

# GUEST EDITORIAL: PERSONAL INSOLVENCY – A FRESH START

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The international personal insolvency conference, *A Fresh Look at Fresh Start: The Human Dimension to Bankruptcy* was hosted by Queensland University of Technology, Brisbane, Australia in September 2016. The conference attracted delegates from a wide-range of disciplines including academics, accountants, economists, financial counsellors, lawyers, regulators, policy makers and non-profit organisations. They came from around the globe bringing perspectives from North America, Europe, Africa, Asia, and Oceania.

While the current focus in much insolvency scholarship or commentary is upon salvaging economic value for large businesses facing financial collapse, the harsh reality is that many more people experience financial stress as over-indebted consumers or ‘owners’ of micro/small/medium sized enterprises. This conference provided a forum for scholars, practitioners and policy-makers to discuss and present on the human experience of bankruptcy.

This Special Issue of the *QUT Law Review* contains a select number of articles based on papers prepared for the conference. The issue begins with an invited contribution by The Honourable Justice Andrew Greenwood of the Federal Court of Australia and is based upon his Opening Remarks to launch the conference. His article provides a fascinating insight, based upon original research into the court archives, into the bankruptcy of a prominent Australian lawyer, Sir Garfield Barwick. Early in his career at the bar, Barwick was made bankrupt as a result of legal obligations entered into in order to assist a younger brother — just prior to the Great Depression of the 1930s. Despite this, Barwick went on to become a leading figure in Australian and international legal circles as a King’s Counsel; Minister of the Crown, including a term as the federal Attorney-General; a lengthy term as Chief Justice of the High Court of Australia; a judge of the International Court of Justice; and an occasional member of the Privy Council. Yet not many students of the law and his judgments would be aware that this ‘archetypal self-made man, [who] was a fervent believer in free enterprise, which required “effective competition”, and favoured small business<sup>1</sup> had experienced the impact of bankruptcy on his professional and private life.

The second article, by Professor Iain Ramsay of the University of Kent, explores themes of the conference from a global perspective. Professor Ramsay is well-placed to delineate an

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<sup>1</sup> George Winterton, ‘Garfield Barwick’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press Australia, 2001) 58.



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emerging international paradigm on personal insolvency law, notably based on his former role as a co-author of a World Bank Report on the Treatment of the Insolvency of Natural Persons and his current Leverhulme Trust Fellowship, focusing on explanations for the patterns of development of personal insolvency in the US and Europe. The article includes a discussion of recent radical theories of consumer credit in contemporary capitalism and how these radical insights might contribute to future socio-legal research on personal insolvency law.

The next article is based on the conference's opening address by Professor Jay Westbrook, University of Texas Austin. Professor Westbrook, whose distinguished legal scholarship has analysed American bankruptcy law over many decades, reviews the US experience since the controversial 2005 amendments to the American bankruptcy law. Professor Westbrook likewise examines tensions between consumer credit and personal insolvency and suggests a reappraisal of the goals of consumer bankruptcy law in the 21<sup>st</sup> century. This includes abandoning the idea that bankruptcy law should be used as a collection device for professional creditors in consumer cases. The article discusses various possible approaches for a new reform while emphasising the importance of the continuing role of lawyers and courts in the consumer bankruptcy process.

The human dimension is central to the article by scholars from Leiden University, Jennifer van Kesteren, Professor Jan Adriaanse, and Professor Jean-Pierre van der Rest, a multi-disciplinary team who have undertaken a phenomenological study to gain an understanding of the private, personal and social implications of the legal procedure as experienced by bankrupt entrepreneurs in the Netherlands. While the notion of bankruptcy as a fresh start was a theme of the conference, this paper describes the experience as being comparable to losing a loved one. This paper depicts the subjects undergoing a psychological process similar to mourning — with a lack of empathy, respect and transparency by formal institutional representatives seen by the entrepreneurs as 'emotional punishment'. The mental health implications of bankruptcy and its effectiveness (or lack thereof) in reinvigorating small business entrepreneurs are receiving increasing attention and this article will contribute usefully to both of these areas of cutting edge scholarship.

Moving now to the Asia-Pacific region, Associate Professor Stacey Steele, Melbourne Law School and Associate Professor Jin Chun, Doshisha University Japan, provide a thorough comparative analysis as a basis for some suggestions for reforming Australia's personal bankruptcy law, based on the Japanese experience. At the turn of the 21<sup>st</sup> century, Japan introduced a new proceeding for individual rehabilitation. By comparing Japanese approaches to discharge, investigation and continuing obligations, including requirements for income contributions, the authors describe the proposed Australian reforms as conservative and not as debtor-friendly as those in Japan. The article also addresses the obstacles of adverse credit histories and enforcement of personal guarantees against entrepreneurs and describes these as problematic for an entrepreneur seeking a fresh start in both jurisdictions.

Next, Trish Keeper, Senior Lecturer, Victoria University of Wellington, examines pension laws and bankruptcy in New Zealand. Given the aging profiles of bankrupts, this issue raises relevant and significant policy issues in respect of whether some, or all, of a bankrupt's pension savings should be available to the estate for the benefit of a bankrupt's creditors. This paper critically examines a recent New Zealand proposal to expose more pension savings to the claims of creditors in bankruptcy, in stark contrast with a worldwide trend in the opposite direction. The basic policy objectives of personal bankruptcy are thrust into stark relief by this proposed incursion into debtors' old-age safety nets. An alternative, more sensible, humane,

and effective approach to sanctioning opportunistic ring fencing of assets available to creditors is proposed.

Finally, issues arising at the intersection of superannuation, taxation and bankruptcy laws are examined by Dr Jennifer Dickfos and Catherine Brown, Griffith University, and Jason Bettles, Partner, Worrels Accounting. Like the preceding paper on pension savings, this paper argues for a need to balance the protected asset status of superannuation funds, a significant personal issue for bankrupts, with other objectives, such as achieving a fair distribution of the bankrupt's assets among creditors.

It has been a pleasure to serve as Guest Editors of this Special Issue and to assist in compiling this selection from an excellent range of papers that contributed to a very successful and stimulating forum on the human experience of bankruptcy. The Guest Editors also thank the many anonymous referees from around the globe who have also assisted in bringing this Special Issue to fruition. The topics examined here are of increasing importance to policy makers worldwide. Several of the papers in this Special Issue have already been cited in major policy analyses by leading institutions such as the World Bank, and we are immensely proud to have played a role in bringing these valuable contributions to the attention of the international community.