, 'Joint Stock Companies' in *The Oxford History of the Laws of England*, 13 Vols (Oxford, 2003), xii 625.

the company in the Court of Chancery was dependent on the names of *all* shareholders being listed in the proceedings.[87]

57. This impracticality was ameliorated in 1844 when legislation allowed for companies to be wound up in the Bankruptcy Court, and for the bankruptcy of companies to proceed without it *necessarily* extending to the bankruptcy of individual shareholders.[88]

58. Despite this advancement, the 1844 Act still respected creditors' rights to pursue individual shareholders in Chancery (reflecting the fact that companies did not have limited liability until 1855). Thus in reality, creditors would often fasten on rich individual shareholders in Chancery rather than rely on the company's assets in the Bankruptcy Court.[89] This is reflected in the fact that in the first three years of the 1844 Act, only four companies were wound up under its provisions.[90]

59. The complexity of company insolvency law was compounded in 1848 when legislation was passed enabling shareholders to petition for the winding up of their company in Chancery.[91] This was part of a backlash against unlimited liability, which was increasingly seen to encourage the giving of "mischievous credit".[92] There was recognition that "there are such things as dishonest creditors as well as dishonest debtors."[93] One can only speculate on the influence such sympathy could have had on the broader movement for reform of insolvency and bankruptcy law occurring at the same time.

60. However, with shareholders able from 1848 to apply to Chancery, there was more than ever a concurrent operation and overlap of jurisdiction between Chancery and the Bankruptcy Court. This inevitably led to tension and was

[87] Ibid, 80.
[88] *Joint Stock Companies Act* (1844) 7 & 8 Vic, c 110 (**1844 Act**).
[89] Taylor, above n 85, 94 ftn 150.
[90] Ibid, 94.
[91] *Joint Stock Companies* (1848) 11 & 12 Vic, c 45.
[92] Taylor, above n 85, 97. Taylor speaks of one prominent example at 110. The North of England Joint Stock Banking Company, with capital of only £150,000, secured credit sufficient to incur liabilities of £1.9 million. The shareholders faced an ensuing "vortex of ruin".
[93] Ibid, 97.

described somewhat prophetically as an arrangement that “would achieve little beyond enriching the lawyers”.[94]

61. The rivalry between the courts quickly became self evident when the Royal British Bank failed in 1856. The bank’s shareholders obtained a winding-up order in Chancery before the creditors applied to the Bankruptcy Court. When the creditors sought to call upon the shareholders for contribution, the Bankruptcy Court could not make the necessary order. This was because to do so the Bankruptcy Court had to apply to Chancery for the necessary direction to be effected. However, Chancery having already made a winding up order for the shareholders, refused to make a (second) winding up order for the creditors.[95]

62. Ultimately, the 1848 legislation meant matters disintegrated into races to file with the different courts. These tensions were addressed by the introduction of limited liability in 1855; however they were not totally resolved until the Chancery was given sole competence to hear matters in 1862.[96]

63. At the same time the winding up of companies was moved out of the bankruptcy arena and under the *Companies Act*.[97] Thus, with the removal of one distinction between trader and non-trader, insolvency law created another distinction, between individuals and companies.

[94] Ibid, 110.
[95] Cooke, *Corporation Trust and Company An Essay in Legal History* (Manchester University Press, 1950), 149.
[96] *Companies Act* (1862) 25 & 26 Vic, c 89, ss 79, 81 and 205.
[97] *Companies Act* (1862) 25 & 26 Vic, c 89.

Early Bankruptcy law in the NSW colony

64. To move now to Australia and the early bankruptcy law particularly in the New South Wales colony. Although bankruptcy and insolvency laws were not specifically referenced in the 1787 First Charter of Justice, it did provide that all civil actions in excess of £10 were to be commenced only by arrest of the defendant.[98] However, there was no absolute right of creditors to imprison debtors on final execution.[99] This represented both a harsher and softer approach to that current at the time in England.

65. As the New South Wales colony became more successful there was an easing of the original tension between the need to have laws both that allowed easy credit to kick start the colony's economy and that were in line with the philosophies of the day.[100]

66. In 1823 the Supreme Court of New South Wales was created and expressly vested with insolvency jurisdiction.[101] Although generally the Australian colonies adopted the laws of England,[102] the bankruptcy statutes were regarded as an exception and considered to have no extra-territorial application.[103] The resultant lacuna was remedied by flexibility, innovation and at times what seems like blatantly ignoring the jurisdictional limits of the Court.[104] The effect of this was a relatively low long-term prison population for debt within the New South Wales colony.[105]

67. Despite the inventiveness of the Court, it was not until a series of droughts led to almost 2,000 applications for debt recovery in 1829 to 1830 that there was a focus on drafting insolvency laws, tailored to the needs of the New South Wales colony.[106] Even then, legislation was often experimental and only in place for short periods at a time.

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[98] Allsop and Dargan, above n 8, 448.
[99] Ibid, 449.
[100] Low, above n 58, 181.
[101] *Act to Provide for the Better Administration of Justice in New South Wales*, (1823) 4 Geo IV, c 96.
[102] *New South Wales Act* (1823) 4 Geo IV, c 96 and *Australian Courts Act* (1828) 9 Geo IV, c 83.
[103] Allsop and Dargan, above n 8, 449.
[104] Ibid, 449.
[105] Ibid, 449.
[106] Ibid, 450.

68. Of note and ahead of England, in 1830 debtors were allowed to be discharged if fair disclosure was made as to their assets and a majority of creditor's consented. Significantly, this applied indiscriminately to all persons, whether a trader or non-trader.[107]

69. Imprisonment before proceedings was then abolished, save where there was a perceived risk of absconding, in 1839.[108] Any form of imprisonment was subsequently removed in 1846, except were there was fraudulent concealment of assets or a threat of absconding or removing property from the jurisdiction.[109] This continued to be the case, broadly speaking, for civil actions in the New South Wales Supreme Court until 1970 and in the District Court until 2005.[110]

70. In comparison to England, it would be fair to describe these laws as "revolutionary".[111] Their progressive stance may be explained by a recognition that for the colony's survival the appropriate response to insolvencies was a commercial reintegration of debtors, rather than an obsessive focus on punishment.[112]

71. However, these developments in New South Wales were not mirrored in the other colonies and, over time, the lack of uniform legislation caused problems. The situation worsened as economic transactions across states and territories increased. The case between *The Union Bank* and *Tutle* in 1889 illustrates the point.[113] There, despite the relation back period of a sequestration order obtained in New South Wales, creditors who had executed judgments in Victoria and seized assets of the debtor during the relation back period, were not divested of their title in the seized assets.

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[107] *Debtors' Estates Distribution Act 1830* (NSW).
[108] *Arrest on Mesne Process Abolition Act 1839* (NSW), s 1.
[109] *Imprisonment for Debt Abolition Act 1846* (NSW).
[110] *Supreme Court Act 1970* (NSW), ss 10 and 98 and *District Court Act 1973* (NSW).
[111] Gava, 'The Revolution in Bankruptcy Law in Colonial New South Wales', in Ellinghaus Bardbrook & Duggan (eds), *The Emergence of Australian Law* (Butterworths, Sydney, 1989), 216.
[112] Note similar thinking with respect to the economic situation in Tasmania as expressed in Low, above n 58.
[113] *The Union Bank v Tutle* (1889) 15 VLR 258.

72. By the time of federation the laws between the states had grown significantly divergent. The most prominent distinction was that the colonies of New South Wales, Victoria, Western Australia and South Australia had laws based on England's 1883 *Bankruptcy Act*, while Queensland and Tasmanian laws were based on the 1869 *Bankruptcy Act*.[114]

Insolvency law after federation: unifying the States

73. At federation the Commonwealth was given power to legislate with respect to "bankruptcy and insolvency" per s 51(xvii) of the Constitution. Here the importance of terminology again is self evident. Despite the term "insolvency", the restrictive interpretation of the Commonwealth's corporation power by the High Court meant the insolvency of companies, was dealt on a state by state basis even after Federation.[115]

74. At least bankruptcy laws in theory could be dealt with on a unified national level. Despite this theoretical potential, national bankruptcy legislation, although drafted early on, was not ready until 1924. It was then subsequently amended so it did not commence until 1928.[116] Somewhat generously the 1924 Act was described in parliament as "…a bill, not for lawyers, but for poets and melodramatists. It is a bill to inspire the creative genius of writers of romance".[117]

75. Despite such praise and bravado, in substance the 1924 Act was not a unifying piece of legislation. It reflected the staunch defence of each States' version of bankruptcy laws which, rather than synthesised, were lumped together in the one document. Thus Part XI concerned schemes of arrangements and compositions stemming from Western and South Australian law, whereas Part XII dealt with deeds of arrangement as based on Victorian law.

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[114] Allsop and Dargan, above n 8, 455.
[115] *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330.
[116] *Bankruptcy Act 1924* (Cth) (**1924 Act**).
[117] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 17 September 1924, Vol 109, 4414-4418 (Frank Brennan).

76. Disunity also existed in that the 1924 Act created a Federal Court of Bankruptcy (established in 1930), with a single judge to exercise jurisdiction in New South Wales and Victoria. The other states had to use their Supreme Courts to exercise this jurisdiction. This at first caused constitutional problems when the Registrars were set up working in the State Courts.[118] However these were subsequently rectified by clarifying the Registrars, whilst under the control of the State Courts, were not part of their organisation.[119]

77. To make matters worse, the 1924 Act did not dictate what constituted a debt, this being left to the rules and common law principles within each state and territory.

78. These problems of disunity were in part rectified by the *Bankruptcy Act 1966*, which emanated out of a report by Sir Thomas Clyne. The 1966 Bankruptcy Act for the first time established a centralised institution for the administration of bankrupts (ITSA, now AFSA). The old Parts XI and XII were consolidated and refined into the current personal insolvency agreements. Unity was also furthered by the creation of the Federal Court in 1976 and the Federal Magistrates Court, now the Federal Circuit Court, in 2000. This provided, at least in theory, an appropriately resourced national forum in which bankruptcy disputes could be heard. Now the majority of all bankruptcy matters are filed in the latter court.[120]

79. Of course, as alluded to before, disunity still existed in corporate insolvency. Due to the restrictions on the Commonwealth's corporation power, from the 1860s till the 1960s corporate insolvency law was dealt with as states gradually updated their respective *Companies Act*, most commonly in reaction to amendments in Britain.[121] Australian corporate insolvency law during this period is remarkable "chiefly for its disconformity".[122] As in England, it unashamedly borrowed from bankruptcy law.[123]

[118] *Le Mesurier v Connor* (1929) 42 CLR 481.
[119] *Bond v George A Bond & Co Ltd* (1930) 44 CLR 11.
[120] Federal Magistrates Court of Australia, Annual Report 2008-2009.
[121] Symes and Duns, *Australian Insolvency Law* (LexisNexis Butterworths, 2nd ed, 2012), 4.
[122] Tomasic, *Australian Corporate Insolvency Law* (Butterworths, 1993), 3.
[123] Symes and Duns, above n 120, 3.

80. By the 1960s a supposedly uniform company law was implemented by each State enacting legislation modelled on a common *Companies Act*. However, these acts were in reality never uniform, and became increasingly less so during the 1960s and 1970s as individual States legislated independently.[124]

81. Unity in corporate insolvency was not fully achieved until the successful referral of state power to the Commonwealth allowing for the introduction of the current *Corporations Act*.[125] This followed the failed attempts to confer jurisdiction on the Federal Court in the early 1990s.[126] The establishment of this referral has finally ensured a unified method of dealing with bankruptcies and corporate insolvencies, only 100 years after federation.

Privatised, regulated and collective administration in Australia

82. Other than a struggle to achieve unity, another feature of the history of Australian insolvency law has been the privatisation of the administration of estates and greater collective administration. This has coincided with a move from court to government regulation.

83. Throughout the 20th century there were various attempts to limit the government's role to one of regulator and effectively outsource the duties of trustees to private administration.[127] The step towards government, as opposed to court, regulation began in England with the administration of insolvent estates being handed to the Board of Trade in 1883.[128] Prior to this both the administration of insolvent estates and any regulation of those administering the estates fell under the purview of the English courts, most relevantly Chancery.

84. In Australia, government regulation of bankruptcy was set on a firm footing when the 1924 Act established the Inspector General in bankruptcy with supervisory functions over all trustees. However, transitioning regulation away from the courts

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[124] LexisNexis, *Australian Corporation Laws Principles and Practice*, 1.1.0005 and 2.1.0105.
[125] *Corporations (Commonwealth Powers) Act 2001* (NSW); (Vic); (Qld); (SA); (Tas); (WA).
[126] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.
[127] See for instance the recommendations of the Lynch Committee introduced in the *Commonwealth Functions (Statutes Review) Act* 1981 (Cth).
[128] *Bankruptcy Act 1883* (UK).

has proved a gradual process, with courts still conducting non-judicial administrative responsibilities as late as December 1996.[129]

85. Similarly, government regulation of companies (and thus, corporate insolvency), was always present in some form or another in Australia. At first this was handled by relevant government ministers and their departments. For instance, in 1840 regulation of company accounts required disclosure to be reported to the Colonial Secretary of New South Wales.[130] Individual state arrangements for government regulation made way for a national scheme in the 1970s with the introduction of the National Companies and Securities Commission. This in turn became the Australian Securities Commission and is now ASIC.

86. With respect to private rather than official administrations, I have already detailed the swinging pendulum of preference that occurred throughout England's history. In Australia, from the time of Federation, private administration has always been preferred over official administrations in the context of bankruptcy. Thus while the 1924 Act created an official receiver, it was always intended it would be a trustee of last resort. With regards to corporate insolvency, there has been more fluctuation in the form of approach. Commissioners were used to liquidate companies early on,[131] however a Public Trustee was in use in 1934.[132] Today there is a blended approach, with liquidators either being appointed by creditors or the court in different circumstances. The liquidators whilst private individuals are given some "official" status by the requirement that they be registered with ASIC.[133]

87. One of the biggest hurdles to increasing the proportion of private administrations was the lack of training and expertise within the private profession, as well as the

[129] Wenn and Lowe, 'History of bankruptcy administration in the 20th century' (2001) 11(1) *History of Administration* 10, 10-11.
[130] *An Act to provide for the periodical publication of the Liabilities and Assets of Banks in New South Wales and its Dependencies and the registration of the names of the Proprietors thereof* (1840) 4 Vict No 13.
[131] *An Act for facilitating the winding up of Joint Stock Companies unable to meet pecuniary engagements* (1847) 11 Vic.
[132] *Companies (Receiver and Manager) Act 1934* (NSW).
[133] *Corporations Act*, s 1282.

overwhelming number of insolvent estates to be administered.[134] In the case of bankruptcy, privatised administrations were made easier through the introduction in the 1966 Act of an automatic discharge system. This allows an insolvent to be discharged after five years from the date of bankruptcy.[135]

88. The prior requirement, harking back to the 1860s, as I mentioned required the debtor to at least provide a return to creditors of 10 shillings in the pound, or 50 cents in the dollar, before being discharged. Given the average return for unsecured creditors is currently around one cent in the dollar, it is clear the automatic discharge system is crucial to maintaining a manageable number of estates to be administered by the private, rather than official, sector.[136]

89. The development of professional associations such as the Australian Restructuring, Insolvency and Turnaround Association have also been crucial in allowing Australian insolvency to effectively privatise the administration of insolvent estates.

90. In terms of collective administration, a particularly important event was the 1966 Act's amalgamation of the official receivers into a statutory corporation (now a body corporate). This allowed for the creation in 1982 of the Common Investment Fund,[137] where individual trust funds are pooled and invested on a short-term basis while waiting for the final distribution of the estate. Any income from the investment is used to off-set the administrative costs associated with the bankruptcy system. This undoubtedly marks the high watermark of the collective administration of estates in insolvency history.

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[134] Wenn and Lowe, above n 127, 11.
[135] *Bankruptcy Act 1966*, s 149.
[136] AFSA, Selected Statistics on Personal Insolvency in 2012-2013, 8.
[137] *Bankruptcy Amendment Act 1980* (Cth).

The Harmer Report: modernising corporate insolvency

91. The most recent defining event for the history of Australian insolvency law is the implementation of the recommendations from the 1998 Harmer Report. The Report was triggered by significant increases in insolvencies. For instance, bankruptcies increased from 3,600 in 1985 to 1986, to 11, 500 from 1991 to 1992.[138] This has largely been attributed to excessive uses of credit facilities. An infamous example is the bankrupt who purchased two new Holden Kingswoods, a sedan and a station wagon despite disclosing on his application for credit that he was an invalid pensioner.[139]

92. The Harmer Report was the first time both corporate insolvency and bankruptcy laws were reviewed together. Its recommendations primarily focused on updating corporate insolvency law to better reflect the advancements in corporation law. Significant recommendations in this area were the changes to the statutory demand process,[140] and the replacement of "official management" with that of voluntary administration.[141] Prior to the latter invention it was said before the Harmer Report, there were no viable options to save a company other than winding it up. As Mr Harmer has described:

> "I can recall during my work at the [ALRC] we thought, "Maybe if you can save just 10 per cent of all insolvent or near insolvent corporations then you are going to be at least nine per cent in front of what was then happening".[142]

93. Other, more general recommendations of the Report that are noteworthy include the rewriting of the insolvent trading legislation (so as to remove the right of individual creditors to take recovery actions). This represents a further step forward in the focus on creditors as a collective.

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[138] Keay's, above n 52, 8.
[139] Registrar O'Connor, 'Farewell speech for 1958-1984' (Speech delivered in South Australia, 7 November 1984).
[140] Assaf, *Statutory Demands and Winding Up in Insolvency* (LexisNexis Butterworths, 2nd ed, 2012), 1.29.
[141] Karen O'Flynn, *The Harmer Amendments: 15 years on*, http://www.claytonutz.com/people/oflynn_karen/docs/UNSW_insolvency_paper.pdf.
[142] Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency Laws: a Stocktake*, Canberra, June 2004, at par [5.13].

94. However, a significant recommendation that was not made was the eradication of the dual system of bankruptcy and liquidation. It has been said this "imposes an unnecessary regulatory burden on insolvency practitioners and is impeding the efficient conduct of the insolvency regime."[143] Nonetheless the 1988 Harmer Report was of the view that the bifurcated systems were not an issue of major significance warranting unification.[144] England, as well as Canada and the United States already have consolidated, rather than dual, systems.

Insolvency law going forward

95. The Harmer Report largely brings my account of the history of insolvency law to a conclusion. Moving forward there will continue to be fluctuations on the stance taken between privatised as opposed to official administrations and the degree of government or court regulation. Individual cases have already caused oscillations in the perceptions of the fairness in the balance the law currently strikes between creditor and debtor. For instance, it was only after the under hand use of small creditors in the Skase bankruptcy that the requirement that the election of a trustee be by majority in value, as well as number, was introduced. Similarly greater investigative and recovery powers were given to trustees only after the media coverage over the bankruptcy of Alan Bond.[145]

96. More recently the tension between creditors, debtors and shareholders has begun to be played out in a new context. On 16 June 2014, for the first time with respect to a listed company, the Supreme Court granted leave to an application under s 444GA of the *Corporations Act*. This section allows administrators to wipe shareholder's property rights in an attempt to recapitalise the company. In the case of Mirabela Nickel Limited, this meant 98.2% of shares are to be transferred to unsecured creditors, without the consent of, or consideration to, the shareholders.[146]

[143] Keay's, above n 52, 9 ft 11.
[144] Australian Law Reform Commission, *General Insolvency Inquiry*, ALRC Report 45 (1988), par [4].
[145] *Bankruptcy Amendment Act 1991* (Cth).
[146] *Mirabela Nickel Limited (subject to deed of company arrangement) (ACN 1081 161 593)* [2014] NSWSC 836 and Janna Robertson, 'Recent Restructuring Trends and Techniques' (Speech delivered for Insolvency Law Series Part 2 hosted by The Continuing Professional Education Department of The College of Law, 18 August 2014).

97. Another battleground being forged between creditors, debtors and in this case beneficiaries, is how to deal with insolvent trusts, particularly of late, insolvent managed investment schemes. Despite the issue being noted in the Harmer Report and subsequently, there is still no legislative scheme covering these entities in the event of insolvency. Instead this is probably one of the last outposts in insolvency law which has been left to the ingenuity of the Courts and the general law to solve. Now however is probably not an ideal time to launch into a discussion on what are the best solutions to these problems.

98. So instead, I will content myself with observing simply that the fairness of the balance between debtor and creditor, private or official administrations and government or court regulation will undoubtedly continue to be judged by the public. However, it would seem safe to say that the fundamental principles by which the state of insolvency law will be judged are settled and historically have been for quite some time.