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BARWICK, BANKRUPTCY AND THE HUMAN DIMENSION

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The overall theme of this conference is 'A Fresh Look at "Fresh Start": the Human Dimension to Bankruptcy.' The Queensland University of Technology prides itself, rightly, on being a University for the real world. The topics, the subject of this conference, engage that notion in a very direct and contemporary way. However, let me give you an old illustration of a contemporary problem.

I GARFIELD BARWICK

Garfield John Edward Barwick became one of Australia's most successful advocates. He dominated the High Court lists and as we all know, he was appointed Chief Justice of Australia on 27 April 1964 after a successful career in federal politics, upon the retirement of Sir Owen Dixon.[1] He was born on 22 June 1903. He was the eldest of three sons of Jabez Edward Barwick and Lily Grace Ellicott.[2] Jabez Barwick was a printer. He had also once been employed as a journalist working for country newspapers. Garfield Barwick believed that pursuing this occupation brought his father to Moree where he met the Ellicott family and Lily Ellicott. In Moree, Jabez changed his occupation from that of a journalist and became a printer, most likely working in a newspaper printery.[3] He continued to work in the printing industry and ultimately had to abandon his trade as he had become affected by lead poisoning from handling the moveable lead type by which printing was done at that time.[4] Jabez and Lily Ellicott moved to Sydney. Lily Ellicott was a Wesleyan Methodist who attended the Bourke Street Methodist Mission.[5] Both parents believed in the Methodist conception that hard work and discipline lead to the realisation of God's gifts in each individual.[6] As to these matters and other aspects of his

* Justice of the Federal Court of Australia. This is a slightly edited version of Opening Remarks delivered by His Honour at the international personal insolvency conference 2016, *A Fresh Look at Fresh Start: The Human Dimension to Bankruptcy*, (Faculty of Law, Queensland University of Technology, 7 September 2016). This paper was an invited contribution to this Special Issue and hence has not been peer-reviewed.

[1] The remarks at the ceremonial occasion of the retirement of Sir Owen Dixon from the office of Chief Justice of the High Court are recorded at (1964) 110 CLR at (v) and following. Interestingly, the Commonwealth of Australia was represented by the Prime Minister, Sir Robert Menzies. The remarks at the ceremonial occasion of the taking of the oaths of office by Sir Garfield Barwick are recorded at (1964) 110 CLR (xiv). This paper was also published as a speech at the Federal Court of Australia website – http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-greenwood/greenwood-j-20160907. The paper will also be published in the Australian Law Journal in December 2017.

[2] Barwick's mother was always affectionately known amongst her family and friends as Lally: Garfield Barwick, *A Radical Tory: Garfield Barwick's Reflections and Recollections* (Federation Press, 1995) 3.

[3] Ibid 4.

[4] Ibid 9.

[5] Barwick described his mother as 'young and vigorous, physically and mentally strong-minded and a good administrator'. He also describes her as a woman who 'had those radical leanings so often associated with Wesleyanism'. He says that both his parents were intelligent, logical and courteous though forceful in discussion. Neither parent was dogmatic: Barwick, above n 2, 5.

[6] Barwick, above n 2, 5.

life, Barwick expressed some reservation about placing reliance upon the accuracy of David Marr's biography, *Barwick*.[7]

Garfield Barwick regularly attended Sunday School in Flinders Street, Darlinghurst and won many prizes in state-wide annual examinations in biblical knowledge. He attended Cleveland Street High School and won a bursary to the famous Fort Street High School.[8] Jabez Barwick's illness and the abandonment of his trade caused the Barwick family to move from their Glenview Street, Paddington home and become shopkeepers in the suburb of Burwood.[9] Barwick's Leaving Certificate results won him a bursary to Sydney University, which paid his fees and provided him with £5 annually for textbooks, and entitled him to free travel on suburban railway between Burwood and Central Sydney.

In 1929, Garfield Barwick married Norma Montier Symons.[10] After passing the Intermediate Certificate, Norma worked full-time in her mother's millinery business. She later managed a second shop for her mother in a neighbouring suburb. These millinery skills would become very important having regard to the events in 1930 that were to befall Garfield Barwick.

Barwick entered Sydney University at 16 years of age.[11] He graduated with a Bachelor of Arts in 1922 at the age of 19. He continued his law studies at the Law School in Phillip Street. He took up Articles of Clerkship with Mr HW Waddell to whom he was recommended by the Dean of the Law School.[12] Mr Waddell had grazing interests in country New South Wales at Merriwa. He went to his country property from time to time and sometimes for up to a week. In these periods, Mr Waddell entrusted important decisions in the conduct of the practice to Barwick. He gained vast experience in the practice of the law. In his third year as an Articled Clerk he was receiving ₤9 9s per week.[13] Barwick planned to go to the Bar. However, he had overlooked the need to register as a 'student at law', a step which had to be effected at least two years before applying for admission to the Bar. Notwithstanding that he had served three years as an articled clerk and had passed all the necessary exams and had acquired an Arts

[7] In the prologue to *A Radical Tory*, Barwick says this at p ix: 'It is not my intent to attempt any rectification of David Marr's text, but I must refute two statements he made about my parents. Firstly, it is said that when my parents met, their families were neighbours and related by intermarriage. … They were not neighbours: none of one family had met any member of the other. The Barwicks lived in the Monaro in the south of New South Wales, principally around Cooma. My father, Jabez Edward Barwick was born on 23 May 1874 at Monga, New South Wales, the son of Edward and Sarah Jane Barwick, nee Warne. The Ellicotts lived around Inverell and Moree in the north-east of New South Wales.' Secondly, as to the suggested distance between Barwick's parents, Barwick observes that his parents were devoted to each other all their lives, enjoyed a successful marriage and presided over a close-knit and happy family.

[8] At Fort Street, Barwick was influenced by Mr AJ Kilgour, the Headmaster, who was a qualified Barrister. Kilgour very much favoured a choice of law or medicine as the career for his students. Barwick had entered Fort Street with an interest in the law and at the end of his school days there he remained committed to following the law: Barwick, above n 2, 8.

[9] They were also encouraged to leave the Paddington house on medical advice due to Garfield Barwick's persistent bronchitis with its complications of asthma. The Burwood premises were in a 'drier climate'. Barwick's parents opened a novelty shop and they lived over the shop.

[10] Norma's father had died while she was very young. Her widowed mother and her grandmother lived above a millinery shop which Norma's mother conducted in Burwood Road, on the opposite side of the railway line to the novelty shop operated by Barwick's parents.

[11] Barwick recognises that he was too young to absorb all the benefits of University life: Barwick, above n 2, 12.

[12] At this time, it was customary for solicitors to ask for substantial premiums when agreeing to Articles of Clerkship. No premium was asked of Barwick by Mr Waddell. Waddell practised in Challis House, Martin Place. His practice was largely conveyancing but there was always some litigious work on hand: Barwick, above n 2, 13.

[13] This was a very significant sum for an Articled Clerk in about 1924.

degree and a Law degree, he nevertheless undertook two further years of studentship rather than apply to the Supreme Court for an exemption. In this period, he worked for a fellow Fort Street lawyer, Mr Roy Booth.

On 1 June 1927, Barwick was admitted to the Bar and commenced a search for chambers in Phillip Street. After many enquiries, Sybil Greenwood (sometimes known, according to Barwick, as Sybil Morrison) agreed to let Barwick share her chambers as a temporary arrangement in Campbell House.[14] Barwick was 24 when he commenced practice at the Bar, 'a man without capital and certainly one unable to pay high rent'.[15] In March 1929, Barwick and Norma Symons were married. Barwick was 26, and by this time, he was receiving 'steady work'.[16] He and Norma bought a cottage at Cheltenham financed by first and second mortgages and exhausting what little capital they had in the process. The feared recession was by now deepening into a depression.

The events I am now about to describe are based upon an examination of all the documents contained in the official file relating to the bankruptcy of Garfield Barwick. The actual file is held by the National Archives of Australia and is in a fragile condition, but the National Archives office has digitised the entire file at the request of the Federal Court,[17] and it is in this format that the entire file has been made available to the author. The file consists of approximately 400 pages of documents, including all the proofs of debt, the affidavits of Barwick sworn on 21 February 1930 and 29 October 1930, the extracts of Barwick's oral examination and the transcripts of cross-examination of Barwick and other witnesses relied upon by him in seeking to resist the making of a sequestration order. It contains the Official Receiver's report and other related court documents.

Garfield Barwick had two younger brothers. The elder, Douglas Frederick Barwick, was six years younger than Garfield Barwick. In September 1928, Garfield Barwick purchased for Douglas the lease (having a term of four years), stock and goodwill of a petrol service station known as the 'Super Service Station' at Parramatta Road, Ashfield for £550. Douglas was 19 years of age. Thus, he was a minor. To enable credit to be obtained for him, the lease, on purchase of the business, was taken up in Barwick's name and credit for the business was extended to Barwick in his personal capacity.[18] Barwick had no part in the management or control of the business, which was carried on by his brother, and a partner, a man named Plumstead.[19] Nor did he derive any profit from the business other than a payment by way of interest on monies made available by him in the purchase and development of the business.[20] In his Public Examination on 4 August 1930, Barwick explained that the purchase price of

[14] Campbell House was a two-storey double-fronted building next door to St Stephen's Church. On the first floor level, WA Holman KC occupied two rooms off a wide central hallway. Once Holman got to know Barwick, he gave Barwick the use of his secretary's room, which formed part of Holman's suite.
[15] Barwick, above n 2, 19.
[16] Ibid 26.
[17] The file is held by the National Archives as a client file of the Federal Court of Australia in view of the Court's jurisdiction in bankruptcy. At the time of the relevant events, the Supreme Court of New South Wales was exercising federal jurisdiction in bankruptcy.
[18] Affidavit of Garfield Barwick sworn 21 February 1930. Some accounts of this foundation transaction describe Barwick as the guarantor of the debts. This is incorrect. The transactions were directly with Barwick.
[19] In his Public Examination of 4 August 1930, Barwick said that he had an understanding with his brother that Douglas was to get a man named Plumstead in as a partner. Plumstead was not to put any money into the partnership with Douglas until Barwick had been paid back. Plumstead was to do the night work until the whole of the monies advanced by Barwick were paid back. Douglas and Plumstead were paid £5 10s each per week out of the business.
[20] Affidavit, Barwick, 21 February 1930, [3]. No interest was ever paid.

£550 was advanced to him by the *Bank of Australasia* as an extension to £1450 of an existing overdraft supported by the security of a deposit of the deeds to a Strathfield property purchased by Barwick out of earnings when employed by Mr Waddell and Mr Booth.[21] The business lost heavily, and in August 1929 Barwick sold the business but was unable to obtain more than a small payment in cash. The balance of the purchase money was represented by a Bill of Sale taken by Barwick from the purchaser over the plant and stock, a mortgage of the lease and the transfer of the purchaser's equity in a block of land.[22]

The business closed, with heavy commitments still outstanding, chiefly, monies due to three large petrol supply companies: Atlantic Union Oil Company Limited ('Atlantic Union Oil'), Vacuum Oil Proprietary Limited ('Vacuum Oil') and Shell Company of Australia Limited ('Shell'). The total liabilities of the business amounted to £2700. The amount due to the three oil companies amounted to £2200.

Before the sale of the business in August 1929, the Bank had called upon Barwick, in May 1929, to substantially reduce the overdraft facility. In order to do that, Barwick approached the three oil companies and sought credit for 60 days on all accounts to enable reductions to be made on the overdraft. The oil companies agreed to the extended credit arrangement. In August, the service station was sold to Arthur Knibb for £2000 on this basis: Barwick took over Knibb's equity in a property at Narrabeen, the equity being valued at £1250; Knibb gave Barwick a Bill of Sale for £750 over the lease and plant and agreed to pay for the stock in cash; Barwick received £220 for the stock. Of that, £160 was paid to Atlantic Union Oil.[23]

Not having provided against the contingency of a loss of this order, and having lost the availability of bank credit formerly available to him, Barwick found himself unable to meet his commitments 'in cash'. He was also unable to sell any property held by him 'even at sacrifice value'.[24] Barwick let the purchaser of the petrol station into possession of the premises. However, the landlord of the service station refused to accept the purchaser as a tenant and refused to assign the lease. The landlord treated Barwick's conduct as a breach of covenant and commenced an ejectment action against Barwick.[25] Barwick maintained in his statement of affairs that he had a good action against the landlord for £750.[26] Between the date of sale of the service station in August 1929 and 9 December 1929, Barwick contracted to sell certain assets which were expected to realise £1500 in cash. The transaction collapsed and on 9 December 1929, Barwick convened a meeting of his creditors and offered an annual payment of £500, suitably guaranteed, in payment of all his debts. The creditors refused the offer and required a Promissory Note for the total indebtedness of £2900 due in six months and appropriately endorsed. Barwick was unable to obtain such a Promissory Note.[27]

On 29 November 1929, judgment was obtained against Barwick by Atlantic Union Oil for £784 0s 1p with interest at the rate of seven per cent. On 7 January 1930, a bankruptcy notice issued and on 8 January 1930 the bankruptcy notice was served upon Barwick at his Chambers now at 164 Phillip Street, Sydney. On 20 January 1930, a petition issued in an amount of

[21] The Strathfield property then had a value of £1650. Barwick's overdraft at the time of purchase of the lease for the service station was between £300 to £400 less than the limit of £1450: Barwick's Public Examination of 4 August 1930.
[22] Affidavit, Barwick, 21 February 1930, [4].
[23] Barwick's evidence at the Public Examination on 4 August 1930.
[24] Ibid [6].
[25] Ibid [7].
[26] The landlord was Andrew Sinclair. He ultimately lodged a proof of debt for £164 6s 9p.
[27] Barwick's evidence at the Public Examination on 4 August 1930, [8]–[11].

£866 9s, based on an act of bankruptcy in failing to comply with the requirements of the bankruptcy notice on or before 16 January 1930.[28]

In his Public Examination, Barwick said that at about the time of the issue of the bankruptcy notice, another meeting of creditors was called. He said that he offered them an assignment in an attempt to protect the lease of the garage but that the creditors would not accept the proposal unless Barwick personally paid the landlord and his solicitor's costs of about £250. On Friday, 24 January 1930, the landlord, in possession, sold the lease for partial recovery of unpaid rent. These remarks of Barwick in the Public Examination are directed to the following matter, which became significant a little later on. A meeting of Barwick's creditors was convened at the offices of Mr Ross at 2.30 pm on 13 January 1930. The preservation of the lease of the service station, as an asset of the estate, required the landlord's claim for rent and legal costs to be paid. Barwick contended, consistent with a copy of a resolution on the file, that a resolution was passed to the effect that in the event that Barwick paid the landlord's unpaid rent and legal costs (about £250 in all) on or before 16 January 1930, Barwick would then execute an assignment of his estate for the benefit of his creditors to Mr AN Ross as sole trustee with power to dispose of the assets of the estate to best advantage. This would avoid a sequestration of Barwick's estate. The resolution then contemplated that failing payment of the rent and costs by Barwick, and failing an assignment to Mr Ross, Atlantic Union Oil would proceed on the basis of the bankruptcy notice served upon Barwick.

Barwick contended that he had reached agreement with the creditors to an assignment, consistent with the resolution, and that a cheque for £250 had been provided to the creditors for payment of the unpaid rent and legal costs of the landlord. The creditors denied that any such agreement had been reached or such a resolution passed. The contended agreement seems not to have been reached (if at all) at the meeting on 13 January 1930. That seems clear enough from the documents on the file. Further meetings of the creditors occurred later in January. Barwick contended that arrangements were struck on or about 23 January 1930 and then acted upon on 24 January 1930 and in the immediate following days and, in particular, 28 January 1930. A further meeting of the creditors occurred on 30 January 1930. Barwick contended that this meeting led to the election to serve the bankruptcy petition the following day. Money was to be advanced to Barwick to fund the arrangement by a man called Vere Terrill. An amount of £250 was provided for the payment of the debt to the landlord and legal costs.

Apart from the debt due to Atlantic Union Oil, Shell was owed £685 13s 7p; Goodyear Tyre and Rubber Co. was owed £160 8s 3p for which they had obtained judgment on 10 February 1930; Commonwealth Oil Refineries Limited was owed £184 9s; Vacuum Oil was owed £707 12s; and the Law Book Company of Australia Limited was owed £25 1s 9p. All of these companies lodged proofs of debt. The Bank of Australasia was owed £1626 7s 10p. The remaining proofs of debt were lodged by trade creditors of the business.

From 23 or 24 January, or at least by 28 January 1930, Barwick maintained that he had an arrangement with the creditors. However, on 31 January 1930, Stafford Smith, the New South

[28] The Bankruptcy Notice and the Creditor's Petition were prepared by Mr NN Chippindall, the solicitor retained by Atlantic Union Oil on all of its collections work. The company's commercial solicitors, Hughes Hughes & Garvin would later take over the petition proceedings against Barwick. Mr Hughes of that firm (the father of Mr Tom Hughes QC), would ultimately act as the solicitor in the petition proceedings resulting in the Sequestration Order of 11 June 1930. He instructed the 'heavyweights' of the day, Mr D Maughan KC and Mr Nicholas, for Atlantic Union Oil. Mr LS Abrahams was retained by Barwick to resist the making of the sequestration order.

Wales credit manager for Atlantic Union Oil served Barwick with the bankruptcy petition issued by that company on 20 January 1930. Barwick was served, according to Smith's affidavit, at his chambers at 164 Phillip Street, Sydney in the afternoon. The bankruptcy petition came on for hearing before the Judge in bankruptcy in the Supreme Court of New South Wales, Reginald Heath Long Innes J, on 17 March 1930. Barwick relied upon his affidavit sworn 21 February 1930 and other material. Having regard to the contended arrangement with the creditors, Long Innes J dismissed the petition.

A curious event then occurred which unleashed a firestorm. Two days later on 19 March 1930, Barwick issued a writ for defamation for £10 000 against Atlantic Union Oil and its national credit manager, David William Dalley-Watkins to whom Stafford Smith reported. Dalley-Watkins removed the matter from the company's collections solicitor, NN Chippindall, and appointed the company's standing commercial solicitor, Mr Hughes (the father of Tom Hughes QC) from Hughes Hughes & Garvin. That firm was appointed to deal with the dismissal of the bankruptcy petition and the new question of the defamation suit. Dalley-Watkins, in cross-examination by Barwick's counsel, LS Abrahams, gave evidence that the change to Mr Hughes was very much in contemplation before the service of the defamation writ. Barwick contended that the three oil companies had entered into an arrangement (perhaps a conspiracy) to damage Barwick by persisting with the service of the bankruptcy petition in the face of the contended compromise. Hughes retained one of the pre-eminent silks of the day, D Maughan KC, for Atlantic Union Oil. The company made an application under section 26 of the *Bankruptcy Act 1924–1927* (Cth) to review and secure the rescission of the order of 17 March 1930 dismissing the bankruptcy petition. Many affidavits were put on for the company.[29] Barwick put on a number of affidavits.[30] As to the application, Mr Hughes described the considerations this way in a document dated 19 September 1930:

> In this case it was necessary to establish to the satisfaction of the Court that a previous Order made dismissing the Petition was made under a misapprehension as to certain material facts and that there was material evidence available that was not called at the previous hearing. This involved attendances not only on those who gave evidence on the previous hearing but on other possible witnesses, a careful perusal and consideration of all the documentary and oral evidence which had been given and a close analysis of the documents and letters relating to the transactions involved and the Judge's notes. …
> In this case there was a direct conflict of evidence as to material interviews and as was anticipated it was alleged by the Debtor's counsel that the witnesses for the Petitioning Creditor had conspired together to concoct evidence since the first hearing of the Petition. This involved extreme precautions to keep all witnesses apart and separate interviews with each of them on all material points, so that no witness was aware of any of the other's evidence. It was essential to attack the credibility of the witnesses for the Debtor particularly VW Terrill and RK Daniel and in order to do this material had to be gathered for their cross-examination as to credit. This necessitated exhaustive enquiries into their past history and many interviews with persons in a position to give information as to their past transactions and associations. Included in these enquiries were interviews with five firms of Solicitors and obtaining and perusing large numbers of documents relating to the association of Terrill with certain transactions of [another company] and litigation concerning that company. In addition to these enquiries

[29] The affidavits included affidavits from Dalley-Watkins, Stafford Smith, NN Chippindall, Matthew Parkin (the Australian credit manager for Vacuum Oil), William Godwin (the assistant company secretary for Atlantic Union Oil), EL Townsend (credit manager for Shell), and AU Ross who attended the creditors' meeting on 30 January 1930.

[30] Affidavits by Barwick; RK Daniel (a financier); and three affidavits of VW Terrill (a person who had agreed to provide financial assistance to Barwick).

> searches were made in the Firms Register and attendances made to obtain copies of transcript in other litigation in which their evidence was disbelieved. …

It seems from the cross-examination of Mr Terrill that Mr Townsend was particularly hostile to Barwick. The following exchange occurred between Terrill and Mr Maughan KC [emphasis added]:

> Q: You made an affidavit in this case eventually, on the 11th April, as to what took place at the Atlantic Union Oil Company's office on 24 January?
> A: Yes I made an affidavit.
> Q: You told Mr Abrahams originally, when you were under examination orally, that you did not get a document signed in writing because you trusted the honour of those present?
> A: Yes.
> Q: In your affidavit of the 29th April, according to you, one at least of those that were present expressed the greatest hostility to Mr Barwick — do you remember that?
> A: Yes.
> Q: Which one was that?
> A: Mr Townsend, mostly.
> Q: And, according to you, he said he would like to see him **on the street**?
> A: Yes.
> Q: And he would like to **put him out of practice**?
> A: Yes.
> Q: He adopted a **very hostile attitude**?
> A: Yes.

Mr Maughan KC then tested the making of the arrangement in this way:

> Q: You told the Court that within 20 or 30 minutes of [Townsend] making those statements, you accepted the document [as to the arrangement] without a signature, relying, as you say, on his moral obligation?
> A: Quite so.
> Q: I suppose, when the document was handed to you, you had a vivid recollection of what Mr Townsend had said within the previous half hour?
> A: Yes.
> Q: Were you surprised when there was any alternative suggestion at all that these three gentlemen, including Mr Townsend, were prepared to make any alternative suggestion or offer?
> A: I was quite surprised for some reasons.
> Q: You tell the Court now that notwithstanding Mr Townsend's attitude at the early part of the [meeting], you were satisfied with his word?
> A: Together with the others. … Yes, I thought it did not matter what disparaging remarks he made about Barwick, he would stand up to his word of honour with regard to the agreement.
> Q: Did you ask any of these gentlemen to date or attest this document?
> A: No.

The application before Long Innes J was heard on 14, 15 and 16 April 1930. In the result, Long Innes J ordered that the order of 17 March 1930 dismissing the petition be 're-heard … on 13 May 1930 in order that [the Court] may consider whether it's said order dismissing the petition should be reviewed rescinded or varied'.[31] Directions were made for the filing of further affidavits. The matter was heard over a number of days. Barwick was cross-examined on 10

[31] See above n 17.

June 1930. He accepted that at the date of filing the petition (20 January 1930) he was insolvent and that his unsecured liabilities were £2742 2s 10p. Barwick also admitted that on 23 January 1930 when Terrill approached Atlantic Union Oil on his behalf to facilitate a discussion about payment of debts, he had no defence to the petition. The following exchange occurred [emphasis added]:

Q: What you are relying on is something which took place firstly on the 24th, and secondly on the 28th January?
A: It occurred subsequent to the 23rd.
Q: What you are relying on as a defence to this petition is an interview on the 24th January reported to you by your agent, and followed by certain action on the 28th?
A: I do not know when the actual petition was served.
Q: You are relying on certain events of the 24th and 28th January as affording you a defence to this petition?
A: Things have happened subsequent to the 23rd.
Q: Your **contention** is that some agreement resulted from those events?
A: I put the **facts** before the Court. I am **not contending anything** at the moment.
Q: You **complain** that on the 31st January the petitioning creditor committed a breach of some agreement by **serving** the petition on you?
A: **Broadly** that would be the position.
Q: They did go on with the petition and it was eventually heard on the 17th March?
A: I do not remember the date.
Q: Approximately **seven** weeks afterwards?
A: Sometime afterwards.
Q: They went on with the petition which they served on you on the 31st January?
A: Yes.
Q: Which you say was in breach of some agreement that had been made?
A: Yes.
Q: The petition then came on to be heard before His Honour and was dismissed, and the bankruptcy proceedings came to an end for the time being. On the 19th you took steps to issue a writ for £10,000 damages?
A: Yes.
Q: Do you **conscientiously** tell his Honour between the 31st January and the 17th March, you suffered damage to the extent of £10,000 by reason of what happened?
A: No.
Q: Your **garage business** had come to an end as a matter of fact **long** before that?
A: It was sold in August or September.
Q: You do **not pretend your practice as a barrister** had suffered damage by reason of these proceedings?
A: **It has.**
Q: Between the 31st January and the 17th March your practice suffered damage?
A: Some damage and that has been accentuated since.
Q: Do you suggest it is anything approaching £10,000 damages you suffered? [Question not pressed]
Q: You went to a meeting of the creditors on the 24th March?
A: Yes.
Q: And you went there according to yourself to plead for some better terms?
A: I asked for a re-consideration, yes I did.
Q: You went there to ask for better terms?
A: Yes.
Q: To get a better and more reasonable bargain?
A: Yes.
Q: Did you say a single word to the creditors then about this **tremendous loss** you had suffered between the 31st January and the 17th March?

A: I did not get a chance. I was put out.
Q: Did you tell them there [were] actually two writs out claiming £10,000 damages from them?
A: **No.**

The reference to whether Barwick was *conscientiously* contending that between 31 January 1930 and 17 March 1930 he had suffered damage to the extent of £10 000 was a carefully framed question as it invoked notions of 'good conscience' before a well-respected equity lawyer and equity Judge, Long Innes J Maughan's cross-examination of VW Terrill, in particular, and also RK Daniel, achieved the outcome Mr Hughes (and counsel) sought to achieve. The cross-examination seriously called into question the credit of the witnesses and thus the reliability of their versions of the events. Although it is not entirely clear from the papers on file, it seems that Barwick was represented on the petition proceedings by Mr LS Abrahams and Mr Ernest Street.

In the result, an order was made on 11 June 1930 rescinding the order of 17 March 1930 dismissing the petition. The order recognises that an act of bankruptcy had been committed by reason of Barwick's failure on or before 16 January 1930 to comply with the requirements of the bankruptcy notice served by Atlantic Union Oil on him on 8 January 1930. A sequestration order was made against Barwick as a person carrying on a business as Super Service Station at Parramatta Road, Ashfield and also practising as a barrister-at-law at 164 Phillip Street, Sydney. Charles Fairfax Waterloo Lloyd was constituted as the Official Receiver of the estate. For those of you with an historical interest in the costs of these things, it is interesting to note that in 1930 Mr Maughan KC's fee on the motion for re-hearing was £32 10s and conferences were charged at £5 10s. The fee on the hearing of the petition was £43 and refreshers were charged at £29 2s per day. The fee on settling the affidavits was £52 9s. Each conference of three hours was charged at £13 2s. The fees charged by the junior counsel were two-thirds of senior counsel's fees.

One of the most powerful images in children's literature is JM Barrie's crocodile, constantly pursuing Captain Hook.[32] The crocodile had swallowed a clock and Hook was conscious of the crocodile's presence by the sound of the 'tick tock, tick tock'. The clever idea that Hook, like all of us, is constantly stalked by devouring time is a powerful image. Barwick must have felt that the impending bankruptcy was pursuing him in a way that might well foreclose his career with the result that he might be 'put out on the street', as Shell would have it. He may also have felt that he was stalked by bankruptcy, as his father Jabez, once he lost his trade and other ventures failed, also became bankrupt.

The administration of the bankruptcy took its course. Barwick's Public Examination occurred on 4 August 1930. On 27 August 1930, he applied for a discharge. The application was listed for hearing on 30 September 1930 before Lukin J,[33] and all the creditors were notified of the application. The hearing was adjourned to 1 November 1930 and judgment was given by Lukin J on 29 November 1930. The Official Receiver published a report on 24 September 1930 and Barwick responded to it by affidavit on 29 October 1930. In the report, the Official Receiver contended that Barwick fell within the elements of section 119(7) of the *Bankruptcy*

[32] Featuring in the play and books by JM Barrie, *Peter Pan or The Boy Who Would Not Grow Up* (1904); *Peter Pan in Kensington Gardens* (1906); *Peter and Wendy* (1911).
[33] The hearing was held at the Supreme Court at Taylor Square. There is a certain irony in the location, as Barwick, as Chief Justice of the High Court would spend much time in the court room at Taylor Square.

Act, most relevantly, paragraphs (b), (c) and (d).[34] As to (b), the Official Receiver contended that neither a cashbook nor a creditors' ledger had been kept properly. As to (c), the Official Receiver contended that in the period September 1929 to June 1930, credit had been obtained from four creditors in an amount of £1604 11s 6p and that in the period January to September 1929, credit had been obtained from nine creditors in an amount of £1273 1s 9p. The statement of affairs shows 31 creditors to the value of £2940 18s. As to (d), the Official Receiver contended that the debts to the value of £1604 11s 6p, as mentioned, had been incurred in circumstances where there was no reasonable or probable expectation of the debts being paid.

Barwick put on material addressing all of the circumstances leading to the bankruptcy and the matters addressed by the Official Receiver. There is no doubt on the basis of that material that Barwick's brother, Douglas, and his partner Plumstead, failed to keep proper records within the business of the service station. Barwick gives an indication of the scope of that problem in these terms:[35]

> 12. In May 1929 my Bank asked me to reduce my overdraft and I found that to do so I would have to get an extension on the current month's bills. This I did and obtained from the majority of the suppliers sixty days credit for that month.
> 13. This caused me to make an examination of the business for the first time and I found that while there was a fair turnover the overhead was out of all proportion and that there had undoubtedly been leakages through the staff, more than one hundred gallons of petrol alone being lost in a week. It then appeared that the business was not making the Eleven pounds odd that my brother and Plumstead were drawing out of the business.

On 29 November 1930, the Court was satisfied that proof had been made by the Official Receiver of, relevantly, the matters contemplated by section 119(7)(b), (c) and (d) of the *Bankruptcy Act*. The Court ordered that Barwick's discharge be suspended for a period of six months and that he be discharged from bankruptcy as and from 1 June 1931. The order was entered on 10 December 1930. Having obtained his Certificate of Discharge as and from 1 June 1931, Barwick made an application to the Official Receiver to purchase his 'Law Library and office furniture' for £65 with a deposit of £25 payable and the balance to be paid at the rate of £8 a month. The proposal was accepted on 17 July 1931.

These matters concerning Barwick's bankruptcy are worthy of examination in a contemporary setting because they demonstrate again that in the right or relevant circumstances, anyone might become bankrupt. The Barwick bankruptcy demonstrates just how confronting the stress and difficulty of bankruptcy can be. Barwick describes the matter:[36]

> Through the good offices of Ernest Street who appeared for me in the sequestration proceedings, the Bar Counsel was assured that I had not myself been trading; no question of my continuing in practice arose. But of course, Norma and I had to begin again. I had to buy our cottage again by arrangement with the second mortgagee, who had foreclosed.

[34] Sub-s (7)(b) contemplates that the bankrupt has omitted to keep such books of account as are usual and proper in the business and as sufficiently disclose transactions and the financial position of the business within the preceding five years; sub-s (7)(c) that the bankrupt has, after knowing himself to be insolvent, continued to trade, or obtained credit to the amount of £50 or upwards; sub-s (7)(d) that the bankrupt has contracted any provable debt without having at the time any reasonable or probable ground of expectation of being able to pay it after taking into consideration his other liabilities at the time.

[35] Affidavit, Barwick, 29 October 1930.

[36] Barwick, above n 2, 26, 27.

> To make matters worse, the Depression deepened. I doubt if anyone who did not pass through it can appreciate the distress it caused. Norma and I suffered along with so many others. To supplement what small income I had I did some coaching of law students and Norma went to work in her trade as a milliner. Our joint efforts and mutual determination to succeed pulled us through, though the depth of the penury we experienced was almost devastating.
>
> The bankruptcy proceedings were not an encouragement to solicitors to brief me, and having to attend to financial affairs had distracted me to no small degree. So, the growth of my practice was much retarded.

Barwick always had a sense of, and an eye to, the human dimension of the way in which the law worked. He was conscious of it in developing his own style of advocacy, which he described in his autobiography:

> I thought I should act on the footing that the jury were intelligent, honest and capable of being instructed in even the most complicated matters of fact and that they could apply principles of law if these were simply expressed; that in general they would listen closely to what counsel and the judge had to say. I thought my task would be to persuade them by logic and good sense. I realized that there is room in appropriate cases to press the jury to give effect to human values where the law seemed not to do so. [37]

II BANKRUPTCY POLICY IN MODERN REGIMES

The concept of a 'Fresh Start' is widely considered a key policy goal in modern bankruptcy regimes. That follows because an *objective*, at least, of bankruptcy is to provide an insolvent person with a release from insolvency and a reintroduction to economic participation. The fresh start objective can be contrasted with what is sometimes described as the 'punitive approach' to bankruptcy which seeks to *deter* debtors from insolvency, or the particularly creditor-focused objective of identifying, gathering in and distributing the debtor's assets efficiently.

There is, perhaps, some taxonomic inconsistency in the use of the term 'fresh start'. The debate about the term engages, in part at least, the extent to which the *personal concerns* of insolvent persons are supported. At one end of that debate, a fresh start focuses upon the speed with which a bankrupt is discharged from his or her debts (the so-called *discharge focused fresh start*). At the other end of that debate, a fresh start comprehends wholesale financial rehabilitation and support for a bankrupt so as to bring about financial *well-being* (the so-called *rehabilitation focused fresh start*). A rehabilitation focused fresh start would generally include education and social services support. The concept of the 'human dimension' of bankruptcy is now increasingly recognised as an important aspect of bankruptcy policy. Plainly, policy needs to consider the personal and emotional cost of insolvency. This is particularly true in the context of the financial pressures and stresses of impending financial dislocation and bankruptcy and its relationship with depression and suicide.

The conference organisers emphasise that this conference is designed to provide a forum for scholars and policy-makers to discuss and examine the human experience and human dimension of bankruptcy. There are a number of sub-themes to be examined in the course of the conference:

- Fresh start: is it just rhetoric or reality?

[37] Ibid 19.

- What are the policy tensions between enabling a fresh start and sustaining commercial certainty and continuity?
- How might personal insolvency law be reformed?
- What are the alternatives to bankruptcy?
- Are there insights which might be derived from a multi-disciplinary approach to the questions?
- What comparative approaches have been adopted by other civil societies?
- What are the perspectives of lenders?
- How does the bankruptcy regime intersect with human rights and how might a properly crafted regime intersect with human rights?
- What are the health effects of over-indebtedness?

A *A Principled Foundation and the Human Dimension*

One of the difficulties in delivering a fresh start, which might properly take account of the human dimension to bankruptcy is dealing with the notion reflected in some of the debates in Australia that bankruptcy is too easy; that insolvent persons can too easily step aside from the consequences of their conduct; that a reduced period of bankruptcy discourages debtors from striking arrangements with creditors to settle debts; that bankruptcy no longer has what some people seem to think is the important social utility of the deterrence effect of an appropriate degree of stigma or shame. Erving Goffman describes 'stigma' as 'an attribute that is deeply discrediting' or 'an undesired differentness' that makes an individual seem 'not quite human'.[38] For my own part, I struggle with the notion that deterrence in the form of stigma or shame provides any principled foundation for a bankruptcy regime.

A *principled foundation* engages an understanding of the objectives of such a regime and the powers, authorities and duties conferred and to be exercised and discharged by the relevant participants in furtherance of the objectives of the regime. Nicola Howell and Professor Rosalind Mason pointed out in 2015[39] that there is very little empirical evidence about the extent or impact of bankruptcy 'stigma' in Australia. Professor Paul Ali, Lucinda O'Brien and Professor Ian Ramsay have also observed[40] that the relationship between the law and social attitudes is difficult to gauge in Australia where the history of bankruptcy law has received less scholarly attention than, for example, in the United States. However, in the last 10 years, a number of studies have been undertaken, particularly in 2010 and 2012; and I note that in 2014 the Australian Research Council funded a study at the Melbourne Law School as part of an ARC linkage project.[41] Scholarly writing and analysis in this area is critical. Universities are places to which society turns for critical thinking, thought leadership and empirical analysis. The Academy must shape the debate and provide a principled foundation upon which policy makers might act, considering the contributions of other disciplines including the professions. This conference comes at a time when interest in bankruptcy scholarship and policy analysis has been growing significantly. Much of the academic literature emphasises that Australian bankruptcy law has unclear objectives that seem to lead to conflicting policies. Several historical accounts of the development of bankruptcy laws stress that bankruptcy has evolved

[38] Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Penguin, 1968).
[39] Nicola Howell and Rosalind Mason, 'Reinforcing Stigma or Delivering a Fresh Start: Bankruptcy and Future Engagement in the Workforce' (2015) 38 *University of New South Wales Law Journal* 1529.
[40] Paul Ali, Lucinda O'Brien and Iain Ramsay '"Short a Few Quid": Bankruptcy Stigma in Contemporary Australia' (2015) 38 *University of New South Wales Law Journal* 1575.
[41] Paul Ali, Lucinda O'Brien and Iain Ramsay, 'Bankruptcy and Debtor Rehabilitation: An Australian Empirical Study' (2017) 40 *Melbourne University Law Review* 688.

to respond to changing economic circumstances but has failed to fully resolve clear objectives. The lack of empirical research is seen as a contributing factor.

B *Examining the Policy Objectives Underlying Bankruptcy Regimes*

The literature suggests three broad objectives. The first is *moral policing*. Historical accounts of English bankruptcy law outline its origins in the 16th century as a quasi-criminal area of the law, enforcing social and moral norms through harsh penalties. The development of a credit dependent capitalist economy is understood as the driver of the emergence of a more liberal regime. However, modern bankruptcy laws continue to contain elements of moral policing, it is said.[42] While Australian policy has become more liberal, it continues to stress the need to avoid abuse and punish unscrupulous debtors. Over the last 20 years, bankruptcy policy in Australia has taken up both these notions and also whether bankruptcies are caused by misfortune or misdeed. In 1991, the Keating Government introduced an early discharge, which was subsequently reversed by the Howard Government in 2002 due, in part at least, to concerns about what was described as debtors 'gaming the system'. Early discharge is again a key proposal of the Turnbull government's innovation agenda.

The second objective is to promote *economic efficiency*, one of the central objectives of modern bankruptcy regimes. The Law Reform Commission's 1988 *Harmer Report*[43] cemented this objective as the central concern of Australian policy makers. The *Harmer Report* positioned insolvency regimes as a commercial process rather than a punishment, with the aim of distributing assets amongst creditors and thereby re-deploying economic value. While recent bankruptcy policy has begun to shift the focus from the creditor to the experience of the debtor, economic considerations represent a primary rationale underpinning the bankruptcy regime.

The third objective is *social welfare*. While economic efficiency remains a core objective of policy makers, the academic literature seems increasingly focused on the human experience of the debtor. This discussion has centred on the discharge versus rehabilitative conceptualisation of the fresh start. While the economic approach is mainly concerned with the re-deployment of resources through discharge, a social welfare approach is more concerned with how bankruptcy impacts the debtor's stress level, family cohesion, health and social standing. Much of this concern is compatible with an economic approach in the sense that effective rehabilitation will reduce social costs and increase economic participation. The distinction is perhaps most clear in the policy debate over the 'homestead exception' — the exclusion of the debtor's residence from bankruptcy proceedings. On the one hand, the family home is likely to be a key asset for the benefit of creditors. On the other hand, losing the family home is likely to lead to stress, family breakdown, and barriers to economic rehabilitation. In giving attention to the importance of the social welfare of debtors much of the literature calls for a more rehabilitative focus in bankruptcy.

Although these three approaches have overlapping elements, they are also often in conflict. A major complaint is that the *Bankruptcy Act* contains no provisions setting out the objectives of the legislation (and thus the regime), which makes it difficult, it is said,[44] to assess whether the statutory regime is achieving its goals. The literature broadly agrees that the objectives of

[42] See eg Iain Ramsay in this edition for discussion of the issue of moral hazard and a policy focus on lengthy payment plans versus debt relief. See also Howell and Mason, above n 39; Ali, O'Brien and Ramsay, above n 40.
[43] Australian Law Reform Commission, *General Insolvency Inquiry* (Report No 45, 1988).
[44] See eg Nicola Howell, 'The Fresh Start Goal of the *Bankruptcy Act*: Giving a Temporary Reprieve or Facilitating Debtor Rehabilitation?' (2014) 14 *Queensland University of Technology Law Review* 29.

bankruptcy laws need to be more clearly defined. I think there is some force in that observation. This issue of the social stigma of bankruptcy is an important matter for policy makers. The issue is clearly linked to the historical development of bankruptcy law and its unresolved objectives. In many ways, it is a case study of how the moral policing objective of bankruptcy continues to linger and conflict with economic and social welfare objectives. Fundamentally, the interest in the social stigma related to bankruptcy is a concern about the ways that bankruptcy laws interact with social and community norms. Bankruptcy laws do not operate in a vacuum. The historical origins of bankruptcy as a quasi-criminal concern, in the early days, means that despite the supposed moral neutrality of modern bankruptcy laws, their effects have wide-ranging social impacts. The social stigma effect is seen as a key social welfare issue as it causes stress and poor health and impedes economic rehabilitation. Social stigma is also increasingly seen as an economic issue as it promotes risk aversion in business, and impedes re-engagement by failed business persons. The academic literature discusses the way legislation facilitates or exacerbates the effect of the stigma of bankruptcy[45] and therefore impedes economic and social welfare objectives. Some examples are the role that professional licensing plays in excluding bankrupts from employment and the establishment of a permanent publicly accessible database of bankrupt persons.

Economic policy has increasingly become interested in the role of the entrepreneur in driving innovation and growth. Policy makers interested in replicating the entrepreneurial culture of places like Silicon Valley have identified insolvency regimes as an important factor in mitigating the risk of business start-ups. Recent policy documents in Australia include a Productivity Commission Report on *Business Set-up, Transfer and Closure*[46] and a proposals paper from the Australian government as part of its National Innovation and Science Agenda ('NISA').[47] Both documents highlight the government's interest in the role of bankruptcy policy in fostering entrepreneurialism. The key recommendation of the Productivity Commission's report is the reduction of the bankruptcy or 'exclusion' period from three years to one year. This recommendation has been taken up by the NISA as its personal insolvency proposal, and the proposal has been put forward for public consultation.

The rationale behind this policy is driven by concern for economic value rather than concern for the human experience. In this respect, it follows closely the precedent set by the *Harmer Report*. The rationale is as follows: first, entrepreneurs assessing the risk of initiating a start-up will factor in the consequences of failure, and shorter bankruptcy periods lower the risk; second, the stigma of bankruptcy contributes to a culture of fear of failure and entrepreneurialism; and third, first time business bankrupts are valuable contributors to the economy and they should be free to use their skills and access credit.

Although the wider academic literature makes reference to the nexus between bankruptcy and entrepreneurialism, it is largely sceptical of its impact.[48] In Australia, business related bankruptcies make up only around 20 per cent of all bankruptcies. The academic literature, which generally focuses on the human dimension, is more concerned with improving the bankruptcy experience for the remaining 80 per cent.

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[45] See eg Howell and Mason, above n 39, and references cited there; Ali, O'Brien and Ramsay, above n 40.

[46] Productivity Commission, *Business Set-up, Transfer and Closure: Inquiry Report* (No 75, 2015).

[47] The Treasury (Aust), *Improving Bankruptcy and Insolvency Laws: Proposals Paper* (2016) <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2016/Improving-bankruptcy-and-insolvency-laws>.

[48] See eg Howell and Mason, above n 39; Productivity Commission, above n 46; see also the discussion in this edition, *QUT Law Review*, 17(1) by van Kesteren, Adriaanse and van der Rest.