MISFORTUNE OR MISDEED: AN EMPIRICAL STUDY OF PUBLIC ATTITUDES TOWARDS PERSONAL BANKRUPTCY

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I INTRODUCTION

While the field of bankruptcy scholarship is well established, there has so far been very little scholarly investigation of the social context in which bankruptcy occurs. Scholars, politicians and other commentators tend to discuss this subject under the rubric of 'bankruptcy stigma'.[1] Yet these discussions generally draw upon interviews with debtors,[2] or other indirect indicators of public opinion, such as newspaper articles.[3] They are seldom based upon surveys or interviews with members of the public. To date, only three empirical studies have investigated public attitudes to bankruptcy in this way.[4] These three studies were all carried out by the Insolvency Service ('IS') in the United Kingdom ('UK') in the 2000s,

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1 See, eg, 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; Michael D Sousa, 'Bankruptcy Stigma: A Socio-legal Study' (2013) 87 *American Bankruptcy Law Journal* 435; Rafael Efrat, 'Bankruptcy Stigma: Plausible Causes for Shifting Norms' (2006) 22 *Emory Bankruptcy Developments Journal* 481.

2 See, eg, Sousa, above n 1.

3 See, eg, Efrat, 'Shifting Norms', above n 1.

4 Insolvency Service (UK), 'Attitudes to Bankruptcy' (Report, 2004) <http://webarchive.nationalarchives.gov.uk/20121021124135/http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/policychange/attitudes/report-attitudestobankruptcy1.pdf>; Insolvency Service (UK), 'Attitudes to Bankruptcy Revisited' (Report, 2007) <http://webarchive.nationalarchives.gov.uk/20130702083659/http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/policychange/ABrevisited/ABrevisitedMenu.htm>; Insolvency Service (UK), '*Enterprise Act 2002*: Attitudes to Bankruptcy 2009 Update' (Report, October 2009) <http://webarchive.nationalarchives.gov.uk/20130702083658/http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/policychange/AB2009/ABrevisitedMenu.htm>. See also Insolvency Service (UK), '*Enterprise Act 2002* – The Personal Insolvency Provisions: Final Evaluation Report' (November 2007) <http://webarchive.nationalarchives.gov.uk/+/http:/www.insolvency.gov.uk/insolvencyprofessionandlegislation/legislation/evaluation/finalreport/report.pdf>.

as part of an evaluation of legal reforms introduced by the *Enterprise Act 2002*.[5] This Act reduced the period of bankruptcy from three years to one, with the explicit objective of reducing the stigma associated with bankruptcy. While the IS studies detected a decline in the stigmatisation of bankruptcy in the UK between 2004 and 2009, they found no evidence that this change was caused by the *Enterprise Act* reforms.[6] This finding is especially pertinent to Australia, where policymakers have recently outlined a series of proposals that closely resemble the UK reforms, both in substance and in rhetoric.[7]

While the IS studies are a valuable resource for empirical researchers, they are limited in scope. Surveying a sample 'designed to be representative' of the general community,[8] they evoke public attitudes in aggregate terms, without attempting to identify differences based on demographic factors such as gender or age, or other attributes such as direct, personal experience of bankruptcy. Requiring respondents to 'agree' or 'disagree' with a series of generalised statements about bankrupt debtors,[9] the IS studies offer little scope for the expression of nuanced or equivocal views on bankruptcy. They also afford little insight into the wider cultural, political and historical influences on public perceptions of bankruptcy. Moreover, the IS studies make no attempt to relate their findings to existing scholarship on bankruptcy stigma or the causes of unmanageable debt. This narrow focus is of course appropriate, given that that the purpose of the IS studies was purely to assess the impact of the *Enterprise Act* over a relatively short period. At the same time, these studies illustrate the pressing need for further, more finely grained, analytically nuanced and scholarly empirical research on public attitudes to bankruptcy.

This article describes the first scholarly empirical study of public attitudes to bankruptcy to be conducted in any jurisdiction. Based upon an online survey of over 2000 Australians, the study provides a unique insight into public views on bankruptcy and the prevalence of bankruptcy stigma in Australia. The study finds considerable evidence that bankruptcy arouses disapproval, with many respondents associating bankruptcy with poor financial management, extravagance and greed. Yet it also shows that, in Australia, bankruptcy is frequently associated with the stereotypical figure of the dishonest, 'high-flying'

5 *Enterprise Act 2002* (UK) c 40 ('*Enterprise Act*').

6 Insolvency Service (UK), '*Enterprise Act 2002*: Attitudes to Bankruptcy 2009 Update', above n 4, 5, 20. See also Insolvency Service (UK), 'Final Evaluation Report', above n 4, 50–3.

7 The Australian Commonwealth Government has expressed a desire to 'encourage entrepreneurial endeavour and reduce … stigma' associated with bankruptcy, by reducing the period of bankruptcy from three years to one. Related measures include a proposal to 'consult with relevant industry and licensing associations with a view to aligning restrictions with the reduced period of bankruptcy', where these restrictions would not be 'automatically … reduced as a consequence of the reduction' in the period of bankruptcy: Treasury (Cth), 'Improving Bankruptcy and Insolvency Laws' (Proposals Paper, National Innovation and Science Agenda, April 2016) 5, 9 <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2016/Improving-bankruptcy-and-insolvency-laws>.

8 Insolvency Service (UK), 'Attitudes to Bankruptcy', above n 4, 6.

9 Such statements included the following: 'There is a stigma attached to bankruptcy'; 'A bankrupt is a failure'; 'A bankrupt is unlucky'. See Insolvency Service (UK), 'Attitudes to Bankruptcy Revisited', above n 4, Appendix A3; Insolvency Service (UK), '*Enterprise Act 2002*: Attitudes to Bankruptcy 2009 Update', above n 4, Appendix A3. See also Parts II(B) and III(A) below.

businessman.[10] In this sense, it points to significant cultural differences between Australia and the United States ('US'), where the stereotypical bankrupt is 'a high school dropout' with 'an unskilled or, at best, semiskilled job'.[11] The study also finds evidence of widespread sympathy for debtors on modest incomes who go bankrupt as a consequence of unemployment, illness or other unforeseeable events. It demonstrates that many Australians view bankruptcy as a complex phenomenon, arising from a wide variety of circumstances. The study also indicates that the term 'stigma' does not fully convey the complexity of Australians' attitudes to bankruptcy. It shows that many Australians do not hold rigid or unequivocal views on the subject, but instead, often combine a generalised sense of disapproval with considerable sympathy for individual debtors and a recognition of the suffering associated with financial failure. These findings have important implications, not only in Australia, but in other jurisdictions in which 'bankruptcy stigma' is the subject of scholarly and political debate.

The article begins, in Part II, by providing an overview of academic and public policy debates regarding the nature and extent of 'bankruptcy stigma', in the US, the UK and Australia. Part III outlines the aims and significance of the article. It describes the methodology employed by the authors in conducting a survey of 2000 Australians, in early 2016. Part IV outlines the results of this survey. It identifies statistically significant differences in respondents' views, based on their gender, age and personal experience of bankruptcy. It also outlines the most important themes emerging from respondents' extended comments, in an open-ended question at the end of the survey. Part V analyses these findings, drawing out their implications for bankruptcy scholars, as well as for Australian policymakers. It concludes that the concept of 'stigma' does not fully encapsulate the complex, ambivalent attitudes revealed by the survey. It suggests that the term, 'shame', facilitates a more nuanced account of the way in which bankruptcy commands public sympathy, even as it elicits equally strong feelings of disapproval.

II THE DISCOURSE OF 'BANKRUPTCY STIGMA'

A The United States

The extent and nature of 'bankruptcy stigma' has aroused much controversy in the US, particularly in so far as it relates to the *Bankruptcy Abuse Prevention*

10 The late Alan Bond and Christopher Skase are the two most notorious corporate bankrupts in Australia's recent history. For examples of the public discourse surrounding these figures, see, eg, Paul Barry, *Going for Broke* (Transworld, 2000). See also Tom Prior, *Christopher Skase: Beyond the Mirage* (Information Australia, 1994); Lawrence Van der Plaat, *Too Good to Be True: Inside the Corrupt World of Christopher Skase* (Macmillan, 1996).

11 Teresa A Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, *The Fragile Middle Class: Americans in Debt* (Yale University Press, 2000) 34.

and Consumer Protection Act ('*BAPCPA*'), enacted in 2005.[12] Responding to rapid and significant increases in the rate of bankruptcy filings in the US, the *BAPCPA* sought to make bankruptcy less attractive, by restricting the availability of debt discharge and instead directing debtors towards long-term repayment arrangements.[13] Its champions argued that bankruptcy had become a 'first stop' for unscrupulous debtors, rather than a 'last resort' for people in severe financial distress.[14] They maintained that in contemporary America, debt was no longer a source of embarrassment but a 'status symbol', while bankruptcy was no longer stigmatised, but rather seen as flowing from 'events beyond the control of the individual filer'.[15] Proponents of the 'declining stigma hypothesis'[16] attributed this change in attitudes to a great variety of factors, including rising levels of consumerism and increasing access to credit,[17] greater public awareness of bankruptcy filings,[18] media portrayals of bankrupt celebrities,[19] advertising,[20] urbanisation[21] and even declining levels of religious belief.[22] Critics of the *BAPCPA* have argued that these claims lack a firm basis in empirical evidence.[23] They point to alternative explanations for increasing bankruptcy rates, including job insecurity, rising divorce rates, escalating housing costs and the deregulation of consumer credit, which in turn has led many households to accrue unsustainable levels of debt.[24] Some even speculate that 'the stigma of bankruptcy may … be increasing', due to the growing importance of credit scores and the fact that debtors' personal details are now often published on the internet.[25]

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12 *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, Pub L No 109–8, §256, 119 Stat 23 (2005). For a brief overview of the relevant scholarship, see Paul Ali, Lucinda O'Brien and Ian Ramsay, '"Short a Few Quid": Bankruptcy Stigma in Contemporary Australia' (2015) 38 *University of New South Wales Law Journal* 1575, 1586–94.

13 Whereas Chapter 7 of the *United States Bankruptcy Code* provides for comprehensive debt discharge within a few months of filing, Chapter 13 'involves a three- to five-year payment plan under which the debtor must devote all of his or her disposable income to repaying unsecured creditors': Dov Cohen and Robert M Lawless, 'Less Forgiven: Race and Chapter 13 Bankruptcy' in Katherine Porter (ed), *Broke: How Debt Bankrupts the Middle Class* (Stanford University Press, 2012) 175, 175; 11 USC §§ 701–84, 1301–30.

14 Sullivan, Warren and Westbrook, 'Less Stigma', above n 1, 234–5 n 63, quoting *Bankruptcy Revision: Hearing on Bankruptcy Reform and Financial Servs Issues Before the SubComm On Banking*, 106th Cong 11 (1999) (statement of Rep Rick Boucher, Del Va).

15 Efrat, 'Shifting Norms', above n 1, 495. See also Todd J Zywicki, 'Institutions, Incentives, and Consumer Bankruptcy Reform' (2005) 62 *Washington and Lee Law Review* 1071.

16 Sullivan, Warren and Westbrook, 'Less Stigma', above n 1, 233.

17 Efrat, 'Shifting Norms', above n 1, 494.

18 Ibid 510.

19 Ibid 500.

20 Ibid 504.

21 Ibid 514.

22 Efrat writes that Americans' traditional distaste for debt was partly attributable to 'a robust Church influence': ibid 493. See also David M Tucker, *The Decline of Thrift in America: Our Cultural Shift from Saving to Spending* (Praeger, 2nd ed, 1991) 13, 18, cited in Efrat, 'Shifting Norms', above n 1, 493 n 65.

23 Sullivan, Warren and Westbrook, 'Less Stigma', above n 1, 235; Elizabeth Warren and Amelia Warren Tyagi, *The Two-Income Trap: Why Middle-Class Parents Are Going Broke* (Basic Books, 2003) 72–3.

24 See, eg, Sullivan, Warren and Westbrook, 'Less Stigma', above n 1, 248–9; Sullivan, Warren and Westbrook, *Fragile*, above n 11; Warren and Warren Tyagi, above n 23, see especially at 126–37.

25 Sullivan, Warren and Westbrook, 'Less Stigma', above n 1, 215, 242–7.

Empirical studies provide some insight into community attitudes to bankruptcy in the US. These studies are predominantly based upon the views of individual debtors,[26] or other indirect or specialised sources such as newspaper commentators,[27] 'jurists, government officials … members of the credit industry … lawyers and bankruptcy trustees'.[28] The largest and most well-known empirical study of bankruptcy is the Consumer Bankruptcy Project, conducted over a period of several decades beginning in 1981.[29] This study extensively documents the emotional distress caused by bankruptcy. Noting that many debtors go to great lengths to conceal their circumstances from friends and colleagues, the authors conclude that 'it is certainly not respectable … to be bankrupt' in the US.[30] Some empirical researchers have focussed specifically on bankruptcy stigma.[31] In 2006, Deborah Thorne and Leon Anderson published the results of 37 interviews with 19 married couples who had declared bankruptcy in 1999.[32] They documented the various 'strategies' that these individuals had employed in order to 'manag[e]' their feelings of 'shame and stigmatization' over the course of their bankruptcies.[33] Based on these interviews, Thorne and Anderson concluded that bankruptcy is 'disparage[d]' by both individual debtors and 'American society at large',[34] and that those who declare bankruptcy in the US 'do so within a cultural context of shame, embarrassment, and assertions of their moral failure'.[35] Other US research has been more equivocal regarding the prevalence of bankruptcy stigma. Michael Sousa's 2013 study found that a significant proportion of debtors feel only a 'diluted sense of shame' in relation to their bankruptcies, while others express no shame and instead 'justif[y]' their bankruptcies with reference to 'exogenous events'.[36] Similarly, in a historical survey of articles published in the *New York Times*, Rafael Efrat found evidence of an increasingly 'sympathetic view' towards people who go bankrupt, over the

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26 See, eg, Deborah Thorne and Leon Anderson, 'Managing the Stigma of Personal Bankruptcy' (2006) 39 *Sociological Focus* 77, 83; Sousa, above n 1.

27 Efrat, 'Shifting Norms', above n 1.

28 Ibid 485.

29 To date, the CBP has consisted of four discrete studies, carried out in 1981, 1991, 2001 and 2007. For details of the 1981 study, see Teresa A Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* (Oxford University Press, 1989). For details of the 1991 study, see Sullivan, Warren and Westbrook, *Fragile*, above n 11. The 2001 study is described in Warren and Warren Tyagi, above n 23. For a discussion of the 2007 study, see Katherine Porter, 'Appendix: Methodology of the Consumer Bankruptcy Project 2007' in Katherine Porter (ed), *Broke: How Debt Bankrupts the Middle Class* (Stanford University Press, 2012) 235. Each iteration of the CBP has involved changes in methodology and scope, as well as in research personnel. See, eg, Warren and Warren Tyagi, above n 23, 181–8.

30 Sullivan, Warren and Westbrook, *Fragile*, above n 11, 32.

31 See, eg, Rafael Efrat, 'The Evolution of Bankruptcy Stigma' (2006) 7 *Theoretical Inquiries in Law* 365; Sousa, above n 1; Sullivan, Warren and Westbrook, 'Less Stigma', above n 1; Thorne and Anderson, above n 26.

32 Thorne and Anderson, above n 26.

33 Ibid 83. These strategies included concealment, with many admitting that they had gone to considerable lengths to prevent their families and co-workers from learning of their bankruptcies.

34 Ibid 83.

35 Ibid 94.

36 Sousa, above n 1, 463, 469.

course of the 20th century.[37] Efrat suggested that this phenomenon might be attributable to 'the rampant growth in American consumerism',[38] combined with a 'decline in personal responsibility' and a 'tendency to shift blame from personal fault to external causes'.[39]

B The United Kingdom

In contrast to the relatively liberal and accessible US regime, the UK's bankruptcy laws have been described as 'unforgiving' and 'highly administrative'.[40] Pointing out that bankruptcy rates are much lower in the UK than in the US and Canada,[41] some scholars argue that bankruptcy is regarded 'far more negatively in England' than in North America.[42] Others offer quite different reasons for the UK's relatively low bankruptcy rates, including the high cost of declaring bankruptcy in the UK and the availability of other 'cheaper, possibly faster, and surely less bureaucratic' forms of relief from unmanageable debt.[43] Still others point out that in the UK, consumer bankruptcies have increased substantially over recent decades, as the relaxation of consumer credit laws has led to a rapid escalation of household debt. Iain Ramsay notes that non-business debtors are increasingly amenable to declaring bankruptcy, while advisers such as Citizens Advice are becoming much more 'willing to recommend it as a consumer remedy'.[44] He also argues that in contemporary UK society, bankrupt debtors are generally viewed with sympathy rather than disdain.[45] Ramsay concedes that some journalists continue to employ narratives of 'living beyond [one's] means' and to allege the existence of a rampant 'debt culture' in the UK.[46] Yet he maintains that many members of the general public now associate bankruptcy with 'desperate cases', 'vulnerable people trapped in debt' and in

37 Efrat, 'Evolution', above n 31, 389, 391.

38 Efrat, 'Shifting Norms', above n 1, 494.

39 Ibid 491.

40 Nathalie Martin, 'Common-Law Bankruptcy Systems: Similarities and Differences' (2003) 11 *American Bankruptcy Institute Law Review* 367, 367.

41 Nathalie Martin, 'The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation' (2005) 28 *Boston College International and Comparative Law Review* 1, 38–9; Rafael Efrat, 'Global Trends in Personal Bankruptcy' (2002) 76 *American Bankruptcy Law Journal* 81, 100–1.

42 Martin, 'Common-Law Bankruptcy Systems', above n 40, 368. See also Efrat, 'Global Trends', above n 41, 106, cited in Martin, 'History and Culture', above n 41, 38–9; Jacob S Ziegel, *Comparative Consumer Insolvency Regimes – A Canadian Perspective* (Hart, 2003) 113; Martin, 'History and Culture', above n 41.

43 Ziegel, above n 42, 112–13. Writing in 2003, Ziegel cited administration orders under the *County Courts Act 1984* (UK) c 28 as an example of such a 'less bureaucratic' form of relief, however by 2012 Iain Ramsay observed that such orders had 'withered in importance', having been replaced by the 'consumeris[ed]' Individual Voluntary Arrangement: Iain Ramsay, 'A Tale of Two Debtors: Responding to the Shock of Over-indebtedness in France and England – A Story from the *Trente Piteuses*' (2012) 75 *Modern Law Review* 212, 237, 240.

44 Ramsay, 'Tale', above n 43, 237–8.

45 Ibid 243.

46 Iain Ramsay, '"Wannabe WAGS" and "Credit Binges": The Construction of Overindebtedness in the UK' in Johanna Niemi, Iain Ramsay and William C Whitford (eds), *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* (Hart, 2009) 75, 76, cited in ibid 243.

need of assistance.[47] He links this shift to recent law reform initiatives, such as the introduction of Debt Relief Orders for debtors with no assets. Citing such changes, Ramsay argues that UK public policy now manifests considerable 'uncertainty … as to who is responsible for over-indebtedness'.[48]

The reforms effected by the *Enterprise Act* bear testament to this shift. With this Act, the UK Government reduced the duration of bankruptcy from three years to one.[49] This reform was framed as a measure to promote entrepreneurial culture, on the basis that 'fear of failure can act as a powerful disincentive to potential entrepreneurs'.[50] Introducing the proposals, the then Secretary of State for Trade and Industry, Stephen Byers, explicitly stated that the aim of the legislation was to influence public attitudes towards bankruptcy.[51] Mr Byers claimed that the UK's '*cultural attitudes* are among the least supportive of entrepreneurs and respect for them is lower here than in any other comparable economy'.[52] He observed that bankruptcy law drew no distinction 'between those who are honest but unlucky or undercapitalised and the reckless or fraudulent'.[53] 'We believe that a distinction can and should be made', he stated, 'so that the vast majority of honest bankrupts do not continue to be stigmatised through association with the dishonest'.[54] Consistent with this aim, the *Enterprise Act* introduced new, punitive measures directed at 'culpable' bankrupts. It imposed specific sanctions on bankrupts deemed to have acted dishonestly or recklessly, including the Bankruptcy Restriction Order ('BRO'), which can be imposed for up to 15 years after discharge.[55] Courts may impose a BRO on a wide range of grounds, including fraud, incurring debt with 'no reasonable expectation of being able to pay', 'gambling, rash and hazardous speculation or unreasonable extravagance', and 'neglect of business affairs' in a way that 'materially

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47 Ramsay, 'Tale', above n 43, 243; see also Ramsay, 'Overindebtedness', above n 46.

48 Ramsay, 'Tale', above n 43, 247.

49 *Insolvency Act 1986* (UK) c 45, s 279 ('*Insolvency Act*').

50 Insolvency Service (UK), 'Insolvency – A Second Chance' (White Paper, Department of Trade and Industry, July 2001) 1 <http://webarchive.nationalarchives.gov.uk/+/http:/www.insolvency.gov.uk/cwp/cm5234.pdf>.

51 Insolvency Service (UK), 'Bankruptcy: A Fresh Start' (Consultation Document, March 2000) <http://webarchive.nationalarchives.gov.uk/20140311023846/http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/con_doc_archive/consultation/freshstart/foreword.htm>.

52 Ibid (emphasis added).

53 Ibid.

54 Ibid.

55 *Insolvency Act* sch 4A. When subject to BROs, individuals are precluded from holding certain positions: they cannot serve as Members of Parliament, or company directors, among other things. They may not obtain credit without disclosing the existence of the BRO. See *Insolvency Act* s 426A; Adrian Walters, 'Personal Insolvency Law After the *Enterprise Act*: An Appraisal' (2005) 5 *Journal of Corporate Law Studies* 65, 87. Debtors may also voluntarily subject themselves to Bankruptcy Restrictions Undertakings ('BRUs'). These have the same legal effect as BROs but do not require debtors to appear in court: Insolvency Service (UK), *Guidance: Bankruptcy Restrictions Orders and Undertakings* (4 April 2017) <https://www.gov.uk/government/publications/bankruptcy-restrictions-orders-and-undertakings/bankruptcy-restrictions-orders-and-undertakings#what-happens-after-a-bro-or-a-bru-is-made>.

contribute[s] to or increase[s] the extent of' a bankruptcy.[56] The IS publishes the names and addresses of individuals subject to BROs, together with details of their offending conduct, on a searchable website.[57] The purpose of this is to help 'lenders and public to differentiate between culpable and non-culpable … bankrupts',[58] and thus, by implication, to relieve 'honest' debtors from the burden of unwarranted stigma.

Since the introduction of the *Enterprise Act*, the IS has sought to gauge its impact through a series of empirical studies of 'attitudes to bankruptcy'. The results of these studies were published in 2004, 2007 and 2009, respectively.[59] To the authors' knowledge, these are the only published studies of attitudes to bankruptcy to be based upon surveys of the general public. Each study involved surveys administered to three distinct groups: bankrupt debtors, businesspeople and a third group representing the views of the general public.[60] Members of the public were asked whether or not '[t]here is a stigma attaching to bankruptcy',[61] then asked further questions designed to elicit the reasons for their views. They were asked to respond to statements such as, 'A bankrupt is a failure', 'A bankrupt is dishonest', 'It's not necessarily the bankrupt's fault' and 'Bankruptcy is "common-place"'.[62] They were also asked about the stigmatising impact of specific elements of bankruptcy law and procedure, such as '[h]aving to attend court', '[h]aving to meet with people in authority such as the official

56 *Insolvency Act* sch 4A, sub-para 2(2). Adrian Walters points out that several of these grounds are 'identical to, or based on, the grounds on which the court could refuse to discharge an individual from bankruptcy' under earlier UK bankruptcy laws: Walters, above n 55, 91.

57 Insolvency Service (UK), *Bankruptcy and Debt Relief Restrictions Outcomes: Summary of Results* (2017) <https://www.insolvencydirect.bis.gov.uk/IESdatabase/viewbrobrusummary-new.asp>.

58 Insolvency Service (UK), 'Final Evaluation Report', above n 4, 19.

59 The first of these, the 'benchmark' study, was conducted in 2004, in conjunction with the commencement of the *Enterprise Act*: see Insolvency Service (UK), 'Attitudes to Bankruptcy', above n 4, 4. The second was conducted in 2006 and 2007: see Insolvency Service (UK), 'Attitudes to Bankruptcy Revisited', above n 4. The third was conducted in 2009: see Insolvency Service (UK), '*Enterprise Act 2002*: Attitudes to Bankruptcy 2009 Update', above n 4.

60 This third group was 'designed to be representative of all adults in telephone owning households in Great Britain': Insolvency Service (UK), 'Attitudes to Bankruptcy', above n 4, 6. In each case, the survey of the general public was administered via telephone, as part of an omnibus survey conducted by a market research company. See Insolvency Service (UK), 'Attitudes to Bankruptcy', above n 4, 6; Insolvency Service (UK), 'Attitudes to Bankruptcy Revisited', above n 4, 6; Insolvency Service (UK), '*Enterprise Act 2002*: Attitudes to Bankruptcy 2009 Update', above n 4, 6. The 2007 and 2009 surveys were each administered to 1000 members of the general community: see Insolvency Service (UK), 'Attitudes to Bankruptcy Revisited', above n 4, Appendix B1; Insolvency Service (UK), '*Enterprise Act 2002*: Attitudes to Bankruptcy 2009 Update', above n 4, Appendix B1. As the appendices to the 2004 Report are no longer available online, the size of the sample in the 2004 survey is unknown.

61 See Insolvency Service (UK), 'Attitudes to Bankruptcy Revisited', above n 4, Appendix A3; Insolvency Service (UK), '*Enterprise Act 2002*: Attitudes to Bankruptcy 2009 Update', above n 4, Appendix A3. As the appendices to the 2004 Report are no longer available online, the survey questions for this evaluation are not known. The data reported in the 2004 Report indicates that the questionnaire employed in this evaluation was very similar to those employed in the 2007 and 2009 evaluations, with some minor differences: for example, in 2004, members of the public were asked to respond to the statement, 'Bankruptcy does not infringe upon your life'. This statement was not included in the 2007 or 2009 questionnaires.

62 Insolvency Service (UK), 'Attitudes to Bankruptcy Revisited', above n 4, Appendix A3; Insolvency Service (UK), '*Enterprise Act 2002*: Attitudes to Bankruptcy 2009 Update', above n 4, Appendix A3.

receiver', and being subject to 'restriction[s] … such as not being able to be a company director'.[63] These highly specific and technical questions are, in a sense, problematic. Assuming that most respondents had no professional or personal experience of bankruptcy,[64] it seems likely that many would have had no firm views on the stigmatising effects of specific procedures or legal provisions, prior to completing the survey.[65] It is also important to note that the format of the survey imposed strict limitations on respondents' capacity to express their views. Respondents were only invited to 'agree' or 'disagree' with statements posed by their interviewers, choosing one of six options on a Likert scale.[66] They were unable to qualify or nuance their views, to volunteer additional reasons for their views, or to place their views within a wider social, economic or political context. This necessarily imposed significant restrictions on the data available for analysis.

The three IS studies record a modest decline in public disapproval of bankruptcy between 2004 and 2009. In 2004, 53 per cent of the general public agreed that there was a stigma attaching to bankruptcy, with 19 per cent disagreeing and 28 per cent expressing no opinion.[67] By 2009, only 43 per cent of the general public agreed that there was a stigma attaching to bankruptcy, while 23 per cent disagreed and 33 per cent expressed no opinion.[68] In its 2009 report, the IS observes that 'the extent to which any reduction in perceived stigma may be directly attributable to the E[nterprise] A[ct] is unclear'.[69] It notes that 'the most significant changes' in attitudes[70] appear to have occurred after 2006, 'by

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63 Respondents who agreed that bankruptcy carries a stigma were read the following script: 'Some aspects of the bankruptcy process have a large amount of stigma attached to them. Please tell me, again using a scale of 1 – 5, to what extent you agree or disagree that each of the following parts of bankruptcy has a large amount of stigma attached to it'. They were then asked to respond to statements such as 'Having to attend court', 'Having to complete paperwork such as forms', 'Having to meet with people in authority such as the official receiver' and 'Having the bankruptcy order advertised in a newspaper'.

64 Respondents to this survey were not asked whether or not they had ever been bankrupt or had direct experience of the bankruptcy system in any other capacity.

65 For example, it seems unlikely that many respondents would have had a strong opinion on the impact of 'restriction[s] imposed on someone who's bankrupt, such as not being able to be a company director': Insolvency Service (UK), 'Attitudes to Bankruptcy Revisited', above n 4, Appendix A3; Insolvency Service (UK), '*Enterprise Act 2002*: Attitudes to Bankruptcy 2009 Update', above n 4, Appendix A3. Other research by the IS has found that the public remains largely unaware of the changes introduced by the *Enterprise Act 2002*. In a separate evaluation of the changes to discharge provisions, the IS found that more than half of debtors were unaware that the automatic discharge period had been reduced from three years to one year, at the time they went bankrupt: Insolvency Service (UK), 'Discharge from Bankruptcy' (Report, 2006) 7–10 <http://webarchive.nationalarchives.gov.uk/20080610162130/http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/policychange/policychange.htm>.

66 All possible responses were expressed on a Likert scale, ranging from 'Strongly agree' to 'Strongly disagree'. Respondents also had the option to respond, 'Don't Know': Insolvency Service (UK), 'Attitudes to Bankruptcy Revisited', above n 4, Appendix A3; Insolvency Service (UK), '*Enterprise Act 2002*: Attitudes to Bankruptcy 2009 Update', above n 4, Appendix A3.

67 Insolvency Service (UK), 'Attitudes to Bankruptcy', above n 4, 7.

68 Insolvency Service (UK), '*Enterprise Act 2002*: Attitudes to Bankruptcy 2009 Update', above n 4, 8. All three studies indicate that the views of the UK public do not vary significantly according to gender, age, occupation or geographic location: at 9, 12–15.

69 Ibid 7.

70 Here the authors are referring to the aggregate change in attitudes evinced by bankrupt debtors, businesses *and* the general public. While the general public reported steadily decreasing levels of

which the time the personal insolvency provisions of the E[nterprise] A[ct] had been in force for a number of years'.[71] The study points out that 'it takes time for new legislation to settle in, and to become both known and accepted'. Yet it also suggests that increasing public tolerance of bankruptcy might be due not to legislative change, but to other factors, such as the increasing prevalence of bankruptcy and 'the publicity this has attracted'. The study speculates that declining public disapproval of bankruptcy might simply indicate a growing awareness of 'what being bankrupt actually means'.[72]

C Australia

The Australian Government has recently announced its intention to modify Australia's bankruptcy laws, in order to promote innovation and economic growth. In language that closely echoes the rhetoric surrounding the *Enterprise Act*, the Australian Government has expressed a desire to 'encourage entrepreneurial endeavour and reduce … stigma' associated with bankruptcy.[73] In April 2016, it released a discussion paper in which it outlined a proposal to reduce the period of bankruptcy from three years to one year. By 'encourag[ing] Australians to embrace risk, learn from mistakes, be ambitious and experiment to find solutions',[74] it said, reducing the period of bankruptcy would stimulate entrepreneurial activity, 'economic growth, job creation and future prosperity'.[75] In making the case for its proposed reforms, the Government's discussion paper noted that 'bankruptcy can be a result of necessary risk-taking or misfortune rather than misdeed'.[76] It claimed that, 'over time', a reduction in the period of bankruptcy would 'reduce the stigma associated with business failure',[77] presumably by making the wider community more accepting of bankruptcy as an inevitable part of business life.[78] The Government's discussion paper did not explain how, in practical terms, these relatively technical changes to the law would influence the views of the general public. Moreover, by framing the reforms in the language of entrepreneurship and innovation, it did not offer any guidance as to how, if at all, the reforms would influence public attitudes towards non-business or 'consumer' bankruptcies.[79] This is a significant omission, given that such bankruptcies constitute 78 per cent of all bankruptcies in Australia.[80]

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stigmatisation, from 2004 to 2006 and from 2006 to 2009, the views of bankrupt debtors and businesspeople 'remain[ed] largely the same between 2004 and 2006': ibid 7.

71 Ibid 7. See also Katharina Möser, 'Restrictions after Personal Insolvency' [2013] *Journal of Business Law* 679, 690–1; John Tribe, 'Discharge in Bankruptcy: An Examination of Personal Insolvency's Fresh Start Function in English Law: Part Three' (2013) 26 *Insolvency Intelligence* 1, 3.

72 Insolvency Service (UK), '*Enterprise Act 2002*: Attitudes to Bankruptcy 2009 Update', above n 4, 7.

73 Treasury (Cth), above n 7, 5.

74 Ibid 3.

75 Ibid.

76 Ibid 5.

77 Ibid 3.

78 Ibid.

79 Jennifer Dickfos and Catherine Brown, 'Reducing Bankruptcy to 12 Months Ignores Realities of Insolvency', *The Conversation* (online), 15 June 2015 <https://theconversation.com/reducing-bankruptcy-to-12-months-ignores-realities-of-insolvency-60382>. The discussion paper also failed to address other measures that some have suggested as a means of reducing stigma, such as restricting access to the names

In claiming that these reforms would influence public attitudes towards bankruptcy, the Government had little pre-existing empirical evidence upon which to draw. The Australian Financial Security Authority ('AFSA') publishes extensive statistical data regarding bankruptcy, and other forms of personal insolvency, on its website. It issues regular media releases, some of which describe individual cases, and, until 2012, produced biennial reports analysing significant trends in this data. However this data relates primarily to the nature and extent of debts discharged in bankruptcy, the causes of bankruptcy (as nominated by debtors) and the demographic characteristics of people who go bankrupt.[81] To date, AFSA has not undertaken any independent research into public perceptions of bankruptcy, comparable to that undertaken by the IS in the UK. Academic research on the subject is also very limited. In 1995, Martin Ryan published a monograph outlining the results of his interviews with 77 bankrupt individuals in the late 1980s.[82] While this study remains a valuable resource for Australian empirical researchers, it only briefly touches on questions of social stigma.[83] Other sources, such as newspapers, also offer little insight into public perceptions of bankruptcy in Australia. In the 1990s, disgraced business tycoons such as Alan Bond and Christopher Skase attracted widespread condemnation for incurring multi-million dollar debts, declaring bankruptcy, and continuing to live extravagant lifestyles while claiming to be destitute.[84] In the early 2000s, bankruptcy briefly returned to prominence, when a group of Sydney barristers were exposed as having used the system to avoid substantial income tax debts.[85] Yet apart from these sensational accounts of high-profile 'rogue' debtors,[86] the

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and details of individual bankrupts on the National Personal Insolvency Index. See Nicola Howell and Rosalind Mason, 'Reinforcing Stigma or Delivering a Fresh Start: Bankruptcy and Future Engagement in the Workforce' (2015) 38 *University of New South Wales Law Journal* 1529, 1572–3.

80 Dickfos and Brown, above n 79. A similar point has been raised in relation to the UK reforms. See, eg, Lisa Linklater, 'The *Enterprise Act*: New Economic Dawn or Disaster?' (2004) 25 *Company Lawyer* 33.

81 See, eg, Insolvency and Trustee Service Australia, 'Profiles of Debtors 2011' (Report, 2012) <https://www.afsa.gov.au/sites/g/files/net1601/f/profiles-of-debtors-2011.pdf>. Insolvency and Trustee Service Australia ('ITSA') changed its name to AFSA in August 2013.

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

83 Seventy-four per cent of those interviewed said they had not personally experienced stigmatisation (in the sense of being 'made to feel different or looked down on'). At the same time, the majority (54 per cent) said that they still 'felt' stigmatised. Most said that they had only revealed their bankrupt status to their relatives and friends, with less than 20 per cent revealing it to employers, co-workers or neighbours: ibid 181, 187.

84 In his obituary for Bond, Paul Barry writes that in the eyes of many Australians, Bond epitomises 'all that was wrong with the 1980s … that decade of selfishness and greed': Paul Barry, 'Alan Bond, 1938–2015', *The Australian* (online), 5 June 2015 <http://www.theaustralian.com.au/news/special-features/alan-bond-a-risk-taking-salesman-who-made-life-fun/news-story/592e0fda729caf5fba87ddcdd18c6b7b>. See also Barry, *Going for Broke*, above n 10; Prior, above n 10; Van der Plaat, above n 10.

85 See, eg, Paul Barry, 'Rich Lawyers Dodging Income Tax', *The Sydney Morning Herald* (online), 26 February 2001 <http://www.smh.com.au/national/rich-lawyers-dodging-income-tax-20130526-2n50f.html>; Louise Hall, 'Struck Off Barrister Again Faces Bankruptcy', *The Sydney Morning Herald* (online), 10 August 2011 <http://www.smh.com.au/nsw/struckoff-barrister-again-faces-bankruptcy-20110809-1ikwc.html>.

86 Barry, 'Alan Bond', above n 84.

media seldom reports bankruptcy cases. With rare exceptions,[87] 'middle class'[88] bankruptcy is almost invisible in the Australian public sphere.

AFSA's data indicates that the vast majority of bankrupt debtors are not failed corporate entrepreneurs, but instead, come from relatively modest socio-economic backgrounds. The 'most common occupation' among people who go bankrupt is a 'clerical or administrative' role.[89] This category includes logistics clerks, conveyancers and legal clerks, human resource clerks, debt collectors and library assistants, as well as many other occupations. AFSA notes that although people in such 'clerical and administrative' roles constitute approximately two per cent of the employed workforce,[90] they make up six per cent of people who go bankrupt in Australia.[91] The incomes reported by people in bankruptcy present an even starker contrast to the stereotypical image of the bankrupt as a 'high-flying' businessman or barrister. In 2011,[92] the last year for which detailed figures are available, 39 per cent of bankrupt debtors earned between A$30 000 and A$70 000 a year,[93] while 52 per cent reported an individual annual income of less than A$30 000. Since the minimum wage at that time was A$30 643,[94] these figures strongly suggest that over half the bankrupt population was unemployed or underemployed in the 12 months leading up to bankruptcy. This is borne out by AFSA's data on the causes of bankruptcy. In 2013–14, 34 per cent of those

87 Rarely, a journalist will profile a 'middle class' bankruptcy where some aspect of the case is unusual, for example a recent case in which a husband and wife were declared bankrupt after failing to pay $20,000 in credit card debt, despite having $300,000 in equity in their family home. Their total liabilities, including legal fees and interest, eventually amounted to $291,124: Liam Mannix, 'Riches to Rags: A Family Made Homeless from a Credit Card Debt', *The Sydney Morning Herald* (online), 1 March 2016 <http://www.smh.com.au/national/riches-to-rags-a-family-made-homeless-from-a-credit-card-debt-20160226-gn4nc7.html>. Another recently reported case involved a woman who was made bankrupt after failing to pay her son's private school fees: Rania Spooner and Henrietta Cook, 'Mother Loses Bankruptcy Battle over Private School Fees', *The Age* (online), 31 July 2015 <http://www.theage.com.au/victoria/mother-loses-bankruptcy-battle-over-private-school-fees-20150730-gio17d.html>.

88 Ian Ramsay and Cameron Sim, 'Personal Insolvency in Australia: An Increasingly Middle Class Phenomenon' (2010) 38 *Federal Law Review* 283.

89 The category is 'other clerical and administrative' and is based upon the Australian and New Zealand Standard Classification of Occupations, a system of categorising occupations jointly developed by the Australian Bureau of Statistics and Statistics New Zealand.

90 Australian Financial Security Authority, *Commentary: All Debtors* (2016) <https://www.afsa.gov.au/statistics/commentary-all-debtors>.

91 In 2013–14, 'other clerical and administrative' workers made up 1198 of 19 354 total bankruptcies. In 2014–15, they made up 1057 of 17 575 bankruptcies. In 2015–16, they made up 1081 of 17 755 bankruptcies. In all three years, they constituted six per cent of total bankruptcies. The authors wish to thank the Statistics team at AFSA for providing figures for the 2014–15 and 2015–16 years. At the time of writing, these figures were not publicly available. See also ibid.

92 In 2011, AFSA (then ITSA) published statistics by calendar year, rather than by financial year.

93 AFSA notes that, in the 2009–10 financial year, the average taxable income for all individuals was A$48 027: Insolvency and Trustee Service Australia, above n 81, 18. According to AFSA, in 2011, 26 per cent of bankrupts had earned between A$30 000 and A$49 999 in the 12 months prior to bankruptcy. A further 13 per cent earned between A$50 000 and A$69 999.

94 Fair Work Australia, *Order: Annual Wage Review 2010–11*, PR062011, 20 June 2011. This order set the minimum wage at $589.30 per week from 1 July 2011: at para 4.2.

declaring a non-business bankruptcy cited 'unemployment or loss of income' as the 'main cause' of their insolvency.[95]

Recent Australian empirical research confirms that the vast majority of Australians in bankruptcy are not failed corporate entrepreneurs. One Australian study has cast bankruptcy as an 'increasingly middle class phenomenon'.[96] Analysing data published by AFSA between 1997 and 2007, this study found that 'personal insolvency … affect[s] a broad section of the population'.[97] The study concluded that it is not 'correct to assume that personal insolvents are only the very wealthy who are avoiding meeting their financial obligations'. Instead, bankruptcy affects 'the broad section of Australian society represented by the middle class'.[98] Another recent study has found that a significant proportion of Australians who go bankrupt in fact suffer from 'long term' or 'entrenched' poverty.[99] Based on surveys of Australian financial counsellors, this study reported that many who go bankrupt experience 'persistent, entrenched disadvantage', due to low income, reliance upon social security, ill health, disability and other related factors.[100] These findings suggest that there is a significant disjuncture between the somewhat dated stereotype of the 'high flying' corporate entrepreneur and the real experiences and circumstances of most Australians in the bankruptcy system.

III THE STUDY

A Aims and Significance

This article documents the first scholarly empirical study of community attitudes to bankruptcy to be carried out in any jurisdiction. It aims to assess the extent to which bankruptcy is regarded as a stigmatising or shameful condition in Australia. In some respects, it represents an Australian counterpart to the research conducted by the IS in the UK. Both studies asked members of the general public to express a view on whether bankruptcy is due to fault, on the part of individual debtors, or whether it is generally a consequence of bad luck. Drawing on this data, both attempt to gauge the extent to which bankrupt debtors suffer stigma and the extent to which they elicit sympathy in the public domain. However, in several important respects, the present study differs from and extends beyond the IS research. As noted above, the respondents to the IS study were asked to answer a series of questions with responses expressed on a Likert scale. By contrast, this study provided respondents with an opportunity to leave extended

95 See Australian Financial Security Authority, *Causes: Non-business Related* (2016) <https://www.afsa.gov.au/statistics/causes-non-business-related>.

96 Ramsay and Sim, above n 88.

97 Ibid 284.

98 Ibid 309.

99 Paul Ali, Lucinda O'Brien and Ian Ramsay, 'Bankruptcy, Social Security and Long Term Poverty: Results from a Survey of Financial Counsellors and Consumer Solicitors' (2016) 44 *Australian Business Law Review* 144, 150.

100 Ibid.

comments, in which they could qualify their views on bankruptcy. In this way, it offered respondents the chance to provide a more nuanced perspective on bankruptcy than simply inviting them to 'agree' or 'disagree' with blunt statements such as, 'There is a stigma attached to bankruptcy'.[101] Importantly, these extended comments also allowed respondents to place bankruptcy in its social and cultural context, rather than simply presenting it as an expression of individual choices. The present study also differs from the IS research in its analysis of the data collected. The IS research simply reported the views expressed by 'individuals' (that is, the general public) in aggregate terms, alongside the views of 'bankrupts' and 'businesses'.[102] By contrast, the present study seeks to differentiate between demographic groups within the general population, carrying out statistical analysis in order to identify statistically significant differences in attitudes, based upon gender, age, personal experience of bankruptcy and other factors. Moreover, unlike the IS research, the present study interprets these findings in the context of longstanding political and scholarly debates over the nature, causes and extent of bankruptcy stigma. In this sense, its purview is significantly wider than that of the IS research, which sought specifically to assess the impact of the *Enterprise Act*.

This study has important implications for scholarship and public policy, not only in Australia but in other jurisdictions in which public perceptions of bankruptcy are the subject of scholarly and political debate. The study examines the extent to which bankruptcy is indeed a stigmatised condition. It offers an insight into the nature of negative attitudes towards bankruptcy and the extent of public sympathy for people who go bankrupt. It also explores the cultural and historical factors that play a part in shaping attitudes to bankruptcy, including stereotypical images of the archetypal bankrupt. This study offers a valuable source of empirical evidence to inform the Australian Government's current reform agenda. More broadly, it contributes to the growing international literature on bankruptcy stigma.

B Methodology

The research team designed an online survey consisting of 29 questions. The first four questions were demographic, asking respondents to state their gender, year of birth, postcode and highest formal qualification.[103] These were followed by four factual questions regarding the process of declaring bankruptcy and the consequences of bankruptcy.[104] The survey then asked respondents to identify

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101 See Insolvency Service (UK), 'Attitudes to Bankruptcy Revisited', above n 4, Appendix A3; Insolvency Service (UK), '*Enterprise Act 2002*: Attitudes to Bankruptcy 2009 Update', above n 4, Appendix A3.

102 Insolvency Service (UK), '*Enterprise Act 2002*: Attitudes to Bankruptcy 2009 Update', above n 4, 4.

103 In stating their highest level of qualification, respondents were given the following options: 'Year 10', 'Year 12', 'TAFE [Technical and Further Education] or a college diploma', 'A Bachelor's degree', 'A post-graduate degree', or 'Other'.

104 Respondents were asked to indicate whether they thought the following statements were 'true or false': (a) 'When you go bankrupt, you get to keep your furniture and ordinary household goods'; (b) 'While you are bankrupt, you are not allowed to borrow money'; (c) 'While you are bankrupt, you have to ask permission to travel overseas'; and (d) 'Bankruptcy has a permanent effect on your credit-worthiness,

'the most significant reasons that people get into serious or unmanageable debt', by ranking the following five potential reasons in order of importance: 'lack of self-control'; 'the rising cost of living'; 'extravagance or greed'; 'advertising and easy access to credit cards'; and 'failing to save money for emergencies'. Respondents were asked to express their personal opinions regarding 'people who go bankrupt', responding to statements such as, '*I think* that people who go bankrupt deserve sympathy,' and '*I think* that people who go bankrupt are unlucky'.[105] They were then asked to express their opinion on the views of 'Australians generally', responding to statements such as, '*Australians generally* believe that people who go bankrupt deserve sympathy'.[106] The survey asked respondents whether or not they had ever been bankrupt, and whether or not a friend, relative or partner had ever been bankrupt. The last two questions were open-ended. Respondents were asked, 'Can you tell us which words, images or names cross your mind when you think of bankruptcy?' They were also invited to 'tell [the research team] anything more about [their] views on people who go bankrupt'.

The survey was administered online by a professional research company. The company recruited the survey participants from its 'panel' of consumers, who register for the express purpose of participating in research studies.[107] The research team asked the company to obtain 2000 completed surveys and asked it to impose quotas so as to ensure that respondents to the survey were broadly representative of the Australian population. The company imposed quotas for gender, age and state or territory of residence.[108] The survey was tested on an initial group of 124 respondents, then launched on 9 May 2016. The survey closed on 23 May 2016, after 2014 respondents had completed it in full.[109] A number of statistical tests were employed to analyse the survey data.[110]

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making it harder for you to take out loans'. Respondents could choose any of the following responses: True, Probably True, Unsure, Probably False and False.

105 Emphasis in original. Respondents were asked to answer these questions using a Likert scale, in which possible responses were 'Strongly agree', 'Agree', 'Unsure', 'Disagree' and 'Strongly disagree'.

106 Emphasis in original. Again, respondents were asked to answer these questions using a Likert scale, in which possible responses were 'Strongly agree', 'Agree', 'Unsure', 'Disagree' and 'Strongly disagree'.

107 The company, Pureprofile, pays its panellists a small cash payment for each survey completed. Payments are calculated according to the amount of time taken to complete a survey.

108 These quotas were based upon Australian Census data.

109 Two weeks after the formal launch of the survey, 1992 people had completed the survey. The survey quotas were relaxed in order to speed up collection of the outstanding eight surveys. On 23 May 2016, the research company relaxed its quotas, whereupon it very quickly received a further 22 responses.

110 The main statistical procedure utilised was the chi-square test of independence, which compared percentages of agreement (the total of 'strongly agree' and 'agree' responses; or in some cases, the sum of 'true' and 'probably true' responses) between various demographic groups (for example, male and female respondents).

IV RESULTS

A Respondents' Views on Bankruptcy

1 The Causes of Unmanageable Debt

When asked about 'the most significant reasons that people get into serious or unmanageable debt', respondents expressed a range of views. Thirty-three per cent nominated 'lack of self-control' as the primary cause of unmanageable debt, while 22 per cent nominated 'extravagance or greed'. Others cited external factors as the primary causes of unmanageable debt, with 20 per cent choosing 'advertising and easy access to credit' and 16 per cent choosing 'the rising cost of living'. Only 10 per cent selected 'failing to save money for emergencies' as the primary cause of unmanageable debt.

2 People Who Go Bankrupt

When asked to state their views on the general characteristics of 'people who go bankrupt', respondents tended to be moderately critical, rather than sympathetic. A majority, 65 per cent, agreed that 'people who go bankrupt are bad at managing their money'. A significant minority, 36 per cent, agreed that 'people who go bankrupt are extravagant or greedy', though only 16 per cent agreed that people who go bankrupt are 'lazy' or 'dishonest or untrustworthy'. At the same time, a substantial group of respondents expressed more sympathetic attitudes. Thirty-one per cent agreed that 'people who go bankrupt deserve sympathy' and 24 per cent agreed that they were 'unlucky'.

3 Perceptions of Wider Community Attitudes

While respondents' personal views were relatively moderate, most believed that the general public is strongly critical of people who go bankrupt. Fifty-three per cent agreed that 'Australians generally believe that people who go bankrupt are extravagant or greedy', while 38 per cent agreed that 'Australians generally believe that people who go bankrupt are dishonest or untrustworthy'. Only 27 per cent believed that 'Australians generally' viewed people in bankruptcy as 'unlucky' and only 21 per cent agreed that Australians viewed people in bankruptcy as 'deserv[ing of] sympathy'.

B Differences Within the Sample

1 Gender

Male respondents were more likely to cite personal attributes as the causes of debt, while women were more likely to attribute it to social and economic conditions.[111] Similarly, when asked to state their views on 'people who go

111 Thirty-eight per cent of men nominated 'lack of self-control' as the primary cause of unmanageable debt, compared with 27 per cent of women. This difference was statistically significant at the 0.01 level. Henceforth, one asterisk (*) indicates significance at the 0.05 level, while two asterisks (**) indicate significance at the 0.01 level. Twenty-four per cent of men attributed bankruptcy to 'extravagance or greed', compared with 19 per cent of women (*). By contrast, 20 per cent of women attributed it primarily to 'the rising cost of living', compared with 13 per cent of men (**). Twenty-three per cent of

bankrupt', men were more likely to agree that such people were extravagant or greedy, bad at managing their money, lazy, dishonest or untrustworthy.[112] When asked about the views of 'Australians generally', women were again more likely to adopt a sympathetic attitude, while men were more likely to agree that 'Australians generally believe that people who go bankrupt are dishonest or untrustworthy'.[113]

2 Age

Older respondents[114] were somewhat less sympathetic to people who go bankrupt than the younger people in the sample. Younger people were much more likely to attribute debt to the rising cost of living,[115] while older people were more likely to cite extravagance or greed[116] or advertising and easy access to credit cards.[117] Younger people were more likely to say that that people who go bankrupt are unlucky,[118] while older people were more likely to say that they are 'bad at managing their money'[119] or 'extravagant and greedy'.[120]

3 Other Attributes

Degree-holders were somewhat less sympathetic towards people in bankruptcy than people with no tertiary qualifications, but these differences were not marked.[121] There were few differences between the views of respondents

women attributed it to 'advertising and easy access to credit cards', compared with 16 per cent of men (**). Eleven per cent of women attributed it to 'failing to save for emergencies', compared with nine per cent of men, however this difference was not statistically significant.

112 Forty-one per cent of men agreed that 'people who go bankrupt are extravagant or greedy', compared with 31 per cent of women (**). Sixty-eight per cent of men agreed that they are 'bad at managing their money', compared with 63 per cent of women (*). Eighteen per cent of men agreed that they are 'lazy', compared with 13 per cent of women (**). Nineteen per cent of men agreed that they are 'dishonest or untrustworthy', compared with 14 per cent of women (**). Women were somewhat more likely to agree that 'people who go bankrupt deserve sympathy', and that 'people who go bankrupt are unlucky', but these differences were not statistically significant.

113 Forty per cent of men agreed with this proposition, compared with 36 per cent of women. There were no other statistically significant differences between the opinions of men and women, regarding the attitudes of 'Australians generally'.

114 For the purposes of this analysis, those aged 56 and over are 'older' while those aged 55 and under are 'younger'.

115 This was selected as the most important cause of unmanageable debt by 20 per cent of younger respondents and eight per cent of older respondents (**).

116 This was selected as the most important cause of unmanageable debt by 19 per cent of younger respondents and 28 per cent of older respondents (**).

117 This was selected as the most important cause of unmanageable debt by 17 per cent of younger respondents and 25 per cent of older respondents (**).

118 Twenty-seven per cent of younger respondents agreed that people who go bankrupt are unlucky, while only 18 per cent of older respondents agreed (**).

119 Seventy-two per cent of older respondents agreed that people who go bankrupt are bad at managing their money, while only 62 per cent of younger respondents agreed (**).

120 Forty-two per cent of older respondents agreed that people who go bankrupt are extravagant or greedy, while only 33 per cent of younger respondents agreed (**).

121 For example, degree holders were more likely to agree that 'people who go bankrupt are dishonest or untrustworthy'. Nineteen per cent of degree-holders agreed with this statement, while 14 per cent of those with no degree agreed (**).

living in metropolitan areas and those living in rural or regional areas. There were also few differences between those respondents who were socio-economically advantaged and those who were disadvantaged.[122]

4 Personal Experience of Bankruptcy

Those respondents who had been bankrupt themselves were less critical of bankruptcy than others in the sample. They were much more likely to say that 'people who go bankrupt deserve sympathy'[123] and that they are 'unlucky'.[124] They were much less likely to attribute unmanageable debt to 'extravagance or greed'.[125] They were also less likely to say that people who go bankrupt are bad at managing their money;[126] that they are extravagant or greedy;[127] and that they are dishonest or untrustworthy.[128] Compared with the overall sample, those who had been bankrupt were slightly more likely to agree that 'Australians generally believe that people who go bankrupt are deserving of sympathy'.[129]

C Summary

The following tables present respondents' views on the causes of unmanageable debt (Table 1), the characteristics of 'people who go bankrupt' (Table 2) and the views of 'Australians generally' regarding the characteristics of 'people who go bankrupt' (Table 3).

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122 For the purposes of this discussion, 'advantaged' refers to respondents who ranked in the top 25 percentiles on the Australian Bureau of Statistics' *Socio-economic Indexes for Areas* ('SEIFA') Index of Education and Occupation. Those respondents who ranked in the bottom 25 percentiles on the same index are deemed to be 'disadvantaged'. See Australian Bureau of Statistics, *Socio-economic Indexes for Areas* (23 September 2013) <http://www.abs.gov.au/websitedbs/censushome.nsf/home/seifa>.

123 Forty-nine per cent of respondents who had been bankrupt agreed with this statement; only 30 per cent of those who had not been bankrupt agreed with it (**).

124 Forty-seven per cent of respondents who had been bankrupt agreed with this statement; only 23 per cent of those who had not been bankrupt agreed with it (**).

125 Ten per cent of respondents who had been bankrupt agreed with this statement; 22 per cent of those who had not been bankrupt agreed with it (**).

126 Fifty-one per cent of respondents who had been bankrupt agreed with this statement; 66 per cent of those who had not been bankrupt agreed with it (**).

127 Twenty-six per cent of respondents who had been bankrupt agreed with this statement; 37 per cent of those who had not been bankrupt agreed with it (*).

128 Twelve per cent of respondents who had been bankrupt agreed with this statement; 16 per cent of those who had not been bankrupt agreed with it (not statistically significant).

129 Twenty-nine per cent of respondents who had been bankrupt agreed with this statement; only 21 per cent of those who had not been bankrupt agreed with it (*).

Table 1: Respondents' views on the causes of unmanageable debt

Most significant reason for 'serious or unmanageable debt'	**Whole Sample (%)**	**Men (%)**	**Women (%)**	**Older respondents (%)**	**Younger respondents (%)**	**Respondents who had been bankrupt (%)**	**Respondents who had never been bankrupt (%)**
Lack of self-control	33	38	27	28	35	28	33
Rising cost of living	16	13	20	8	20	32	16
Extravagance or greed	22	24	19	28	19	10	22
Advertising and easy access to credit cards	20	16	23	25	17	22	19
Failing to save money for emergencies	10	9	11	11	10	9	10

Table 2: Respondents' views on 'people who go bankrupt'

'I think that people who go bankrupt …'	**Whole Sample (%)**	**Men (%)**	**Women (%)**	**Older respondents (%)**	**Younger respondents (%)**	**Respondents who had been bankrupt (%)**	**Respondents who had never been bankrupt (%)**
Deserve sympathy	31	30	31	30	31	49	30
Are unlucky	24	23	25	18	27	47	23
Are bad at managing their money	65	68	63	72	62	51	66
Are lazy	16	18	13	14	16	17	15
Are extravagant or greedy	36	41	31	42	33	26	37
Are dishonest or untrustworthy	16	19	14	16	16	12	16

Table 3: Respondents' views on what 'Australians generally' think about 'people who go bankrupt'

'Australians generally believe that people who go bankrupt ...'	Whole Sample (%)	Men (%)	Women (%)	Older respondents (%)	Younger respondents (%)	Respondents who had been bankrupt (%)	Respondents who had never been bankrupt (%)
Deserve sympathy	21	22	21	20	22	29	21
Are unlucky	27	26	29	25	28	33	27
Are bad at managing their money	71	71	72	80	67	66	72
Are lazy	29	29	30	21	33	31	29
Are extravagant or greedy	53	54	51	55	52	44	53
Are dishonest or untrustworthy	38	40	36	32	40	30	38

D Extended Comments

Almost all respondents provided extended comments at the end of the survey, in response to Question 11, 'Can you tell us which words, images or names cross your mind when you think of bankruptcy?', and Question 12, 'Would you like to tell us anything more about your views on people who go bankrupt?' The responses to both questions are discussed concurrently, below.

1 Disapproval and Sympathy

Some respondents expressed strong disapproval of individuals who go bankrupt. '[S]tupid, thoughtless. How did they manage to do it', one wrote. '[C]an't see a reason for bankruptcy, one has to be stupid,' wrote another.[130] 'Nobody is forced into debt', one respondent wrote. '[I]f they become unable to meet their commitments they deserve no sympathy for [t]heir lack of foresight'. Surprisingly, one of the harshest expressions of disapproval came from a respondent who had been bankrupt. 'They are dishonest, greedy and untrustworthy as was I when I declared bankruptcy. Thought nothing of ripping off the banks', wrote this respondent. At the same time, many respondents expressed sympathy for people who go bankrupt. 'I feel sorry for people who lose their homes because they can't afford the mortgage payments due to losing their jobs,' one wrote. '[T]he people I feel sorry for are those who are suddenly unemployed due to company failure', wrote another. Another wrote that 'we need to work towards lifting the bad stigma and working to help these people'.

130 The original statement was, 'cant see a reason for bankruptcy, one has to be stupid'. In all subsequent quotations from the survey results, minor typographical errors have been silently corrected.

2 'High Flyers' and 'The Little Fellow'

Many respondents referred to high-profile corporate bankruptcies, often naming individuals such as Alan Bond and Christopher Skase. In response to Question 11, 107 respondents named Bond, while 48 mentioned Skase.[131] These individuals were almost always cited with contempt. Many respondents drew a distinction between these infamous corporate bankrupts and ordinary wage-earners, small business owners or investors. 'I think the "little investors" who go bankrupt are unlucky due to trusting people who knowingly rip them off. Big investors such as Bond & Skase are outright crooks,' wrote one. '[H]igh flyers who go bankrupt hide assets and live like kings after bankruptcy … [B]ond, [S]kase … the little fellow has no chance', wrote another. One wrote: 'It seems to be an easy way out for people of a certain class. They may be bankrupt but still have access to millions. It appears it is a business strategy for the wealthy and a last resort for regular people'.

Another wrote:

> [I] guess there's a lot of reason[s] [people] go bankrupt, shame on the people that are greedy and go bankrupt. [H]owever if [you are] a hard working person trying to get by and doing it tough and go bankrupt then that makes me real sad that it's come to that for them.

A further respondent eloquently summarised the distinction as follows:

> [B]ankruptcy seems to have two polarities – the high flyers – Christopher Skase, Alan Bond … – those will rise from the ashes they burned themselves in as a result of bankruptcy, and the second face of bankruptcy – those who lose their job, suffer mental illness, illness and the impact of this is like a house of cards situation – one crisis or fall and it all comes crashing down.

3 Character and Moral Attributes

Other respondents drew a distinction between two categories of people in bankruptcy, based not upon differences in wealth, power or social class, but upon character and inherent moral attributes. Some attributed bankruptcy to an inability to manage one's finances. 'They are generally good people with no concept on restraint or budgeting,' one wrote. 'They borrow to pay back debt and the circle keeps on going around endlessly'. 'They can not manage money, it burns holes in their pockets,' wrote another. Others associated bankruptcy with dishonesty and a willingness to exploit the legal system, creditors or the sympathy of others. '[M]y friend was unable to manage money, led a rather extravagant lifestyle and was able to con others into supporting him', one wrote.

4 Chance and External Circumstances

Many respondents expressed the view that bankruptcy was often due to chance and external forces. One wrote:

> [I] think that some people go bankrupt for a reason not all because of greed some may lose their house in a fire or a family member may have a health condition and

131 See Part II(C) above. This tally includes the variant spellings, 'Scace', 'Scaces', 'Scase', 'Skace' and 'Chase', and one respondent who referred to 'Colin Bond'. The responses to Question 12 included three further references to Bond and two further references to Skase.

> cost a lot of money to fix … I think it is a circumstantial type thing, I think ever[y] person that you encounter that has been bankrupt will have a different story as to why. You will encounter people who were in that situation due to poor money management, addiction (drug, gambling etc) or sheer greediness, but you will also encounter people who were trying to do the right thing; family hardship, helping others.

Several stated that they believed bankruptcy 'could happen to anyone'. 'In this day and age', one wrote, 'it's a very real chance that anyone could go bankrupt with the rising cost of everyday living'.[132] Some even said that they could imagine going bankrupt themselves, in certain circumstances. One wrote, 'I have come very close to insolvency myself through no fault of my own & can sympathize with anyone who chooses bankruptcy to enable them to start all over again'. Others wrote: 'I can imagine a scenario where I would need to declare bankruptcy. It's very slight but I'm realistic that it could happen if a series of events were to unfold', and '[w]ith cost of living rising it is a situation you could find yourself in very quickly if you take your eye off you[r] finances for too long …'.

5 Consumer Credit and Irresponsible Lending

A small number of respondents identified bankruptcy as a necessary and legitimate part of commercial life, recognising its benefits for creditors as well as debtors. One wrote:

> Whilst bankruptcy normally comes from poor cash flow management, it is a necessary process that allows a debtor to effectively start again after a period of managed living. It also allows creditors to have a defined loss, and for them to permanently write off any losses, rather than dragging on with the sometimes costly process of recovery. It is an appropriate process to have available, and whilst it can be abused, it is an effective tool for both sides of the equation. I don't think any less of anyone who uses bankruptcy as a process to manage overwhelming debt, however, I'm unlikely to become a creditor of theirs in the future.

However, many more respondents argued that banks and other credit providers were partly to 'blame' for many bankruptcies, due to irresponsible lending, high interest rates and unwillingness to assist struggling businesses.[133] 'It is too easy to get yourself into debt with the amount of credit and loans available', one wrote. 'I think there should be more regulation …' wrote another, 'but that won't happen because there is money to be made in lending credit with huge interest rates'. A further respondent expressed the view that 'small

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132 Similarly, others wrote: 'It's a sad state of affairs that could happen to anyone'; 'I think people who go bankrupt do so for a variety of reasons. Some bad luck. Some bad planning. Some greedy with too high expectations. It could happen to anyone'; 'I think it can happen to anyone, [from] the kindest person who has been taken advantage of to [the] greedy person who always wants more'; 'It can happen to almost anyone whether it be someone in business or someone as an employee'; 'I feel that they deserve sympathy and kindness, as I believe it could happen to anyone. Sometimes people just get unlucky and we should all be kind to people who are down on their luck'.

133 Other, similar comments included: '[r]epossession of all the properties. Because of the greedy people and the careless banks who don't check the credit worthiness before sanctioning credit'; 'The banks must bear some responsibility for lending methods'; 'banks hand out too much cash too easily'.

businesses fail regularly, sometimes through no fault of their own, just caused by banks calling in loans, or unprepared to assist in tough economic conditions'.

6 Government Policies

Some respondents framed bankruptcy in broadly political terms, linking it to government policy settings in social security, employment, health and other areas. As one respondent put it:

> I personally believe that the government has a lot to answer for in connection to bankruptcy. Cutting Medicare,[134] not maintaining the pension at liv[e]able levels/cutting the pension, inflation, the cost of living, keeping wages at a minimum … and generally not caring about not only pensioners, but also low income earners.

Another wrote:

> I was one who lost everything & have got back on my feet after the recession … that took away years of hard work & building a respected business. I have no respect for governments who cause this to happen.

A third described experiencing '[d]evastation at having to take that course due to huge interest rate rises, [caused] by an incompetent … Treasurer … which killed small businesses'.

7 Emotion

Emotional states figured very strongly in responses to both questions 11 and 12. Seventy-six respondents used the words 'sad' or 'sadness', in response to Question 11, while a further 14 used these words in answering Question 12. A further 44 respondents used broadly synonymous terms such as 'depression',[135] 'misery', 'despair', 'anguish' and 'grief'. Respondents mentioned many other emotions, feelings or mental states, including 'shame', embarrassment', 'humiliation' and 'disgrace';[136] 'hurt'; 'desperation'; 'anxiety'; 'loneliness'; 'loss of self esteem and self worth'; and 'stress'. Other respondents evoked emotions indirectly, for example with references to 'crying people', 'crying children', and 'suicide'.

V ANALYSIS

A Key Findings

1 Public Disapproval of Bankruptcy

The results of this survey indicate that negative attitudes to bankruptcy are relatively common in Australia and that these attitudes do not vary significantly according to gender, age, education levels, geographic location or socio-

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134 Medicare is Australia's national public health care scheme.

135 There were 44 respondents who used the words 'depressed', 'depression' or 'depressing' in response to Question 11. This tally does not include two references to 'the Great Depression'.

136 Forty-one respondents used the word 'shame', 'shameful' or 'ashamed' in their responses to Question 11. A further 22 used the term 'embarrassment'.

economic status.[137] As noted above, when respondents were asked to nominate the causes of unmanageable debt, they tended to attribute blame to individual debtors, citing such factors as 'lack of self-control' and 'extravagance or greed'. Sixty-five per cent of respondents agreed that 'people who go bankrupt are bad at managing their money', while 36 per cent agreed that 'people who go bankrupt are extravagant or greedy'. This disapproval of bankruptcy was still more apparent when respondents were asked about the views of 'Australians generally'. While only 16 per cent personally believed that people who go bankrupt are 'dishonest or untrustworthy', 38 per cent said that 'Australians generally' held this view. Whereas 31 per cent personally agreed that 'people who go bankrupt deserve sympathy', only 21 per cent believed that 'Australians generally' held this view. The open-ended questions at the end of the survey reinforced these findings. Some respondents used this section to express strong disapproval of people who go bankrupt, asserting that personal qualities such as 'lack of foresight', 'stupid[ity]' and dishonesty were the causes of their problems.

2 The Stereotypical Bankrupt

Many respondents closely associated morally culpable bankruptcy with wealth, and, in particular, with business and entrepreneurship. Respondents frequently drew a distinction between 'ordinary' bankrupts, deserving of sympathy, and culpable corporate bankrupts whose behaviour deserved condemnation. One respondent summed this up by claiming that there are '2 types' of bankrupt:

> either dodgy business types doing a phoenix[138] on a dodgy company, or some poor bugger who has an unfortunate life, and doesn't get enough government support, and can't manage on the miser[a]ble pension etc which the government tries to rip off people.

While such comments frequently referred to specific individuals, such as Alan Bond and Christopher Skase, many others referred to 'dodgy business types' in much more general terms, suggesting that figures such as Bond and Skase are not seen as exceptional, but rather, as exemplifying certain aspects of corporate culture. In this respect, the survey suggests that in Australia, popular negative stereotypes about bankruptcy are fundamentally different from those current in the US, where the 'bankrupt stereotype' is 'a twenty-something male, a high school dropout' with 'an unskilled or, at best, semiskilled job'.[139] The Australian stereotypical bankrupt appears to occupy a position at the opposite end of the socio-economic scale and to possess a remarkable ability to go on 'l[i]v[ing] comfortably', despite being bankrupt.

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137 In this respect, the results are broadly consistent with the findings of the IS in the UK. See Insolvency Service (UK), '*Enterprise Act 2002*: Attitudes to Bankruptcy 2009 Update', above n 4, 12–15.

138 The phrase 'phoenix activity' refers to the practice of allowing one's company to fail and subsequently resuming business under the auspices of a new company. Under Australian law, this practice is illegal when it is undertaken with the intention of evading one's obligations to unsecured creditors, such as employees. See Helen Anderson et al, 'Profiling Phoenix Activity: A New Taxonomy' (2015) 33 *Company and Securities Law Journal* 133, 133.

139 Sullivan, Warren and Westbrook, *Fragile*, above n 11, 34.

3 Reluctance to Generalise

At the same time, the survey shows that many Australians do not accept negative stereotypes surrounding bankruptcy, or at least recognise that these stereotypes fail to reflect the true circumstances of many people in the bankruptcy system. Several respondents used the open-ended questions to present a nuanced account of bankruptcy, protesting that it is impossible to generalise about the circumstances that can lead to bankruptcy or the character of people who go bankrupt. As one respondent wrote:

> [A] lot of people go bankrupt and some are crooks and some are genuine[.] [E]ach case has to be judged on the particular people[.] [U]nfortunately the crooked ones make some people frown on the ones who have tried their best and failed.

This theme emerged repeatedly in respondents' answers to the open-ended questions, with many expressing concern for the 'honest' debtors who were tainted by association with the dishonest. Some endorsed negative stereotypes, while also sympathising with people who go bankrupt in particular circumstances. As one wrote:

> When I hear the term bankrupt I tend to think of two groups of people. The first that comes to mind are those who are deliberately fraudulent – those who maybe have a business and run up debts before going bankrupt to renege on payments … The other group are honest people who have maybe fallen on hard times for whatever reason. I think of people who work very hard, make sacrifices and try hard to 'keep afloat' but who eventually fail in their business despite their best effort. I am sympathetic to these people and think that they should be treated differently to those who go bankrupt deliberately or carelessly.

Several respondents appeared deeply equivocal, casting bankrupt debtors as reckless and extravagant, but at the same time absolving them of intentional wrongdoing. Some appeared unable to decide, as reflected in their use of qualifiers such as 'may' and 'possibly': many bankrupts '*may* have overcommitted themselves and are just not good at business', wrote one respondent, but this 'does not necessarily mean they are greedy or corrupt *although many bankrupts possibly are*' (emphasis added).[140]

4 Sympathy for People Who Go Bankrupt

A substantial minority was positively inclined towards people in bankruptcy, with 31 per cent agreeing that 'people who go bankrupt deserve sympathy', only slightly less than the 36 per cent who agreed that they were 'extravagant or greedy'. Similarly, 24 per cent agreed that people who go bankrupt are 'unlucky'. In the final part of the survey, some respondents denied that bankruptcy has any negative associations, with one stating that '[b]ankrupt[cy] can happen to anyone and is actually quite common and to me nothing to be ashamed of'. In these extended comments, many respondents expressed considerable sympathy for people who go bankrupt, evoking bankruptcy as a deeply emotional and

140 Other, similarly equivocal comments included the following: 'Sometimes it's sad and sometimes they may deserve it if they managed their money poorly or [were] greedy'; 'I do believe people who get to the point in which they have no other option but to declare bankruptcy, are probably at least somewhat justified in doing so … I do however wonder if people who get to the point have lived to[o] risk[il]y.'

distressing experience. As discussed above, 76 respondents used the words 'sad' or 'sadness', in response to Question 11, while a further 44 respondents associated bankruptcy with 'depression' and many others used similar or related terms such as 'despair' or 'misery'.[141] These results underscore the sharp distinction, drawn by many respondents, between the calculating, opportunistic corporate bankrupt of popular mythology and the 'desperate' individual who resorts to bankruptcy after having 'hit rock bottom'.

B Policy Implications

1 Suspicion of Business-Related Bankruptcies

The results of this study indicate that Australian policymakers and politicians may meet with some resistance in attempting to reframe bankruptcy as a normal or even desirable aspect of entrepreneurial culture. They suggest that, in Australia, the stigma attaching to bankruptcy is in fact a direct result of its association with business and entrepreneurship, particularly notorious corporate bankrupts of the 1990s. The Government's discussion paper implicitly recognises this, stating that 'a cultural shift' is necessary in order to 'create an ecosystem' that allows 'entrepreneurs [to] fail several times before they achieve success'.[142] It suggests that a reduction in the period of bankruptcy, from three years to one, will encourage more businesspeople to 'embrace risk, learn from mistakes, be ambitious and experiment to find solutions'.[143] Yet it does not explain how this change will serve to 'reduce the stigma associated with business failure', in the sense of making the wider Australian public more favourably disposed towards people who go bankrupt. The results of this survey suggest that a reduction in the period of bankruptcy might even exacerbate public hostility, if this is perceived as enabling 'repeat offend[ing]' by 'dodgy businesses'.[144] Indeed, repeat bankruptcy in the course of business is precisely the kind of behaviour that attracted the greatest ire among those surveyed. One respondent expressed this attitude with particular clarity, demanding, 'those high flyers … how can they reboot their careers and fly the high life again? is this not a self-perpetuating cycle?' Several others associated bankruptcy with people who 'close a business after ripping people off then starting in another name'. Consumer advocates have voiced similar concerns, observing that

> [p]olicies which are intended to encourage risk-taking and experimentation should not … facilitate repeated poor behaviour … It is important that rather than facilitating a fresh start, bankruptcy … does not become a mechanism for

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141 There were 44 respondents who used the words 'depressed', 'depression' or 'depressing' in response to Question 11. This tally does not include two references to 'the Great Depression'.

142 Treasury (Cth), above n 7, 3.

143 Ibid.

144 There were several other comments in this vein, eg:

> These people plan their bankruptcy carefully so that they have money set aside for themselves while their companies go 'broke' and then in 3 or 5 years? They can start another business, rack up a huge amount of debt, make some money and then go bankrupt again. There should be some legal consequences when people go bankrupt owing other people or business[es] money.

> undermining the effectiveness of consumer protection and trade practices laws … [or] facilitating unlawful or unconscionable conduct …[145]

2 *Sympathy for 'Consumer' Debtors*

The survey also demonstrates that many Australians are concerned about the impact of bankruptcy upon people whose financial difficulties are *not* business-related, but rather, the result of unemployment, ill health or simply inadequate income. Several respondents expressed sympathy for people who go bankrupt due to an unexpected 'change of circumstances'. Many linked bankruptcy to the loss of a job, while others mentioned health problems, divorce and even natural disasters as events that can lead people to go bankrupt through 'no fault of their own'. Some expressed a strong view that more should be done to 'help these people'.[146] This category of debtor was not mentioned in the Government's discussion paper, despite the fact that non-business bankruptcies constitute over 80 per cent of all bankruptcies in Australia.[147] These findings suggest that there might in fact be considerable public support for the Government's proposed reforms, if they are presented not only as a stimulus to innovation, but as a measure designed to assist ordinary consumers who accumulate unmanageable debt, as a result of misfortune or unforeseen circumstances.

3 *Treatment of 'Culpable' Bankrupts*

The study also demonstrates that many Australians feel considerable resentment towards those who misuse the bankruptcy system in order to evade their financial obligations or to facilitate an extravagant lifestyle. Respondents did not identify such behaviour exclusively with consumers or with businesspeople, but rather, identified a pattern of conduct typified by greed and dishonesty. Such comments suggest that the public's response to the new regime will depend, to some extent, on its treatment of dishonest or fraudulent debtors. In developing measures to deal with such debtors, the Government might look to the UK's *Enterprise Act*, particularly its BRO regime. The BRO regime has attracted criticism on a number of grounds. Some commentators have observed that the *Enterprise Act* confers an extremely wide discretion on the courts, in relation to the issuing of BROs, while offering very little guidance as to how this discretion should be exercised.[148] Others have objected that distinctions between 'culpable' and 'honest' bankrupts are inherently subjective, raising 'uncomfortable questions of proof' when courts are required to adjudicate them.[149] At the same time, the capacity of BROs to influence public opinion

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145 Financial Rights Legal Centre, Submission to Financial Systems Division, Treasury, *Bankruptcy and Insolvency Laws Proposal Paper*, May 2016, 15 <http://financialrights.org.au/wp-content/uploads/2016/05/160527_ImprovingBankruptcy_Sub_Final.pdf>.

146 Other, similar comments included the following: 'the government needs to assist these people'; 'wish government help them more'; 'it's great some people get covered by government and … Centrelink … but I feel as though families who can't receive that should be able to get some sort of help.'

147 Australian Financial Security Authority, *Commentary* (2016) <https://www.afsa.gov.au/statistics/commentary>.

148 Walters, above n 55, 90.

149 Möser, above n 71, 699.

remains in doubt. In surveys of the general public, conducted in 2006 and 2007, the IS found that 'less than a third of respondents agreed that the [new] regime protected the public from dishonest or reckless bankrupts'. Moreover, it found that less than a quarter of respondents had 'heard of' BROs, and of these, none could 'accurately describ[e] what they were'.[150] It concluded that, although the details of BROs are publicly available, most individuals are 'unlikely to … understand the significance of a BRO being recorded against a bankrupt' and use this information to make 'informed decisions in their dealings with bankrupts'.[151] These findings suggest that if the Australian Government does decide to implement special measures designed to identify 'culpable' bankrupts, it must provide clear legislative guidance to the courts, to ensure their consistent implementation.[152] They also suggest that such measures will only have a limited capacity to influence prevailing public attitudes.

C Implications for Bankruptcy Scholarship

1 Bankruptcy Stigma

By illustrating the ambivalence of public attitudes towards bankruptcy, this study has important implications for the field of scholarship concerned with bankruptcy stigma. Despite using terms such as 'evolution', 'shift'[153] and 'decline',[154] implying a spectrum of views, these studies generally cast public attitudes as being divided into two clearly delineated camps: one disapproving and punitive, the other, 'sympathetic'.[155] According to this narrative, bankrupt individuals are either viewed as 'cheaters and charlatans' or as deeply pitiable people at the extreme edge of hardship: 'families with dying children and years of joblessness'.[156] This study shows that, in Australia at least, public attitudes to bankruptcy are more equivocal than this, with most people feeling a degree of sympathy combined with an element of censoriousness. As noted above, a large proportion of respondents, 65 per cent, agreed that 'people who go bankrupt are bad at managing their money', suggesting that moderate disapproval of bankruptcy is relatively widespread. Yet only a small percentage of respondents demonstrated strong disapproval by agreeing that people who go bankrupt are 'lazy' or 'dishonest or untrustworthy'.[157] Slightly more respondents were prepared to agree that 'people who go bankrupt are unlucky' or 'deserve

150 Insolvency Service (UK), 'Final Evaluation Report', above n 4, 95.

151 Ibid 98.

152 The limited number of BROs and BRUs issued in recent years suggests that the courts are adopting a cautious approach and are, in fact, becoming increasingly reluctant to implement these measures. In the 2015–16 financial year, only 51 BROs and 383 BRUs were issued. By way of comparison, there were 188 BROs and 1757 BRUs issued in the 2009–10 financial year. Since 2009, numbers have steadily declined: Insolvency Service (UK), *Insolvency Service Enforcement Outcomes Monthly Data Tables: February 2017* (10 March 2017) <https://www.gov.uk/government/statistics/insolvency-service-enforcement-outcomes-monthly-data-tables-february-2017>.

153 Efrat, 'Evolution', above n 31, 393.

154 Sullivan, Warren and Westbrook, 'Less Stigma', above n 1, 234.

155 Efrat, 'Evolution', above n 31, 389.

156 Sullivan, Warren and Westbrook, 'Less Stigma', above n 1, 244.

157 As noted above, only 16 per cent of respondents agreed with these statements.

sympathy', but again, strong expressions of unqualified sympathy were comparatively rare.[158]

This ambivalence emerged much more starkly in respondents' answers to the open-ended questions at the end of the survey. As already noted, many used this section of the survey to point out that it is difficult to generalise about the causes of debt or the character and motives of people who go bankrupt. Many respondents dwelt on poor money management as the underlying cause of bankruptcy, suggesting that while such behaviour was regrettable, it was at times understandable. Many others drew a contrast between two perceived 'types' in the bankruptcy system, the unscrupulous 'con artists' and those who are genuinely 'struggling'. Repeatedly, respondents expressed the view that some people go bankrupt for 'legitimate' reasons, in response to 'unforeseen circumstances', while others do so to avoid their responsibilities or to 'cheat' the system. Several expressed dissatisfaction with legal 'loopholes' that can facilitate dishonest behaviour by people in the latter category. At the same time, several others stated that 'more' should be done to assist people who go bankrupt, particularly where this happens through 'no fault of their own'. This suggests that, rather than basing their views on stereotypes or rigid ideological positions, many Australians regard bankruptcy as a complex and difficult public policy issue. Based on these results, it appears that Australians who go bankrupt are not universally stigmatised, but rather, regarded with a mixture of contempt, sympathy and uncertainty. In expressing strong and varied emotions regarding debt, financial distress and 'people who go bankrupt', the respondents to this survey illustrate the limitations of the term, 'stigma', as a way of understanding Australians' attitudes towards bankruptcy.

2 Bankruptcy and Shame

Describing both subjective, individual feelings and collective social norms, the term 'shame' is in some ways better suited to describing bankruptcy than the more censorious and impersonal term, 'stigma'. Most discussions of stigma presume a detachment or alienation between the stigmatised individual and the people by whom he or she is stigmatised. In Erving Goffmann's classic formulation, the stigmatised individual is marked by 'differentness', an attribute that 'turn[s]… us… away from him, breaking the claim that his other attributes have on us' and making him seem 'not quite human'.[159] Similarly, as already noted, the scholarship on bankruptcy stigma frequently delineates public attitudes into two distinct groups: unqualified sympathy or rigid and extreme disapproval. On this analysis, those who disapprove of bankruptcy are treated as having no sympathy at all for the plight of the individual bankrupt. In these accounts, shame rarely figures as an important or distinctive aspect of social attitudes to bankruptcy. The empirical studies conducted by Thorne and Anderson in 2006, and Sousa in 2013, are partial exceptions. Both refer to shame when describing

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158 As noted above, 31 per cent of respondents agreed that 'people who go bankrupt deserve sympathy' and 24 per cent agreed that they were 'unlucky'.

159 Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Penguin, 1968) 15.

the experiences of people who have gone bankrupt. Yet both these studies use the terms 'shame and stigmatization'[160] more or less interchangeably.[161] Moreover, they conceive of shame as a purely personal experience on the part of bankrupt debtors and do not consider the way in which notions of shame inform the attitudes and behaviours of the wider community.

By contrast, a growing body of interdisciplinary scholarship identifies shame as a distinct 'phenomenon', one that is both 'social and … psychological'.[162] Thomas Scheff, one of the leading theorists of shame, regards it as 'the premier social emotion',[163] illustrating the 'intimate links between self and society'.[164] Scheff views shame as a primary means by which individuals are integrated into social groups and deterred from violating social norms. Indeed, he writes, the coercive or disciplinary power of shame is so profound that even acknowledging it 'risks offence'. Citing Gershen Kaufman, Scheff observes that '[t]he taboo on shame is so strict … that we behave as if shame does not exist'.[165] In contrast to Goffmann's account of stigma, based upon inherent and irrevocable 'differentness',[166] Scheff describes shame as fundamentally predicated on an affective relationship between the person who is shamed and the person who causes, or witnesses, his or her shaming. He writes that an individual's sensation of shame derives from a belief that he or she is viewed 'negatively' by another person whose good opinion is valued or desired.[167] In this sense, Scheff characterises shame as a mutual or 'intersubjective' experience,[168] one that is jointly experienced by the individual who is shamed and the person who witnesses his or her shaming. The experience is profoundly unpleasant for both parties, as it produces a feeling of alienation and threatens 'our sense of being connected' to one another.[169]

The responses to this survey reflect this intersubjective experience of shame. Respondents used the term to describe both the subjective emotional state of the bankrupt debtor and the collective set of norms that define bankruptcy, in a wider social sense. As noted earlier, 41 respondents used the term 'shame' to describe bankruptcy, while several others used related terms such as 'embarrassment', 'humiliation' and 'disgrace'. The term 'shame' was sometimes employed in a normative sense, to denote widely-held negative attitudes or values regarding bankruptcy and non-payment of debts. 'In my culture, going bankrupt is quite shameful', wrote one respondent, exemplifying this use of the term. Yet several other respondents used the word 'shame' in a much more emotive fashion, to

160 See, eg, Thorne and Anderson, above n 26, 83.

161 Sousa refers to 'generalized feelings of shame and stigma': Sousa, above n 1, 461. Elsewhere, he writes that 'notions of shame and stigma continue to exist' among people who go bankrupt: at 464.

162 Thomas J Scheff, 'Shame in Self and Society' (2003) 26 *Symbolic Interaction* 239, 241.

163 Ibid 239.

164 Ibid 240.

165 Gershen Kaufman, *The Psychology of Shame: Theory and Treatment of Shame-based Syndromes* (Springer, 1989) 3–4, cited in Scheff, above n 162, 240.

166 Goffmann, above n 159, 15.

167 Scheff, above n 162, 254.

168 Ibid 256.

169 Ibid.

describe the psychological state of a hypothetical bankrupt individual. These responses frequently mentioned 'shame' in conjunction with other distressing emotions, associating bankruptcy with 'shame, stigma, sadness, helplessness'; 'debts, shame, anguish'; 'losing one's home; distress; shame'; or 'disaster … hardship, shame, despair [and] suffering'. Some explicitly linked shame to the destruction of relationships, ranging from 'broken family' and the 'loss of friends' to 'insult[s]' from 'people in insurance and other companies'. These responses indicate that, unlike the strictly pejorative 'stigma', the term 'shame' conveys a much more varied set of feelings about bankruptcy. While reflecting widespread social disapproval of bankruptcy, the term 'shame' also evokes the intensely difficult and painful experience of bankruptcy, from the perspective of the individual debtor. In this sense, it indicates a measure of persistent public sympathy for people who go bankrupt, thus bearing testament to the ongoing 'social bond'[170] between debtors and the wider community.

When bankruptcy is viewed as a *shameful*, rather than *stigmatised*, condition, it becomes possible to understand the deeply ambivalent and even, at times, contradictory attitudes expressed by respondents to this survey. While the language of stigma connotes unqualified contempt, casting the debtor as different and 'not quite human', the language of shame captures the enduring empathetic bond between a debtor and his or her society. This bond implies a shared set of norms and thus serves as the basis for condemning the debtor who violates these norms. At the same time, it requires recognition of the debtor's humanity, and thus, of the pain that he or she is likely to experience as a result of going bankrupt. As outlined above, several respondents expressed disapproval of people who go bankrupt *while also* expressing sympathy for them. Several described bankrupt debtors as reckless, extravagant or foolish, while recognising that even these debtors are often 'good people' who do not intend to default on their loans or abandon their financial obligations. Importantly, even those respondents who expressed sympathetic views acknowledged that bankruptcy is a source of shame. For this reason, they frequently imagined bankruptcy as a painful experience, marked by sadness, humiliation and despair. These findings offer an alternative to many prevailing scholarly accounts, which posit two diametrically opposed views on bankruptcy – unqualified sympathy and unqualified contempt. They illustrate the limitations of the discourse of stigma, in this context, and the potential for theories of shame to furnish a more accurate account of contemporary social attitudes to bankruptcy.

VI CONCLUSION

This study illustrates that many Australians continue to harbour negative attitudes towards people who go bankrupt, particularly those who do so in connection with business dealings. It shows that, in stark contrast to the US, Australian stereotypes regarding bankruptcy do not involve low-income or

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170 Ibid 255.

unemployed people, but instead, focus on the apocryphal figure of the business 'high flyer'. In this sense, it demonstrates the profound and lasting impact of historical events, such as certain notorious bankruptcies of the 1990s, in shaping Australians' attitudes towards bankruptcy. At the same time, the study reveals that many Australians draw a sharp distinction between these 'high flying' bankrupts and ordinary, struggling individuals who go bankrupt as a result of misfortune. It shows that many people view bankruptcy as a complex issue and accept that debtors declare bankruptcy in a wide variety of circumstances. These results have important implications for the Australian Government's current proposals to modify bankruptcy laws in order to promote innovation, entrepreneurship and risk-taking. As discussed above, it seems likely that a reduction in the discharge period for business-related bankruptcies might in fact *increase* the stigma attaching to bankruptcy, by reinforcing the association between bankruptcy and unscrupulous entrepreneurs. By contrast, the survey suggests that Australians might be more amenable to the Government's proposed reforms if these are cast as a means of assisting ordinary consumers who become overwhelmed by debt and need help to start again. It also suggests that the Government should carefully consider the UK Government's attempts to address dishonest or reckless conduct by bankrupt debtors, with the creation of the BRO regime. More generally, this study illustrates the inadequacy of the term 'stigma', as a way of describing public attitudes towards bankruptcy. While 'stigma' implies rigidly negative attitudes, this survey shows that many Australians adopt a far more qualified approach, viewing bankrupt debtors with both censure and sympathy. This study demonstrates that bankruptcy is a highly emotive subject, associated with powerful affective states such as sadness, despair, and particularly, shame. It points to the potential for future scholarship to draw upon interdisciplinary sources, such as studies of shame, in order to develop a more nuanced account of contemporary attitudes towards bankruptcy.