

REINFORCING STIGMA OR DELIVERING A FRESH START: BANKRUPTCY AND FUTURE ENGAGEMENT IN THE WORKFORCE

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I INTRODUCTION

Commentators in the United States and elsewhere have bemoaned a supposed decrease in the stigma attached to filing for bankruptcy,¹ and have argued that this decrease correlated with increasing rates of bankruptcy. In the United States, a belief that debtors were abusing the bankruptcy system, and that ‘the shame and stigma associated with bankruptcy had been eroded’ was the catalyst for major amendments to bankruptcy legislation² designed to ‘ferret out the abusers’.³ Studies on the incidence of bankruptcy stigma over time, in the United States, have reached different conclusions, but more recent qualitative studies have confirmed that, for at least some percentage of the bankrupt population, stigma

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1 See Rafael Efrat, ‘The Evolution of Bankruptcy Stigma’ (2006) 7 *Theoretical Inquiries in Law* 365, 380; Yvana L B H Mols, ‘Bankruptcy Stigma and Vulnerability: Questioning Autonomy and Structuring Resilience’ (2012) 29 *Emory Bankruptcy Developments Journal* 289, 308.

2 *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, Pub L No 109–8, 119 Stat 23, amending *Bankruptcy Code*, 11 USC (2013).

3 Michael D Sousa, ‘Bankruptcy Stigma: A Socio-Legal Study’ (2013) 87 *American Bankruptcy Law Journal* 435, 437.

and shame remain associated with bankruptcy.⁴ In this context, stigma signifies ‘an undesired differentness’⁵ from the expected social norm.

In Australia, bankruptcy debates have often reiterated concerns about bankruptcy being ‘too easy’ and no longer having shame or a stigma associated with it.⁶ The response has often been to make bankruptcy more difficult or more onerous. One policy decision that reflects this approach was the removal, from 2003, of the opportunity introduced in 1992 for some debtors to seek early discharge from bankruptcy.⁷ For example, the explanatory memorandum supporting this change argued that

[t]hese provisions are most often cited as the cause of concern that bankruptcy is too easy. The reduced period of bankruptcy is seen to discourage debtors from trying to enter formal or informal arrangements with their creditors to settle debts, and provides little opportunity for debtors to become better financial managers.⁸

Despite this concern with the ‘ease’ of bankruptcy, there is little empirical evidence about the extent or impact of bankruptcy stigma in Australia; a 1995 monograph is one exception, but the data it relies upon is now more than 25 years old.⁹

This issue of stigma associated with bankruptcy has a long heritage in both the common law and civil law legal systems.¹⁰ Such stigma has a social dimension – in particular affecting relationships with family and friends. A seminal British law reform report on insolvency in the 1980s, the Cork Report, referred to one result of bankruptcy as ‘a sense of failure and humiliation ... with [his] family or [his] colleagues at work’ which must be aggravated if there is a

4 Ibid 481. See also Deborah Thorne and Leon Anderson, ‘Managing the Stigma of Personal Bankruptcy’ (2006) 39 *Sociological Focus* 77, 93; Teresa A Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, ‘Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings’ (2006) 59 *Stanford Law Review* 213, 214–15 who report in the third of three comparable empirical observations of individual bankruptcy spread over 20 years that

[t]he data we present are not consistent with the claim that declining bankruptcy stigma has fuelled an increase in bankruptcy filings. Instead, the data are far more consistent with the hypothesis that increased filings result from increased financial distress, and they hint that, despite loud claims to the contrary, the stigma of bankruptcy may actually be increasing.

5 Martin Ryan, ‘The Stigma of Bankruptcy’ [1992] (Spring) *Socio-Legal Bulletin* 6, 6 citing Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Penguin, 1968) 13, 15.

6 John Duns, *Insolvency: Law and Policy* (Oxford University Press, 2002) 171.

7 John King, ‘Moving beyond the “Hard”–“Easy” Tug of War: A Historical, Empirical and Theoretical Assessment of Bankruptcy Discharge’ (2004) 28 *Melbourne University Law Review* 654, 656.

8 Explanatory Memorandum, Bankruptcy Legislation Amendment Bill 2002 (Cth) [42].

9 Martin Ryan, *The Last Resort: A Study of Consumer Bankrupts* (Avebury, 1995) 83, 88.

10 Efrat, above n 1; ‘Declaring oneself unable to manage one’s obligations has for centuries signalled a sort of social and economic death in many parts of the world, and such connotations are difficult to overcome’: Jason J Kilborn et al, ‘Report on the Treatment of the Insolvency of Natural Persons’ (Report No ACS6818, Working Group on the Treatment of the Insolvency of Natural Persons, World Bank, 1 January 2014) 44 [122] <<http://documents.worldbank.org/curated/en/2014/01/18836883/world-working-group-treatment-insolvency-natural-persons>> (*‘World Bank Report’*).

public examination and press publicity.¹¹ More recently a World Bank report in 2014 on insolvency and natural persons cited surveys of debtors in many well-established insolvency systems that revealed ‘pervasive and profound feelings of guilt, shame, and stigma’.¹² Bankruptcy stigma also has an economic aspect – affecting a bankrupt as an economic player, whether in seeking employment, credit (eg to operate a business as a sole trader) or positions of responsibility. In fact, a frequent advantage trumpeted for entering formal arrangements with creditors is that debtors avoid the stigma of bankruptcy and the limitations imposed on bankrupts.¹³

The Australian insolvency regime reflects this stigma associated with personal bankruptcy.¹⁴ In a leading High Court decision on the importance of strict compliance with the statutory requirements for Bankruptcy Notices,¹⁵ Deane J referred to the many ‘honest, albeit unbusinesslike or naive, people’ for whom bankruptcy ‘represents a pronouncement of failure and humiliation attended by the fear of unknown consequences and the susceptibility to criminal punishment for what would otherwise be innocent conduct’.¹⁶

While the literature also refers to bankruptcy becoming more accepted and more frequent, commentators have noted that bankruptcy ‘still retains some moral and social stigma’.¹⁷ In *Wharton v Official Receiver in Bankruptcy*¹⁸ when dealing with an objection to discharge from bankruptcy, Weinberg J noted that ‘[e]ven in this day and age bankruptcy carries a measure of stigma. It can be traumatic for the bankrupt and for the bankrupt’s family and associates’.¹⁹

The label of ‘bankrupt’ for an individual is seen to be morally reprehensible in a society and economy such as Australia that relies so heavily on the extension

11 Additional likely results of bankruptcy noted were a degree of disruption of family life; some inescapable intrusion into the privacy of the home; the family dwelling itself is in peril; and the recording of the bankruptcy with a credit reference agency to the detriment of the future ability to obtain work and credit: United Kingdom Insolvency Law Review Committee, *Report on Insolvency Law and Practice*, Cmnd 8558 (1982) 55–6 (‘Cork Report’).

12 Kilborn et al, above n 10, 43 [120].

13 In the Australian context, see Paul McQuade and Patrick Hay, Thomson Reuters, *Bankruptcy in Australia: A Guidebook* (at Update 52) [31.105]; Michael Murray, CCH Australia, *Australian Insolvency Management Practice Commentary* (at 25 April 2015) [2.040], [24.150]. It is noted that, as with bankruptcy, the alternatives are reported on the National Personal Insolvency Index.

14 Unlike the United States and the United Kingdom, the regulation of insolvency in Australia is bifurcated between individual and corporate insolvencies. Collective insolvency proceedings for individuals are primarily subject to the *Bankruptcy Act 1966* (Cth) and corporate insolvencies to the *Corporations Act 2001* (Cth). This bifurcation of insolvency law between individual (or natural person) debtors and corporate debtors has resulted in separate regulatory bodies for personal and corporate insolvency administrations and practitioners.

15 *Bankruptcy Act 1966* (Cth) s 41. The most common basis for a creditor presenting a petition for an involuntary bankruptcy is noncompliance with a bankruptcy notice.

16 *Kleinwort Benson Australia Ltd v Cowl* (1988) 165 CLR 71, 82 (Deane J).

17 Michael Murray and Jason Harris, *Keay’s Insolvency: Personal and Corporate Law and Practice* (Lawbook, 8th ed, 2014) 32 [2.08].

18 (2001) 107 FCR 28.

19 *Ibid* 36 [38].

of credit and its repayment (with interest) for the wheels of commerce to turn.²⁰ The notion of a debtor ‘failing’ to discharge his or her financial commitments can bring with it the suspicion that the debtor cannot be trusted to meet their obligations in general.²¹ At the very least, it may be evidence that they have likely not met their contractual promises.²²

The issue of bankruptcy stigma has more recently been raised in the Australian Government’s Productivity Commission *Draft Report on Business Set-Up, Transfer and Closure*. This draft report recommends that the period of bankruptcy prior to discharge should be reduced from three years to one year, with the trustee and courts retaining the power to extend the period to a maximum of eight years.²³ The rationale is to ‘help reduce the stigma attached to bankruptcy, and encourage entrepreneurs to start new businesses, while still preserving regulatory oversight to prevent abuse of the bankruptcy process’.²⁴ Research on the relationship between bankruptcy and entrepreneurship has shown that stigmatisation is seen ‘as an important contributor to permanent exits from entrepreneurial careers after bankruptcy’.²⁵ However, it is notable that, in Australia at least, the majority of bankruptcies are non-business bankruptcies,²⁶ thus the objective of facilitating entrepreneurship may be less relevant for many people who enter bankruptcy.

Sociologists investigating the phenomenon of ‘stigma’ have identified a range of ways in which an individual’s behaviour ‘deviates’ from the social norm results in labelling – by others in an official or informal way as well as by the person themselves as a form of self-labelling. One area where such ‘labelling’ of bankrupts has the potential to adversely affect individuals is in their ability to

20 ‘The function of stigma is to bolster the dominant economic and social order’: Robert M Page, *Stigma* (Routledge and Kegan Paul, 1984).

21 Michael Quilter refers to approbation being attached to ‘the financial failure that is behind the stigma’ rather than to the bankruptcy itself: Michael Quilter, ‘Bankruptcy and Order’ (2013) 39 *Monash University Law Review* 188, 211.

22 It is possible that the financial obligations which gave rise to the bankruptcy arose because of a failure to meet statutory obligations (such as failure by directors to prevent their company trading whilst insolvent) or to meet obligations under tort law. However that is likely a small proportion of the individuals who are made bankrupt each year in Australia.

23 In Canada also, discharge from bankruptcy is referred to in terms of restoring individuals to productivity: Stephanie Ben-Ishai, ‘Discharge’ in Stephanie Ben-Ishai and Anthony Duggan (eds), *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c 47 and Beyond* (LexisNexis, 2007) 370.

24 Productivity Commission, *Business Set-Up, Transfer and Closure* (Draft Report, 21 May 2015) 25 (*‘Draft Report on Business Set-Up, Transfer and Closure’*).

25 Ingrid Wakkee, Frank Dorrestein and Paula Englis, ‘The Stigmatization of Bankrupt Entrepreneurs in Dutch Newspapers’ (2015) *Journal of Small Business & Entrepreneurship* 1, 4. On the cultural context of stigma and entrepreneurial risk-taking and whether individualistic cultures may be more tolerant to the stigma of failure than collectivistic cultures, see Naga Lakshmi Damaraju, Jay Barney and Gregory Dess, ‘Stigma and Entrepreneurial Risk Taking’ (Paper presented at the Summer Conference 2010 – Opening Up Innovation: Strategy, Organization and Technology, Imperial College London Business School, 16–18 June 2010).

26 In the June 2015 quarter, 22.1 per cent of bankruptcies were business related: Australian Financial Security Authority, *Commentary: June Quarter 2015* <<https://www.afsa.gov.au/resources/statistics/provisional-business-and-non-business-personal-insolvency-statistics/quarterly-statistics/commentary-june-quarter-2015>>.

engage or re-engage in the workforce. Australian law currently countenances and indeed reinforces in a number of ways the continuance of bankruptcy stigma in employment and equivalent engagement in the workforce.²⁷

First, there are numerous professions and trades where legislation or regulation provides that a bankruptcy or other insolvency administration is a bar to employment. In some cases, this bar exists only for the period of bankruptcy, but in others it can extend to some of the period after discharge from bankruptcy. Second, there are some professions and trades where a bankruptcy or insolvency administration is required by legislation or regulation to be disclosed to the employer or professional body. Third, bankruptcy and other insolvency administrations are matters that are required by legislation to be recorded on the National Personal Insolvency Index ('NPII'); this is a permanent public register, accessible to any person (including existing or potential employers) on payment of a fee.

Each of these matters can potentially result in adverse employment outcomes for an individual who is, or has been, bankrupt (or, in some cases, a party to another insolvency administration). Further, there is no prohibition on employers or prospective employers using insolvency information to make decisions adverse to such a person.

This article therefore explores the extent to which Australian laws (across all jurisdictions: federal, state and territory); regulations; and professional and licensing rules reinforce the stigma associated with bankruptcy and so affect the future employment prospects of bankrupts and former bankrupts. Although there are three primary personal insolvency administrations provided for in the *Bankruptcy Act 1966* (Cth) (bankruptcy, debt agreement, and personal insolvency agreement), the focus of this article is on bankruptcy, as it is the option that encompasses the greatest restrictions, and is also the most commonly used option.²⁸ In addition, it is likely that stigma is more closely associated with bankruptcy than with the other personal insolvency administrations.²⁹

Part II of this article provides a brief overview of literature on stigma and its relevance for the status of being or having been a bankrupt. Part III follows with clear examples where labelling of bankrupts facilitates stigmatisation when seeking employment or engaging in the workforce, for example, as a sole trader or in a business partnership. In some examples, the restrictions only apply to undischarged bankrupts; while for other examples, the restrictions extend into a period after discharge from bankruptcy.

27 For example, a tradesperson engaging as a subcontractor providing services.

28 Provisional statistics show that there were 17 163 bankruptcies, 10 911 debt agreements, and 214 personal insolvency agreements in 2014–15: Australian Financial Security Authority, *Annual Statistics 2014–15*, <<https://www.afsa.gov.au/resources/statistics/provisional-bankruptcy-and-personal-insolvency-statistics/annual-statistics/annual-statistics-2014-15>>.

29 In his second reading speech for the Bankruptcy Legislation Amendment Bill 1996, the then Attorney-General expressed the view that entering into a debt agreement would 'avoid the stigma that bankruptcy entails': Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 1996, 2828 (Daryl Williams).

In light of the evidence in Part III, Part IV puts forward arguments as to why the reinforcement of bankruptcy stigma matters and can adversely affect, for inadequately stated policy reasons, the negative characteristics associated with being a current or former bankrupt. In Part V, the article makes some suggestions for change through law reform – in order to promote the fresh start objective of Australia's bankruptcy system as well as its wider rehabilitative effect and so increase the likelihood that a former bankrupt will be able to engage or re-engage as an economic actor in Australian society, and improve their financial wellbeing.

II STIGMA AND BANKRUPTCY

'Stigma' has been defined as 'an attribute that is deeply discrediting' and 'an undesired differentness'³⁰ from the expected social norm. In his seminal work, Goffman viewed stigma as 'a process based on the social construction of identity'.³¹ The social status of people associated with a stigmatised condition moves from a 'normal' status to a 'discredited' or 'discreditable' social status.³² 'Discredited' stigmas are overt and easily identified by others upon encounter, such as a physical disability (leprosy) or social disability (obesity), whereas 'discreditable' stigmas are not noticeable to others, but could become known,³³ such as a criminal background or mental illness. Bankruptcy is one such form of discreditable stigma.³⁴

At law, bankruptcy effects a change in status, initiating a collective proceeding rather than *inter partes* litigation.³⁵ As Allsop J stated in *Labocus Precious Metals Pty Ltd v Thomas*³⁶ when referring to the public and private importance of this change of status:

[Bankruptcy] is not a matter merely between debtor and creditor. It affects creditors generally and the public. The bankrupt, while bankrupt, has his or her status changed. Conduct which might otherwise be innocent may become punishable at law. There remains a stigma to the person, often as a mark of failure in life, sometimes of a particularly humiliating character.³⁷

A person's legal status as a bankrupt also carries with it implications for their social or personal status: 'The stigmatised are likely to have to confront the issue

30 Ryan, 'The Stigma of Bankruptcy', above n 5, 6 citing Erving Goffman, *Stigma* (Penguin, 1968) 13, 15.

31 Arthur Kleinman and Rachel Hall-Clifford, 'Stigma: A Social, Cultural and Moral Process' (2009) 63 *Journal of Epidemiology and Community Health* 418.

32 Ibid.

33 Ryan, 'The Stigma of Bankruptcy', above n 5, 6.

34 Ibid 7; Thorne and Anderson, above n 4; Sousa, above n 3. The extent to which bankruptcy causes a stigma 'varies across regions and over time due to differences and changes in norms and values which are caused by contextual factors such as rules and regulations, demographics and economic circumstances': Wakke, Dorrestein and Englis, above n 25, 3.

35 *Ahern v Deputy Commissioner of Taxation (Qld)* (1987) 76 ALR 137, 148. It is also quasi-penal and imposes certain restrictions on a bankrupt person.

36 [2007] FCA 1154.

37 Ibid [53].

of whether they will be accepted for what they are or will their stigmas become master statuses which others heavily emphasise, to the exclusion of other characteristics, in dealing with the person.³⁸

Bankruptcy has long incurred 'societal disapproval' as an indication that an individual's behaviour has deviated from accepted norms or expectations.³⁹ As it is not readily observable, bankruptcy is a discreditable stigma, one which people may seek to conceal through 'managing information'.⁴⁰ Any such attempt to hide this change in legal status however is limited by the information that is publicly available on bankruptcies⁴¹ or by the circumstances where a person is required to reveal such information, for example when applying for credit or employment.⁴²

Some of the key elements identified in sociological research on stigma are present in bankruptcy. First, stigma indicates a falling short of what society expects and carries with it the notion of 'deviance'.⁴³ Debtors in default are seen as deviants in that they 'deviate from the rules of society by not repaying their debts as they fall due'.⁴⁴ Bankruptcy has been perceived as 'deceitful' and 'quasi-criminal'⁴⁵ and brings with it various 'penalties'.⁴⁶ Based on research into the history of bankruptcy regulation, Efrat notes an association has long been made between bankrupts and criminals.⁴⁷ As observed in a recent New Zealand High Court decision:

It is unfashionable to label bankruptcy as having a punitive element. There is a tendency to flinch from referring to this aspect, perhaps because of a residual memory of the Marshalsea Prison when the law provided for the detention of bankrupts who could not honour their creditors. Nevertheless it is a fact of life that

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- 38 Ryan, 'The Stigma of Bankruptcy', above n 5, 6. Anthropologists refer to the moral status of a stigmatised person: 'The moral standing of an individual or group is determined by their local social world, and maintaining moral status is dependent on meeting social obligations and norms. Individuals with (or associated with) stigmatised conditions are de facto unable to meet these requirements': Kleinman and Hall-Clifford, above n 31.
- 39 Sousa, above n 3, 436 citing Gerhard Falk, *Stigma: How We Treat Outsiders* (Prometheus Books, 2001) 17. Michael Quilter refers to 'social stigma' connected to 'a lack of financial acumen' as well as the characterisation of bankrupts historically and currently as 'fraudulent, untrustworthy, careless, immoral, lacking in character, disrespectful': Michael Quilter, 'Development of Bankruptcy Process in the Late Republic and Its Relationship to Modern Bankruptcy' (2013) 21 *Insolvency Law Journal* 125, 139.
- 40 Ryan, *The Last Resort*, above n 9, 61.
- 41 This information is published in the National Personal Insolvency Index: see *Bankruptcy Regulations 1966* (Cth) sch 8, discussed below. In the American context, companies that notify residents about neighbours who have filed for bankruptcy and for a fee provide information taken from court records: see Thorne and Anderson, above n 4.
- 42 Ryan, 'The Stigma of Bankruptcy', above n 5, 9.
- 43 Ryan, *The Last Resort*, above n 9, 60.
- 44 Ibid 56.
- 45 Efrat, above n 1, 369. Andrew R Keay, *Bankruptcy Proceedings Handbook* (Longman Professional, 2nd ed, 1992) 4: the effect of bankruptcy is still regarded by the courts as 'quasi-penal' referring to *Re Walsh* (1982) 47 ALR 751, 753; *Re Wheelahan* (1982) 58 FLR 91, 97.
- 46 Ryan, *The Last Resort*, above n 9, 56. For example, a person who is an undischarged bankrupt is prohibited from managing a corporation: *Corporations Act 2001* (Cth) ss 206A–206B. Also it is an offence for an undischarged bankrupt to travel overseas without their trustee's consent and conditions may be imposed by the trustee: *Bankruptcy Act 1966* (Cth) ss 272(1)(c), 272(2).
- 47 Efrat, above n 1, 371. Christopher Symes and John Duns, *Australian Insolvency Law* (LexisNexis Butterworths, 2009) 16 [2.1.1].

bankruptcy has a punitive element. There is a stigma that attaches to bankruptcy. It also carries disabilities.⁴⁸

An involuntary bankruptcy will require proof of an ‘act of bankruptcy’⁴⁹ and the timing of such acts also establishes the commencement of a bankruptcy, relevant to the potential ‘claw back’ of assets into the estate.⁵⁰ These acts of bankruptcy, which are now repealed in the United Kingdom,⁵¹ reflect a quasi-criminal approach to bankruptcy which continues in Australia. They include for example, where the bankrupt ‘with intent to defeat or delay his or her creditors’ either ‘departs or remains out of Australia’; ‘departs from his or her dwelling-house or usual place of business’; ‘otherwise absents himself or herself’; or ‘begins to keep house’.⁵² Also, the pre-bankruptcy conduct of debtors is examined following bankruptcy – based on the statement of affairs that must be lodged by all bankrupts,⁵³ and, in certain circumstances, also through a private⁵⁴ or public⁵⁵ examination. These reinforce the concept that, upon bankruptcy, a debtor deviates from societal expectations.

Second, stigma is also associated with ‘labeling theory’⁵⁶ and the labelling of deviant behaviour which leads to a ‘downward placement’ in the social status hierarchy.⁵⁷ There are three categories of ‘labelling’. ‘Official labelling’ occurs where an individual experiences stigmatisation from formal societal institutions such as through discrimination in employment.⁵⁸ As the research in the following sections shows, while there are no restrictions on employment of bankrupts contained in the *Bankruptcy Act 1966* (Cth), there are a number of professions and trades that officially label bankrupts through imposing eligibility restrictions for membership or licensing. Another aspect of official labelling occurs in that bankrupts often have more difficulty obtaining new credit, and if successful are subjected to higher rates of interest.⁵⁹

‘Informal labeling’ occurs in family, work and friendship groups. Of specific relevance to this article is informal labelling in employment and business contexts. Our research shows that there are circumstances where bankrupts, while not explicitly restricted from certain forms of employment, are required to disclose their status as bankrupts with the potential impact on the assessment of

48 *Darby v Official Assignee* [2013] NZHC 22 (29 January 2013) [22].

49 *Bankruptcy Act 1966* (Cth) s 40.

50 *Bankruptcy Act 1966* (Cth) s 115 and ‘relation back day’.

51 *Insolvency Act 1986* (UK) c 45.

52 *Bankruptcy Act 1966* (Cth) s 40(1)(c).

53 *Bankruptcy Act 1966* (Cth) ss 54, 55, 56B, and 57, and on creditor access to this information s 54(4).

54 *Bankruptcy Act 1966* (Cth) s 77C.

55 *Bankruptcy Act 1966* (Cth) s 81.

56 Sousa, above n 3, 440 citing Stephen C Ainlay, Lerita M Coleman and Gaylene Becker, ‘Stigma Reconsidered’ in Stephen C Ainlay, Gaylene Becker and Lerita M Coleman (eds), *The Dilemma of Difference: A Multidisciplinary View of Stigma* (Springer, 1986) 8.

57 Ibid citing Bruce G Link and Jo C Phelan, *Conceptualizing Stigma* (2001) 27 *Annual Review of Sociology* 363, 371.

58 Ibid 440.

59 Ibid 445.

their suitability for employment.⁶⁰ The labelling of a person as a ‘bankrupt’ carries with it ‘strong adverse social connotation’ and inflicts ‘penalties and discrimination’ on the individual.⁶¹ Australian research by Martin Ryan indicated that ‘[w]hen there was experienced stigma, it was likely to come from relatives and friends rather than others.’⁶²

The final category is ‘self-labeling’, which ‘may have serious negative consequences for an individual, including lessened employment prospects, a lower quality of life, and low self-esteem.’⁶³ Sousa observes that ‘bankruptcy debtors experience all three forms of labeling, with self-labeling perhaps being the harshest consequence of filing for bankruptcy.’⁶⁴ Research undertaken in America by Thorne and Anderson found that ‘[f]eelings of stigmatization were a pervasive feature of our informants’ bankruptcy experiences.’⁶⁵ Even discharge from bankruptcy does not necessarily provide a fresh start to the debtor with certain of the stigma remaining.⁶⁶

In 1978, the United States when enacting its new Bankruptcy Code sought to ‘ameliorate debtors’ attitudes about bankruptcy and society’s attitudes about debtors’ through changing the term for filers from ‘bankrupts’ to ‘debtors’.⁶⁷ The new Code also changed the filing of a bankruptcy petition to the seeking of an ‘order for relief’ and included section 525 to prohibit certain forms of discrimination against bankruptcy debtors.⁶⁸ Examining the issue of debt relief from a human rights perspective, Ondersma has observed:

There are, however, limits to what insolvency can accomplish with respect to protecting or restoring debtors’ human dignity. Stigmatization and marginalization will likely not be cured in an insolvency system unless the jurisdiction develops a method for ensuring that its insolvency system is capable of mitigating the shame or stigmatization associated with over-indebtedness or failure to pay debts.⁶⁹

In the next Part, we explore the ways in which bankruptcy stigma is enacted and entrenched by bankruptcy legislation and other laws in Australia.

60 See discussion below on applications to the police service.

61 Efrat, above n 1, 370, 372.

62 Ryan, *The Last Resort*, above n 9, 233; ‘[T]wo respondents commented that they thought they had been rejected by potential employers when applying for a job because of their bankruptcy. In both cases, it seemed that the employers had conducted credit reference checks without the applicants’ knowledge’: at 182.

63 Sousa, above n 3, 441.

64 Ibid 444. ‘Stigma’s pervasiveness in bankruptcy has negative psychological effects on the debtor’: Mols, above n 1, 295.

65 Thorne and Anderson, above n 4, 93.

66 *Re Todd; Ex parte Todd* [1986] FCA 463 [19] (Lockhart J).

67 Mols, above n 1, 301.

68 Sousa, above n 3, 454.

69 Chrystin Ondersma, ‘A Human Rights Framework for Debt Relief’ (2014) 36 *University of Pennsylvania Journal of International Law* 269, 321.

III THE LAW CREATES AND FACILITATES LABELLING AND BANKRUPTCY STIGMATISATION IN EMPLOYMENT AND BUSINESS

Stigmatisation of bankruptcy specifically in an employment and business context occurs through official labelling and through informal labelling.⁷⁰ This stigmatisation can lead to adverse impacts on the ability of a person who is bankrupt, or has previously been bankrupt, to earn an income, and is therefore an issue worth examining. This official labelling is explicitly provided for in Commonwealth, State and Territory laws; regulations; and professional rules for entry into a wide range of occupations; as well as through the *Bankruptcy Act 1966* (Cth) obligation to disclose bankruptcy status in certain circumstances. Further, the potential for informal labelling is also facilitated by the establishment of the NPII as a permanent and public record of bankruptcy administrations, and by the lack of any proscription against using bankruptcy information in employment decision-making.

In this Part of the article, we therefore explore the different ways in which the Australian laws create, maintain and reinforce the stigma of bankruptcy, through official and informal labelling in the employment and self-employment context. Of course, it does not necessarily follow that these laws lack justification, either at all, or in particular circumstances⁷¹ – we will return to this issue in Part IV below. Similarly, it is not necessarily the case that the laws have been designed with the object of stigmatisation, but, as we explain below, current laws and policies facilitate stigmatisation.

A Official Labelling through the Imposition of Employment Restrictions upon Bankrupts and Former Bankrupts

One way in which the law officially labels people who are, or have been, bankrupt is through the imposition of occupational entry restrictions on bankrupts or former bankrupts, preventing or limiting the ability of such persons to work in numerous occupations and professions. Most of these restrictions are not found in the *Bankruptcy Act 1966* (Cth), but instead are found in industry specific legislation, regulations and professional rules at Commonwealth or state/territory level. There is not, to our knowledge, a single document or source that identifies all of the occupational restrictions imposed on persons who have been bankrupt. On this question, the Bankruptcy Regulator, the Australian Financial Security Authority ('AFSA'), has noted the following on its website:

The *Bankruptcy Act 1966* does not impose any restrictions on employment in any trades or professions. However, particular industry associations or licensing authorities may impose certain restrictions or conditions should a member or licensee become bankrupt or enter into an arrangement under the *Bankruptcy Act*. Generally state governments administer legislation that govern eligibility for

70 It is also possible for self-labelling to be present and have adverse effects on employment or business outcomes. However, the law plays little role in such labelling.

71 Murray and Harris, above n 17, [2.08]; Kilborn et al, above n 10, 44 [124].

particular trades (eg builders, plumbers, second hand dealers, etc) while national or state based professional associations and/or statutory boards set the eligibility requirements for particular professions (eg accountants, lawyers, barristers, tax agents, etc).⁷²

AFSA then provides on its website a list of some trades and professions where restrictions may apply, although AFSA notes that this is not a comprehensive listing and that if a bankrupt's trade or profession is not listed they should contact the relevant licensing authority or association and make further enquiries.⁷³

We have independently undertaken a survey of the restrictions imposed on bankrupts and former bankrupts across the jurisdictions within Australia. The complexity of the task is such that this article likewise does not purport to be comprehensive; however it does illustrate the range of occupations where official labelling of bankruptcy occurs. As noted above, we have focused only on restrictions on the grounds of bankruptcy; although in many cases restrictions also apply to other personal insolvency administrations. For example, in the case of property, stock and business agents in New South Wales ('NSW'), the restriction applies to persons who are, or have been bankrupt, as well as to persons who have 'applied to take the benefit of any law for the relief of bankrupt or insolvent debtors' or 'made an assignment of his or her remuneration for their benefit'.⁷⁴ This would include entering into a debt agreement or personal insolvency agreement as a debtor.

From our review, we have identified two circumstances where official labelling occurs, and has the potential to adversely affect a person's ability to enter an occupation or profession: first, where bankruptcy creates a mandatory bar on participation in the occupation for a specified period of time; and second, where bankruptcy is a bar on participation in the occupation, but there is some discretion in the decision-maker to relax that bar in certain circumstances. These categories are discussed further below, with specific examples focusing on restrictions to entry. In most of the cases discussed, there is a similarly adverse impact if a person *becomes* bankrupt whilst already a participant in the occupation.⁷⁵

72 Australian Financial Security Authority, *Employment Restrictions* <<https://www.afsa.gov.au/debtors/bankruptcy/bankruptcy-overview/employment-restrictions>>.

73 Ibid.

74 *Property, Stock and Business Agents Act 2002* (NSW) s 16(1A).

75 See eg, *Public Service Act 1999* (Cth) ss 47, 54 under which a Senior Public Servant must be removed from office if he or she becomes bankrupt; *Commonwealth Electoral Act 1918* (Cth) s 25 under which appointment as an Electoral Commissioner or Deputy Electoral Commissioner is mandatorily terminated upon bankruptcy; *Commercial Agents and Private Inquiry Agents Act 2004* (NSW) ss 13, 17 under which a master licence or operator licence must be cancelled if the licensee becomes bankrupt; *Second-Hand Vehicle Dealers Act 1995* (SA) s 14B regarding cancellation of a second-hand vehicle dealer's licence if the licensee becomes bankrupt.

1 Bankruptcy as a Mandatory Bar to Participation

Table 1 sets out a number of occupations where there is a mandatory exclusion of persons who are or have been bankrupt. Such persons are prevented from entering the occupation if the relevant criteria are met. In some cases this mandatory exclusion exists only during the period of bankruptcy (that is, whilst the person is an undischarged bankrupt); in other cases it has a longer duration and extends to a time period after a person has been discharged from bankruptcy. There does not appear to be any consistent approach across occupations on this issue.

As Table 1 demonstrates, the range of occupations affected by mandatory bars includes company directors and managers; bankruptcy trustees and debt agreement administrators; parliamentarians; senior public servants; justices of the peace; motor car dealers; property agents; security agents; primary produce agents and participants in the racing industry.

Table 1: Examples of Mandatory Exclusion from Occupation

Occupation	Jurisdiction	Impact of bankruptcy	Relevant time period	Source of restriction
Company Director of Manager	Cth	A person is disqualified from managing a corporation whilst an undischarged bankrupt.	Current bankruptcy	<i>Corporations Act 2001</i> (Cth) ss 206A–206B.
Bankruptcy Trustee	Cth	A person is ineligible to be registered as a trustee if he or she has been a bankrupt in the previous 10 years.	Up to previous 10 years	<i>Bankruptcy Act 1996</i> (Cth) s 155A.
Debt Agreement Administrator	Cth	Application for registration as a debt agreement administrator must be refused if the applicant has been an 'insolvent under administration' in the last 10 years.	Up to previous 10 years	<i>Bankruptcy Act 1996</i> (Cth), ss 186A–186C.
Member of Parliament	Cth	A person is ineligible to sit as a Member of Parliament if he or she is an undischarged bankrupt.	Current bankruptcy	<i>Commonwealth of Australia Constitution Act</i> (Cth) s 44.
Justice of the Peace	NSW	A person is not eligible to be appointed as a Justice of the Peace if he or she is an undischarged bankrupt.	Current bankruptcy	<i>Justice of the Peace Regulation 2014</i> (NSW) reg 5.
Motor Trades	NSW	A person is not eligible for a motor vehicle dealers' licence, a motor vehicle repairers' licence or a motor vehicle recyclers' licence if an undischarged bankrupt.	Current bankruptcy	<i>Motor Dealers and Repairers Act 2013</i> (NSW) s 25.
Property Agents	NSW	A person is disqualified if an undischarged bankrupt or if they have been an undischarged bankrupt at any time in the 3 years prior to application.	Current bankruptcy and up to five years prior to application	<i>Property, Stock and Business Agents Act 2002</i> (NSW) s 16.
Racing Industry	NSW	A person is not eligible to be a member of Greyhound Racing NSW if an undischarged bankrupt.	Current bankruptcy	<i>Greyhound Racing Act 2009</i> (NSW) s 6.
Commercial and Private Inquiry Agents	NSW	Application for master licence or operator licence must be refused if person is an undischarged bankrupt.	Current bankruptcy	<i>Commercial Agents and Private Inquiry Agents Act 2004</i> (NSW) ss 7, 10.
Wool, Hide and Skin Dealers	NSW	A natural person is not entitled to a licence if they are an undischarged bankrupt.	Current bankruptcy	<i>Wool, Hide and Skin Dealers Act 2004</i> (NSW) s 9.
Security Agents	VIC	Application for a private security business licence or private security business registration must be refused if the applicant (or a relevant person) declared bankrupt within preceding 5 years.	Bankruptcy commenced in five years prior to application	<i>Private Security Act 2004</i> (Vic) ss 26, 83.
Second-hand Vehicle Dealer	SA	A person is not entitled to be licensed as a second-hand vehicle dealer if they are an undischarged bankrupt.	Current bankruptcy	<i>Second-Hand Vehicle Dealers Act 1995</i> (SA) ss 9, 14B. ⁷⁶

⁷⁶ The *Second-Hand Vehicle Dealers Act 1995* (SA) refers to the s 9 definition of 'insolvent under administration' in the *Corporations Act 2001* (Cth).

2 Previous Bankruptcy as a Discretionary Consideration

In other cases, a current or previous bankruptcy is not an absolute bar to participation. Although bankruptcy is listed as one of a number of factors that may impact on eligibility to participate in the occupation, there is scope for some discretion on the part of a decision-maker to allow a person who is, or has been, bankrupt to enter and remain in that occupation.

This discretion is expressed in at least two different ways. In some examples, bankruptcy is normally a bar but it is possible for an affected person to make an application to the decision-maker that the bar should not be applied in their particular case, on the grounds that there is some lack of moral culpability in relation to the bankruptcy. In other examples, it is a requirement for participation in the occupation that the person be a 'fit and proper person'. A previous bankruptcy is a matter that can properly be considered in that assessment of whether an applicant is a fit and proper person, but it is not determinative of the outcome.

The range of occupations affected in this way includes manufacturers, producers and dealers of excise goods, builders, directors, senior managers and auditors in the banking industry, accountants, taxation professionals, valuers, members of the legal profession, school teachers, security agents, property agents, conveyancers, public servants, and the mining industry. Table 2 provides some more details of some of the restrictions applicable in these occupations. As with the mandatory exclusions, there is a variation across the restrictions as to whether they apply to both undischarged and discharged bankrupts.

Table 2: Examples of Discretionary Exclusion from Occupation

Occupation	Jurisdiction	Impact of bankruptcy	Relevant time period	Scope of discretion	Source of restriction and discretion
Excise Licences	Cth	The collector may refuse to grant a licence to manufacture, produce, store and deal in excised goods if not a 'fit and proper person'.	Current bankruptcy	In considering 'fit and proper' person' requirement, the collector may have regard to whether the applicant is an undischarged bankrupt.	Excise Act 1901 (Cth) ss 39A, 39B, s 39D, 39H.
Builders	Qld	An individual is an 'excluded individual' if becomes bankrupt or has taken advantage of the laws of bankruptcy in past five years.	Up to five years previously	The Queensland Building and Construction Commission may categorise the individual as a 'permitted individual' if all reasonable steps were taken to avoid the bankruptcy and in so doing must have regard to the factors listed.	Queensland Building and Construction Commission Act 1991 (Qld) ss 56AC, 56AD.
Directors, Senior Managers and Auditors of Authorised Deposit-Taking Institutions ('ADI') (eg Banks)	Cth	A person is disqualified from being, or acting in the role of, a director or senior manager of an ADI if he or she has been or becomes bankrupt, or has 'applied to take the benefit of a law for the relief of bankrupt or insolvent debtors.'	Unrestricted	A disqualified person (or the Australian Prudential Regulatory Authority) can apply to the Federal Court of Australia for an order that the person is not a disqualified person.	Banking Act 1959 (Cth) ss 19-21.
Chartered Accountants	National	Applicant for membership of the Institute of Chartered Accountants Australia must be a 'fit and proper person'.	No restriction	The Board of the Institute can have regard to current or previous bankruptcy, but is not bound to refuse membership on the grounds of current or previous bankruptcy.	Institute of Chartered Accountants Australia bylaws 10(a), 12.
Taxation Agents	Cth	Eligibility for registration as a taxation practitioner includes a 'fit and proper person' requirement.	Up to five years prior to application	The Tax Practitioners Board must have regard to current or previous bankruptcy, but is not bound to refuse membership on the grounds of current or previous bankruptcy.	Tax Agents Services Act 2009 (Cth) ss 20-5, 20-15.
Security Agents	NSW	An application for a master licence must be refused if an applicant was an undischarged bankrupt at any time in the previous three years.	Up to three years prior to application	Despite a relevant bankruptcy, the Commission can grant a licence if satisfied that the person took all reasonable steps to avoid the bankruptcy.	Security Industry Regulation 2007 (NSW) reg 16.

Occupation	Jurisdiction	Impact of bankruptcy	Relevant time period	Scope of discretion	Source of restriction and discretion
Valuers	NSW	A person is disqualified from registration if they are an undischarged bankrupt currently or within the previous three years.	Up to three years prior to application	Despite a relevant bankruptcy, the Director-General can allow registration if satisfied that the person took all reasonable steps to avoid the bankruptcy.	Valuers Act 2003 (NSW) s 9.
Mining Industry	NSW	A decision to refuse to grant or renew a mining right may be made on the ground that the person is not a 'fit and proper person'.	Up to three years prior to application	The Secretary or Minister may have regard to current or previous bankruptcy, but is not bound to refuse to grant or renew a licence on the grounds of current or previous bankruptcy.	Mining Act 1992 (NSW) s 380A.
Conveyancers	NSW	Person disqualified and ineligible for a licence if an undischarged bankrupt or applying to take the benefit of any law for bankrupt or insolvent debtors, compounding or making an assignment to creditors.	Current bankruptcy and any time in previous three years	The Director-General may exempt a person from this requirement if satisfied that the person took all reasonable steps to avoid the bankruptcy or other financial difficulties concerned.	Conveyancers Licensing Act 2003 (NSW) ss 6, 8, 10.
Legal Profession	NSW	Legal Profession Admission Board must consider whether applicant is a 'fit and proper person'.	No time limit	Whether person is or has been insolvent under administration must be considered, but is not determinative; a person can be determined to be a 'fit and proper person' despite a 'suitability matter' existing.	Legal Profession Act 2004 (NSW) ss 9, 25.
Teaching and Training Organisations	Vic	Bankruptcy of a person (or a person involved in the management of a body, or in business of providing services) is a factor that the Victorian Registration and Qualifications Authority may have regard to when determining whether to register a person, body or school.	No time limit	Bankruptcy is a factor that may be taken into consideration.	Education and Training Reform Act 2006 (Vic) ss 4.3.11(2)(d), 4.3.16(2A)(a)(i), 4.3.21(3)(d).

In most cases, there is scope for the exercise of this discretion to also be challenged by an administrative tribunal and/or by the courts. The following discussion of some recent cases in the building industry in Queensland, and in the legal profession in NSW, provides an insight into the ways in which discretionary powers can be exercised in cases where the applicant is or has been bankrupt. However, it is difficult to draw any generally applicable conclusions, as these decisions all turn on their individual facts.

a) *Queensland Building Industry*

In Queensland, a person who has taken advantage of bankruptcy laws (and who would thus normally be ineligible to hold a licence) can apply to the Queensland Building and Construction Commission for a declaration that the person be treated as a 'permitted individual' and thus be eligible for a builder's licence.⁷⁷ An applicant can be categorised as a permitted individual for the relevant event only if the individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event.⁷⁸ There are specific matters that must be considered in making this assessment, including the extent to which the applicant kept proper books of account and financial records; sought appropriate financial or legal advice; and made appropriate provision for taxation debts.⁷⁹ A decision of the Commission to reject an application can be reviewed by the Queensland Civil and Administrative Tribunal.⁸⁰

The approach to be taken by the Tribunal is described in *Younan v Queensland Building and Services Authority*:⁸¹

The test in s 56AD(8) requires first. the identification of the relevant event; second. the identification of the circumstances that resulted in the happening of the relevant event; third. a consideration of whether the relevant individual took all reasonable steps to avoid those circumstances coming into existence; and. if satisfied of that. fourth. a decision whether to categorise the individual as a permitted individual. What were reasonable steps depended on what was reasonable for the individual concerned in the circumstances in which he found himself. with such information as he then had. It is not a question of whether he did everything possible to prevent these circumstances from arising. or whether they would not have arisen if he had acted differently. The reasonableness of his behaviour must be assessed by reference to what was known by him at the time, without the benefit of hindsight.⁸²

This is the approach that was taken in the case of *Cashen v Queensland Building and Construction Commission*.⁸³ In this case, the relevant event was Mr

77 *Queensland Building and Construction Commission Act 1991* (Qld) s 56AC. Also note that under s 74B, if a licensee is bankrupt or insolvent, that constitutes proper grounds for taking disciplinary action against the licensee.

78 *Queensland Building and Construction Commission Act 1991* (Qld) s 56AD(8).

79 *Queensland Building and Construction Commission Act 1991* (Qld) s 56AD(8A).

80 *Queensland Building and Construction Commission Act 1991* (Qld) s 56AH.

81 [2010] QDC 158.

82 Ibid [26] (McGill DCJ).

83 [2014] QCAT 362 (Unreported, Senior Member Oliver, 29 July 2014).

Cashen's entering into bankruptcy. Of the various circumstances that were identified as resulting in the happening of the bankruptcy, the Tribunal accepted that 'the catalyst for the financial difficulties ultimately experienced by Mr Cashen resulted from his marriage breakdown'.⁸⁴ As Mr Cashen's wife had previously assisted him to run the business, the separation had an adverse impact on the business,⁸⁵ and the circumstances that resulted in the bankruptcy were Mr Cashen's ability to solely manage and conduct the business and make payments to financiers.⁸⁶ The Tribunal, however, found that Mr Cashen there was 'no reasonable step that he could take concerning the separation, insofar as it related to the conduct of the business'.⁸⁷ The Tribunal also noted the various steps that Mr Cashen did take to address his deteriorating financial position after the separation, including seeking advice about marketing the former matrimonial home, improving the home as a result of that advice, renting the home and residing in cheaper accommodation, seeking approval for a refinancing, and seeing advice from professional people about his financial situation.⁸⁸ The Tribunal found that 'there was little more he could reasonably do to avoid the downward financial spiral that led to bankruptcy',⁸⁹ and so granted the application to be categorised as a permitted person.

In contrast, in *Dancey v Queensland Building Services Authority*,⁹⁰ the Tribunal confirmed the Authority's decision refusing to categorise Mr Dancey as a permitted individual.⁹¹ In this case, the relevant event was Mr Dancey's bankruptcy, which in turn had resulted in part from Mr Dancey being unable to satisfy personal guarantees that he had given as a director of his company.⁹² The Tribunal was not satisfied that Mr Dancey had taken all reasonable steps to avoid the circumstances resulting in his bankruptcy, including because he:

- did not seek legal and financial advice about the specific terms of a substantial loan agreement signed by his company, particularly given that the agreement entailed more financial risk to the company than a bank loan;⁹³
- did not provide the company's records, and so the Tribunal could not be satisfied that Mr Dancey took action to ensure that the company kept proper books of account and financial records;⁹⁴ and

84 Ibid [9].

85 Ibid [25].

86 Ibid [26].

87 Ibid [27].

88 Ibid [27].

89 Ibid [28].

90 [2014] QCAT 173 (Unreported, Member F FitzPatrick, 30 April 2014).

91 Ibid [45].

92 Ibid [15].

93 Ibid [22], [27].

94 Ibid [32]–[33].

- did not ensure that the personal guarantees that he gave were covered by sufficient assets.⁹⁵

b) *NSW Legal Profession*

As noted above, bankruptcy or other insolvency event is not an immediate bar to practise in the legal profession in NSW. Instead, a legal practitioner or applicant is required to disclose the event (a ‘show cause’ event) at the time of application, and the relevant council is required to determine whether the person is a ‘fit and proper person’ to hold a practising certificate. Although a bankruptcy or other insolvency event can be considered as one of the ‘suitability’ matters, it is not the fact of the bankruptcy that is determinative, it is ‘whether the circumstances in which the act of bankruptcy was committed are such as to persuade a Council that ... such a person is not a fit and proper person to hold a practising certificate’.⁹⁶ The focus is on whether there is ‘some form of moral turpitude’;⁹⁷ dishonesty is sufficient, but is not necessary.⁹⁸ Two cases where the cancellation of a practising certificate was reviewed by the Administrative Decisions Tribunal are discussed below.

One is the case of *Barakat v Law Society of New South Wales*.⁹⁹ In this case, prior to petitioning for bankruptcy, Mr Barakat had made a number of transactions that, according to the Administrative Decisions Tribunal, demonstrated that he ‘chose to prefer the financial interests of himself and his family over those of the taxpayer and his judgment creditor clients.’¹⁰⁰ However, on appeal, the NSW Supreme Court found that Mr Barakat’s conduct ‘was certainly not dishonest’, he sought and acted on legal advice in respect of the transactions, and had regard to the interests of creditors as well as considering his own interests a high priority.¹⁰¹ The Court also noted that ‘[m]ore honourable courses of action were open’, but this did not mean that the conduct revealed ‘such deficiency in character’ as to mean he was unfit to practise.¹⁰²

In contrast, in *Council of the New South Wales Bar Association v Davison*,¹⁰³ the Administrative Decisions Tribunal agreed with the Bar Association that Mr Davison should be removed from the practitioner’s roll as a result of breaches of his legal and civic obligations in relation to his taxation obligations.¹⁰⁴ The fact

95 Ibid [35]–[36].

96 *New South Wales Bar Association v Murphy* (2002) 55 NSWLR 23, cited in *Barakat v Law Society of NSW* [2013] NSWADT 271 (Unreported, Member Mullane, Member Fairlie and Member Tingle, 16 May 2013) [188] (‘*Barakat*’).

97 *Barakat v Law Society of NSW* [2014] NSWSC 773 [150] (Beech-Jones J) (‘*Barakat*’).

98 Ibid [151].

99 [2014] NSWSC 773.

100 *Barakat* [2013] NSWADT 271 (Unreported, Member Mullane, Member Fairlie and Member Tingle, 16 May 2013) [241].

101 *Barakat* [2014] NSWSC 773 [155].

102 Ibid [156].

103 [2005] NSWADT 252 (Unreported, Deputy President Chesterman, Member Norton and Member Bennett, 11 July 2005).

104 Ibid [95], [103].

that Mr Davison was bankrupt at the time, and had previously been bankrupt twice, was not, of itself, an explicit factor in the decision.

These illustrative examples from the building industry and legal profession confirm that the relevance of a bankruptcy to fitness for purpose goes to the reasons for the bankruptcy, and the morality or otherwise of the person's decisions in relation to their financial affairs, rather than to the fact of the bankruptcy itself. The exercise of the discretion necessitates a 'going behind' the bankruptcy to uncover the reasons for the bankruptcy, whether other steps could reasonably be taken, and whether there is the required 'moral turpitude' to exclude the person from the occupation or profession.

B Variation in Bankruptcy Restrictions across Australia

Our review of occupational restrictions also highlights the potential for variation in restrictions across Australia, even in the one occupation or profession. For example, Table 3 below shows the differences in the occupational restrictions imposed due to bankruptcy in building occupations across NSW, Victoria, Queensland and South Australia. This shows differences in:

- the type of insolvency event that acts as a bar (with some restrictions applying only to bankruptcy, while others also involve other types of insolvency administrations);
- the length of time for which the insolvency event is relevant (noting that in each example here, the restriction can extend to a person who has been discharged from bankruptcy); and
- the scope or grounds for any discretion by the decision maker.

Table 3: Comparison of Restrictions for Building Licences across Jurisdictions

Occupation	Jurisdiction	Type of restriction (mandatory/discretionary)	Time period for which previous bankruptcy is relevant	Other insolvency administrations to which the restriction extends	Source of restriction
Building Licence (Residential Building)	NSW	Discretionary for some categories of licences	Up to three years prior to application	Restriction also applies where applicant was a director or manager of a company that is or was in external administration in the previous 3 years.	<i>Home Building Act 1989</i> (NSW) s 20 refers to 'fit and proper person', s 33B, 105
Contractor's Licence	Qld	Discretionary	Up to five years prior to application	Restriction also applies if person has taken advantage of bankruptcy laws (as a debtor), or has been involved in a company that has taken advantage of insolvency laws in the relevant time period.	<i>Building and Construction Commission Act 1991</i> (Qld) ss 56AC, 56AD.
Registered Building Practitioner	Vic	Discretionary. Requirement for registration is that person is of good character. Information that is prescribed as being relevant to good character (and which must be provided with application) includes whether the applicant has ever been insolvent under administration. ¹⁰⁵	No time limit	Restriction applies if person has been insolvent under administration. No definition of insolvent under administration in Act or Regs. (A definition was repealed in 2008 amendments).	<i>Building Act 1993</i> (Vic) s 170; <i>Building Regulations 2006</i> (Vic) reg 1509.
Building Work Contractors Licence	SA	Mandatory, but some discretion for licence with conditions for subcontractors and specified trades in specified circumstances or limitations.	Up to two years prior to application	Extends to all insolvencies under administration as defined in the Corporations Act 2001 (Cth); and composition or deed or scheme of arrangement with or for the benefit of creditors. Also extends to having been a director of a body corporate when the body corporate was wound up or within the 12 months preceding the winding up. (Although here the time frame is the previous five years).	<i>Building Work Contractors Act 1995</i> (SA) s 9.

¹⁰⁵ For information on 2015 amendments, see NSW Fair Trading, *Major Changes to Home Building Laws* <http://www.fairtrading.nsw.gov.au/sites/default/files/About_us/Legislation/Changes_to_legislation/Major_changes_to_home_building_laws.page>.

¹⁰⁶ Interestingly, the fact that a person has been insolvent under administration is specifically identified as a ground for refusing to register or license to be a plumber under the same piece of legislation: *Building Act 1993* (Vic) s 221S(1)(d).

Identifying a policy rationale for such variations *within* one occupational group is difficult, and can perhaps be explained in part by the difficulties of coordinating a national approach. Variations such as these may have little practical impact if most people spend all of their working lives in one jurisdiction. However, Australia has a mobile population, with figures from the Australian Bureau of Statistics showing that just fewer than 350 000 people moved States or Territories during 2013–14, and a similar number moved in 2012–13.¹⁰⁷ For people who are seeking to move, or have moved, interstate, this variability in occupational restrictions potentially adds a further level of complexity to the impact of bankruptcy on their employment and self-employment options.

Similarly, while individuals may be able to determine the impact of a bankruptcy event on their current employment or occupation (and thus make informed decisions about their insolvency options), the variation between occupations makes it difficult to determine the potential effect of bankruptcy on future employment options.

C Informal Labelling through Disclosure Obligations

A second group of laws that we identified in our review facilitate informal labelling of bankrupts and former bankrupts. These are laws that require disclosure of bankruptcy status in employment and business settings, but do not proscribe any specific consequences for the bankruptcy.

1 Disclosure Obligations in Occupational Regulation

There are a number of occupations where the relevant legislation imposes an obligation upon persons who become bankrupt to disclose that bankruptcy to their employer, but where the relevant legislation, regulation or policy does not specify any further consequences of the bankruptcy. Table 4 sets out the details of three settings in which such disclosure obligations occur.

In these circumstances, it is not known whether or not these restrictions are used to terminate or restrict employment of a person following disclosure of a bankruptcy. However, clearly there would be the potential for some adverse consequences following disclosure, and the obligations are likely, at a minimum, to create uncertainty for individuals likely to be subject to such disclosure obligations.

107 Australian Bureau of Statistics, *Australian Demographic Statistics: June Quarter 2014* (Cat No 3101.1, ABS, Canberra, 18 December 2014) 44, Table 17. <[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/126E319BBCA7E237CA257DB1001620B4/\\$File/31010_jun%202014.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/126E319BBCA7E237CA257DB1001620B4/$File/31010_jun%202014.pdf)>.

Table 4: Occupational Disclosure Obligations

Occupation	Jurisdiction	Disclosure obligation	Relevant time period	Source of obligation	Obligation in relation to other insolvency events
Teaching Staff	NSW	Officer and temporary employees must disclose the fact of bankruptcy to the Director-General immediately	Bankruptcy during appointment	Teaching Service Act 1980 (NSW) s 92A.	Extends to making a composition, arrangement or assignment for the benefit of the officer's or the temporary employee's creditors, the officer or temporary employee.
Education (School Administration and Support Staff)	NSW	School and administrative staff must disclose to the Director-General immediately if they become bankrupt	Bankruptcy during appointment	Education (School Administrative and Support Staff) Act 1987 (NSW) s 7B.	Extends to making a composition, arrangement or assignment for the benefit of the member's creditors.
Passenger Transport	SA	Accredited operator of a passenger transport service or accredited operator of a centralised booking service must disclose bankruptcy within 7 days	Bankruptcy during period of accreditation	Passenger Transport Regulations 2009 (SA) regs 9(1)(a), 15(1)(d).	Extends to informing of action to bankrupt the person or to declare the person insolvent, or of proceedings by the person to take the benefit (as debtor) of a law relating to bankruptcy or insolvent debtors or, in the case of a body corporate of action to windup the body corporate or to place the body corporate under 'official management' ¹⁰⁸ or in receivership.

¹⁰⁸ Note this form of insolvency administration was repealed from Australia's corporations legislation in 1993 upon the introduction of the Part 5.3A voluntary administration and deeds of company arrangement regimes.

2 Disclosure Obligations in the Bankruptcy Act

The *Bankruptcy Act 1966* (Cth) also facilitates informal labelling by imposing an obligation on persons who are bankrupt to disclose their bankruptcy status when obtaining credit or entering into a hire purchase agreement; or when obtaining goods or services from a person by giving a promissory note, bill of exchange or cheque, or promising to pay for the goods or services. In all cases, the obligation to disclose arises when the amount in question is equal to, or more than, the prescribed amount (currently \$5447).¹⁰⁹

In addition, if an undischarged bankrupt is carrying on a business under an assumed name, in the name of another person, or under a firm name (alone or in partnership), he or she is required to disclose their true name and bankruptcy status to every person with whom the bankrupt (or the partnership) deals (regardless of the size of the transaction).¹¹⁰

Faced with such information, many suppliers and other persons with whom the bankrupt person deals may commonly decide against a one-off or continuing relationship. The obligation to disclose bankruptcy status to creditors, suppliers and others may therefore lead to adverse consequences, and make it difficult, if not impossible, for an undischarged bankrupt to carry on a business or to set up a new business. Notably this obligation of disclosure applies only during the period of bankruptcy, and ceases once a person is discharged from bankruptcy. In this way, it contrasts with some occupational restrictions, where the restriction continues for a period of time after discharge from bankruptcy.

D Informal Labelling through Public Records

The third way in which the law facilitates informal labelling of people who are, or have been, bankrupt is through the requirement for a permanent, publicly accessible database of bankruptcy administrations.

Bankruptcies are no longer published in national, state or territory newspapers. However, AFSA is responsible for administering the NPII, which is established as a permanent, public record, of bankruptcy administrations, including bankruptcies, debt agreements, and personal insolvency agreements.¹¹¹ Similarly, potential suppliers or clients can seek information about bankruptcy status through the NPII (even where disclosure is not required under the

109 *Bankruptcy Act 1966* (Cth) ss 269(1)(a)–(ad); ‘Above this limit, bankrupts ... must disclose their bankrupt ... status when seeking to obtain goods or services on credit, by hire purchase or cheque; when leasing, hiring or promising to pay for goods and services; or when seeking to obtain an amount by promising to supply goods or render services’: Australian Financial Security Authority, *Indexed Amounts* (20 September 2015) <<https://www.afsa.gov.au/resources/indexed-amounts/indexed-amounts-1>>.

110 *Bankruptcy Act 1966* (Cth) s 269(1)(b).

111 *Bankruptcy Act 1966* (Cth) s 5 and *Bankruptcy Regulations 1996* (Cth) reg 13, sch 8 list the information to be entered on the NPII; see generally Australian Financial Security Authority, *Maintaining the National Personal Insolvency Index* (Official Receiver Practice Statement 8, 8 September 2015) <<https://www.afsa.gov.au/about-us/policies-and-practices/official-receiver-practice-statements/maintaining-the-national-personal-insolvency-index>>.

Bankruptcy Act 1966 (Cth).¹¹² Upon payment of the required fee (\$15 from 1 July 2015),¹¹³ anyone can search the NPII to find out whether a particular individual is in, or has ever been in, a bankruptcy administration in Australia.¹¹⁴ There is currently no restriction on who can access the NPII data, and for what purpose.¹¹⁵

An employer can also bypass the NPII altogether, and ask (directly or through an agent) an employee or prospective employee to provide information about their bankruptcy status. Some employers specifically seek information about bankruptcy on their application forms.¹¹⁶ Again, there is nothing to prevent employers from making such a request; and a failure to grant such a request is likely to be perceived by an employee or prospective employee as leading to adverse consequences, including perhaps being excluded from consideration.¹¹⁷

Employers can similarly seek access to a wider range of financial history information (including bankruptcy) that is found in consumer credit reports. Credit reporting agencies are generally permitted to provide only credit reports to credit providers,¹¹⁸ and only for use in credit assessment and similar decisions.¹¹⁹

112 One commercial provider of business check services explains: ‘Business credit express reports help small to medium business reduce risk in decision making, allowing you to check a company is legitimate, confirm an organisation’s details such as ACN and registered address, find out an organisation’s structure, including shareholder details, check a company’s credit history, including the directors behind it. Explore our reports now to begin mitigating potential risk of people you do business with’: Veda Advantage, *Reports* (2015) <<http://www.veda.com.au/businesscreditexpress/reports>>.

113 Australian Financial Security Authority, *Fees and Charges* <<https://www.afsa.gov.au/resources/fees-and-charges/fees-and-charges>>.

114 Note that a person can ask that their address be suppressed from the NPII if publication will jeopardise their safety, but their name and birthdate cannot be suppressed: Australian Financial Security Authority, *Requesting to Suppress or Correct Personal Details* <www.afsa.gov.au/resources/npii/requesting-to-suppress-personal-details>. Also, the Official Receiver can refuse to allow a person access to any documents if that access would jeopardise the safety of any person: Australian Financial Security Authority, *Inspecting Documents Filed with the Official Receiver* (Official Receiver Practice Statement 9, 28 October 2014), 9–10 <<https://www.afsa.gov.au/about-us/policies-and-practices/official-receiver-practice-statements/searching-the-public-record-and-inspection-of-documents>>.

115 Australian Financial Security Authority, *Maintaining the National Personal Insolvency Index*, above n 111, 8; Consumer Credit Legal Centre (NSW), *Credit Reporting: Getting It Right for Consumers* (Research Report, April 2007) 118. We note the helpful suggestion from a reviewer that it would be interesting to compare the permanency of the public record for bankruptcy and other personal insolvency administrations, and the policy rationale for this permanency, with the provision for spent convictions in criminal law settings, see eg, *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) and similar laws for other Australian jurisdictions. However, a discussion of this point is beyond the scope of this article.

116 See, eg, application forms for the police service in WA and SA: for WA, see Western Australia Police, *Application for Employment as a Police Officer* <<http://www.stepforward.wa.gov.au/assets/PDFs/App-for-Employment-as-a-Police-Officer-Feb-2013.pdf>>; for SA, see South Australia Police, *Application for Employment* <<http://www.achievmore.com.au/pdf/PO-SAPOL-Application-for-Employment.pdf>>.

117 See, eg, Lea Shepard ‘Toward a Stronger Financial History Antidiscrimination Norm’ (2012) 53 *Boston College Law Review* 1695, 1748.

118 *Privacy Act 1988* (Cth) ss 20E(1), 20E(3)(a), 20F. Some exceptions apply – including, where disclosure is required or authorised by an Australian law or court/tribunal order; or where disclosure is for the purposes of a recognised external dispute resolution scheme to which the credit reporting body or a credit provider belongs; or where disclosure is to an enforcement body where the credit reporting body is satisfied that the body believes on reasonable grounds that the individual concerned has committed a serious credit infringement: at ss 20E(2), (3).

119 See the list of permitted disclosures in *Privacy Act 1988* (Cth) s 20F.

However, there is nothing to prohibit an employer asking a job applicant to provide a copy of their consumer report,¹²⁰ and to use that information as they see fit, subject to the requirements of the privacy legislation.¹²¹ Again, failure to accede to such a request has the potential to lead to adverse consequences or adverse implications being made.

E Informal Labelling through Employer Policies

Finally, informal labelling occurs through internal policies and disclosure requirements of employers, even in the absence of restrictions or disclosure obligations imposed by law. The relatively accessible legislation, regulations and rules that impose bankruptcy restrictions for particular occupations or positions therefore tell only part of the story.

For example, although legislation governing the Australian Public Service ('APS') does not specify that insolvency is a barrier to employment,¹²² information provided to potential applicants makes it clear that security clearances for appointment can, in some circumstances, include a bankruptcy check.¹²³

Further, the vetting practices for personnel security guidelines' document suggests that a financial history check will be required for baseline vetting; a financial statement will be required for higher levels of clearance; and a financial probity check will be required for the highest level of clearance.¹²⁴ A document produced for Queensland Public Service agencies similarly suggests that a bankruptcy search should be conducted before finalising a short-list for senior

120 In its 2007 Credit Reporting report, the Consumer Credit Legal Centre NSW (now the Financial Rights Legal Centre) recommended that a prohibition be introduced against requiring an individual to provide a copy of their credit report for or in the course of any business or enterprise: Consumer Credit Legal Centre (NSW), above n 115, 119 (Recommendation 36), 141 (Recommendation 47).

121 Concerns about this 'back-door' method of accessing consumer credit information were raised in the Australian Law Reform Commission's ('ALRC') inquiry into the privacy law. However, the ALRC took the view that there was no need to prohibit individuals from being required to provide their credit reporting information for non-credit related purposes, suggesting that the privacy principle that collection of information must be 'necessary' to an organisation's functions or activities would be sufficient regulation: Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (Report No 108, May 2008) 1981 [59.55].

122 The legislation does specify that the engagement of an APS employee may be made subject to conditions notified to the employee, including conditions dealing with 'security and character clearances': *Public Service Act 1999* (Cth) s 22(6)(d).

123 The document notes that '[b]ankruptcy can be taken into account in assessing your suitability if it is relevant to the specific requirements of the employment opportunity. A bankruptcy check may be required in some cases as part of a security clearance': Australian Public Service Commission, *FAQ: Criminal Record or Bankrupt* (1 Feb 2004) <<http://www.apsc.gov.au/publications-and-media/faq/can-i-get-a-job-in-the-australian-public-service-if-i-have-a-criminal-record-or-have-been-declared-bankrupt>>.

124 Protective Security Policy Section, *Personnel Security Guidelines: Vetting Practices* (Version 1.2, Attorney-General's Department, April 2015) 20 <<http://www.protectivesecurity.gov.au/personnel-security/Documents/PersonnelsecurityguidelinesVettingpractices.pdf>>.

leadership positions,¹²⁵ and templates for position descriptions indicate that applicants for senior leadership and technical specialist positions will not be eligible for appointment if they are an undischarged bankrupt.¹²⁶

Similarly, although there is nothing in the relevant legislation restricting bankrupts from joining the Northern Territory Police Services, Integrity Guidelines for recruitment include the following:

Recruitment staff may allow an applicant to remain in the selection process where:

- the applicant's bankruptcy was discharged or the order expired more than five years ago;
- did not form part of a series or pattern of similar orders;
- the applicant has otherwise demonstrated very high standard of conduct; and
- there are no other circumstances or criminal history which brings the applicant's integrity into doubt.

... All bankruptcy matters to be referred to the Committee for evaluation and determination based on circumstances and applicants may be excluded.¹²⁷

Material for applicants to the Australian Federal Police also suggests that an exclusion from eligibility may apply in the case of bankruptcy,¹²⁸ and application forms for police services in South Australia and Western Australia require disclosure of any current or former bankruptcies; and, in the case of South Australia, disclosure of whether any bankruptcy proceedings are under consideration.¹²⁹

F Bankruptcy Discrimination Not Prohibited

As we have just described, a person may be required to disclose their bankruptcy to an employer, supplier or client or potential employer, supplier or client under a legislative obligation, or in response to a specific request for that information. Alternatively the bankruptcy might be discovered through an NPII search or other means. However, unlike official labelling through occupational restrictions, the law does not provide for specific consequences of informal labelling of bankruptcy. Instead, it is up to the recipient of the information to determine whether and how they will use that information in business or decision-making, including decisions about new appointments, promotions or other opportunities in employment, or in decisions about supply and purchasing and business ventures. Such decisions can be made on an individual basis, or

125 Public Service Commission, *Best Practice Guide for Executive Recruitment and Selection* (Version 1.1, Queensland Government, 18 October 2013) 9 <<http://www.psc.qld.gov.au/publications/assets/guidelines/Best-practice-guide-for-executive-recruitment-and-selection.pdf>>.

126 See, eg, role description template for executive leadership positions; role description template for executive technical specialist positions: Public Service Commission, *Recruitment and Selection* (2013) <<http://www.psc.qld.gov.au/for-executives/employment/recruitment-and-selection.aspx>>.

127 Northern Territory Police, *Assessment Guidelines for Recruiting Staff and the Integrity Committee*, 4 <<http://www.pfes.nt.gov.au/~media/Files/Recruitment/Police/General/Integrity%20Guidelines.ashx>>.

128 Australian Federal Police, *AFP Character Guidelines* (2014), 5 <<http://www.afp.gov.au/~media/afp/pdf/e/employment-character-guidelines.pdf>>.

129 For WA, see Western Australia Police, above n 116; for SA, see South Australia Police, above n 116. Note that we have not reviewed the application forms for all police services.

through a blanket policy,¹³⁰ and can be decisions or policies that have adverse impacts on bankrupts and former bankrupts. Despite the potential for significant adverse consequences, discrimination in employment and business on the grounds of current or former bankruptcy is not prohibited under Commonwealth, state or territory anti-discrimination laws.¹³¹

In conclusion, the discussion above shows that there are a number of ways in which the law creates, maintains and/or facilitates bankruptcy stigma in an employment and business context. In the next Part, we discuss the reasons why this situation warrants review.

IV WHY DOES THE REINFORCEMENT OF BANKRUPTCY STIGMA MATTER?

In the above section, we have identified a number of ways in which the law entrenches or encourages bankruptcy stigma through official and informal labelling. However, this does not of itself necessarily identify a problem that requires addressing.¹³² For example, it may be that bankruptcy restrictions are appropriate in relation to employment and business, at least in some circumstances, including where fraud is involved. In this Part then, we identify and describe two ways in which the law's role in relation to bankruptcy stigma does matter and does require attention.

A Stigma and the Fresh Start Objective

First, the entrenchment of bankruptcy stigma through the mechanisms described above operates to inhibit the fresh start objective of bankruptcy. That one of the objectives of bankruptcy in Australia is to assist a debtor to receive a fresh start at the conclusion of their bankruptcy is a commonly voiced opinion,¹³³ although there is not always a consistent view about the scope and meaning of the fresh start concept in Australia and elsewhere.

130 For example, Queensland Public Service template documents discussed above.

131 For example, at the Commonwealth level, age, sex, race and disability discrimination are prohibited: *Age Discrimination Act 2004* (Cth); *Disability Discrimination Act 1992* (Cth); *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth).

132 Efrat, above n 1, 393. Although the World Bank Report, above n 10, 44 [125] notes that '[a]ttitudes about debt and cultural stigma change slowly, and relatively little can be done to affect such an expansive and disperse notion directly, but policymakers can make and have made choices to minimize stigma by avoiding or repealing judgmental language and punitive measures in existing laws'; see also Sousa, above n 3, 453: '[w]hile this study and others like it evidence the pervading nature of bankruptcy stigma, some have argued that the stigma traditionally associated with bankruptcy has declined over time'.

133 The Harmer Report includes as an aim of modern insolvency law the 'effective relief or release from the financial liabilities and obligations of the insolvent': Law Reform Commission, *General Insolvency Inquiry: Summary of Report* (Report No 45, 13 December 1988) 2 [5].

For example, some commentators have suggested that the fresh start potential of bankruptcy provides a ‘clean sheet’;¹³⁴ ‘economic rehabilitation’;¹³⁵ the opportunity to begin again ‘on the economic treadmill’;¹³⁶ or a restored ability to participate in the open credit economy.¹³⁷ Other commentators suggest that the fresh start in bankruptcy allows debtors to restore their ‘financial well-being’,¹³⁸ or to obtain ‘long-term financial health’.¹³⁹ There are some similarities between each of these expositions of the fresh start concept, but they are not identical.

In a recent review of the fresh start concept, Howell suggested that:

[C]ommentators have different ways of understanding the fresh start concept in bankruptcy. Some emphasise the significance of debt discharge to delivering the fresh start, while others consider that more is needed if debtors are to truly receive a fresh start. These differences can perhaps be located along a continuum from a fresh start that is solely or primarily about debt discharge (the debt discharge-focused fresh start), to a fresh start that is about debtor rehabilitation in a broader sense (the rehabilitation-focused fresh start).¹⁴⁰

In order to better understand the fresh start objective as expressed in the Australian bankruptcy system, Howell reviewed references to it in the key primary and secondary sources of bankruptcy law in Australia.¹⁴¹ She noted that, from the debtor’s perspective, a primary outcome of the bankruptcy process in Australia is that, at the conclusion of the bankruptcy, the debtor will be released (with some exceptions)¹⁴² from their obligation to pay the debts proved in the bankruptcy.¹⁴³ This provides at least a debt discharged focused fresh start.

There are also aspects of the *Bankruptcy Act 1966* (Cth) that facilitate a wider, rehabilitation sense of the fresh start. These include the protection of certain essential assets from realisation and distribution to creditors,¹⁴⁴ a relatively generous threshold before a debtor is required to

134 Lynden Griggs, ‘Bankruptcy Policy and the Decision of the High Court in *Pyramid Building Society (In Liq) v Terry*’ (1999) 1 *University of Notre Dame Australia Law Review* 57, 57.

135 Katherine Porter and Deborah Thorne, ‘The Failure of Bankruptcy’s Fresh Start’ (2006) 92 *Cornell Law Review* 67, 68.

136 Griggs, above n 134, 69.

137 Margaret Howard, ‘A Theory of Discharge in Consumer Bankruptcy’ (1987) 48 *Ohio State Law Journal* 1047, 1048.

138 Jay L Zagorsky and Lois R Lupica, ‘A Study of Consumers’ Post-discharge Finances: Struggle, Stasis, or Fresh-Start?’ (2008) 16 *American Bankruptcy Institute Law Review* 283, 284.

139 Jean Braucher, ‘Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill?’ (2004) 44 *Santa Clara Law Review* 1065, 1070.

140 Nicola Howell, ‘The Fresh Start Goal of the *Bankruptcy Act*: Giving a Temporary Reprieve or Facilitating Debtor Rehabilitation’ (2014) 14(3) *QUT Law Review* 29, 34.

141 *Ibid.*

142 *Bankruptcy Act 1966* (Cth) ss 82(2)–(3B) (debts not provable in bankruptcy), ss 153(2)–(3) (debts not dischargeable in bankruptcy).

143 *Bankruptcy Act 1966* (Cth) s 153.

144 *Bankruptcy Act 1966* (Cth) s 116(2); *Bankruptcy Regulations 1996* (Cth) reg 6.03.

make income contributions during bankruptcy;¹⁴⁵ and the protection of post-bankruptcy income¹⁴⁶ and assets from creditors.¹⁴⁷ However, these provisions are counterbalanced by other aspects of the *Bankruptcy Act 1966* (Cth) or other legislation that have, or may have, the effect of limiting the potential for debtor rehabilitation.¹⁴⁸ There is also a tension between the requirements for income contributions, and the policy of encouraging bankrupts to earn income during bankruptcy, and the occupational restrictions and other aspects of labelling discussed in this article.¹⁴⁹

Howell concluded that providing for a fresh start *is* one of the goals of the *Bankruptcy Act 1966* (Cth), but that ‘the fresh start as it has been implemented in practice is focused on debt discharge, rather than debtor rehabilitation’.¹⁵⁰ A number of the key legal and policy documents reviewed by Howell also include references to the importance of debtor rehabilitation. This suggests that there is a need to consider whether a wider rehabilitative fresh start goal might be a new focus for the bankruptcy system into the future.¹⁵¹

However, the entrenchment of bankruptcy stigma in an employment and business context clearly works against the achievement of this wider sense of the fresh start in theory and in practice, it inhibits the achievement of an improvement in financial wellbeing after the conclusion of bankruptcy.

That the ability to earn an income contributes to whether a fresh start can be achieved after bankruptcy makes intuitive sense. However, it is also supported by research from the United States. In their analysis of interviews with 359 debtors who had filed for Chapter 7 bankruptcy in 2001,¹⁵² Porter and Thorne report that, a year after filing, eight per cent of respondents reported that their financial situation was worse than it had been at the time of filing, while over a quarter (27 per cent) reported that their financial situation was about the same as at filing.¹⁵³ In comparing the survey responses, Porter and Thorne found that ‘worse-off families were *five and a half times* more likely than better-off families to report

145 Income contributions are calculated on the basis of 50 per cent of the excess income earned above the threshold: *Bankruptcy Act 1966* (Cth) s 139S. As at 6 March 2015, the income threshold for a person with no dependents was \$53 280.50: Australian Financial Security Authority, *Indexed Amounts* (28 January 2015) <<https://www.afsa.gov.au/resources/indexed-amounts>>. Note that debtors can request a higher threshold on the grounds of hardship: *Bankruptcy Act 1966* (Cth) s 139T.

146 During bankruptcy, income contributions are required once the debtor’s income exceeds the relevant income threshold: *Bankruptcy Act 1966* (Cth) s 139P.

147 See *Bankruptcy Act 1966* (Cth) s 116(1), which provides that the bankrupt’s divisible property includes property belonging to, or vesting in a bankrupt at the commencement of the bankruptcy, and property acquired by the bankrupt after the commencement of bankruptcy and *before* discharge. This is subject to an obligation to make payment of an income contribution that was assessed during bankruptcy.

148 Including, eg, the relatively long period of bankruptcy, the public accessibility of bankruptcy information, employment restrictions, and the absence of any integrated financial capability training: see Howell, above n 140, 37.

149 We acknowledge the comments of an anonymous reviewer drawing attention to this tension.

150 Howell, above n 140, 47.

151 Ibid 50.

152 Porter and Thorne, above n 135, 81.

153 Ibid 87.

an income drop of at least 10%'.¹⁵⁴ They found that there was not necessarily a correlation between having a low income and reporting a worsened financial position, it was 'the direction of income change that influences whether a family is able to capitalize on the fresh start offered by a bankruptcy discharge'.¹⁵⁵ Morato's statistical analysis of the effects of bankruptcy also shows that people who have filed for bankruptcy had reduced income, and reduced number of work hours, than those who had not filed for bankruptcy in the same time period.¹⁵⁶

Of course, a drop in income following bankruptcy is not a necessary consequence of bankruptcy itself. However, to the extent that stigmatisation of persons who are, or have been bankrupt, is used to facilitate, permit or mandate adverse employment and business decisions, including decisions about the suitability of individuals for appointment, promotion and/or access to employment-related benefits, there is the potential for the fresh start goal of bankruptcy to be compromised. As Thorne has noted in the United States context:

That debtors would report difficulties finding or keeping jobs because of the bankruptcies on their credit reports is particularly disturbing in light of other research that suggests that a family's post-bankruptcy financial success is principally dependant on stable or modestly increased income.¹⁵⁷

The restrictions and obligations we have described above, together with the ready access to bankruptcy information and the lack of a proscription against discriminating against bankrupts in employment in business settings has the potential to result in adverse incomes, including denials of employment or promotion, or inability to commence or continue in business. The extent to which these impacts are crystallised in practice in Australia is not known. Some details of the numbers of persons prevented from continuing in a particular occupation are published by regulatory authorities, but the numbers appear small.¹⁵⁸ And information on persons self-excluding from particular occupations due to their bankruptcy is not, to our knowledge, reported.

154 Ibid 95.

155 Ibid 96.

156 Michelle Maroto, 'The Scarring Effects of Bankruptcy: Cumulative Disadvantage across Credit and Labor Markets' (2012) 91 *Social Forces* 99, 110.

157 Deborah Thorne, 'Personal Bankruptcy and the Credit Report: Conflicting Mechanisms of Social Mobility' (2007) 11(4) *Journal of Poverty* 23, 41 (citations omitted).

158 Eg, in Queensland, during the period 1 December 2013–30 June 2014, 131 individuals were excluded from holding a contractor or nominee supervisor licence in the building industry due to 'involvement in a financial failure': Queensland Building and Construction Commission, *Annual Report: 1 December 2013–30 June 2014* (Report, 20 August 2014) 35 <http://www.qbcc.qld.gov.au/sites/default/files/QBCC_Annual_Report_-_1Dec13_-_30Jun14.pdf>. This is in a context where there were over 84 000 active licenses at 30 June 2014: at 2.

The most common occupations of persons who have entered bankruptcy do not necessarily have bankruptcy restrictions imposed upon them¹⁵⁹ – this might suggest that bankruptcy restrictions affect few bankrupts; alternatively it might suggest that those working in occupations affected by bankruptcy restrictions will seek other methods to deal with financial difficulty. Further, although access to the NPII is widespread, with 311 829 searches conducted in 2013–14 (excluding those conducted by AFSA itself),¹⁶⁰ it is not possible to identify the extent to which NPII searches are made to assist with decision-making in employment and business contexts.

There has also been little research on the experience of bankrupts in the job market. The only relevant study, involving interviews with bankrupts in 1987–88, suggested that the impact or perceived impact of bankruptcy on employment was not a concern for many of the interviewed participants.¹⁶¹ However, given the time that has elapsed since this research, it would not be appropriate to speculate on whether similar attitudes are likely to persist today, particularly given economic and labour market changes since this research.

In the United States, where greater attention has been paid to this issue, there is more information available on the extent of access to, and use of, bankruptcy information and/or credit reports in employment decision-making. One study from the Society for Human Resources Management found that nearly half (47 per cent) of its members reported that they conducted credit background checks history when hiring for some or all positions,¹⁶² although one commentator has suggested that this figure ‘fails to clarify how many employees are actually subject to credit checks, or the likelihood that a job seeker will be obliged to consent to one in order to be considered for a job.’¹⁶³

Looking at it from the perspective of job applicants, Deborah Thorne has reported that in a study of 703 debtors in 2003–04, 5.7 per cent of respondents

159 In 2013–14, the most commonly reported categories of occupations for persons entering personal insolvency administrations were: other clerical and administrative workers; sales assistants and salespersons; road and rail drivers; and other labourers: Australian Financial Security Authority, *Commentary: All Debtors – Occupations of Debtors Who Have Entered a Personal Insolvency* <<https://www.afsa.gov.au/resources/statistics/socio-economic-statistics/occupations/occupations-of-debtors>>. Few of the occupations within these categories are likely to have explicit bankruptcy restrictions imposed on entry.

160 Australian Financial Security Authority, *Annual Report 2013–14* (Report, 26 September 2014) 65 <<https://www.afsa.gov.au/about-us/annual-report/annual-report-2013-14/afsa-annual-report-2013-14>>.

161 In the Ryan study, of the 20 respondents who reported that they had experienced stigma, two reported that they felt that had been rejected by potential employers because of their bankruptcy: Ryan, *The Last Resort*, above n 9, 182; and two (of the 36 who were employed at the time of bankruptcy) reported that they were worried about losing their job as a result of their bankruptcy: at 179. On the other hand, 15 respondents (out of 76) reported that they told their boss about their bankruptcy: at 187, presumably with no adverse consequences (none of the forms of experienced stigma reported by respondents included stigma from an existing employer: at 184).

162 Society for Human Resource Management, *Background Checking – The Use of Credit Background Checks in Hiring Decisions* (19 July 2012) <<http://www.shrm.org/research/surveyfindings/articles/pages/creditbackgroundchecks.aspx>>.

163 Amy Traub, ‘Credit Reports and Employment: Findings from the 2012 National Survey on Credit Card Debt of Low- and Middle-Income Households’ (2013) 46 *Suffolk University Law Review* 983, 986.

reported that they were fired from, denied or had difficulties getting a job because of a bankruptcy on their credit report.¹⁶⁴ And, from her study, Traub reports that 10 per cent of participants who were unemployed had been advised they would not be hired because of information in their credit report.¹⁶⁵ The figure was higher (one in seven) for applicants with blemished credit histories.¹⁶⁶ Again, these figures might underestimate the extent of the impact of bankruptcy or credit history on employment, as the fact that an employment decision is based, wholly or partly, on this information will often not be explicitly disclosed.¹⁶⁷ Another impact of bankruptcy on employment has been suggested by Michelle Morato, who finds that ‘bankrupts spent less time working and suffered lower earnings, especially those with high levels of education’ than their counterparts who had not entered bankruptcy.¹⁶⁸ These impacts occur despite some protections in the United States against the use of credit checks in employment contexts.¹⁶⁹

Thus, although the extent to which the laws which we have discussed in this article do have an adverse impact on the ability of bankrupts and former bankrupts to earn an income is not known, evidence from the United States suggests it is likely to be an issue of concern for a significant number of people. Further, to the extent that the law creates official labelling, this is likely to directly impact on the extent of informal labelling and bankruptcy discrimination in other employment and business contexts. In this way, the law inhibits access to a rehabilitative-focused fresh start for people who have been bankrupt.

B The Evidence Base for Stigmatisation and Labelling is Weak, and Does Not Generally Support the Attribution of Negative Characteristics to Bankrupts

Our second concern relates to the policy rationale for the law’s role in labelling bankruptcy as deviant, and in permitting informal labelling. The policy rationale for the law’s role here is not well defined. To the extent that a rationale exists, it appears to be based on ‘common sense wisdom’ about the characteristics of persons who become bankrupt. If there were evidence to support a correlation between bankruptcy and specific negative personal or other attributes, it might be appropriate for the law to play a role in labelling and stigmatisation of bankruptcy to protect the public, deter bankruptcy, and/or assist employers and businesses to identify appropriate persons with whom to deal or

164 Thorne, above n 157, 37.

165 Traub, above n 163.

166 Ibid.

167 Ibid 986–7.

168 Maroto, above n 156, 122.

169 See *Consumer Credit Protection* 15 USC § 1681(b) Conditions for Furnishing and Using Consumer Reports for Employment Purposes. For criticism of the practical effectiveness of these protections, see Traub, above n 163; Shepard, ‘Towards a Stronger Financial History Antidiscrimination Norm’, above n 117, 1749.

not deal. However, we contend that there is little empirical evidence to support this attribution.

1 The Policy Rationale for Restrictions and Labelling Associated with Bankruptcy Is Not Clearly Articulated

There is only limited discussion of the rationale for the law having a role in creating and entrenching bankruptcy stigmatisation in Australia. The issues that we have discussed in this article were not explored in either the 1962 Clyne Committee Report¹⁷⁰ or the 1988 Harmer Report.¹⁷¹ The Harmer Report does include a reference to the possibility that bankruptcy may have adverse impacts on employment, but this occurs in the context of identifying factors that a trustee could consider in deciding whether to certify a person as suitable for early discharge; it does not include consideration of whether the potential for such adverse effects should be minimised.¹⁷² To the extent that there is discussion in the explanatory material for the bankruptcy legislation on the need for a permanent, public record of bankruptcy, it refers to an objective of enabling 'persons entering into substantial transactions' to know about another person's insolvency status.¹⁷³ However, the NPII can equally be used for insubstantial transactions or other employment or businesses purposes. We have not been able to identify any explicit rationale in the explanatory material for much of the current legislation that imposes bankruptcy restrictions for particular occupations.¹⁷⁴ It may be possible, or even likely, that the restrictions have been imposed for reasons other than stigmatisation, but such reasons are not explicitly identified in the explanatory material.

Similarly, the more recent World Bank report did not engage in any substantive examination of these issues. The report did at least acknowledge that 'the principle of *non-discrimination* is an important consideration in achieving the full benefit of a discharge';¹⁷⁵ that little discussion had occurred on this issue; and that it was an issue that required attention in the future.¹⁷⁶

Instead, it appears likely that the law's role here mirrors perceptions of the attributes of persons who have become bankrupt. These views about the

170 The Clyne Committee was appointed by the Federal Attorney-General in 1956 to review Australia's bankruptcy law and submitted its report in 1962.

171 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988).

172 Ibid vol 1, 235 [553]: 'The Commission considers that where a trustee is determining whether or not to issue a certificate of discharge the trustee should be required to take into account the following matters ... The future financial prospects and aspirations of the bankrupt, including whether the bankruptcy is adversely affecting the ability of the bankrupt to obtain employment or advancement in income-earning ability'.

173 Australian Financial Security Authority, *Maintaining the National Personal Insolvency Index*, above n 111, 10.

174 This may reflect the fact that bankruptcy restrictions are often longstanding in many licensing, registration or accreditation regimes, even though the format of the regimes may have changed significantly in the ensuing period. An exclusion or restriction based upon bankruptcy might be simply seen as a given, with no need to separately explain the rationale.

175 Kilborn et al, above n 10, 118 [360].

176 Ibid 119 [360].

relevance of bankruptcy information to employment and business can be observed in advertising and general commentary in Australia. For example, one business that provides pre-employment screening services suggests that a basic credit check ‘offers an insight into the [individual’s] reliability’,¹⁷⁷ while another suggests that information from the NPII ‘is relevant to individuals holding responsible management positions with financial control’ and that ‘[c]redit information on a subject can reveal how an individual handles financial responsibility.’¹⁷⁸ A law firm advising employers suggests that ‘bankruptcy and credit history checks can give a useful indication of a candidate’s level of responsibility and reliability’.¹⁷⁹

Similar views about the relevance of bankruptcy and consumer credit information are observed in the United States, where there has been greater academic, policy and other commentary about these issues. A 2012 survey of human resources managers reported that the primary reasons that organisations conducted credit checks on job candidates were to reduce or prevent theft and embezzlement (45 per cent), to reduce legal liability for negligent hiring (22 per cent), and to assess the overall trustworthiness of the job candidate (19 per cent).¹⁸⁰

Academic commentators have suggested similar rationales. For example, Nielson and Kuhn suggest that the two common justifications for the use of credit checks in employment selection processes are that:

- employees with serious financial problems are thought to be more likely to steal, and credit checks have traditionally been commonly used for positions in banks and other institutions where employees have access to financial accounts, and
- that an applicant’s credit history is an indicator of her general conscientiousness and responsibility, and one that (unlike personality tests) is thought to be an objective behavioural record.¹⁸¹

177 Professional Recruitment Australia, *Reference and Probity* <<http://pra.com.au/Reference-and-Probity-Checks>>.

178 NHN Investigations, *NHN Pre Employment Screening* (2006) <<http://www.nhninvestigations.com.au/screening.htm>>.

179 Aoife Gallagher-Watson, *Pre-employment Screening Can Help You Avoid Hiring the Wrong Candidate* (25 May 2014) Colin Biggers & Paisley <[http://www.cbp.com.au/publications/2014/may/pre-employment-screening-can-help-you-avoid-hi-\(1\)](http://www.cbp.com.au/publications/2014/may/pre-employment-screening-can-help-you-avoid-hi-(1))>.

180 Society for Human Resource Management, above n 162, 10. Interestingly, the two top responses declined in percentage between 2010 and 2012, while trustworthiness was given as the primary reason by more respondents in 2012 (19 per cent) than in 2010 (12 per cent).

181 Marsha L Nielsen and Kristine M Kuhn, ‘Late Payments and Leery Applicants: Credit Checks as a Selection Test’ (2009) 21 *Employee Responsibilities & Rights Journal* 115, 116.

Shepard has described these two hypotheses as, respectively, the 'Fraud Hypothesis' and the 'Responsibility Hypothesis'.¹⁸² Other academics from law, management and social policy disciplines offer similar views.¹⁸³

Other reasons suggested for performing credit checks in an employment context include allowing an employer to confirm information about an application, including address and employment history;¹⁸⁴ to avoid negligent hiring litigation;¹⁸⁵ and to comply with specific legal obligations to perform a credit check.¹⁸⁶ However, the validity of each of these reasons has been questioned by Shepard,¹⁸⁷ and they have not, to our knowledge, been specifically identified in the Australian context.

2 The Evidence-Base for Attribution of Personal Characteristics

There have been a small number of studies conducted in the United States that have sought to explore a correlation between financial history and job performance. For example, Bernerth et al reported a positive correlation between, for example, credit scores and conscientious performance (but not one between credit scores and deviant workplace activity).¹⁸⁸ Oppler et al reported a positive relationship between an adverse financial history¹⁸⁹ and 'counterproductive work behavior'.¹⁹⁰ Also Ayra et al, in an experimental study, found a positive correlation between estimated credit scores and impulsivity, time preference (or future orientation) and trustworthiness.¹⁹¹

In contrast, another study compared actual credit reports of current and terminated employees, and found 'virtually no relationship between credit history

182 Shepard, 'Towards A Stronger Financial History Anti-discrimination Norm', above n 117, 1711, 1714.

183 See, eg, Traub, above n 163, 987; Maroto, above n 156, 103; Thorne, above n 157, 40; Jon Socolof and Julie Jordan, 'Best Practices for Health Care Background Screening' (2006) 8 *Journal of Health Care Compliance* 5, 9.

184 See, eg, Nielsen and Kuhn, above n 181, 117.

185 See, eg, Jund-Ming Wang and Brian H Kleiner 'Effective Employment Screening Practices' (2004) 27(4–5) *Management Research News* 99, 101. See also the suggestion by Kiviat that credit checks may be used because the mistake of hiring the wrong worker is more likely to be penalised than the mistake of letting a good worker slip away: Barbara Kiviat, 'Moral Storytelling From Financial Pasts: How Employers Translate Credit Reports into Hiring Decisions' (Presentation to Law and Society Meeting, Seattle, May 2015).

186 See, eg, Society for Human Resource Management, above n 162, 10.

187 See, eg, Shepard, 'Towards A Stronger Financial History Antidiscrimination Norm', above n 117, 1718.

188 Jeremy B Bernerth et al, 'An Empirical Investigation of Dispositional Antecedents and Performance-Related Outcomes of Credit Scores' (2012) 97 *Journal of Applied Psychology* 469, 474; although the authors note small sample and other limitations in relation to the relationship between deviant work behaviours.

189 Negative financial history was recorded if the person answered yes to one or more of the following questions: 'In the last 7 years, have you, or a company over which you exercised some control, filed for bankruptcy, been declared bankrupt, been subject to a tax lien, or had legal judgment rendered against you for a debt?' and 'Are you now over 180 days delinquent on any loan or financial obligation?': Edward S Oppler et al, 'The Relationship between Financial History and Counterproductive Work Behavior' (2008) 16 *International Journal of Selection and Assessment* 416, 417.

190 Ibid 418.

191 Shweta Arya, Catherine Eckel and Colin Wichman, 'Anatomy of the Credit Score' (2013) 95 *Journal of Economic Behavior and Organization* 175, 184.

and performance ratings',¹⁹² and that, although 'a few of the measures of credit history were correlated with termination decisions', 'this number is sufficiently small that chance is probably the best explanation'.¹⁹³ The authors cautioned against using credit history data in employment selection 'unless the company demonstrates evidence that such data have validity for predicting employee behaviour'.¹⁹⁴

Limitations in a number of these studies may affect the generalisability of their results.¹⁹⁵ In any case, none of these studies refer specifically to bankruptcy, the focus of this paper. Instead, given the direct access that employers in the United States can have to credit reports, these studies focus on wider categories of financial history and financial information. As a result, they cannot be used to directly support a claim that bankruptcy alone is evidence of characteristics detrimental to work performance.

The difficulty of attributing particular personal characteristics to people who are, or have been, bankrupt, is compounded by the fact that the characteristics of people who become bankrupt, and the circumstances that lead to bankruptcy, are highly variable. In 2011, 78 per cent of bankruptcies were 'consumer' bankruptcies, and 22 per cent were business related bankruptcies; just over half of bankrupts (53 per cent) were employed at the time of their bankruptcy; but a similar percentage (52 per cent) earned less than \$30 000 at the time of their bankruptcy.¹⁹⁶ The most common (self-reported) primary causes for non-business bankruptcies commencing in 2013–14 were unemployment/loss of income (35 per cent), excessive use of credit (19 per cent), domestic discord (12 per cent) and ill health or absence of health insurance (9 per cent).¹⁹⁷ Most of these reasons do not suggest any fault or moral failing on the part of the individual concerned.

192 Laura Koppes Bryan and Jerry K Palmer, 'Do Job Applicant Credit Histories Predict Performance Appraisal Ratings or Termination Decisions?' (2012) 15 *Psychologist-Manager Journal* 106, 116.

193 Ibid 119–20.

194 Ibid 119.

195 See, eg, in the Bernerth study, the study examined the relationship between credit scores and the various characteristics, when employers do not generally access credit scores, but the more detailed (and difficult to interpret) credit report: Traub, above n 163, 987. In the Oppler study, there was no attempt to distinguish between personal and business credit history (at 988), the study relied on self-reported data 'which may or may not be reflective of an applicant's credit history as interpreted by an employer': Lea Shepard, 'Seeking Solutions to Financial History Discrimination' (2014) 46 *Connecticut Law Review* 993, 1009; and the counterproductive work behaviours included failure to pay debts and misuse of credit cards; these are not necessarily related to work performance or employment suitability. And in the Ayra study, the sample size was small and from a limited population, and the FICO scores were estimated, rather than actual scores: Ayra et al, above n 191. See also criticisms in Traub, above n 163, 987–8; Shepard, 'Towards A Stronger Financial History Antidiscrimination Norm', above n 117, 1715–6; Shepard, 'Seeking Solutions to Financial History Discrimination', 1009–10.

196 Insolvency and Trustee Service Australia, *Profile of Debtors 2011* (Report, 2012) 15, 17–18 <<https://www.afsa.gov.au/resources/statistics/profiles-of-debtors-documents/profiles-of-debtors-2011>>.

197 Data calculated from Australian Financial Security Authority, *Non-Business Causes Time Series* <<https://www.afsa.gov.au/resources/statistics/socio-economic-statistics/causes-1/causes-non-business-related>>.

Bankrupts also have varying occupations,¹⁹⁸ debts¹⁹⁹ and assets²⁰⁰ at the time of bankruptcy, again suggesting that it is difficult to identify particular personal characteristics that apply universally to persons who are, or have been, bankrupt. There is little evidence of widespread fraud amongst bankrupts; instead, the evidence that we do have (albeit quite dated now) suggests that people who enter bankruptcy do so regretfully, with a feeling of shame, and only as a last resort.²⁰¹

And while there is a correlation between having been bankrupt once, and the likelihood of entering bankruptcy again in the future,²⁰² it is difficult to see how this potential is likely to be genuinely relevant to employment decision-making. Overall, the number of people who have entered bankruptcy more than once is relatively low, with only 16 per cent of bankruptcies in 2011 (the latest data available) involving people who had previously been bankrupt.²⁰³

Bankruptcy does provide evidence of financial difficulty at the time of bankruptcy, but figures from the Australian Bureau of Statistics show that, in 2009–10, just under one-third of the sample group reported at least one indicator of financial stress, while 8.8 per cent reported three or more indicators of financial stress.²⁰⁴ Bankruptcy simply provides a more easily identifiable marker of financial difficulty, but this is not a justifiable reason for discriminating against current or potential employees.²⁰⁵

Thus, there seems to be little in the way of conclusive evidence for attributing particular general qualities (relevant to employment performance) to persons who are, or have been bankrupt, and in the absence of this evidence, the policy rationale for permitting all employers the potential to access, and use without restriction, bankruptcy information in employment decision-making is not strong.

3 *A Different Case for High Trust Occupations or Occupations in the Financial Services Sector?*

As can be seen from Tables 1–3 above, bankruptcy restrictions are commonly imposed in occupations that are perceived to be high trust occupations and/or occupations involving financial services or financial responsibility. For example, politicians, accountants, trustees, company directors and managers of deposit-

198 Insolvency and Trustee Service Australia, above n 196, 28–9.

199 Ibid 20.

200 Ibid 25.

201 In the Ryan study, most bankrupts took positive action at the time they realised they had a serious financial problem; most sought advice from a financial counselling service or other advice service, where they were presented with a range of options, and many felt stigma as a result of their bankruptcy: Ryan, *The Last Resort*, above n 9, 120, 124, 185–6.

202 The chance of any person going bankrupt is 1 per cent, cf 16 per cent having been bankrupt more than once – calculated from data in: Insolvency and Trustee Service Australia, above n 196, 15.

203 Ibid.

204 Ben Phillips and Binod Nepal, 'Going Without: Financial Hardship in Australia' (Report, National Centre for Social and Economic Modelling, August 2012) 15.

205 In fact, Shepard has suggested that because bankrupts have decreased indebtedness, the fraud hypothesis has less validity than it might have had for heavily indebted persons: Shepard, 'Towards A Stronger Financial History Antidiscrimination Norm', above n 117, 1757–8.

taking institutions are all subject to bankruptcy restrictions in Australia.²⁰⁶ In the United States, a 2012 survey suggested that credit checks are more frequently used by human resources personnel when considering job candidates for positions with fiduciary and financial responsibilities (87 per cent), for senior executive positions (42 per cent), and for job candidates who have access to highly confidential employee information (34 per cent).²⁰⁷ And legislation in the United States, where there is some, albeit limited, protection against discrimination of persons who have been bankrupt,²⁰⁸ incorporates wide exceptions in both State and Federal laws, including exceptions where '[t]he position involves access to personal or confidential information, financial information, trade secrets, or State or national security information.'²⁰⁹ This is a very widely drawn net.²¹⁰ Even some proponents for strengthening anti-discrimination laws appear to support some level of exception for 'high trust' occupations or roles where the occupant might have access to significant financial or other resources.²¹¹ Such exemptions reinforce the fraud and responsibility hypotheses, despite the fact that the evidence supporting these hypotheses is limited at best.²¹²

To the extent that bankruptcy may be relevant in particular circumstances, it may be appropriate to consider the specific circumstances leading to bankruptcy to confirm whether the bankruptcy is likely to have an adverse effect on a person's ability to perform the job and garner public/private trust. Again, however, the reference to public trust presupposes an acceptance of bankruptcy stigmatisation, based on the (ill-founded) perception that persons who are, or have been bankrupt, are less responsible, less moral, and have a greater propensity to engage in fraud or theft, than persons who have never been bankrupt. Changing this perception is unlikely to occur while bankruptcy labelling and stigmatisation is permitted and encouraged by the law,²¹³ and we

206 See Tables 1 and 2 above.

207 Society for Human Resource Management, above n 162, 16.

208 For criticism of Federal Credit Reporting Act protections, see Jeanette E McPherson, 'The Antidiscrimination Provision Does Not Apply to Private Employers Who Deny Employment Based upon Bankruptcy Status' (2011) 20(6) *Norton Journal of Bankruptcy Law & Practice* Art 4.

209 Beverley Earle, Gerald Madek and David Missirian, 'The Legality of Pre-employment Credit Checks: A Proposed Model Statute to Remedy An Inequity' (2012) 20 *Virginia Journal of Social Policy and the Law* 159, 188.

210 Ibid; see also Shepard, 'Towards A Stronger Financial History Antidiscrimination Norm', above n 117, 1714.

211 For example, Gallagher supports an exemption for employment of persons 'handling an organization's finances, accounting, or receipts and expenditures': Kelly Gallagher, 'Rethinking the Fair Credit Reporting Act: When Requesting Credit Reports for 'Employment Purposes' Goes Too Far' (2006) 91 *Iowa Law Review* 1593, 1618; Earle, Madek and Missirian propose a model law that would exempt '[h]igh-ranking policy making executives' and persons 'who may authorize expenditures of \$25,000 or more, or who have signatory authority over more than \$100,000 ... in any calendar year': Earle, Madek and Missirian above n 209, 191–2.

212 Shepard, 'Seeking Solutions to Financial History Discrimination', above n 195, 1009.

213 In the context of the Federal Credit Reporting Act, Shepard notes that the provisions assume the validity of these perceptions and sanctions and legitimises employer's use of financial information: Shepard, 'Towards A Stronger Financial History Antidiscrimination Norm', above n 117, 1749.

contend that, even for certain high trust occupations or roles, attention should be given to the policy justification for restrictions.

4 A Different Case for Licensing Restrictions?

The above discussion relates to the attribution of particular negative characteristics to persons as current or potential employees. We have suggested that the lack of evidence for such attribution means that there is not a strong policy justification for permitting employers to have access to, and to use, bankruptcy information.

However, a different approach might be justified in the context of licensing or registration arrangements, where the licence holder or registered person contracts with consumers for services, and the government plays a role as gatekeeper.²¹⁴ For example, in the context of the prospect of moving towards a national occupational licensing scheme for some occupations,²¹⁵ including property, electrical and plumbing and gas fitting occupations, the regulation impact statement notes the following:

Financial probity requirements aim to ascertain whether the financial integrity of the applicant is such that the risk of consumers dealing with the licensed person is minimised. One of the aims of licensing of business entities (contractors) is to protect consumers from those who have been involved in the mismanagement of business.²¹⁶

Thus, the rationale for bankruptcy restrictions here focuses on the need to protect consumers from the risks of businesses becoming insolvent. In this context, it is relevant to note that there *is* some correlation between having been bankrupt once and repeat bankruptcies.²¹⁷ This suggests that contracting with such a person invites a greater possibility of bankruptcy, with its attendant risk of having contracted for work left uncompleted. On the other hand, it is not necessarily the case that a current or former bankruptcy resulted from a ‘mismanagement of business’. In fact, most bankruptcies are not related to business debts at all.²¹⁸ And for bankruptcies that result from involvement in a business, the primary reason given for bankruptcy (42 per cent of respondents) is economic conditions,²¹⁹ which may have little to do with mismanagement of a business.

Another factor relevant for licensing arrangements may be the need for licensing authorities to ‘scrutinize applicants’ financial histories ... to ensure that the prospective licensee will satisfy the financial prerequisites necessary for

214 See, eg, Karen Cordry, ‘Section 525: Policy Thoughts about Discriminating against Debtors’ [2010] *Norton Annual Survey of Bankruptcy Law* 4, 22.

215 The scheme was later disbanded.

216 Council of Australian Governments’ National Licensing Steering Committee, *Decision Regulation Impact Statement: Proposal for National Licensing of the Electrical Occupations* (2013) 44.

217 See above n 202.

218 In 2011, only 22 per cent of bankruptcies were business-related bankruptcies: Insolvency and Trustee Service Australia, above n 196, 15.

219 *Ibid* 16.

him or her to succeed in the venture.’²²⁰ In this context, imposing bankruptcy restrictions on entry to an occupation involving direct contracts with consumer clients may be less objectionable than in the employment context generally. However, such restrictions should proceed only where a genuine policy rationale can be articulated; they should not be based on unsubstantiated claims relating to honesty, responsibility, or similar attributes.

As we have described above, there are real difficulties with the entrenchment and encouragement of bankruptcy stigma by the law. First, because it inhibits a rehabilitative sense of the fresh start objective of bankruptcy; and second, because there is little evidence that would fairly allow particular negative characteristics to be attributed to persons who are, or have been, bankrupt. There is not a generic set of characteristics, attitudes, practices, or skills that can be fairly attributed to all, or almost all, people who are or have been bankrupt.

This last point applies overwhelmingly in the use of bankruptcy stigmatisation in employment decision-making generally. However, it may be that, for some occupations, or in some licensing regimes, there is a genuine relationship between bankruptcy status and the job requirements. The fact that bankruptcy statistics show that there is a greater risk of bankruptcy for persons who are, or have been, bankrupt, compared to persons who have never been bankrupt might also suggest a genuine relevance of bankruptcy for relationships (for example, customers, suppliers, clients) where there is a direct contractual relationship with a person who is, or has been bankrupt. In any case, however, a blanket approach is unlikely to be appropriate, and a more robust policy rationale is needed. In the next Part, we discuss some areas where change should be considered.

V SOME INITIAL SUGGESTIONS FOR LAW REFORM

The above discussion demonstrates that there is a potential for bankruptcy to have an adverse impact on the ability to earn an income, whether through employment or self-employment. This situation results from the law engaging in official labelling, and requiring or facilitating informal labelling of bankrupts as deviants. The extent to which such adverse impacts materialise in the Australian context is impossible to identify with any certainty. Although research findings in the USA suggest that bankruptcy and credit report discrimination in employment settings is a real problem, these findings are not necessarily applicable here, given the different economic and employment settings of Australia and the USA. In addition, the situation in the USA as regards the right of employers to directly access credit reports contrasts markedly with the situation in Australia, at least in theory.

220 Shepard, ‘Towards A Stronger Financial History Antidiscrimination Norm’, above n 117, 1722. See also Cordry, who suggests that bankruptcy should only be taken into account if to do so is addressing an underlying regulatory problem: Cordry, above n 214, 25–6.

Research is therefore needed on the extent to which the potential impacts identified in this article manifest in practice, including the extent to which there are different impacts for people who enter bankruptcy as a result of consumer debts, and people who enter bankruptcy as a result of business debts – the laws we have discussed in this article do not make this distinction.

Even in the absence of empirical evidence on this point, however, there is work that is needed to modify the law's role in labelling, and thus in stigmatising bankruptcy, given that there is not strong evidence for a link between bankruptcy and poor job performance, or increased propensity for irresponsibility, theft or fraud in an employment context. Further, the general stigmatisation of bankruptcy, in the context of the specific issues that we have discussed above, inhibits the potential for a rehabilitation-focused fresh start. We contend that a rehabilitation-focused fresh start should be the approach favoured in Australia, as it is more likely to lead to an improved financial wellbeing for former bankrupts. We therefore provide some initial suggestions for law reform in this area.

Rehabilitation is also an important goal in the context of debt agreements and personal insolvency agreements under the *Bankruptcy Act 1966* (Cth), and some of the suggestions made below will also be relevant to these other administrations.

First, in the case of occupations involving a licensing or registration requirement where the government is playing a gatekeeper role, a policy review should be undertaken to determine, in a robust manner, the circumstances in which there is a genuine policy justification for imposing a restriction to entry on the grounds of bankruptcy, and thus a need for official labelling.²²¹ As we have demonstrated above, there is currently little by way of explicit policy rationale for these restrictions. In addition, there is a level of inconsistency in existing occupational bankruptcy restrictions. For example, there are differences between occupations on the length of time that bankruptcy can be used to restrict entry to a particular occupation, the extent to which bankruptcy either operates as a mandatory bar to an occupation, or allows a decision maker to consider the 'story' behind a bankruptcy, and the types of other insolvency administrations that also lead to occupational restrictions. Given the many and varied circumstances that can lead to bankruptcy, if a restriction should be retained, consideration should be given to a preference for discretionary bars, rather than mandatory bars, so that the affected person at least has an opportunity to have their particular circumstances taken into consideration.²²²

The policy review could therefore relevantly consider what might be the grounds for extending restrictions to persons who have been discharged from bankruptcy, and/or to persons who have entered into alternative insolvency administrations. One mechanism for achieving such a review could be through a

221 See, eg, Cordry, above n 214.

222 Although there is a risk that this results in a lack of certainty for debtors. It also facilitates and entrenches a link between certain personal characteristics and bankruptcy, and favours more literate persons, rather than more deserving persons, see the discussion in Shepard on this point in relation to job applicants: Shepard, 'Seeking Solutions to Financial History Discrimination', above n 195, 1025–7.

reference to the Australian Law Reform Commission, perhaps as part of a wider reference on insolvency laws.

Once a robust policy rationale has been identified, existing restrictions should then be reviewed to ensure that they are consistent with the agreed policy justification, and amended where they are not.

Second, there is a need to consider amendments to the *Bankruptcy Act 1966* (Cth) so as to reduce the stigmatisation of bankruptcy, and thus the potential for an adverse impact on employment and self-employment.

One potential reform to consider is to reduce the minimum length of bankruptcy. This would have a particular impact on occupational restrictions that are imposed only while a person is undischarged, and the obligation to disclose bankruptcy status to creditors and persons with whom the undischarged bankrupt does business. Reducing the minimum period of bankruptcy would be consistent with provisions for early discharge that were in force between 1992 and 2003.²²³

Reducing the minimum period of bankruptcy would also be consistent with the approach taken in comparable fresh start jurisdictions. For example, in England and Wales, bankruptcies are automatically discharged after 12 months;²²⁴ in Canada, the automatic discharge period is nine months or 21

223 Early discharge provisions in the *Bankruptcy Act 1966* (Cth) (eg ss 149S, 149T) were in place from 1 July 1992 until 5 May 2003. The memorandum accompanying the Bankruptcy Legislation Amendment Bill 2001 which repealed them, stated that

[t]he former Minister for Justice and Customs, Senator Amanda Vanstone, explained the abolition of early discharge provisions by saying: “many creditors feel that the possibility of being released from bankruptcy after six months does not reflect the serious nature of the decision to become bankrupt.” It was also felt that early discharge provisions “discourage debtors from trying to enter formal or informal arrangements with their creditors to settle debts, and provide little opportunity for debtors to become better financial managers”. Other justifications advanced by the Government for the abolition of the early discharge provisions [were]: they were initially intended to apply to those who became bankrupt out of misfortune (those with few assets and low incomes) rather than misdeed, but it seems inappropriate to thus imply that all those with some assets or income have been guilty of incurring debts in bad faith, and they apply in a discriminatory way, by excluding women who have joint debts with, and generally a lower income than, their spouse, and thus are disqualified by the 150 per cent rule.

Katrine Del Villar, *Bills Digest*, No 8 of 2001–2002, 25 July 2001, 5–6 (citations omitted).

224 *Insolvency Act 1986* (UK) s 279. An automatic discharge after 12 months was introduced from 1 April 2004 with an additional option for application for early discharge. However the option for early discharge was later repealed for persons who become bankrupt on or after 1 October 2013: Insolvency Service, *Discharge from Bankruptcy* (January 2008) <<https://www.insolvencydirect.bis.gov.uk/casehelpmanual/D/DischargeFromBankruptcy.htm>>. Further, Bankruptcy Restriction Orders (‘BRO’) or Bankruptcy Restriction Undertakings (‘BRU’) were introduced by the *Enterprise Act 2002* (UK). This was in part ‘to differentiate between culpable and non-culpable bankrupts’: R3 (Association of Business Recovery Professionals), *Redressing the Balance: Strengthening the Bankruptcy Process and Recognising Prior Behaviour*, 2 <https://www.r3.org.uk/media/documents/policy/policy_papers/personal_insolvency/Redressing_the_balance.pdf>. The R3 report also recommends that the standard term of bankruptcy could be increased to three years, and reduced to one year for the ‘least culpable’ bankrupt: at 5.

months if required to contribute surplus income to the estate;²²⁵ in New Zealand, bankruptcies are discharged after three years, but an application can be made for early discharge;²²⁶ and in the United States, Chapter 7 bankruptcies (liquidation bankruptcies) are normally discharged within two to three months.²²⁷ Similar moves towards shortening the period of bankruptcy are being investigated in Ireland where the Minister for Justice has referred a proposal to cut the term from three years to one year to a formal committee.²²⁸ In Germany, legislation shortening residual debt discharge proceedings and strengthening the rights of creditors²²⁹ was introduced from mid-2014. Although there is not yet a uniform approach to consumer bankruptcies in Europe, a 2014 European Commission Recommendation suggests that, for entrepreneurs at least, discharge should be available after no more than three years.²³⁰ However, it is noteworthy that the notion of fresh-start is not universal, for example, in Lithuania where bankruptcy of natural persons is not available.²³¹ Reducing the minimum period of bankruptcy was also suggested in a discussion paper released by the Commonwealth Attorney-General's Department in 2009,²³² and was recommended in a draft report by the Productivity Commission in May 2015.²³³ As King notes 'Australia is the only country' in the countries he surveyed, 'to have substantially reduced and then increased its discharge period.'²³⁴

Another potential reform would be to amend the arrangements governing the NPII, so that it no longer operates as a permanent public record. While it may be appropriate that bankruptcy remain a public record for some period of time, it is

225 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 169. See also Bankruptcy Canada, *Your Bankruptcy Discharge* (2015) <<http://bankruptcy-canada.com/how-to-file-bankruptcy-canada/bankruptcy-discharge/>>; Stephanie Ben-Ishai, Saul Schwartz and Thomas G W Telfer, 'A Retrospective on the Canadian Bankruptcy System: 40 Years after the Tassé Report' (2011) 51 *Canadian Business Law Journal* 236, 251.

226 *Insolvency Act 2006* (NZ) s 29. Under s 294, a bankrupt may apply to court for an earlier discharge.

227 Porter and Thome, above n 135, 76. 'In most cases, unless a party in interest files a complaint objecting to the discharge or a motion to extend the time to object, the bankruptcy court will issue a discharge order relatively early in the case – generally, 60 to 90 days after the date first set for the meeting of creditors': United States Courts, *Chapter 7 – Bankruptcy Basics* citing Federal Rules of Bankruptcy Procedure 4004(c) <<http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter7.aspx>>.

228 Fiach Kelly and Harry McGee, 'Plan to Cut Bankruptcy Term Referred to Committee', *The Irish Times*, (Dublin), 12 May 2015.

229 On the legislation, *Gesetz zur Verkürzung des Restschuldbefreiungsverfahrens und zur Stärkung der Gläubigerrechte* 2013, see Dokumentations- und Informationssystem, *Deutscher Bundestag* (1 July 2014) <<http://dipbt.bundestag.de/extrakt/ba/WP17/467/46749.html>>.

230 European Commission, *Commission Recommendation of 12 March 2014 on a New Approach to Business Failure and Insolvency* (Commission Recommendation, 12 March 2014) Part IV.

231 Edita Gruodyte and Julija Kirsienė, 'Application of "Fresh Start" Doctrine for Individual Debtors in Lithuania: EU and US perspective' (2010) 21 *Engineering Economics* 263. For a discussion of French law, see Régis Blazy et al, 'Personal Bankruptcy Law, Fresh Starts, and Judicial Practice' (Research Report, 2011) <http://economix.fr/pdf/workshops/2011_faillites/CHOPARD_Journees_Faillite_2011.pdf>.

232 Attorney-General's Department, 'Proposed Amendments to the *Bankruptcy Act 1966*' (Discussion Paper, 28 May 2009) 2. Copy on file with the authors. It is not clear how widely this document was circulated.

233 Productivity Commission, above n 24, 322 (Recommendation 13.1).

234 King, above n 7, 657.

not clear that such records should be permanently publicly accessible without restrictions. A suggestion that there may be merit in reducing the length of time that bankruptcies and other insolvency administrations are recorded on the NPII was mentioned in a 2009 discussion paper released by the Attorney-General's Department, with the suggestion being made that the current situation with respect to the NPII 'appears contrary to the "fresh start" which bankruptcy is supposed to deliver to the debtor'.²³⁵ However, neither the former Government nor the current Government have indicated any policy to change the NPII arrangements. Reducing the length of time that insolvency information can be accessed on the NPII would also be consistent with the approach in New Zealand where bankruptcies are removed from the public register four years after the person has been discharged from bankruptcy.²³⁶

An alternative to reducing the permanent nature of NPII records would be to restrict the circumstances in which access to a NPII will be granted.

Finally, the *Bankruptcy Act 1966* (Cth) could be amended by changing some of the language surrounding bankruptcy. For example, changing the language to refer to 'debtors', rather than 'bankrupts', and doing away with the concept of an 'act of bankruptcy' could have the result of decreasing the incidence of informal labelling and bankruptcy stigma.

Third, consideration should be given to the need for a prohibition on discrimination against bankrupts or former bankrupts on the grounds of their bankruptcy in employment settings, except where the employer can demonstrate that there is a robust policy rationale for the discrimination.²³⁷ This would have the effect of not permitting any stigmatisation of bankruptcy to be acted upon in an employment setting, reducing the scope for informal labelling, and reduce the potential for bankruptcy to have an adverse effect on employment and the ability to earn an income.²³⁸ Such a move would be consistent with trends in the USA at both federal and state levels,²³⁹ and would also be consistent with the proscription in Australia against employers directly accessing consumer credit reports.

235 Attorney-General's Department, above n 232, 3. It may also be relevant to consider whether the NPII requirements should be different for debt agreements and personal insolvency agreements, eg, through having a shorter retention period than bankruptcy.

236 *Insolvency Act 2006* (NZ) s 449(4).

237 In the United States, s 525 of the *Bankruptcy Code*, 11 USC (2013) is designed to protect debtors against employment discrimination by (a) government units or (b) private employers because of bankruptcy. For critiques of these provisions, see Cordry, above n 214, and McPherson, above n 208.

238 For further arguments in favour of a robust anti-discrimination law, see generally Shepard, 'Towards A Stronger Financial History Antidiscrimination Norm', above n 117; Earle, Madek and Missirian, above n 211; Gallagher, above n 211. Note, however, that Shepard has more recently suggested that, in light of the practical problems with anti-discrimination laws, an alternative would be to develop a robust 'score' that could be used by employers as a means of identifying persons who are more likely to exhibit personal characteristics relevant to the workplace: Shepard, 'Seeking Solutions to Financial History Discrimination', above n 195, 1035.

239 Bob Lawless, 'The Evidence on Pre-employment Credit Checks' on Bob Lawless et al, *Credit Slips: A Discussion on Credit, Finance, and Bankruptcy* (2 January 2014) <<http://www.creditslips.org/creditslips/2014/01/the-evidence-on-pre-employment-credit-checks.html>>.

These suggestions are a starting point only, and any proposals for reform would need to consider the full context, including the extent to which proposals would help or hinder other objectives of the bankruptcy system, and the practicalities of development and implementation, particularly for proposals that would require the involvement of multiple governments and/or agencies. However, we believe that there is considerable merit in commencing a discussion about possible reforms.

VI CONCLUSION

This article has investigated the extent to which Australian laws; regulations; and professional and licensing rules reinforce the stigma associated with bankruptcy and so affect the prospects of bankrupts and former bankrupts engaging in the workforce and becoming independent economic actors, minimising the impact of their fall from financial grace upon society and the economy.

Following a brief review of the insights by sociologists into stigma, we have identified some of the ways in which it is observed in respect of the discreditable stigma of being or having been a bankrupt. There are clear examples where being labelled either officially or informally as a bankrupt facilitates stigmatisation when seeking employment or similarly engaging in work. We have posited arguments as to why the reinforcement of bankruptcy stigma matters and can adversely affect, for inadequately stated policy reasons, the negative characteristics associated with being a current or former bankrupt. And we concluded with some initial suggestions for law reform in order to promote the fresh start objective of Australia's bankruptcy system as well as its wider rehabilitative effect and so increase the likelihood of a former bankrupt re-engaging as an economic actor in Australian society, and improving their financial wellbeing.