

1 - PERSONAL INSOLVENCY

HISTORY OF BANKRUPTCY LAW

- **The Roman Law of the Twelve Tables (450 BC)**
 - *Gave the debtor 30 days to pay or find someone else to pay*
 - *If payment not made, fastened in stocks for 3 market days*
 - *If still unpaid, debtors were entitled to physically divide the debtor's body among themselves*
 - *Division was in proportion to the creditor's share of the debt*
- **The first English bankruptcy statute (1542)**
 - *Creditors could complain to the Lord Chancellor and obtain seizure of the debtor's property*
 - *The remedy was initially only available to traders*
- **The debtors' prison**
 - *Until 1869 in England*
 - *Until January 2009 in Greece*
 - *Still exists in Dubai*

COMMONWEALTH LAW

- The Commonwealth Of Australia Constitution Act in s 51(xvii) gives the federal parliament power to legislate in relation to bankruptcy and insolvency
- The current legislation is the Bankruptcy Act 1966
- Federal courts deal with bankruptcy matters - s 27
- Inspector-General in Bankruptcy - ss 11,12
- Insolvency and Trustee Service Australia (ITSA)
- Official Receiver - s 15
- Official Trustee - ss 18,19
- Registered trustees - s 154A

PURPOSES OF BANKRUPTCY LAW

- **Pari passu distribution**
 - *proportional sharing*
 - *only deals with unsecured creditors*
 - *often little left after payment of secured creditors and costs*
- **Protection**
 - *bankrupt is protected against further claims by creditors*
 - *protection for creditors*
 - *assets collected and divided amongst creditors*
 - *bankrupt has the slate wiped clean and can start again*
- **Investigation**
 - *why the insolvency occurred*
 - *whether other assets are available for creditors*
- **Restrictions on dealings**

- *financial conduct of bankrupt is restricted and supervised*

INTERACTION WITH OTHER AREAS OF LAW

- Property law - what if your vendor goes bankrupt?
- Commercial law - can you obtain title from a bankrupt seller?
- Litigation - can you sue or be sued by a bankrupt?
- Family law - can maintenance owed by a bankrupt parent be recovered?
- Superannuation - can creditors get at a beneficiary's entitlement?
- Even if you never appear directly in a bankruptcy case, you will certainly need to know the effect which bankruptcy has on titles and rights.
- Bankruptcy affects your future right to practise law:
 - *the "bankrupt barristers" scandal*
 - *Legal Profession Act 2004 s 498(1)(d)*

SOLVENCY

"SOLVENT" AND "INSOLVENT"

- S 5(2) provides: "A person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable."
- s 5(3) provides: "A person who is not solvent is insolvent."
- But how do you prove insolvency?
 - *You know nothing about the debts, liabilities, income and expenses of the debtor*
 - *The debtor may not even keep financial records*
- The Bankruptcy Act provides a simple means of establishing insolvency by prescribing that certain events constitute an "act of bankruptcy"

ABILITY TO PAY DEBTS AS THEY FALL DUE

Sandell v Porter (1966) 115 CLR 666

"Insolvency is expressed in s. 95 as an inability to pay debts as they fall due out of the debtor's own money. But the debtor's own moneys are not limited to his cash resources immediately available. They extend to moneys which he can procure by realization by sale or by mortgage or pledge of his assets within a relatively short time - relative to the nature and amount of the debts and to the circumstances, including the nature of the business, of the debtor. The conclusion of insolvency ought to be clear from a consideration of the debtor's financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity. It is the debtor's inability, utilizing such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates insolvency. Whether that state of his affairs has arrived is a question for the Court and not one as to which expert evidence may be given in terms though no doubt experts may speak as to the likelihood of any of the debtor's assets or capacities yielding ready cash in sufficient time to meet the debts as they fall due."

- High Court considered a previous version of the definition - *"unable to pay his debts as they become due from his own money"*
- This does not mean just cash on hand
- Regard should be had to monies which a debtor could borrow on mortgage, or which could be obtained by selling assets
- Whether a person is insolvent will be a question of fact in each case