

Chapter 16

The History of Bankruptcy and Insolvency Law in England and Australia

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The history of insolvency law is as much economic as legal, owing to the natural relationship between debt and commerce. Without trade, credit was an exceptional concept and there was little need for laws in respect of it. While trade was regional and economies were agrarian, private remedies of individual creditors were generally sufficient. When commerce extended beyond the regional, with the rise of the merchant and the advent of capital, there arose the need for a system of laws for the enforcement of debt by creditors acting together. Absent collective execution, one creditor could claim an unfair advantage over another. There also arose the need to punish the absconding debtor – to bring home what may be seen as the criminality of conduct in violation of commercial standards of morality, injurious to the economy and injurious to the polity.

By reason of the colonial past of Australia's current legal system, much of this chapter must be devoted to the development of the roots of the Australian law of insolvency in England.¹ That said, to a degree, the Australian colonies deliberately and self-consciously sought from the beginning of their bankruptcy laws to draft different provisions when thought to be necessary to suit local conditions or when a difference in policy or principle was called for.

The objects of Australian insolvency law are threefold. The first object is the provision of a fair and orderly system of rules to regulate the assessment, collection and distribution of a debtor's assets (whether an individual or corporate) between creditors where the assets are insufficient to satisfy all debts. Fundamental to this object is the principle of equality or rateability, being distribution of the assets in proportion to the interest of each creditor. The second object is the prevention of fraud upon creditors, whether by the debtor or by particular creditors. The third object (with both moral and commercial

¹ A helpful and succinct history of English bankruptcy law to 1883, taken from the *Encyclopaedia of the Laws of England* (3rd ed), Vol II, 80-83, is cited in the *Report of the Committee Appointed by the Attorney-General of the Commonwealth to Review the Bankruptcy Law of the Commonwealth 1962* (Australian Government Printer, 1962) (Clyne Report), [11].

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