

SIMPLIFIED NOTES

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Topic 1. Insolvency

Test - A person is solvent if, and only if, the person is able to pay all their debts, as and when they become due and payable [95A CA; 5(2) – (3) BA]

No.	Question	Overview
1.	What is the period of insolvency?	<ul style="list-style-type: none"> Identify from facts
2.	What are the debts in this period?	<ul style="list-style-type: none"> Identify from facts
3.	Are the debts payable?	<ul style="list-style-type: none"> Delays in chasing up repayment or taking enforcement action <u>not relevant unless</u> <ul style="list-style-type: none"> Debtor can show some <u>binding agreement</u> to vary payment terms Debtor can establish an <u>estoppel</u> or Unless debtor can demonstrate a <u>course of dealing</u>. Otherwise court will revert to original payment date [Southern Cross]
4.	Other indicia? [Lewis v Doran]	<ul style="list-style-type: none"> Continuing losses Liquidity ratios below 1 Overdue taxes Inability to borrow further funds or to raise further capital Bank requests to reduce overdraft Changing supply terms to COD, or otherwise demanding special payments before resuming supply Failure to pay within trading terms Post dated or rounded sum cheques Dishonoured cheques Special arrangements with selected creditors Enforcement action taken by creditors Inability to produce timely and accurate financial information
5.	Mere temporary shortage of cashflow? [Crema v Land Mark]	<ul style="list-style-type: none"> Other realisable assets [Sandell v Porter] that can be liquidated <u>promptly</u> (3-9 months) [Hall v Poolman] Borrowed funds (regardless of security or not) [Southern Interiors; 95A CA] Group support [Lewis v Doran] including group debt [Hall v Poolman]

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Topic 2. Bankruptcy

2.1. Process

2.1.1. Voluntary bankruptcy (debtor's petition)

a) **Commencement** – When Official Receiver accepts Debtor's Petition [57A B/A]

Debtor's petition process		
No.	Stage	Comments
1)	Declaration of Intention to present a Debtor's Petition	<ul style="list-style-type: none"> • Submitted to Official Receiver [s 54A(1)] • Must be accompanied by a Statement of the Debtor's Affairs [s 54A(2)]
2)	Acceptance of the Declaration by Official Receiver	<ul style="list-style-type: none"> • Moratorium on seizures by the bailiff • Freedom from Garnishee Orders • Free counselling from AFSA on Debtor's options • 21 day stay of action once Declaration is accepted and signed by Official Receiver <ul style="list-style-type: none"> ○ Stay may be ended by Debtor's Petition or Creditor's Petition [definition of 'stay period'] • NB: Gives debtor some breathing room
3)	Acceptance of Debtor's Petition	<ul style="list-style-type: none"> • Official Receiver endorses petition • NB: Official receiver must reject a Debtor's Petition unless, at the time when the petition was presented, the debtor: [s 55(2A)] <ul style="list-style-type: none"> ○ Was personally present or ordinarily resident in Australia; or ○ Had a dwelling-house or place of business in Australia; or ○ Was carrying on business in Australia either personally or by means of an agent or manager; or ○ Was a member of a firm or partnership carrying on business in Australia by means of a partner or of an agent or manager. • Simultaneous <u>residency</u> accepted in law [<i>Battenberg v Restom</i> [2007]]

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Topic 3. Winding up

3.1.1. Effect of winding up

Effect of Winding Up	
Effect on Company's Business	<ul style="list-style-type: none"> • Company <u>continues to exist as a legal entity such that its corporate state and powers continue</u> until registration • All <u>transactions/dispositions are void against liquidator following commencement</u> [468] • Company must <u>cease to carry on business except to the extent</u> that the liquidator believes it will assist or be necessary for the beneficial disposal of the business <ul style="list-style-type: none"> ○ Voluntary administration [s 493(1)] ○ Compulsory liquidation [s 477(1)(a)] • Company <u>retains ownership of its property</u> <ul style="list-style-type: none"> ○ Liquidator merely becomes the agent of the company and the company retains both the legal and beneficial ownership of the property • However, company can <u>no longer deal with the property</u> (in court liquidations) [s 468(1)] after the commencement of winding up [s 513A(e)] <ul style="list-style-type: none"> ○ Company is protected from <u>creditors' claims which are automatically stayed</u> [s 471B] • Existing proceedings by the company may be continued by the liquidator
Unsecured creditors	<ul style="list-style-type: none"> • <u>Automatic stay of legal proceedings against company</u> but court may give leave to commence or continue <ul style="list-style-type: none"> ○ Winding up by court order [s 471B; 468(4)] ○ Voluntary winding up [s 500(2)] • <u>All debts (present, future, certain or contingent, ascertained or for damages) are provable in winding up</u> [s 553(1)] <ul style="list-style-type: none"> ○ Includes <u>claims</u> for unliquidated damages ○ Not limited to parties with a debt c.f. s 459P • However, legal status of company is unaffected <ul style="list-style-type: none"> ○ Liquidator is an agent for the insolvent company ○ Unlike bankruptcy, there is <u>no vesting of assets in the liquidator</u> but on occasions this does occur under a court order. • Public documents must disclose liquidation status • Winding up is normally an event of default in loan documents.
Secured creditor	<ul style="list-style-type: none"> • Secured creditors can enforce security e.g. by appointing a receiver and manager and prove as unsecured creditors for any balance [s 471B; 554E] • However, any PPSA security interest over personal property will need to be perfected on the PPSA register within <u>20 business days</u> of its creation

END SAMPLE

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