

## 'SHORT A FEW QUID': BANKRUPTCY STIGMA IN CONTEMPORARY AUSTRALIA

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### I INTRODUCTION

Bankruptcy has always been a source of significant stigma. The first Elizabethan statutes regarded bankruptcy as a quasi-criminal state, punishable by public shaming, imprisonment and, in some cases, death. More modern regimes have recognised that bankruptcy serves important economic objectives, by encouraging entrepreneurial risk-taking and offering rehabilitation to debtors with useful skills and productive capacity. Over the course of the 19<sup>th</sup> century, the laws of the United States ('US') and United Kingdom ('UK') became more liberal and less morally prescriptive in their treatment of financial failure. The early laws of the Australian colonies took a similarly pragmatic approach, and the current federal *Bankruptcy Act 1966* (Cth) ('*Bankruptcy Act*') continues in this vein. Still, bankruptcy remains a source of considerable stigma in Australian society, fuelled by political discourse, judicial decisions and media accounts of high-profile bankrupts such as Alan Bond and Christopher Skase. This article provides an outline of empirical research on bankruptcy stigma, most of which has been conducted in the US and the UK. Noting that bankruptcy stigma has received little scholarly attention in Australia, it draws on parliamentary debates, reported cases and media reports, as well as an important early study published in 1995.<sup>1</sup> The article examines the UK's recent efforts to address bankruptcy stigma by way of legislation, and considers several factors that may undermine such efforts. It concludes by calling for a wider public discussion about rising levels of

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

household debt – one that would reframe bankruptcy as a social issue, rather than simply a matter of personal morality.

## II WHAT IS BANKRUPTCY STIGMA?

### A Stigma and the Law

As a social phenomenon, stigmatisation has a long history. It is often noted that the term derives from ancient Greece,<sup>2</sup> and the word *stizein*, meaning ‘to prick’.<sup>3</sup> The Greek word *stigma* referred to a tattoo,<sup>4</sup> applied to criminals and slaves as a mark of their abject status. Slaves who ran away had their foreheads tattooed with the words, ‘[s]top me, I’m a runaway’,<sup>5</sup> while prisoners of war were often marked with ‘the sign of their captors’.<sup>6</sup> In ancient Rome, the tattoo had similarly ‘punitive and degrading’ connotations, reinforcing the connection between bodily markings and social disgrace.<sup>7</sup> Suetonius writes that the Roman emperor Caligula ‘had many people of the better sort first defaced by the marks of tattoos (*stigmatum notis*)’ and then condemned them to the mines and the paving of roads;<sup>8</sup> and as late as the 9<sup>th</sup> century, facial tattooing served as a punishment for idolatry.<sup>9</sup> With the rise of Christianity, such bodily markings began to assume sacred connotations, and the term *stigmata* gradually shifted in meaning, so as to connote spiritual identification with the divine.<sup>10</sup> Still, other kinds of physical marking continued to function as visible signs of abject or marginal status. In Elizabethan England, cloth patches and metal badges were widely used to identify the poor who received alms from local ratepayers. Initially denoting the wearer’s status as a member of the respectable or ‘deserving’ poor, the pauper’s badge became increasingly stigmatising, as ratepayers grew more critical of welfare dependency among the labouring

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- 2 See, eg, Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Penguin Books, 1968) 11; Lynn Osborne, ‘Beyond Stigma Theory: A Literary Approach’ (1974) 9(1) *Issues in Criminology* 71, 72; Stephen C Ainlay, Lerita M Coleman and Gaylene Becker, ‘Stigma Reconsidered’ in Stephen C Ainlay, Gaylene Becker and Lerita M Coleman (eds), *The Dilemma of Difference: A Multidisciplinary View of Stigma* (Plenum Press, 1986) 1, 3; Jill A Fisher, ‘Tattooing the Body, Marking Culture’ (2002) 8(4) *Body and Society* 91, 92; Michael D Sousa, ‘Bankruptcy Stigma: A Socio-Legal Study’ (2013) 87 *American Bankruptcy Law Journal* 435, 436.
  - 3 C P Jones, ‘Stigma and Tattoo’ in Jane Caplan (ed), *Written on the Body: The Tattoo in European and American History* (Princeton University Press, 2000) 1, 4.
  - 4 While the term has often been associated with branding, Jones argues that this is a misconception and that in the ancient world ‘the branding of humans was exceptional’: see C P Jones, ‘Stigma: Tattooing and Branding in Graeco-Roman Antiquity’ (1987) 77 *Journal of Roman Studies* 139, 140–1.
  - 5 C P Jones, ‘Stigma and Tattoo’, above n 3, 9.
  - 6 Mark Gustafson, ‘The Tattoo in the Later Roman Empire and Beyond’ in Jane Caplan (ed), *Written on the Body: The Tattoo in European and American History* (Princeton University Press, 2000) 17, 26–7.
  - 7 C P Jones, ‘Stigma and Tattoo’, above n 3, 9, 11, 12.
  - 8 As cited in C P Jones, ‘Tattooing and Branding’, above n 4, 148. This appears to be Jones’ own translation of the original text. See also Suetonius, *The Twelve Caesars* (Robert Graves trans, Penguin Classics, 2007) 160. Graves’ translation refers to Caligula’s victims being ‘branded’: see above n 6.
  - 9 Gustafson, above n 6, 20.
  - 10 *Ibid* 29–31.

classes.<sup>11</sup> By the end of the 17<sup>th</sup> century, these badges were compulsory, not only for recipients of alms but also their wives and children, reflecting 'the notion that idleness was an inherited condition, propagated by feckless parents who lacked the moral compass to inculcate habits of industry and discipline in their offspring'.<sup>12</sup> These badges anticipated the 'most notorious' example of literal stigmatisation in modern history. In Nazi Germany, various cloth labels sewn onto clothing denoted the wearer as homosexual, a member of an ethnic minority, a political dissident, or most commonly, a Jew.<sup>13</sup>

While literal stigmatisation is an ancient practice, the academic study of stigma is a much more recent development. The concept of stigma emerged in the work of Émile Durkheim<sup>14</sup> and became widespread in the 1960s, after Erving Goffman published *Stigma: Notes on the Management of Spoiled Identity*.<sup>15</sup> In this widely cited study, Goffman defines stigma as 'an attribute that is deeply discrediting',<sup>17</sup> 'an undesired differentness' that makes an individual seem 'not quite human'.<sup>18</sup> Those whom he calls the 'normals' 'turn ... away' from the stigmatised person, 'construct[ing] a stigma-theory [or] ideology to explain his inferiority and account for the danger he represents'.<sup>19</sup> The stigmatised person experiences profound feelings of shame and adopts strategies to hide, excuse or disavow his or her 'defiling' attribute wherever possible.<sup>20</sup> While Goffman observes that some attributes are almost always stigmatising, he argues that stigma is not inherent but culturally determined.<sup>21</sup> The putatively 'normal' person has an important symbolic function, as the personification of a culture's 'common value system'. Yet virtually no-one is 'normal' in every respect and at all times. There is only one truly 'unblushing' American, Goffman writes: the 'young, married, white, urban, northern, heterosexual Protestant father of college

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11 See Steve Hindle, 'Dependency, Shame and Belonging: Badging the Deserving Poor, c.1550–1750' (2004) 1 *Cultural & Social History* 6.

12 Ibid 10.

13 Gustafson, above n 6, 26.

14 Émile Durkheim, *The Division of Labour in Society* (W D Halls trans, Macmillan, 1984) [trans of: *De La Division Du Travail Social* (first published 1893)]; Frédéric Mégret, 'Practices of Stigmatization' (2013) 76(3–4) *Law and Contemporary Problems* 287, 287–90.

15 Goffman, above n 2.

16 For sociological uses of Goffman's work, see, eg, Stephen C Ainlay, Gaylene Becker and Lerita M Coleman (eds), *The Dilemma of Difference: A Multidisciplinary View of Stigma* (Plenum Press, 1986); Robert M Page, *Stigma* (Routledge & Kegan Paul, 1984), For its uses in legal scholarship, see, eg, Martha Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law* (Princeton University Press, 2004); Deborah Thorne and Leon Anderson, 'Managing the Stigma of Personal Bankruptcy' (2006) 39 *Sociological Focus* 77; Rafael Efrat, 'Bankruptcy Stigma: Plausible Causes for Shifting Norms' (2006) 22 *Emory Bankruptcy Developments Journal* 481; Sousa, above n 2.

17 Goffman above n 2, 13.

18 Ibid 15. Goffman enumerates three types of stigma: 'abominations of the body'; 'blemishes of individual character'; and the 'tribal' stigmas attaching to particular nationalities, racial and religious groups: at 14.

19 Ibid 15.

20 Ibid 18.

21 He observes that the same attribute may not be stigmatising for all those who possess it, citing the example of tertiary education as an attribute that may denote success or 'outsider' status, depending on its social context: ibid 13.

education, fully employed, of good complexion, weight and height, and a recent record in sports'.<sup>22</sup> For this reason, stigma and its attendant feelings of shame are an almost universal aspect of human experience. Every 'normal' person is acutely aware that his or her status is tenuous, and is haunted by a fear of being found 'unworthy, incomplete and inferior'.<sup>23</sup> As such, the stigmatised outcast is crucial to the identity formation of the 'normal', being 'the person he is normal *against*'.<sup>24</sup>

Goffman's work exerts a powerful influence on contemporary discussions of stigma and the law.<sup>25</sup> As Martha Nussbaum explains, the law is an important arbiter of stigma. It serves as a 'bulwark' that protects certain citizens from stigma, for example, through anti-discrimination laws.<sup>26</sup> At the same time, it actively stigmatises other citizens by labelling them as aberrant or deviant. This latter phenomenon emerges most clearly in the context of criminal law. Those convicted of crimes suffer public denunciation, punishment and social exclusion.<sup>27</sup> The most culpable offenders are subjected to the 'profoundly humiliating' experience of imprisonment.<sup>28</sup> Those guilty of lesser offences generally receive less stigmatising penalties, such as community service orders, fines, or loss of privileges such as a driver's licence. Yet some jurisdictions explicitly deploy shame and stigma even in response to relatively minor infractions. Nussbaum points to the stigmatising function of judicial sentencing remarks, where these remarks are directed towards and widely reported in the media.<sup>29</sup> She also points to the increasing popularity of 'shaming' penalties, such as bumper stickers reading 'convicted D[riving] U[nder the] I[nfluence]' or T-shirts that denounce the wearer as a thief.<sup>30</sup> For Nussbaum, such 'shaming penalties' are inconsistent with 'the type of balanced and impartial ... justice we rightly demand from a system of law'.<sup>31</sup> She contends that a more humane and 'liberal' legal system would attach greater importance to the 'dignity' of offenders, and would seek to 'reintegrate' rather than stigmatise them.<sup>32</sup>

Nevertheless, stigma is crucial to what Cass Sunstein calls the 'expressive function' of law, that is, its role in symbolically articulating social norms and values. Sunstein argues that much of the law's normative force consists of "making statements" as opposed to controlling behavior directly'.<sup>33</sup> While all

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22 Ibid 153, cited in Nussbaum, above n 16, 173.

23 Goffman, above n 2, 153.

24 Ibid 16 (emphasis added).

25 See, eg, Nussbaum, above n 16; Thorne and Anderson, above n 16; Efrat, 'Shifting Norms', above n 16; Sousa, above n 2.

26 Nussbaum, above n 16, 223, 289.

27 Nigel Walker, *Punishment, Danger and Stigma: The Morality of Criminal Justice* (Blackwell, 1980) 145.

28 Nussbaum, above n 16, 247.

29 Ibid 252–3. See also Nigel Walker's discussion of the stigmatising force of 'judicial homilies': Walker, above n 27, 144–5.

30 Nussbaum, above n 16, 1.

31 Ibid 234.

32 Ibid 233.

33 Cass R Sunstein, 'On the Expressive Function of Law' (1996) 144 *University of Pennsylvania Law Review* 2021, 2024.

criminal laws serve a symbolic purpose in delineating permissible and impermissible conduct,<sup>34</sup> Sunstein argues that certain laws have a particularly strong 'expressive' (as opposed to retributive or deterrent) function.<sup>35</sup> He points out that laws against burning the American flag have a powerful symbolic effect, even if they do little to deter the (already rare) practice of flag-burning.<sup>36</sup> He also cites laws against 'hate speech', claiming that these laws have a 'social meaning' quite unrelated to their practical effects.<sup>37</sup> In particular, he points to social norms regarding money as 'an important domain for the expressive use of law'.<sup>38</sup> By way of example, he describes how the law attempts to stigmatise acts that constitute unacceptable uses of money, such as the sale of body parts, or the buying of votes. The vote-buyer and the dealer in human organs threaten the social order because they blur the accepted distinctions between commercial and non-commercial spheres of activity. By proscribing their activities, the law seeks to reinforce the separation between commercial and non-commercial spheres of life. At the same time, in contrast to them, it imagines an ideal citizen with an intuitive understanding of money and its social role.

## B Stigma and Bankruptcy: Historical Background

Bankruptcy laws have always had an 'expressive' function, serving to reinforce social and moral norms regarding property, money and debt. The first modern bankruptcy statute, enacted in 1542,<sup>39</sup> began with an elaborate preamble denouncing the

divers and sundry persons [who] craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown or keep to their houses ... [and] consume the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity and good conscience.<sup>40</sup>

'[Q]uasi-criminal' in nature, this Act imposed harsh punishments on those who tried to evade their debts.<sup>41</sup> It also sought to institute fairness by

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34 See generally, Walker, above n 27.

35 Sunstein, above n 33, 2023–4.

36 In the Australian context, criminal sanctions relating to the harming of native wildlife might be thought to have a similar symbolic value: see, eg, *National Parks and Wildlife Act 1974* (NSW) s 98. See also Samantha Bricknell, 'Environmental Crime in Australia' (Research and Public Policy Series Report No 109, Australian Institute of Criminology, October 2010).

37 Sunstein, above n 33, 2023.

38 *Ibid* 2039.

39 *An Act Against Such Persons As Do Make Bankrupts 1542*, 34 & 35 Hen 8, c 4 ('*Bankruptcy Act 1542*'), cited in Christopher Symes and John Duns, *Australian Insolvency Law* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2012) 20. The *Bankruptcy Act 1542* contained elements of Roman law: see Roy Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 4<sup>th</sup> ed, 2011) 10; Roland Obenchain, 'The Roman Law of Bankruptcy' (1928) 3(4) *The Notre Dame Lawyer* 169; Michael Quilter, 'Bankruptcy and Order' (2012) 39 *Monash University Law Review* 188. As Quilter notes, there is some doubt as to whether the first statute was enacted in 1542 or 1543: at 196 n 31.

40 *Bankruptcy Act 1542*. This quote has been adapted from the original text.

41 W J Jones, *The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period* (American Philosophical Society, 1979) 16.

seizing a debtor's assets and apportioning them rateably between creditors.<sup>42</sup> The *Bankruptcy Act 1603* provided for the public 'examination' of debtors and their finances. This process sought to ensure a fair and full distribution of debtors' assets, resting on the assumption that without such public scrutiny, debtors were naturally inclined to be 'secretive' about their financial affairs.<sup>43</sup> Under the Tudor statutes, debtors were liable for imprisonment in conditions 'so appalling as to make Dickensian circumstances appear a rest home'.<sup>44</sup> The *Bankruptcy Act 1623* provided that any debtor who concealed assets from creditors could be 'set upon the pillory in some public place ... and have one of his ears cut off'.<sup>45</sup> Imprisonment remained the creditor's chief remedy until the mid-19<sup>th</sup> century,<sup>46</sup> despite the fact that it proved highly ineffective as a practical means of recovering debts. Many debtors died of starvation or disease, since imprisonment made it impossible for them to support themselves. Those who survived the harsh conditions of the debtor's prison were no more able to pay their debts, unless a friend or relative came to their aid.<sup>47</sup> In these early laws, the stigmatisation of debtors, by means of imprisonment, outweighed the more practical objective of debt recovery.

Throughout the 17<sup>th</sup> and 18<sup>th</sup> centuries, bankruptcy law vacillated between an impulse to show clemency to debtors and an equally strong impulse to shame and stigmatise them. This frequently prompted claims that the laws were unjust and that they were not achieving their objectives. Tudor critics complained that, in stark contrast to the harsh treatment meted out to indigent debtors, the well-off flouted the law with impunity. One contemporary lamented that wealthy debtors roamed the country freely and, when confronted by their creditors, merely 'looked them in the face, and laughed at, and jeered them'.<sup>48</sup> Even when imprisoned, wealthy debtors could still enjoy a life of 'comparative luxury and freedom', provided that they could bribe their gaolers for favourable treatment.<sup>49</sup> While these inconsistencies prompted calls for the laws to be made more stringent, commentators also called for some mitigation of the laws' harsh impact on honest but unfortunate bankrupts. In 1649, the laws were amended to allow for the discharge of debt where the debtor was poor and genuinely unable to

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42 Ibid; Louis Edward Levinthal, 'The Early History of English Bankruptcy' (1919) 67 *University of Pennsylvania Law Review* 1, 14.

43 *Bankruptcy Act 1603*, 1 Jac 1, c 15; Levinthal, above n 42, 18.

44 W J Jones, above n 41, 14.

45 *Bankruptcy Act 1623*, 21 Jac 1, c 19, cited in Paul Barry, *Going for Broke* (Transworld, 2000) 2–3; Levinthal, above n 42, 17.

46 While the *Bankruptcy Act 1542* established the principle of seizing and distributing debtors' assets, it did not set out an administrative process for achieving this and was therefore of little practical utility: see Levinthal, above n 42, 15.

47 W J Jones, above n 41, 14.

48 W Leach, *Proposals for an Act for the More Speedy Satisfaction of Creditors* (London, 1649) 3–4, cited in W J Jones, above n 41, 14.

49 W J Jones, above n 41, 14.

pay;<sup>50</sup> and in 1705, this right of discharge was extended to all honest bankrupts, provided that they had complied with the law.<sup>51</sup> The preamble to the 1705 Act confirmed that 'many persons have and do daily become bankrupt, not so much by reason of losses and unavoidable misfortunes, as to the intent to defraud and hinder their creditors'.<sup>52</sup> In this sense, the laws did not seek to reduce bankruptcy stigma, so much as reflect a desire to improve compliance by creating tangible incentives for debtors to cooperate.<sup>53</sup> The reforms did little to dispel the association between bankruptcy, deviance and immorality. More than a century after the passage of the 1705 Act, courts continued to denounce bankruptcy as a 'crime'.<sup>54</sup> In practice, however, these changes made the law more sensitive to individual circumstances and lessened the harshness of the regime.

During the Victorian era, the UK Parliament gradually relinquished the goal of 'legislating morality' by means of bankruptcy laws.<sup>55</sup> The 19<sup>th</sup> century witnessed an exponential rise in bankruptcy rates, fuelled by speculative investment in new technologies, particularly railways.<sup>56</sup> These economic circumstances prompted a dramatic liberalisation of bankruptcy law, with the abolition of imprisonment for debt and the creation of an orderly

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50 *An Act for Discharging Poor Prisoners Unable to Satisfie their Creditors*, 4 September 1649; *An Act for Discharging from Imprisonment Poor Prisoners Unable to Satisfie their Creditors*, 21 December 1649; C H Firth and R S Rait (eds), *Acts and Ordinances of the Interregnum, 1642–1660* (His Majesty's Stationery Office, 1911) 240–1, 321–4; Levinthal, above n 42, 18–19.

51 *Bankruptcy Act 1705*, 4 & 5 Anne, c 17; Levinthal, above n 42, 18–19.

52 *Bankruptcy Act 1705*, 4 & 5 Anne, c 17.

53 Ian P H Duffy, 'English Bankrupts, 1571–1861' (1980) 24 *The American Journal of Legal History* 283, 286–7.

54 In 1813, Lord Ellenborough observed that 'the law considers [bankruptcy] a crime': *Smith v Currie* (1813) 3 Camp 349, 350; 170 ER 1407, 1407. The equation of bankruptcy with criminality was occasionally qualified, eg, *R v Mayor, Bailiffs and Common Council of the Town of Liverpool* (1759) 2 Burr 723, 728; 97 ER 533. In that case, the Court held that '[e]very trader is liable to bankruptcy; which may happen to him by accident and misfortune, and without any fault of his own. Becoming bankrupt is a misfortune, not a crime': *R v Mayor, Bailiffs and Common Council of the Town of Liverpool*: at 536. Still, the Court in *Arminer v Spotswood* expressed the more prevalent view when it stated that '[b]ankruptcy is a crime; considered as such by law; and subject to the most heavy punishment': *Arminer v Spotswood* (1773) Lofft 114, 119; 98 ER 562, 564. See also *ibid* 288.

55 Barbara Weiss, *The Hell of the English: Bankruptcy and the Victorian Novel* (Bucknell University Press, 1986) 45.

56 *Ibid* 25.

administrative process to protect debtors from the whims of irate creditors.<sup>57</sup> These reforms reflected legislators' recognition that, in an increasingly complex and credit-dependent market economy, some financial failures were inevitable. In 1849, Parliament established a short-lived system of graded certificates of discharge: 'first class' for those whose bankruptcies were due to 'unavoidable misfortune'; 'second class' for those whose misfortune involved a degree of carelessness or recklessness; and 'third class' for those whose bankruptcies were thought to be a consequence of dishonesty.<sup>58</sup> This system was abolished in 1861, after it became apparent that the classes had little effect on the bankrupt's capacity to re-enter the business world, and that consequently, most bankrupts did not care which kind of certificate they received.<sup>59</sup> The system also faced widespread charges of inconsistency; despite its 'aura of objective truth', it did not provide a clear set of standards for distinguishing between prudent and culpably reckless behaviour.<sup>60</sup> From 1861 onwards, Parliament increasingly adopted a 'hard-headed pragmatism'<sup>61</sup> in its approach to bankruptcy, relying more heavily on lenders' 'self-interest' to act as a brake on the reckless use of credit.<sup>62</sup>

Still, despite this move towards legal pragmatism in the legislative arena, public rhetoric continued to associate financial failure with stigma and disgrace.<sup>63</sup> The figure of the profligate, duplicitous debtor was a target of vocal denunciation in the Victorian era. In the midst of frequent stock market panics, bankruptcy

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57 Lester writes that between 1831–1914, almost 100 bankruptcy bills were introduced into the British Parliament: V Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-Up in Nineteenth Century England* (Clarendon Press, 1995) 2. The most significant statutes included those of 1813 (*An Act for the Relief of Insolvent Debtors in England 1813*, 53 Geo 3, c 102, enabling imprisoned debtors to petition for their release: at s 1); 1831 (*An Act To Establish a Court in Bankruptcy 1831*, 1 & 2 Wm 4, c 56, establishing the Bankruptcy Court and thus limiting the power of creditors: at s 1); 1842 (*An Act for the Amendment of the Law of Bankruptcy 1842*, 5 & 6 Vict, c 122, enabling voluntary bankruptcy through the filing of a declaration: at s 22); 1849 (*An Act to Amend and Consolidate the Laws Relating to Bankrupts 1849*, 12 & 13 Vict, c 106, establishing a system of discharge certificates designed to exonerate bankrupts whose debts were due to 'unavoidable losses and misfortunes': at sch Z); 1861 (*An Act to Amend the Law Relating to Bankruptcy and Insolvency in England 1861*, 24 & 25 Vict, c 134, merging insolvency with bankruptcy and, in this way, extending bankruptcy to non-traders: at ss 1, 69, 157); 1869 (*An Act for the Abolition of Imprisonment for Debt, for the Punishment of Fraudulent Debtors, and for Other Purposes 1869*, 32 & 33 Vict, c 62, abolishing imprisonment for debt in most circumstances: at s 4); and 1883 (*Bankruptcy Act 1883*, 46 & 47 Vict, c 52, establishing the 'Official Receiver', an impartial bureaucratic body with the power to administer debtors' financial affairs and scrutinise their conduct prior to and during bankruptcy: at ss 9, 16, 28). For a summary of the most significant reforms of the 19<sup>th</sup> century, see John Duns, *Insolvency: Law and Policy* (Oxford University Press, 2002) 23–9. For much more detailed discussions, see Weiss, above n 55; Lester, above n 57.

58 *An Act to Amend and Consolidate the Laws Relating to Bankrupts 1849*, 12 & 13 Vict, c 106, sch Z. See also Weiss, above n 55, 44.

59 Weiss, above n 55, 44–5.

60 Aeron Hunt, 'The Authoritative Medium: George Eliot, Ruin, and the Rationalized Market' (2012) 17 *Journal of Victorian Culture* 164, 173.

61 Weiss, above n 55, 29.

62 Hunt, above n 60, 174.

63 Weiss, above n 55, 38; Duns, *Insolvency*, above n 57, 24.



became a focal point for wider concerns about the social impact of industrialisation.<sup>64</sup> As Weiss writes, the prevalence of bankruptcy in Victorian England was widely regarded as 'a deeply painful dilemma of public morality'.<sup>65</sup> Challenging Victorians' 'most cherished' ideals of thrift, hard work and self-discipline, bankruptcy was the 'common nightmare' of the era's art and literature<sup>66</sup> and the subject of constant political debate. Victorian moralists maintained that success flowed from hard work and self-denial. Popular self-help books intoned that 'industry enable[d] the poorest man to achieve honour' and that financial security was 'merely a matter of self-denial and private economy'.<sup>67</sup> From this basis, it followed that economic failure must be due to personal weakness and immorality. This belief gained currency from popular accounts of 'daring and unscrupulous speculator[s]', who rode in carriages and kept mistresses while their 'unfortunate creditors were ruined'.<sup>68</sup> By stigmatising the bankrupt as an 'audacious scoundrel', such critics sought to assert enduring moral values in a society undergoing radical economic and social change.<sup>69</sup>

These Victorian debates found contemporary parallels in the US, which in the 19<sup>th</sup> century experienced similarly high rates of bankruptcy and equally passionate debates over the moral character of bankrupts. To some extent, bankruptcy stigma in the US has always been mitigated by a greater respect for entrepreneurialism and a marked enthusiasm for consumer credit.<sup>70</sup> Alexis de Tocqueville remarked on the 'strange indulgence ... shown to bankrupts' in the New World, in stark contrast to the strict approach adopted by European nations.<sup>71</sup> As Edward Balleisen writes, Americans of the time viewed credit as an 'unmixed blessing', the 'magical lubricant' that enabled consumer spending and economic integration of the previously separate colonies.<sup>72</sup> Yet by virtue of their widespread reliance on credit, suppliers, retailers and customers around the country found that their fortunes were inextricably linked, making them vulnerable to economic shocks or 'panics'. These 'panics' spread very quickly in response to contractions of the market, either domestically or abroad.<sup>73</sup> By the mid-19<sup>th</sup> century, financial 'failure' had become a pervasive aspect of the

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64 Weiss, above n 55, 24–5.

65 Ibid 23.

66 Ibid 29, 47.

67 Samuel Smiles, *Thrift* (Harper Brothers, 1875) 24, 19, cited in ibid 31.

68 Weiss, above n 55, 39.

69 Ibid 31.

70 Nathalie Martin, 'Common-Law Bankruptcy Systems: Similarities and Differences' (2003) 11 *American Bankruptcy Institute Law Review* 367, 403–8.

71 Alexis de Tocqueville, *Democracy in America* (A A Knopf, 1945), cited in Edward J Balleisen, *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America* (University of North Carolina Press, 2001) 13.

72 Balleisen, above n 71, 32. Balleisen writes that credit played a vital role in the growth of the US market economy in the antebellum era. At the beginning of the 19<sup>th</sup> century, American monetary reserves were low and entrepreneurs had great difficulty raising capital to begin new ventures. Credit arrangements 'filled the gap', funding the ventures of travelling salesmen, small shopkeepers and rooming house proprietors as well as large-scale wholesalers, importers and exporters: at 27.

73 Ibid 32–3.

American experience. As in Victorian England, bankruptcy legislation attracted incessant and highly emotive debate. Federal bankruptcy laws enacted in 1800, 1841, and 1867<sup>74</sup> were frequently amended and swiftly repealed,<sup>75</sup> as Congress struggled unsuccessfully to formulate a system that satisfied all the states and the competing interest groups within them.<sup>76</sup> Supporters of national bankruptcy laws argued strenuously that those who failed financially should have the chance to start afresh, and to use their ‘talents and industry’ for their own benefit and for the good of the nation.<sup>77</sup> In the absence of consensus on a national law, American state legislatures gradually dispensed with imprisonment for debt, facilitated debt discharge<sup>78</sup> and extended other valuable protections to debtors, including a ‘homestead exemption’ that protected debtors’ homes from sale or seizure.<sup>79</sup>

Yet despite these reforms, as in the UK, bankruptcy retained its social stigma in the US, serving as a powerful mark of failure. Balleisen points out that ‘in a society that endlessly celebrated entrepreneurial success, business failure could exact a substantial psychological toll, not infrequently leading those who endured it to the whiskey bottle or the insane asylum’.<sup>80</sup> Since the colonial era, American clergymen had spoken stridently on the moral perils of debt in sermons and religious tracts.<sup>81</sup> By the 19<sup>th</sup> century, bankruptcy had become the topic of frequent denunciation in the popular press.<sup>82</sup> For the American public, financial failure suggested not only moral laxity but weakness and effeminacy.<sup>83</sup> The much vaunted ‘go-ahead spirit’ of entrepreneurial capitalism encouraged, indeed demanded, a willingness to speculate and celebrated it as a distinctive feature of American manhood.<sup>84</sup> Yet this credo of ambition and risk-taking made little allowance for the effects of bad luck; rather, it regarded financial failure as ‘a

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74 Act of 4 April 1800, ch 19, 2 Stat 19; Act of 19 August 1841, ch 9, 5 Stat 440; Act of 2 March 1867, ch 176, 14 Stat 517. See also *Bankruptcy Act 1898*, ch 541, 30 Stat 544; David A Skeel, *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton University Press, 2001) 247 n 5.

75 The 1800 Act was repealed in 1803; the 1841 Act in 1843; and the 1867 Act in 1878. By contrast, the 1898 Act endured until 1978: Skeel, above n 74, 247 n 5.

76 Skeel, above n 74, 24–5.

77 ‘On a National Bankruptcy Law’ (1829) 1 *American Jurist* 35, cited in Balleisen, above n 71, 166, 274.

78 Several states enacted laws permitting debt discharge, despite questions as to their constitutionality: see Peter J Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607–1900* (Beard Books, 1999) 273, 276.

79 *Ibid* 257. This exemption is still a prominent feature of American bankruptcy law, in stark contrast to the much more limited exemptions available under English and Australian law: see Martin, above n 70, 377, 379.

80 Balleisen, above n 71, 14.

81 See Bruce H Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* (Harvard University Press, 2002) 36–40.

82 See Balleisen, above n 71, 14; Bruce H Mann, above n 81, 43. See especially Scott A Sandage, *Born Losers: A History of Failure in America* (Harvard University Press, 2005) 26–7.

83 Sandage, above n 82, 87.

84 *Ibid* 85, 88–91.

“moral sieve” that trapped the loafer and passed the true man through’.<sup>85</sup> In this context, the bankrupt served an important symbolic role, haunting every ambitious American with the spectre of failure.<sup>86</sup>

In Australia,<sup>87</sup> where the history of bankruptcy law has received less scholarly attention,<sup>88</sup> the relationship between the law and social attitudes is more difficult to gauge.<sup>89</sup> Australia’s earliest bankruptcy laws closely followed English laws of the time, demonstrating a ‘traditional’ view of bankrupts as disreputable and dishonest.<sup>90</sup> Yet in 19<sup>th</sup> century Australia, as elsewhere, rampant speculation led to frequent economic shocks affecting all sections of the population. As in the UK, colonial parliaments were forced to make pragmatic concessions in the face of widespread financial failure. The *Australasian Chronicle* observed, in 1841, that ‘[t]he epidemic of bankruptcy ... ha[d] enforced a fraternity throughout the colony’.<sup>91</sup> In that year, New South Wales enacted a new statute that was nothing less than ‘revolutionary’ in its sudden, wholesale adoption of a ‘modern’, lenient approach to bankruptcy.<sup>92</sup> With its provisions for debt discharge, and references to ‘relieving’ debtors, the 1841 law was far removed from the ‘moral

85 Ibid 17. Sandage’s account contradicts that of Mann, who identifies a widespread ‘redefinition of debt from moral delict to economic risk’ as early as the mid-1700s: Bruce H Mann, above n 81, 82. Sandage’s claims are corroborated by legal scholars such as Efrat who argue that bankruptcy has ‘traditionally’ been ‘viewed negatively’ in American society. Efrat attributes this to the ‘robust ... influence’ of religion and a cultural tradition of ‘thriftiness’: Efrat, ‘Shifting Norms’, above n 16, 482, 492–93.

86 Sandage quotes extensively from the diaries of Henry Hill, a bankruptcy lawyer whose long and profitable career at the Bar did little to assuage his deep-seated, enduring sense of failure: see Sandage, above n 82, 47, 68.

87 American commentators often compare Australia’s bankruptcy regime to its English antecedent, and regard both as being much less permissive than the American system. Nathalie Martin, for example, describes both the English and Australian regimes as having a ‘penal flavor’: Martin, above n 70, 368.

88 The most relevant studies published to date are journal articles and chapters in books: see John Gava, ‘The Revolution in Bankruptcy Law in Colonial New South Wales’ in M P Ellinghaus, Adrian J Bradbrook and A J Duggan (eds), *The Emergence of Australian Law* (Butterworths, 1989) 210; Bruce Kercher, ‘An Indigenous Jurisprudence? Debt Recovery and Insolvency Law in the New South Wales Court of Civil Jurisdiction, 1788 to 1814’ (1990) 6 *Australian Journal of Law and Society* 15; Bruce Kercher, *Debt, Seduction, and Other Disasters: The Birth of Civil Law in Convict New South Wales* (Federation Press, 1996); J L B Allsop and L Dargan, ‘The History of Bankruptcy and Insolvency Law in England and Australia’ in Justin T Gleeson, J A Watson and Elisabeth Peden (eds), *Historical Foundations of Australian Law* (Federation Press, 2013) vol 2, 415. Carmel Meiklejohn focuses on the administration of the Australian bankruptcy regime and the organisational history of the Official Receiver and the Australian Financial Security Authority (formerly the Insolvency and Trustee Service Australia): Insolvency and Trustee Service Australia and Carmel Meiklejohn, *Officially Receiving: A History of Australia’s Bankruptcy Law and Administration* (2010).

89 It is possible that bankruptcy law has always been less emotive and less controversial here than in other jurisdictions. John Gava cites a newspaper editorial in 1841 observing that ‘attention’ to bankruptcy law reform ‘has been aroused, at last, after a lengthened slumber’. Another denounced the ‘apathy, nay the unpardonable indifference’ hitherto evinced by the legislature on the subject: Gava, above n 88, 218.

90 See, eg, *Debtors’ Estates Distribution Act 1830* (NSW); *Debtors’ Relief Act 1832* (NSW); *Insolvency Statute 1865* (Vic); *Insolvency Statute 1870* (Vic) (frequently cited as the ‘Insolvency Statute 1871’). See also ibid 212–14; J M Bennett and J R Forbes, ‘Tradition and Experiment: Some Australian Legal Attitudes of the Nineteenth Century’ (1971) 7 *University of Queensland Law Journal* 172, 175–8. Gava notes that, despite their titles, the early NSW Acts were ‘framed to relieve creditors’: ibid 213.

91 Gava, above n 88, 217.

92 *Debtors’ Relief Act 1840* (NSW); ibid 216.

opprobrium' expressed by the common law and legislation of the UK.<sup>93</sup> In the absence of detailed historical research on the cultural significance of bankruptcy in 19<sup>th</sup> century Australia, it is difficult to know whether or not Australia's colonial laws reflected a generally permissive attitude towards debt. It is likely, however, that as in the UK and the US, the colonies' lenient bankruptcy regime coexisted with a widespread social disapproval of bankruptcy.<sup>94</sup>

### C The Decline of Stigma?

The 20<sup>th</sup> century witnessed an enormous expansion of consumer credit throughout the Western world.<sup>95</sup> To some extent, this development merely continued a long-running trend towards increasing reliance on credit to purchase consumer goods. As early as the 1850s, it was common for middle class consumers to buy goods such as books, pianos and sewing machines through hire-purchase arrangements, with the result that '[h]ouseholds saved less, and to be in debt became respectable'.<sup>96</sup> In the first half of the 20<sup>th</sup> century, these consumers increasingly turned to instalment credit to fund the purchase of large household appliances and cars, reinforcing the link between debt, affluence and social prestige.<sup>97</sup> After the Second World War, new and more sophisticated forms of lending fuelled an explosion in consumption. In particular, the credit card began to supplant hire-purchase as the most popular form of consumer credit.<sup>98</sup> This mass adoption of consumer credit led to dramatic improvements in living standards, as 'goods which had previously been considered ... luxury items progressively became part of everyday life'.<sup>99</sup> At the same time, it normalised and even valorised indebtedness. From being a source of shame and embarrassment, debt became a sign of prosperity and even 'a status symbol'.<sup>100</sup> As the use of credit to fuel consumption became more 'legitimate', the inability to repay one's debts became associated with 'external, uncontrollable events' rather than 'individual fault'.<sup>101</sup> For some commentators, this in turn led to a gradual

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93 Gava, above n 88, 220.

94 Recent scholarship on domestic colonial fiction suggests that there was considerable continuity between English and colonial attitudes towards debt, reputation and respectability: see Philip Steer, 'Antipodal Home Economics: International Debt and Settler Domesticity in Clara Cheeseman's *A Rolling Stone*' in Tamara S Wagner (ed), *Domestic Fiction in Colonial Australia and New Zealand* (Pickering & Chatto, 2014) 145, 145–59.

95 Dawn Burton, *Credit and Consumer Society* (Routledge, 2008) 1; Rosa-Maria Gelpi and François Julien-Labruyère, *The History of Consumer Credit: Doctrines and Practices* (Mn Liam Gavin trans, St Martin's Press, 2000) [trans of: *Histoire du crédit à la consommation: doctrines et pratiques* (first published 1994)]; Pierre Van Der Eng, 'Consumer Credit in Australia During the Twentieth Century' (2008) 18 *Accounting, Business & Financial History* 243.

96 Gelpi and Julien-Labruyère, above n 95, 99, 129. See also Van Der Eng, above n 95, 249.

97 Gelpi and Julien-Labruyère, above n 95, 100.

98 Van Der Eng, above n 95, 251–6; Robert D Manning, *Credit Card Nation: The Consequences of America's Addiction to Credit* (Basic Books, 2000); Lloyd Klein, *It's in the Cards: Consumer Credit and the American Experience* (Praeger, 1999).

99 Gelpi and Julien-Labruyère, above n 95, 105.

100 Efrat, 'Shifting Norms', above n 16, 495.

101 *Ibid* 489.

reduction in the stigma attaching to bankruptcy.<sup>102</sup> Proponents of this view describe a worrying departure from earlier norms of 'thriftiness' and 'self-restraint', and link the reduction in stigma to a wider social 'decline in personal responsibility'.<sup>103</sup> Other scholars are sceptical of this account. In Bruce Mann's view, '[t]he homiletic injunction "neither a borrower nor a lender be" ... never described reality in commercial societies'.<sup>104</sup> Still, claims of declining bankruptcy stigma have become increasingly prevalent in the US and elsewhere, and are often reiterated by politicians,<sup>105</sup> public administrators,<sup>106</sup> journalists<sup>107</sup> and members of the credit industry.<sup>108</sup>

This perception of declining bankruptcy stigma has prompted recent, radical and highly controversial reforms to the US federal bankruptcy system.<sup>109</sup> Enacted in 2005, the *Bankruptcy Abuse Prevention and Consumer Protection Act* ('BAPCPA') responded to claims that declining stigma was leading to a rapid increase in bankruptcy rates.<sup>110</sup> In the absence of stigma, it was alleged, affluent debtors were using bankruptcy as a 'financial planning tool' and a means of evading debts that they were perfectly able to pay.<sup>111</sup> These claims were taken up by politicians who asserted that bankruptcy was no longer a 'last resort' but rather a 'first stop' for unscrupulous debtors.<sup>112</sup> The BAPCPA addressed this by imposing harsh restrictions on access to debt discharge. It instituted new fees, administrative processes and a means test, and rendered many kinds of debt

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102 Ibid. See also Todd J Zywicki, 'Institutions, Incentives, and Consumer Bankruptcy Reform' (2005) 62 *Washington & Lee Law Review* 1071. For a summary of these arguments, see Sousa, above n 2, 453–5. For a comprehensive discussion and critique of this argument, see 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.

103 Efrat, 'Shifting Norms', above n 16, 491–3.

104 Bruce H Mann, above n 81, 3.

105 For US examples, see Sullivan, Warren and Westbrook, 'Less Stigma', above n 102, 216. In the Australian context, see Commonwealth, *Parliamentary Debates*, Senate, 14 November 2002, 6436 (Andrew Murray); Commonwealth, *Parliamentary Debates*, House of Representatives, 30 May 2002, 2822 (Peter King); Commonwealth, *Parliamentary Debates*, Senate, 9 February 2005, 17 (Andrew Murray).

106 See, eg, Terry Gallagher, Insolvency and Trustee Service Australia, 'Reforms to the Bankruptcy Act', cited in Parliamentary Library (Cth), *Bills Digest*, No 142 of 2001–02, 15 May 2002, 3.

107 See, eg, Julianne Dowling, 'When Things Go Bust', *The Sydney Morning Herald* (online), 17 April 2009 <<http://www.smh.com.au/small-business/entrepreneur/when-things-go-bust-20090417-cr02.html>>; Jason Bryce, 'Cast Off the Load of Debt', *Courier Mail* (online), 26 July 2009 <<http://www.couriermail.com.au/news/cast-off-the-load-of-debt/story-e6freon6-1225754326285>>. For US examples, see Efrat, 'Shifting Norms', above n 16, 487.

108 See Efrat, 'Shifting Norms', above n 16, 486–7.

109 *Bankruptcy Reform Act of 1978*, 11 USC §§ 101–1532 (2005).

110 *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, Pub L No 109-8, §256, 119 Stat 23 (2005).

111 *Bankruptcy Revision: Hearing on Bankruptcy Reform and Financial Servs. Issues Before the S. Comm. on Banking*, 106<sup>th</sup> Cong. 11 (1999) (statement of Rep. Rick Boucher (D–Va.)), cited in Sullivan, Warren and Westbrook, 'Less Stigma', above n 102, 235 n 63.

112 Ibid.

ineligible for discharge.<sup>113</sup> All these measures sought to redirect affluent debtors towards long-term repayment plans rather than debt discharge.<sup>114</sup> Some critics disputed the rationale for the *BAPCPA*, arguing that bankruptcy stigma was still a significant force in the US, and that rising rates of bankruptcy were in fact due to financial hardship and inappropriate lending by consumer credit companies.<sup>115</sup> These critics argued that the *BAPCPA* would only serve to increase the profits of the credit industry, by forcing debtors to go on servicing unmanageable debts for longer.<sup>116</sup> Nevertheless, the reforms have been widely touted as a success, having coincided with a sudden, dramatic reduction in bankruptcy rates.<sup>117</sup>

In the UK, despite rising rates of personal or ‘consumer’ bankruptcy,<sup>118</sup> government policy appears to have moved in the other direction, with recent legislation seeking to liberalise bankruptcy law and reduce the stigma attaching to ‘honest’ bankrupts.<sup>119</sup> In 2000, in a consultation document entitled *Bankruptcy: A Fresh Start*, the government stated its desire to address negative attitudes towards bankruptcy in order to promote entrepreneurialism and economic growth.<sup>120</sup> It maintained that people in the UK were unduly ‘risk averse’ because of the perceived ‘financial and social costs’ of business failure.<sup>121</sup> It proposed to address this by drawing a sharper distinction between ‘unlucky’ and ‘dishonest’ bankrupts, and adopting a less punitive approach towards those in the former category.<sup>122</sup> *A Fresh Start* noted that the law made ‘no distinction ... between those who are honest but unlucky or undercapitalised and the reckless or fraudulent’.<sup>123</sup> It asserted that ‘a distinction can and should be made between the two groups so that the vast majority of honest bankrupts do not continue to be stigmatised through association with the dishonest’.<sup>124</sup> Accordingly, the *Enterprise Act* of 2002 dramatically altered the UK system, reducing the period of bankruptcy to one year.<sup>125</sup> It removed many restrictions on bankrupts,

113 Ronald J Mann, ‘Bankruptcy Reform and the “Sweat Box” of Credit Card Debt’ [2007] *University of Illinois Law Review* 375, 377.

114 Robert M Lawless et al, ‘Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors’ (2008) 82 *American Bankruptcy Law Journal* 349. For a succinct summary of the differences between Chs 7 and 13 bankruptcies, see 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.

115 See generally Sullivan, Warren and Westbrook, ‘Less Stigma’, above n 102.

116 For a discussion of the practice known as ‘sweat-boxing’ see Ronald J Mann, above n 113.

117 Lawless et al, above n 114, 349–50.

118 Insolvency Service, Department of Trade and Industry (UK), ‘Insolvency – A Second Chance’ (Report No CM5234, 30 July 2001) 8 [1.46], cited in Adrian Walters, ‘Personal Insolvency Law after the *Enterprise Act*: An Appraisal’ (2005) 5 *Journal of Corporate Law Studies* 65, 73.

119 Walters, above n 118, 67.

120 Insolvency Service Department of Trade and Industry (UK), ‘Bankruptcy: A Fresh Start’ (March 2000) (*A Fresh Start*).

121 *Ibid.*

122 *Ibid.*

123 *Ibid.*

124 *Ibid* 1, quoted in Katharina Möser, ‘Restrictions after Personal Insolvency’ [2013] *Journal of Business Law* 679, 682–3.

125 *Enterprise Act 2002* (UK) c 40, s 256 (*Enterprise Act*).

including longstanding prohibitions on bankrupts serving as members of parliament and justices of the peace.<sup>126</sup> In place of these restrictions, the *Enterprise Act* made provision for a bankruptcy restriction order ('BRO'), applicable to those bankrupts deemed undeserving of an unqualified 'fresh start'.<sup>127</sup> While the rate of consumer bankruptcies has increased since the introduction of these reforms, it is unclear whether this reflects a decline in stigma, an increase in household indebtedness, or simply greater awareness of bankruptcy and its consequences.<sup>128</sup>

In Australia, as in the US, allegations of declining bankruptcy stigma have prompted a tightening of bankruptcy laws. In the early 2000s, the Inspector-General in Bankruptcy drew a connection between rising rates of bankruptcy and 'a lessening of the stigma' associated with it.<sup>129</sup> These remarks were cited in the Commonwealth Parliament in support of legislative changes designed to 'clamp down on those who abuse the bankruptcy system'.<sup>130</sup> While such rhetoric invites comparison with the *BAPCPA* debates in the US, the reforms themselves were much less severe than those effected by the *BAPCPA*. They abolished early discharge, meaning that all bankruptcies would last at least three years, but otherwise left the basic legal framework unchanged.<sup>131</sup> Perhaps for this reason, the 'declining stigma hypothesis'<sup>132</sup> has received little attention from Australian academics. An exception is a 2009 article by Ramsay and Sim, which queried the suggestion that bankruptcy stigma was waning.<sup>133</sup> Echoing American critics of the 'declining stigma hypothesis',<sup>134</sup> Ramsay and Sim suggested that rising rates of bankruptcy were due to higher levels of indebtedness and increasing financial pressure on middle class Australians, rather than a fundamental shift in social attitudes.<sup>135</sup> Outside the academic context, studies of high-profile bankrupts such as Christopher Skase and Alan Bond suggest that bankruptcy continues to carry

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126 See *Insolvency Act 1986* (UK) c 45, pt IX. See also Walters, above n 118, 83–4. For a discussion of the legal restrictions imposed upon Australian bankrupts, see below Part IV(A).

127 *Enterprise Act* s 257; *Insolvency Act 1986* (UK) c 45, s 281A. For more detailed discussions of the UK reforms, see especially Walters, above n 118. See also Donna McKenzie Skene, 'Morally Bankrupt? Apportioning Blame in Bankruptcy' [2004] *Journal of Business Law* 171. For a recent evaluation of their effectiveness, see Möser, above n 124.

128 Möser, above n 124, 690–1.

129 Terry Gallagher, Insolvency and Trustee Service Australia, 'Reforms to the Bankruptcy Act', cited in Parliamentary Library (Cth), above n 106, 3.

130 Commonwealth, *Parliamentary Debates*, Senate, 14 November 2002, 6436 (Andrew Murray). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 30 May 2002, 2822 (Peter King); Commonwealth, *Parliamentary Debates*, Senate, 9 February 2005, 17 (Andrew Murray).

131 *Bankruptcy Legislation Amendment Act 2002* (Cth).

132 Sullivan, Warren and Westbrook, 'Less Stigma', above n 102, 233. For a brief discussion of bankruptcy stigma in the Australian context, see Ian Ramsay and Cameron Sim, 'Personal Insolvency Trends in Australia, 1990–2008' (2009) 17 *Insolvency Law Journal* 69. To the authors' knowledge, the only other Australian researcher to have addressed this topic is Martin Ryan: see Martin Ryan, 'The Stigma of Bankruptcy' (1992) 7 *Socio-Legal Bulletin* 6; Martin Ryan, *Last Resort*, above n 1.

133 Ramsay and Sim, 'Trends', above n 132.

134 Sullivan, Warren and Westbrook, 'Less Stigma', above n 102, 233.

135 Ramsay and Sim, 'Trends', above n 132, 102.

strongly negative connotations for many Australians.<sup>136</sup> Still, these notorious examples of corporate excess do not tell us much about Australians' attitudes to ordinary 'middle class' bankrupts.

### D Empirical Studies of Bankruptcy Stigma

To date, the most extensive empirical studies of bankruptcy stigma have been carried out in the US.<sup>137</sup> These have differed widely in their conclusions, with some asserting that bankruptcy stigma has declined,<sup>138</sup> and others claiming that it has persisted,<sup>139</sup> or even increased.<sup>140</sup> Several quantitative studies have assessed bankruptcy stigma indirectly, for example through the analysis of debt-to-income ratios,<sup>141</sup> credit card account data<sup>142</sup> or articles published in the *New York Times*.<sup>143</sup> Drawing on the data from their long-running consumer bankruptcy study, Elizabeth Warren, Jay Westbrook and Teresa Sullivan have observed that American bankrupts now have higher debts relative to their incomes. They infer that people in financial distress are now 'more reluctant' to declare bankruptcy, and suggest that this is due in part to increasing stigma.<sup>144</sup> By contrast, economists David Gross and Nicholas Souleles analyse credit card debts and conclude that, after controlling for variables, 'a given account was more likely to go bankrupt in 1996 and 1997 than in 1995'.<sup>145</sup> Because this increase cannot be explained by the study's 'very rich set of controls' or by 'other economic fundamentals', they deem it to be 'consistent with ... a decline in social stigma'.<sup>146</sup> Warren, Westbrook and Sullivan mount a spirited critique of Grossman and Souleles' conclusions, pointing out that they involve a 'leap of faith'.<sup>147</sup> Warren, Westbrook and Sullivan object that when the data cannot otherwise explain a rise in bankruptcy rates, economists nominate declining

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136 Ryan, 'Stigma', above n 132, 10. See also the indirect allusions to Bond and Skase in Kercher, *Seduction*, above n 88, 180. For examples of the public discourse surrounding these figures, see Paul Barry's excoriating portrait of Bond: Barry, *Going for Broke*, above n 45. See also Tom Prior, *Christopher Skase: Beyond the Mirage* (Information Australia, 1994); Lawrence Van der Plaats, *Too Good To Be True: Inside the Corrupt World of Christopher Skase* (Macmillan, 1996).

137 Terrell A Hayes, 'Stigmatizing Indebtedness: Implications for Labeling Theory' (2000) 23 *Symbolic Interaction* 29; Rafael Efrat, 'The Evolution of Bankruptcy Stigma' (2006) 7 *Theoretical Inquiries in Law* 365; Sullivan, Warren and Westbrook, 'Less Stigma', above n 102; Thorne and Anderson, above n 16; Sousa, above n 2. Sousa provides a detailed summary of the US studies to date: Sousa, above n 2, 456–61.

138 Scott Fay, Erik Hurst and Michelle White, 'The Bankruptcy Decision: Does Stigma Matter?' (Working Paper No 98-01, University of Michigan Department of Economics, January 1998); David B Gross and Nicholas S Souleles, 'An Empirical Analysis of Personal Bankruptcy and Delinquency' (2002) 15 *The Review of Financial Studies* 319; Efrat, 'Evolution', above n 137.

139 Thorne and Anderson, above n 16.

140 Sullivan, Warren and Westbrook, 'Less Stigma', above n 102.

141 Ibid.

142 Gross and Souleles, above n 138.

143 Efrat, 'Evolution', above n 137.

144 Sullivan, Warren and Westbrook, 'Less Stigma', above n 102, 242.

145 Gross and Souleles, above n 138, 333, 336, cited in Sousa, above n 2, 457.

146 Gross and Souleles, above n 138, 344–5.

147 Sullivan, Warren and Westbrook, 'Less Stigma', above n 102, 235



stigma as the cause, 'with no evidence required to back ... up' their claims.<sup>148</sup> Indeed, even Gross and Souleles concede that it is difficult to measure stigma in quantitative terms and warn that their findings are 'not conclusive'.<sup>149</sup>

Qualitative studies by US researchers have offered a more nuanced insight into the nature of bankruptcy stigma. Deborah Thorne and Leon Anderson interviewed 19 married couples who had filed for joint bankruptcy in Washington State in the late 1990s. Ninety-five per cent of those interviewed said that they 'felt shame and stigmatization as they negotiated the bankruptcy process'.<sup>150</sup> Most indicated that they had been raised to regard bankruptcy in negative terms and to believe that bankrupts were 'bad people and misfits'.<sup>151</sup> Many had delayed as long as possible before declaring bankruptcy, spending their retirement savings and relinquishing cars and homes in an effort to repay their debts. Having become bankrupt, most sought to conceal their bankrupt status, particularly from parents, co-workers and employers. Several described feeling very fearful and anxious that their bankruptcies would be discovered, despite their attempts at secrecy.<sup>152</sup> Almost all said that they adopted techniques to avoid interacting with debt collectors, and some began avoiding all forms of social interaction in an attempt to avoid stigmatisation.<sup>153</sup> Some practiced what the authors called 'deviance avowal'.<sup>154</sup> Regarding bankruptcy in general as 'deviant', these people disparaged other bankrupts while asserting that their own behaviour did not warrant stigmatisation.<sup>155</sup> They generally offered 'excuses and justifications' for their bankruptcies, often blaming lenders for extending them too much credit or attributing their financial problems to other uncontrollable events such as unemployment.<sup>156</sup> They also drew distinctions between their own spending on 'necessities' and the extravagant habits they attributed to other bankrupts. Seventy-eight per cent said that they knew of someone who 'engaged in profligate spending patterns', indulging in '[f]ancy cars' and 'expensive vacations', before seeking to 'jettison' the debt.<sup>157</sup> Thorne and Anderson viewed these remarks as an attempt to 'manage' the stigma of bankruptcy. They concluded that '[f]eelings of stigmatization were a pervasive feature of [their] informants' bankruptcy experiences' and that 'those who declare bankruptcy do so within a cultural context of shame, embarrassment, and assertions of their

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148 Ibid.

149 Gross and Souleles concede the difficulty of operationalising what they call 'the demand effect', ie, the population's increased willingness to default on debt: Gross and Souleles, above n 138, 321, 345. See also *ibid* 236.

150 Thorne and Anderson, above n 16, 83.

151 Ibid.

152 Ibid.

153 Ibid 86.

154 Ibid 87.

155 Ibid.

156 Ibid 91.

157 Ibid 88.

moral failure'. They suggested that this stigma might be 'enduring', compromising the 'fresh start' that bankruptcy ostensibly provides.<sup>158</sup>

A larger study in 2013 qualified this view, finding that bankruptcy filers varied in their experiences and sense of stigmatisation. Michael D Sousa interviewed 58 people who had filed for bankruptcy between 2006 and 2010 in the American state of Colorado.<sup>159</sup> Expecting to find evidence of pervasive shame and stigma, Sousa instead discovered that respondents experienced 'a wide range of attitudes and feelings'.<sup>160</sup> Some reported internalised feelings of shame and stigma; others reported 'little or no shame' and advanced 'justifications' for their bankruptcies.<sup>161</sup> A third group expressed what Sousa called a 'diluted sense of shame'.<sup>162</sup> This last group combined feelings of shame with a belief that their bankruptcies were caused by factors beyond their control; that bankruptcy is 'commonplace'; or that their own actions were fundamentally different from those of other, blameworthy bankrupts.<sup>163</sup> Sousa concluded that bankruptcy stigma is 'not an "all or nothing issue"', but is 'more nuanced and complex than previously believed'.<sup>164</sup> Nonetheless he concluded that bankruptcy stigma still affects 'a significant segment' of bankruptcy filers.<sup>165</sup>

While to date there have been no academic empirical studies of bankruptcy stigma in the UK,<sup>166</sup> the Insolvency Service has carried out three detailed surveys of attitudes to bankruptcy in 2004, 2007 and 2009.<sup>167</sup> The most recent study consisted of written surveys of around 1400 bankrupts and 855 small business operators, and a telephone survey of 1000 people representing a cross-section of the UK population.<sup>168</sup> As in the two previous studies, most respondents 'perceive[d] ... a stigma attached to bankruptcy'.<sup>169</sup> The Insolvency Service observed that the number of respondents attesting to this stigma had fallen since

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158 Ibid 93, 94.

159 Sousa, above n 2.

160 Ibid 463.

161 Ibid.

162 Ibid.

163 Ibid 463–4.

164 Ibid 481–2.

165 Ibid 481.

166 A search of journal articles using the LexisNexis and Westlaw UK databases yielded no empirical studies of bankruptcy stigma in the UK.

167 Insolvency Service (UK), *Attitudes to Bankruptcy* (Report, 2004) <<http://webarchive.nationalarchives.gov.uk/20121021124135/http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/policychange/attitudes/report-attitudetobankruptcy1.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 Möser, above n 124, 690.

168 Insolvency Service (UK), *Enterprise Act 2002: Attitudes to Bankruptcy 2009 Update*, above n 167, 6, app A.

169 Ibid 7.

2004.<sup>170</sup> Still, it found that bankrupts and businesses showed little change in attitudes over the five year period.<sup>171</sup> It concluded that 'any overall reduction in stigma is attributable primarily to changes in the attitudes of the general public'.<sup>172</sup> It suggested that this could be due to the 'significant increase' in bankruptcies over the same period and the consequent rise in awareness of 'what being bankrupt actually means'.<sup>173</sup> The Insolvency Service asked respondents to nominate the reasons for persistent bankruptcy stigma, asking them to choose from a number of options. Many attributed stigma to the 'process' of bankruptcy, including the need to attend court and provide a detailed statement of financial affairs to the Official Receiver. Respondents also cited the stigmatising effects of bankruptcy, including the loss of the family home and difficulty obtaining credit.<sup>174</sup>

In Australia, there has been very little scholarly study of bankruptcy stigma. In 1986 and 1987, Martin Ryan carried out empirical research based on interviews of 76 undischarged bankrupts.<sup>175</sup> In the context of a long interview on various aspects of the bankruptcy experience, participants were asked three questions relating to stigma: whether they thought that people regarded bankruptcy in negative terms; whether they had directly experienced stigmatisation; and whether they felt 'looked down upon', in a more general sense, as a result of their bankruptcies.<sup>176</sup> Seventy-one per cent believed that people view bankrupts in negative terms. When asked to explain this public perception, they offered a range of explanations. Some said that bankrupts were viewed as irresponsible; others, that they were associated with 'crooked businessmen'; still others pointed to bankrupts' inability to provide for their families, and a perception that '[s]ociety revolves around money'.<sup>177</sup> Surprisingly, 73 per cent of Ryan's respondents had not personally experienced stigmatisation (in the sense of 'being made to feel different or looked down upon').<sup>178</sup> Those who *had* been 'made to feel different' generally encountered 'negative comments' from family and friends, rather than employers, lawyers or other members of the community.<sup>179</sup> This may reflect the fact that most 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.<sup>180</sup> Surprisingly, the majority (54 per cent) said that they still 'felt' stigmatised, regardless of their

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170 Perceptions of bankruptcy stigma fell consistently in all groups across the three studies with one exception. This exception was the 2006 study, in which the perception of stigma among bankrupts rose slightly (from 83 per cent to 85 per cent). This figure dropped to 77 per cent in the 2009 survey: *ibid* 9.

171 This was the case when respondents who offered 'no opinion' were excluded from the data.

172 Insolvency Service (UK), *Enterprise Act 2002: Attitudes to Bankruptcy 2009 Update*, above n 167, 7.

173 *Ibid*.

174 *Ibid* 23. Those who did not perceive a stigma attaching to bankruptcy were also asked to give reasons for this view, though the results were not reported in the same degree of detail: see *ibid*, 29–30.

175 Ryan, *Last Resort*, above n 1; Ryan, 'Stigma', above n 132.

176 Ryan, *Last Resort*, above n 1, 181.

177 *Ibid* 183.

178 *Ibid* 181.

179 *Ibid* 182, 184.

180 *Ibid* 187.

relatively positive personal experiences of bankruptcy.<sup>181</sup> These findings suggest that, at least in the 1980s, bankruptcy carried significant stigma in Australia.<sup>182</sup>

### III STIGMA AND THE OBJECTIVES OF AUSTRALIAN BANKRUPTCY LAW

In the absence of recent empirical research on bankruptcy stigma in the Australian context, it is useful to review the objectives of Australian bankruptcy law to consider whether or not they express or assume the existence of stigma. There is no single, clear exposition of the principles underpinning Australian bankruptcy law.<sup>183</sup> Still, the case law, parliamentary debates and law reform materials are relatively consistent in outlining the following objectives: enabling the fair, orderly and efficient distribution of a debtor's assets; providing debtor rehabilitation; and discouraging fraudulent behaviour by dishonest or rogue debtors.<sup>184</sup>

#### A The Fair, Orderly and Efficient Distribution of Assets

One of the most important goals of Australian bankruptcy law is to administer the affairs of bankrupts and to distribute their assets among creditors in a fair, orderly and efficient manner.<sup>185</sup> This emerges strongly from a report produced by the Law Reform Commission<sup>186</sup> in 1988, known as the 'Harmer Report'.<sup>187</sup> This highly influential<sup>188</sup> document refuted the suggestion that bankruptcy law should function 'on a more abstract level' as a 'guardian of values'.<sup>189</sup> Stating that the law's 'prime function' is 'to provide an ordered legal process', it cast bankruptcy law as having an essentially pragmatic and commercial, rather than social or moral, objective.<sup>190</sup> The report set out the principles that underpin both bankruptcy and corporate insolvency. These included the provision of a 'fair and orderly process' for dealing with insolvent individuals and companies; systems enabling both debtors and creditors to

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181 Ibid 185, 187.

182 Ryan's subsequent research includes Martin Ryan, 'Interviewing the Stigmatised: Experiences of Collecting Data from Consumer Bankrupts in Australia' in Manohar S Pawar (ed), *Data Collecting Methods and Experiences: A Guide for Social Researchers* (New Dawn Press Group, 2004) 61.

183 Symes and Duns, above n 39, 5.

184 Michael Murray and Jason Harris, *Keay's Insolvency: Personal and Corporate Law and Practice* (Lawbook, 8<sup>th</sup> ed, 2014) 33–4; Nicola Howell, 'The Fresh Start Goal of the *Bankruptcy Act*: Giving a Temporary Reprieve or Facilitating Debtor Rehabilitation?' (2014) 14(3) *QUT Law Review* 29. Murray and Harris identify a fourth purpose, namely, the protection of the community through the restrictions imposed on bankrupts' commercial activities: Murray and Harris, above n 184, 34.

185 The administration of debtors' assets is governed by Part VI of the *Bankruptcy Act*. For the provisions governing the distribution of assets to creditors, see *Bankruptcy Act* pt VI div 5.

186 The Law Reform Commission has since been renamed the Australian Law Reform Commission (ALRC).

187 Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) ('Harmer Report').

188 Symes and Duns, above n 39, 2.

189 *Harmer Report*, above n 187, 16.

190 Ibid 17.

participate with minimal delay and expense; 'impartial, efficient and expeditious' administration; a convenient means of collecting or recovering property that should be put towards repaying debts; and equal sharing between creditors of any assets thus recovered.<sup>191</sup> Taken together, these principles overwhelmingly stressed the economic goal of distributing the debtor's assets among creditors. The Harmer Report confirmed that this should be done, 'so far as it is convenient and practical', in a manner consistent with existing 'commercial and economic processes'.<sup>192</sup> The report places little emphasis on debt discharge and debtor rehabilitation, merely noting that relief from liabilities should be 'the end result' of insolvency.<sup>193</sup>

This sense of pragmatism also characterised the parliamentary debates preceding the enactment of Australia's federal bankruptcy legislation.<sup>194</sup> Introducing the first Commonwealth Act in 1924, Sir Littleton Groom presented the Act as conferring mainly administrative and procedural advantages.<sup>195</sup> Citing the many small and sometimes trivial inconsistencies between the states' existing laws, he stressed the commercial advantages to be obtained by enacting a simple, consistent national regime.<sup>196</sup> He repeatedly described the uniformity, practicality and simplicity of the new federal regime, and insisted that there was nothing 'novel' or 'experiment[al]' in the Act.<sup>197</sup> The 1966 Act was similarly modest in its aspirations. When introduced into Parliament, Billy Snedden described it as a 'revision' of the earlier regime, 'rather than ... reform in the sense of ... new and fundamental changes'.<sup>198</sup> Aiming to remedy 'defects' in the previous legislation, to simplify procedures and achieve more efficient administration of bankruptcy, the 1966 Act 'left the basic structure of the law ... undisturbed'.<sup>199</sup> While the Act included new penalties for 'dishonest debtors', these did not feature prominently in the second reading speech, and the prospective rehabilitation of unfortunate debtors did not attract any comment at all.<sup>200</sup>

Australian bankruptcy case law also lays heavy emphasis on the rateable distribution of assets to creditors and the orderly administration of the bankrupt's estate. In a frequently cited case, *Re McMaster*, Hill J stated that

[t]he modern bankruptcy law serves three purposes. The first is to ensure that the assets of the bankrupt are distributed rateably among creditors. The second, which is interrelated to the first, is to ensure that one creditor does not obtain an undue advantage over other creditors. The third is to

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191 Ibid 15–17.

192 Ibid 16–17.

193 Ibid.

194 *Bankruptcy Act 1924* (Cth); *Bankruptcy Act*.

195 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 June 1924, 1711 (Sir Littleton Groom, Attorney-General).

196 Ibid 1713.

197 Ibid 1721.

198 Commonwealth, *Parliamentary Debates*, House of Representatives, 20 May 1965, 1719 (William Snedden, Attorney-General).

199 Ibid.

200 Ibid 1713–23.

bring about the discharge of the debtor from future liability for his existing debts, so that the debtor may start afresh.<sup>201</sup>

The High Court has also stressed that the rateable distribution of assets is ‘a fundamental purpose of the bankruptcy law’.<sup>202</sup>

## B Debtor Rehabilitation

As *Re McMaster* confirms, the rehabilitation of debtors is another important objective of Australian bankruptcy law.<sup>203</sup> The *Harmer Report* stated that the ‘end result’ of bankruptcy should be ‘the effective relief or release from the financial liabilities and obligations’<sup>204</sup> and the case law clearly acknowledges that debt discharge is ‘an essential feature’ of bankruptcy law.<sup>205</sup> Debtor rehabilitation is also a persistent and increasingly prominent feature of political debates surrounding bankruptcy. The second reading speeches approach this topic in different ways, but all refer approvingly to debt discharge,<sup>206</sup> rehabilitation<sup>207</sup> and helping debtors to ‘get back on their feet’.<sup>208</sup> Over the course of the 20<sup>th</sup> century, the goal of debtor rehabilitation has become more prominent in these debates, coupled with a growing recognition that some bankruptcies are due to ill luck rather than financial mismanagement. Introducing a low cost, administrative form of early discharge in 1991, the Keating Government maintained that many bankruptcies are due to ‘misfortune rather than misdeed’.<sup>209</sup> This phrase has become a standard feature of Australian bankruptcy debates,<sup>210</sup> reflecting an increasingly pervasive view that bankrupts merit sympathy rather than condemnation. This sentiment found its clearest expression in 2009, in the context of the Global Financial Crisis, when Attorney-General Robert McClelland observed that many ‘people become bankrupt through no fault of

201 *Re McMaster; Ex parte McMaster* (1991) 33 FCR 70, 72–3. See also *Storey v Lane* (1981) 147 CLR 549; *Fraser v Commissioner of Taxation* (1996) 69 FCR 99; *Otosi v Ferella [No 2]* (2005) 225 ALR 301; *Stoker; Re Starr v Starr* [2011] FCA 746; *Pedersen v Delaveris* [2010] FCA 536.

202 *Storey v Lane* (1981) 147 CLR 549, 557 (Gibbs CJ)

203 While the *Bankruptcy Act* makes no explicit reference to providing debtors with a ‘fresh start’, Nicola Howell argues that this goal can be inferred from the sections providing for debt discharge (s 153) and protecting property acquired after discharge from distribution to creditors (s 116(1)): see Howell, above n 184, 35–6.

204 *Harmer Report*, above n 187, 16.

205 *Storey v Lane* (1981) 147 CLR 549, 556 (Gibbs CJ); Howell, above n 184, 15–16.

206 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 June 1924, 1715 (Sir Littleton Groom, Attorney-General).

207 Commonwealth, *Parliamentary Debates*, House of Representatives, 20 May 1965, 1719 (William Snedden, Attorney-General); Commonwealth, *Parliamentary Debates*, Senate, 14 November 1991, 3127 (Bob McMullan).

208 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 October 2009, 11 170 (Robert McClelland, Attorney-General).

209 Explanatory Memorandum, Bankruptcy Amendment Bill 1991, 131. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 20 May 1965, 1719 (William Snedden, Attorney-General);

210 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 September 2001, 30 879 (Robert McClelland, Attorney-General); Commonwealth, *Parliamentary Debates*, Senate, 14 November 2002, 6434 (Joe Ludwig). See also Bryce, above n 107.

their own as unforeseen circumstances hit them'.<sup>211</sup> McClelland maintained that these 'unfortunate' bankrupts should not be 'prevented from making a meaningful contribution to the economy' or be 'burdened by excessive debt'.<sup>212</sup> Even when the Howard Government abolished early discharge in 2002, it did not dispute the role of 'misfortune' in bankruptcy. Instead, it justified the change on the grounds that early discharge was 'discriminatory' in its operation, and that it was not serving its 'intended' purpose of helping the unfortunate.<sup>213</sup>

### C Discouraging Fraud and Other Offences

For most of its history, Australian bankruptcy law has laid little emphasis on the punishment of bankrupts, except in the context of those who defraud their creditors or otherwise fail to cooperate with the bankruptcy process.<sup>214</sup> The *Harmer Report* did not address fraud or other less serious bankruptcy offences in detail.<sup>215</sup> In line with its emphasis on the economic purpose of bankruptcy, it argued that the criminal law should play little role in bankruptcy law, suggesting that 'the laws covering discharge may be an alternative way of "punishing" bankrupts'.<sup>216</sup> This suggestion reflects the courts' longstanding practice of restricting the availability of discharge, in cases where the bankrupt has committed offences or has refused to cooperate with creditors or the trustee.<sup>217</sup> In considering an application for early discharge under the previous laws, Australian courts scrutinised the bankrupt's conduct prior to and during bankruptcy, in light of broader 'considerations of public interest and commercial morality'.<sup>218</sup> Bankrupts were generally denied an early discharge if they had behaved dishonestly, for example by failing to provide a full account of their assets. Even in the absence of dishonest behaviour, courts have refused to grant an early discharge on the basis that the bankrupt has been 'careless' or 'casual' with regard to debts, or has made no attempt to make any contribution to the estate during bankruptcy.<sup>219</sup> While the courts have held that 'the object of

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211 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 October 2009, 11 168 (Robert McClelland, Attorney-General).

212 Ibid.

213 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 May 2002, 2826 (Daryl Williams, Attorney-General).

214 Offences (including the concealment of property, gambling and the making of false declarations) are governed by Part XIV of the *Bankruptcy Act*.

215 Offences under the *Bankruptcy Act* include concealing or disposing of property in the 12 months prior to bankruptcy; incurring debt without any reasonable expectation of being able to repay it; making false declarations in a Statement of Affairs; failing to keep proper records; gambling; and leaving Australia with the intent to avoid creditors: see Symes and Duns, above n 39, 224–34.

216 *Harmer Report*, above n 187, 18.

217 See, eg, *Re Shepherd* (Unreported, Federal Court of Australia, Wilcox J, 13 February 1985); *Re Bontes* (Unreported, Federal Court of Australia, French J, 12 February 1987); *Re Knight; Ex parte Knight* (Unreported, Federal Court of Australia, French J, 14 August 1991).

218 *Re Knight; Ex parte Knight* (Unreported, Federal Court of Australia, French J, 14 August 1991).

219 *Re Shepherd* (Unreported, Federal Court of Australia, Wilcox J, 13 February 1985); *Re McDonald* (Unreported, Federal Court of Australia, French J, 30 June 1992).

bankruptcy is not punitive’,<sup>220</sup> the practical effect of this has been to punish bankrupts for using the bankruptcy system dishonestly or disingenuously.

This distinction between honest and dishonest bankrupts emerges more sharply in the parliamentary debates. In 1924, Sir Littleton Groom remarked that

[a]lthough the creditor has to be considered, yet the debtor, too, must be justly treated. He is not to be merely the prey of the creditors. If he has acted fraudulently, he should be punished; but when unfortunate, he should get reasonable protection.<sup>221</sup>

The 1966 Act contained new provisions ‘aimed at the punishment of dishonest debtors’.<sup>222</sup> Observing a ‘lessening of the severity with which the law ... regarded a debtor unable to pay his debts’, Billy Snedden emphasised that the sanctions for ‘dishonest debtors’ were punishments ‘not for ... indebtedness, but for the dishonesty which led to their indebtedness and for frauds perpetrated on their creditors’.<sup>223</sup> This theme became more prominent in the early 2000s, when the Howard Government moved to ‘clamp down’ on ‘unscrupulous debtors’ by abolishing early discharge and strengthening the courts’ power to annul a bankruptcy as an ‘abuse of process’.<sup>224</sup> Introducing these amendments, Daryl Williams drew a distinction between ‘those... who must become bankrupt’ and those who ‘use bankruptcy in a mischievous or improper way’.<sup>225</sup> Observing that most bankrupts have ‘low incomes’ and ‘relatively low levels of debt’, he argued that the measures would not deny ‘protection ... to debtors who genuinely need it’.<sup>226</sup> At the same time, he warned that the new provisions would target debtors who misused the system, including those who made ‘a lifestyle choice not to pay tax’ and then sought to evade their tax debts through bankruptcy.<sup>227</sup> The Labor Opposition echoed this rhetoric, even as it opposed the reforms. It criticised the Government for victimising ‘low income bankrupts ... in over their head’.<sup>228</sup> At

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220 *Re Knight; Ex parte Knight* (Unreported, Federal Court of Australia, French J, 14 August 1991).

221 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 June 1924, 1721 (Sir Littleton Groom, Attorney-General). Groom did not attach moral significance to the sanctions imposed by the new Act; rather, he stated bluntly that they sought merely to ‘secure compliance with the law and the honest administration of estates’.

222 Commonwealth, *Parliamentary Debates*, House of Representatives, 20 May 1965, 1720 (William Snedden, Attorney-General). These innovations included sanctions for people who incurred significant liabilities immediately before becoming bankrupt, in the knowledge that they had no reasonable prospects of repaying them: *Bankruptcy Act* s 265(8).

223 Commonwealth, *Parliamentary Debates*, House of Representatives, 20 May 1965, 1713 (William Snedden, Attorney-General).

224 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 June 2001, 27 509 (Daryl Williams, Attorney-General). See also Explanatory Memorandum, Bankruptcy Legislation Amendment Bill 2002 (Cth); *Bankruptcy Legislation Amendment Act 2002* (Cth), s 3 sch 1.

225 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 June 2001, 27 509 (Daryl Williams, Attorney-General).

226 *Ibid* 27 510.

227 *Ibid* 27 508–10.

228 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 May 2002, 2818 (Robert McClelland).



the same time, it offered support for measures aimed at punishing 'high profile bankrupts' who 'ror[ed] the system'.<sup>229</sup>

### D No Place For Stigma?

The case law, parliamentary debates and law reform materials are consistent in identifying three main objectives of Australian bankruptcy law – the rateable distribution of debtors' assets, the provision of a 'fresh start' to deserving debtors and the deterrence of fraud. Ostensibly, then, Australian bankruptcy law does not attach moral opprobrium to honest debtors. Rather than seeking to shame or condemn those who cannot pay their debts, the law regards honest debtors as victims of misfortune, capable of and deserving financial rehabilitation. Combining pragmatism with a measure of compassion for genuinely unfortunate debtors, the law, on its face, suggests that stigma should play little part in the bankruptcy process, at least for those who abide by its rules.

## IV THE PERSISTENCE OF STIGMA

In practice, however, Australian bankrupts are subject to a range of restrictions that mark them out as different from the general population in highly undesirable ways. Moreover, the parliamentary debates, the case law and other sources acknowledge that stigma exists and exerts a significant influence on actual and prospective bankrupts. As will be seen, this stigma applies not only to those guilty of misusing the system, but to everyone who becomes bankrupt.

### A The Practical Effects of Bankruptcy

Bankruptcy brings many changes to an individual's legal, social and economic status. Many of these changes are stigmatising in the sense described by Goffman, in that they constitute an 'undesired differentness' from the non-bankrupt population.<sup>230</sup> The most significant restrictions on bankrupt debtors naturally pertain to their assets and finances. Bankrupt debtors lose control of their property, which vests in the Official Trustee.<sup>231</sup> Though there are some exceptions (such as household items and tools of trade),<sup>232</sup> Australian law is much harsher in this respect than that of the US. There is no 'homestead exemption', meaning that debtors can and often do lose their family homes in bankruptcy, even when their original debts are relatively small.<sup>233</sup> Bankrupt debtors face many other significant legal restrictions and disabilities. They cannot travel outside

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229 Ibid 2816–17.

230 Goffman, above n 2, 15.

231 *Bankruptcy Act* s 58. The Official Trustee is a statutory role conferred on the Australian Financial Security Authority under the *Bankruptcy Act*. The Official Trustee administers bankruptcies when no private trustee is appointed: *Bankruptcy Act*, s 160.

232 *Bankruptcy Act* s 116(2).

233 Jan Pentland, *Homes at Risk: Using Bankruptcy to Collect Small Debts* (Report, Eastern Access Community Health November 2007).

Australia without the permission of their bankruptcy trustee.<sup>234</sup> They cannot serve as company directors<sup>235</sup> or members of parliament,<sup>236</sup> and may be excluded from holding various statutory offices.<sup>237</sup> With some minor exceptions, they cannot take legal action.<sup>238</sup> Bankrupts also lose the right to keep their financial affairs confidential. They must disclose the intimate details of their finances to the Official Receiver and must reveal their status as bankrupts whenever they apply for credit or seek to engage in any form of business.<sup>239</sup> They can be arrested in some circumstances, for example if a court believes they may be about to abscond, conceal property or destroy books.<sup>240</sup> They are also vulnerable to retrospective criminal sanctions for various acts and omissions, including the concealment or disposal of property, gambling, and failure to keep proper books of account – acts and omissions that only become criminal in the event of subsequent bankruptcy.<sup>241</sup> Under Australian law, retrospective criminal offences are extremely rare since they are generally thought to undermine the rule of law.<sup>242</sup> These ‘extraordinary’ sanctions are perhaps the most striking way in which the law stigmatises bankruptcy.<sup>243</sup>

## B Bankruptcy in Political Discourse

The parliamentary debates consistently acknowledge that stigma is a pervasive and inevitable aspect of bankruptcy. Discussing the Howard Government’s ‘clamp down’ in 2001, Daryl Williams suggested that this stigma was only applicable to dishonest or fraudulent bankrupts. He argued that the proposed reforms would ‘protect’ deserving bankrupts from ‘the odium and stigma caused by a few who abuse the process’.<sup>244</sup> For the most part, however, the parliamentary debates concede that stigma affects all bankrupt debtors, regardless of their circumstances. In 2009, introducing a bill that sought to raise the bankruptcy threshold from \$2000 to \$10 000, Robert McClelland stated that

234 *Bankruptcy Act* ss 77(1)(a)(ii), 272(1)(c). See also Symes and Duns, above n 39, 72.

235 *Corporations Act 2001* (Cth) ss 206B(3), (4).

236 *Commonwealth Constitution* s 44(iii); *Constitution Act 1975* (Vic) ss 44(2)(c), 55(c). See also Symes and Duns, above n 39, 73.

237 Symes and Duns, above n 39, 73.

238 *Bankruptcy Act* s 60; *ibid* 72.

239 *Bankruptcy Act* ss 77, 269; Symes and Duns, above n 39, 73.

240 *Bankruptcy Act* s 78.

241 *Bankruptcy Act* ss 263, 266, 270, 271.

242 The ALRC has observed that retrospective sanctions are ‘commonly considered inconsistent with the rule of law’: Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014) 55–60. Other retrospective offences under Australian law include certain forms of tax evasion (‘bottom of the harbour’ schemes) and war crimes: Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) 15–16 <<http://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx>>.

243 John Duns, ‘Other People’s Money: Gambling and Bankruptcy’ (2007) 31 *Melbourne University Law Review* 87, 94.

244 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 June 2001, 27 508 (Daryl Williams, Attorney-General).

bankruptcy should be a 'last resort for creditors and debtors alike'.<sup>245</sup> Arguing that debtors should not be 'prevented from making a meaningful contribution to the economy because of the stigma of bankruptcy', he effectively conceded that bankruptcy stigma has a lasting effect on employment and business prospects.<sup>246</sup> More recently, in 2014, Senator Penny Wright observed that '[t]here is still a strong sense of shame and stigma in Australian society for people who have had to publicly acknowledge that their financial circumstances are out of their control'.<sup>247</sup> Senator Lisa Singh concurred that bankruptcy 'still carries with it a very serious social stigma' and that its 'awful effect' meant that 'it is not a course taken lightly at all'.<sup>248</sup> While all expressed sympathy for those who become bankrupt due to misfortune, they did not suggest that such people were exempt from bankruptcy stigma. On the contrary, they suggested that stigma attaches not simply to dishonesty but to the mere fact of losing 'control' of one's finances.<sup>249</sup>

### C Bankruptcy in the Case Law

The case law attests to the continuing existence of bankruptcy stigma in Australia. Bankrupt debtors often cite the effects of stigma on their employment prospects, social standing and general sense of wellbeing.<sup>250</sup> Before the Howard Government abolished early discharge in 2002,<sup>251</sup> the question of stigma arose frequently in the context of applications for early discharge. In *Re Maher*, the applicants contended that they 'suffer[ed] from the adverse effects of the social stigma of bankruptcy', which they viewed as 'hindering [their] rehabilitation'.<sup>252</sup> In *Re Bontes*, the applicant expressed a desire to 'lead a normal life devoid from the stigma of being an undischarged bankrupt'.<sup>253</sup> In *Re Reilly*, the applicant sought early discharge on the grounds that his bankrupt status would affect his career if it became known to his employer.<sup>254</sup> While bankruptcy did not present a legal obstacle to Reilly's employment as an engineer, the Court appeared to accept that the mere fact of bankruptcy would 'diminis[h] his standing in the eyes of his employer, reducing his 'prospects of advancement'.<sup>255</sup> Reilly also contended that his bankruptcy prevented him from marrying. He pointed out that his regular payments to his trustee reduced his capacity to purchase a family home, and the court also noted Reilly's 'personal sense of shame' regarding his

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245 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 October 2009, 11 169 (Robert McClelland, Attorney-General).

246 Ibid 11 168 (Robert McClelland, Attorney-General). The threshold was ultimately lifted to \$5000: *Bankruptcy Act* ss 41, 44, as amended by *Bankruptcy Legislation Amendment Act 2010* (Cth) sch 4 pt 1.

247 Commonwealth, *Parliamentary Debates*, Senate, 23 June 2014, 3604 (Penny Wright).

248 Ibid 3606 (Lisa Singh).

249 Commonwealth, *Parliamentary Debates*, Senate, 23 June 2014, 3604 (Penny Wright).

250 See, eg, *Re Reilly; Ex parte the Debtor* (1979) 23 ALR 357; *Re Bontes; Ex parte Bontes* [1987] FCA 33; *Re Brown-Neaves; Ex parte Brown-Neaves* [1990] FCA 238.

251 *Bankruptcy Legislation Amendment Act 2002* (Cth) s 3 sch 1 (effective 5 May 2003).

252 *Re Maher* (1985) 7 FCR 240, 249.

253 *Re Bontes; Ex parte Bontes* [1987] FCA 33, [30].

254 *Re Reilly; Ex parte the Debtor* (1979) 23 ALR 357, 361 (Lockhart J).

255 Ibid.

bankruptcy.<sup>256</sup> Justice Lockhart surmised that this sense of shame contributed to ‘the uncertainty ... surround[ing] any prospective marriage’.<sup>257</sup> Similarly, in *Re Masotto*, the applicant sought early discharge in order to ‘rid herself of a stigma arising out of her entanglement with her former husband’s financial dealings’.<sup>258</sup> Like Reilly, Mrs Masotto stated her intention to remarry and expressed apprehension that her status as an undischarged bankrupt would affect her future husband’s ‘standing in the local business community’, his ‘credit worthiness’, and his ‘relations with his employers and major retailers’.<sup>259</sup>

While some bankrupts might conceivably exaggerate their sense of shame and stigmatisation, in order to strengthen their claim to a discharge, the courts have frequently endorsed their sentiments, confirming that their sense of shame is appropriate and even deserved.<sup>260</sup> In *Re Maher*, Woodward J stated that a ‘consciousness’ of stigma did not in itself constitute grounds for an early discharge.<sup>261</sup> Nevertheless, he acknowledged the existence of stigma ‘attaching to all bankrupts’, irrespective of their circumstances.<sup>262</sup> Citing these comments in *Re Tardyvas*, Toohey J confirmed that stigma did not in itself justify an early discharge, but conceded that it was a ‘relevant consideration’.<sup>263</sup> While some recent judgments have queried the existence of stigma,<sup>264</sup> many more suggest that it persists. In a 2006 case, *Hill v James [No 2]*, the Court described the debtor as ‘one of those people who, perhaps not unnaturally, would do anything to avoid the stigma of a sequestration order’.<sup>265</sup> In *Deputy Commissioner of Taxation v Criniti*, the Court endorsed the debtor’s contention that ‘there was a greater stigma attaching to having his affairs administered in insolvency through bankruptcy rather than under a debt agreement’.<sup>266</sup> In 2013, Logan J described discharge as allowing debtors ‘to get on with business and personal life’, with the proviso that they remained ‘subject, enduringly ... to the stigma, and it should be regarded as that, of having been a bankrupt’.<sup>267</sup>

In addition to these explicit statements, the courts have implicitly reinforced bankruptcy stigma through their public condemnation of dishonest or

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256 Ibid 366 (Lockhart J).

257 Ibid 366–7 (Lockhart J).

258 *Re Masotto* [1987] FCA 378, [26] (French J).

259 Ibid.

260 See, eg, *Re Maher* (1985) 7 FCR 240, 249 (Woodward J); *Re Tarvydas; Ex parte Tarvydas* [1985] FCA 436; *Re Sambo; Ex parte Sambo* [1987] FCA 204.

261 *Re Maher* (1985) 7 FCR 240, 249 (Woodward J).

262 Ibid.

263 *Re Tarvydas; Ex parte Tarvydas* [1985] FCA 436, cited in *Re Sambo; Ex parte Sambo* [1987] FCA 204, [59] (French J).

264 In *Endrez v Australian Securities and Investments Commission* [2014] FCA 1139, [20], Justice Beach held that the appellants’ argument ‘concerning the perception or reality of the “stigma of bankruptcy” in the absence of the stays is not convincing. The appellants are now bankrupt. The sequestration orders themselves cannot be stayed or suspended. Accordingly, if there is a stigma, that cannot be altered or significantly ameliorated by any stay sought’ (emphasis added).

265 [2006] FMCA 484, [21] (Raphael FM).

266 [2009] FMCA 417, [29] (Smith FM).

267 *Groves v Robinson* [2013] FCA 490, [11] (emphasis added).

unscrupulous bankrupts.<sup>268</sup> When considering applications for early discharge,<sup>269</sup> the courts were required to consider questions of 'commercial morality' and the public interest, including whether or not 'the conduct ... or the character of the bankrupt' represented a 'dange[r]' to the public.<sup>270</sup> Early discharge cases often featured lengthy accounts of the applicants' 'extravagant lifestyle', 'improper' business dealings<sup>271</sup> and 'complete absence of contrition for the grave losses' they had caused to others.<sup>272</sup> Considerations of 'commercial morality' also required the courts to judge the conduct of bankrupts against a generalised 'standard of honest dealing'.<sup>273</sup> In applying this standard, courts denied early discharge on the grounds that applicants incurred debt without revealing a previous bankruptcy,<sup>274</sup> that they made no attempt to repay their debts during bankruptcy, despite having the capacity to work<sup>275</sup> or receiving 'significant financial benefits' from family members,<sup>276</sup> for demonstrating pronounced animosity towards their creditors,<sup>277</sup> expressing a determination *not* to pay their debts, and generally failing to recognise the 'inappropriateness' of their behaviour.<sup>278</sup> Some of these cases have been memorable for their vivid evocation of the bankrupt as an unrepentant charlatan. In *Re Shepherd*, the applicant's 'deceptive' conduct included campaigning for the Gold Coast mayoralty in a vehicle purporting to be a gold-plated Rolls Royce. Justice Wilcox noted disdainfully that the car was neither a Rolls Royce, nor a 'genuine vintage vehicle', and that it had been merely borrowed in order to lend credence to the applicant's 'flamboyant' but misleading 'multi-millionaire image'.<sup>279</sup>

#### D Bankruptcy in the Media

By reporting the sensational details of high-profile bankruptcy cases, the media have also played a crucial role in the persistence of negative stereotypes about bankruptcy. As Nigel Walker points out in his study of stigma and the criminal law, only the more 'censorious' judicial pronouncements are likely to be published in the media.<sup>280</sup> The Australian experience bears this out. Newspaper coverage of bankruptcy cases reveals a consistent narrative of hubris, extravagance, eccentricity and flagrant dishonesty. The bankruptcies of

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268 Nigel Walker notes the role of 'judicial homilies' in producing stigma: Walker, above n 27, 144.

269 These applications were made under s 150 of the *Bankruptcy Act* (now repealed).

270 *Re Zion; Ex parte the Bankrupt* [1986] FCA 325, [6] (Smithers J).

271 *Ibid* [8] (Smithers J).

272 *Re Kersten* (1985) 10 FCR 47, 56 (Sheppard J).

273 *Re Trautwein* (1950) 15 ABC 119, 126 (Clyne J), quoted in *Re Shepherd; Ex parte Shepherd* (1985) 4 FCR 258, 266 (Wilcox J).

274 *Re Shepherd; Ex parte Shepherd* (1985) 4 FCR 258, 267 (Wilcox J). In *Re Shepherd*, the applicant was an undischarged bankrupt when the debt was incurred.

275 *Ibid* 266 (Wilcox J).

276 *Re McDonald; Ex parte McDonald* [1992] FCA 309, [23] (French J).

277 *Re Shepherd; Ex parte Shepherd* (1985) 4 FCR 258, 266 (Wilcox J).

278 *Ibid* 268 (Wilcox J).

279 *Ibid* 259, 262 (Wilcox J).

280 Walker, above n 27, 145.

millionaire businessmen Alan Bond and Christopher Skase dominated headlines in the 1990s, with commentators stressing the luxurious lifestyles both men continued to enjoy while claiming to be impecunious.<sup>281</sup> Media reports also detailed the elaborate means by which Bond and Skase evaded their creditors, including illicit funds transfers, feigned illnesses, and, in the latter case, permanent exile on the island of Majorca. Paul Barry's 2000 book on Bond captures the indignant tone of this reportage with its epigraph, taken from John Webster's play, *The White Devil*: 'A rape, a rape, You have ravished justice'.<sup>282</sup> A similar tone pervades more recent coverage of 'high-flying' Sydney barristers who have used bankruptcy to evade multi-million dollar tax debts. Journalists' accounts of these bankruptcies and related disciplinary proceedings<sup>283</sup> have in turn been cited in the Commonwealth Parliament, as evidence that bankruptcy laws were being 'abused'.<sup>284</sup> Occasionally, journalists have adopted a more lighthearted tone, casting bankrupts as deserving of mockery as well as condemnation. In making a sequestration order against Lord Andrew Battenberg, otherwise known as 'the Earl of Leitrim', Stone J found that the self-styled aristocrat was 'evasive', 'unreliable' and 'prepared to say whatever he th[ought] best suit[ed] his interests'.<sup>285</sup> Her remarks were quoted in a newspaper article entitled 'Batty Aussie Lord Short a Few Quid', in a piece that also detailed the 'bodgie peer's' other 'colourful escapades', which included 'try[ing] to pass himself off as Prince Phillip's illegitimate son'.<sup>286</sup> Media reports play an important role in making the bankruptcy system transparent and, in many cases, raise issues of significant public interest.<sup>287</sup> At the same time, by reporting selectively on the most egregious and most entertaining cases, they reinforce

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281 See, eg, Lillian Frank and Craig Binnie, 'After 17 Years in Exile, Pixie Skase is Returning to Melbourne', *Herald Sun* (online), 19 December 2008 <<http://www.heraldsun.com.au/news/victoria/pixie-skase-comes-home/story-e6frf7kx-1111118360487>>; 'Alan Bond Master Manipulator', *Sunday Mail* (online), 11 December 2010 <<http://www.adelaidenow.com.au/ipad/alan-bond-master-manipulator/story-fn6t2xlc-1225969494154>>. See also Prior, above n 136; Van der Plaats, above n 136.

282 Barry, *Going for Broke*, above n 45, ix.

283 See eg, Paul Barry, 'Rich Lawyers Dodging Income Tax', *The Sydney Morning Herald* (Sydney), 26 February 200, 3; 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>>.

284 See Commonwealth, *Parliamentary Debates*, Senate, 14 November 2002, 6432 (Joe Ludwig). See also Commonwealth, *Parliamentary Debates*, Senate, 9 February 2005, 17–18 (Andrew Murray).

285 *Restom v Battenberg* [2007] FCA 46, [14], [39].

286 Kate McClymont, 'Batty Aussie Lord Short a Few Quid', *The Sydney Morning Herald* (online), 21 February 2009 <<http://www.smh.com.au/news/entertainment/people/battie-aussie-lord-short-a-few-quid/2009/02/20/1234633057593.html?page=fullpage#contentSwap1>>.

287 Paul Barry's article on tax-evading barristers prompted specific amendments to the *Bankruptcy Act*, making it possible for the courts to 'annul' a bankruptcy if satisfied that its purpose was to avoid a particular creditor, for example, the Australian Taxation Office: Commonwealth, *Parliamentary Debates*, House of Representatives, 30 May 2002, 2825 (Daryl Williams, Attorney-General).

negative perceptions of bankrupts, and in so doing, perpetuate bankruptcy stigma.<sup>288</sup>

## V BANKRUPTCY STIGMA IN THE TWENTY-FIRST CENTURY

It is arguable that stigma, in the form of shame and public censure, is appropriate in cases in which individuals engage in highly reckless business ventures, declare bankruptcy to evade tax debts, or pursue an extravagant lifestyle while evading their creditors. The stigmatisation of bankruptcy becomes problematic, however, when it applies to all bankrupts, including those whose bankruptcies are the result of misfortune. As noted above, the UK has recently sought to draw formal distinctions between honest and culpable bankrupts, in order to reduce the stigma attaching to bankruptcy and to encourage entrepreneurial behaviour. Australian politicians have often stated a desire to draw similar distinctions, to 'protect' honest bankrupts from undeserved stigma,<sup>289</sup> but to date this has not prompted any comparable changes to the law. This part briefly outlines the impact of the UK's new regime, and discusses the problems inherent in any attempt to reduce or refocus bankruptcy stigma by way of legislation. It considers some possible reasons for the persistence of bankruptcy stigma in contemporary Australia, and calls for a more expansive public discussion about the causes of high household debt.

### A Legislating Stigma: The Case of the Enterprise Act

As noted above, the UK government introduced the *Enterprise Act* in an explicit attempt to reduce the stigma attaching to bankruptcy. It did so in the belief that bankruptcy stigma was inhibiting entrepreneurialism in the UK, and that by making bankruptcy less onerous, it could reduce stigma and thus promote economic growth.<sup>290</sup> So far, however, the reforms have had little demonstrable success in reducing bankruptcy stigma or, more broadly, in promoting an American-style entrepreneurial culture in the UK. Even before the reforms were enacted, sceptics claimed that they would do little to deter 'culpable' bankrupts, instead making bankruptcy more attractive to 'shopaholics' and irresponsible youth.<sup>291</sup> Some predicted that the new, much shorter discharge period would

288 For a recent example in the vein of earlier commentary on Skase and Bond, see Chris Vedelago and Ben Butler, "'Bankrupt' Geoffrey Edelsten blows \$48,000 a Month on Luxuries", *The Sunday Age* (online), 2 August 2014 <<http://www.theage.com.au/victoria/bankrupt-geoffrey-edelsten-blows-48000-a-month-on-luxuries-20140726-zwbx0.html>>. For analogous discussions of corporate insolvencies involving prominent, wealthy individuals, see Paul Barry, *Rich Kids: How the Murdochs and Packers Lost \$950 Million in One.Tel* (Bantam Books, 2003); Mark Westfield, *HIH: The Inside Story of Australia's Biggest Corporate Collapse* (Wiley, 2003).

289 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 June 2001, 27 510 (Daryl Williams, Attorney-General).

290 *Enterprise Act*. See also *A Fresh Start*, above n 120; Part II(C).

291 Stuart McNeill, 'In Debt? Try Bankruptcy Lite', *The Times* (London), 30 March 2004, 9, cited in Duns, 'Other People's Money', above n 243, 96.

succeed in making bankruptcy more ‘socially acceptable’.<sup>292</sup> Yet they pointed out that the law’s ultimate economic goals would depend on lenders adopting a more generous approach to former bankrupts.<sup>293</sup> Pessimists surmised that under the new, more liberal bankruptcy regime, lenders might in fact become more ‘cautious’ in their lending practices, an outcome that would ‘inhibit rather than develop the economy’.<sup>294</sup> When the Insolvency Service conducted a review of the provisions in 2007, these predictions proved accurate.<sup>295</sup> The review concluded that the *Enterprise Act* had succeeded in removing several of the direct legal restrictions associated with bankruptcy. Yet it found that former bankrupts still faced significant challenges in accessing credit, as lenders had not changed their policies in response to the new laws. Moreover, the report found that the ‘stigma attached to bankruptcy remain[ed] the same’.<sup>296</sup> The Insolvency Service concluded that this was because ‘the stigma associated with bankruptcy arises from factors ... which were unaffected by the *Enterprise Act*’.<sup>297</sup> Despite these discouraging findings, the report maintained that ‘changes in bankruptcy law may impact on the social “meaning” of business failure,’ such that ‘over time, bankruptcy is “de-stigmatised”’ and ‘consequently, fear of failure is reduced’.<sup>298</sup>

While the Insolvency Service is optimistic that the reforms will eventually reduce bankruptcy stigma, some academic commentators remain deeply sceptical. Katharina Möser argues that the *Enterprise Act* reforms are bound to fail, singling out the BRO regime for particular criticism.<sup>299</sup> As noted above, the *Enterprise Act* dispensed with many restrictions for the majority of bankrupts, limiting them to those bankrupts found to be ‘culpable’ and imposing them in the form of a BRO. Möser points out that although BROs are intended to distinguish between ‘honest’ and ‘culpable’ debtors, the legislation does not define these terms.<sup>300</sup> Under the amended *Insolvency Act*, a court can impose a BRO ‘if it thinks it appropriate having regard to the conduct of the bankrupt (whether before or after the making of a bankruptcy order)’.<sup>301</sup> Yet the legislation makes no specific reference to misconduct, culpability or dishonesty, giving the courts almost no guidance as to when such an order will be ‘appropriate’. Consequently, Möser writes, ‘the outcome ... is highly dependent on individual circumstances and based on a general impression of the defendant’s character, rather than on clearly identifiable legal criteria’.<sup>302</sup> This in turn means that the new system lacks

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292 Lisa Linklater, ‘The *Enterprise Act*: New Economic Dawn or Disaster?’ (2004) 25 *The Company Lawyer* 33, 33.

293 Walters, above n 118, 99–100.

294 Linklater, above n 292, 33. See also Walters, above n 118, 100.

295 Insolvency Service (UK), *Enterprise Act 2002 – The Personal Insolvency Provisions: Final Evaluation Report* (Report, November 2007) <<http://webarchive.nationalarchives.gov.uk/+http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/legislation/evaluation/finalreport/report.pdf>>.

296 *Ibid* 7.

297 *Ibid* 15, 37.

298 *Ibid* 43.

299 Möser, above n 124.

300 *Ibid* 697.

301 *Insolvency Act 1986* (UK) c 45, sch 4A item 2(1).

302 Möser, above n 124, 680, 698.



predictability and transparency, and cannot offer lenders a reliable guide to the moral character of an individual credit seeker. For this reason, Möser argues, the presence or absence of a BRO will have little impact on a lender's willingness to lend to a former bankrupt, undermining a central objective of the government's reforms.

For Möser, the problems besetting the *Enterprise Act* are incapable of resolution. This is because, in her view, they rest on a theoretical distinction between 'honest' and 'culpable' bankrupts that cannot be sustained in practice. As discussed above, the short-lived Victorian system of 'first', 'second' and 'third class' certificates failed because, as one critic noted, it was difficult to tell 'where enterprise end[ed] and reckless trading beg[an]'.<sup>303</sup> Like the Victorian certificate system, the *Enterprise Act* asks courts to distinguish between cases of recklessness and mere misfortune when, in reality, these distinctions may be almost impossible to draw. As Barbara Weiss writes of the Victorian system, faults such as 'lack of prudence ... only became offences if they led to failures and could thus be judged only in the result'.<sup>304</sup> Similarly, under the *Enterprise Act*, 'the types of conduct which may lead to a BRO [are] of almost infinite variety' and require the courts to adjudicate on highly ambiguous personal and domestic situations in which social, psychological and economic contingencies intersect.<sup>305</sup> In one case, the court was asked to impose a BRO on a Gulf War veteran who claimed to have destroyed a rented grand piano 'in a fit of rage'.<sup>306</sup> The debtor claimed that all remnants of the piano had been thrown away, and although 'there were reasons to doubt' this contention, the court had no evidence of deliberate dishonesty and thus refused to grant a BRO.<sup>307</sup> In another case, the Court was asked to decide whether or not an aspiring actor had any 'reasonable prospect' of repaying his debts.<sup>308</sup> While the bankrupt had lived in 'precarious' financial circumstances at various points in his career, the Court could find no evidence that he had no 'reasonable prospect' of repaying his debts at the time he incurred them, and once again declined to grant a BRO.<sup>309</sup> For Möser, these 'uncomfortable questions of proof' illustrate the difficulty of defining culpable conduct, in relation to personal finances.<sup>310</sup> If defining 'prudence' poses a challenge in commercial bankruptcy proceedings, she concludes, it is all the more difficult in the 'purely private context' these cases represent.<sup>311</sup>

The early history of the *Enterprise Act* suggests that any attempt to address bankruptcy stigma by way of legislation will encounter significant practical challenges. This is not only due to the difficulty of defining 'honest' and 'culpable' conduct in the context of personal bankruptcies. It is also because, as

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303 Weiss, above n 55, 44.

304 Ibid 44–5.

305 Möser, above n 124, 698.

306 *Official Receiver v Doganci* [2007] BPIR 87; Möser, above n 124, 698–9.

307 Ibid.

308 *Official Receiver v Southey* [2009] BPIR 89; Möser, above n 124, 698.

309 Ibid.

310 Möser, above n 124, 699.

311 Ibid.

several critics note,<sup>312</sup> the credit markets cannot be relied upon to adopt these standards as a guide to lending practices. Without this, it is unlikely that changes to the law will result in any meaningful changes to public perceptions of bankruptcy. Möser points out that the new legal focus on ‘culpability’ is ‘inherently unattractive to creditors’ since lending is ‘not a moral, but an economic decision’.<sup>313</sup> Lenders are ‘concerned that a debtor might not fulfil his obligations, regardless of whether this is due to culpability or not’, Möser observes dryly.<sup>314</sup> If the government’s ultimate aim is to promote ‘business start-ups’, Möser argues, it should implement policies that will appeal to lenders, influence lending practices and thus provide bankrupt entrepreneurs with greater access to capital.<sup>315</sup> Similarly, Adrian Walters maintains that public attitudes will only change if lenders decide to modify their lending policies. There is, however, ‘no guarantee’ that lenders will offer more favourable terms to bankrupts in response to the new regime.<sup>316</sup> Both Möser and Walters conclude that questions of moral culpability simply do not resonate with the practical, commercial objectives of the banking world. In this sense, they echo the Victorian commentators who claimed that bankruptcy could not fulfil its practical, commercial objectives effectively while also serving as an agent of moral reform.<sup>317</sup>

## B Bankruptcy Stigma and the Pervasiveness of Debt

The UK experience suggests that amending legislation will, on its own, do little to reduce the stigma associated with bankruptcy. Assuming that such a change is desirable, at least in relation to ‘honest’ bankrupts, it may depend on shifting public attention from the personal morality of bankrupts to the social and economic forces that encourage heavy indebtedness. As discussed above,<sup>318</sup> credit has become a pervasive aspect of everyday life in many contemporary societies. Debt is no longer associated with poverty or reckless extravagance, but instead has come to play a central role in promoting economic growth.<sup>319</sup> While access to credit has enabled an increase in living standards for many individuals, it has also paradoxically ‘inflated the cost of middle class life’, particularly the cost of housing.<sup>320</sup> This in turn has led to even greater reliance on credit and higher debt-to-income ratios,<sup>321</sup> making ‘middle class’ households far more likely to

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312 See, eg, Walters, above n 118, 99–100; Möser, above n 124, 697.

313 Möser, above n 124, 697.

314 Ibid.

315 Ibid 700–1. See also Walters, above n 118, 99–100.

316 ‘Put crudely’, he writes, ‘there is nothing to stop the markets rating bankrupts as “bad” and bankrupts who are the subject of BROs ... as ... “worse”’: Walters, above n 118, 100.

317 Weiss, above n 55, 45.

318 See above Part II(C).

319 Burton, above n 95; Gelpi and Julien-Labruyère, above n 95; Van Der Eng, above n 95.

320 Elizabeth Warren and Amelia Warren Tyagi, *The Two-Income Trap: Why Middle-Class Parents Are Going Broke* (Basic Books, 2003) 130.

321 Sullivan, Warren and Westbrook, ‘Less Stigma’, above n 102, 228–33.

experience bankruptcy than they were a generation ago.<sup>322</sup> The social implications of this change are profound, as Elizabeth Warren and Amelia Tyagi point out.<sup>323</sup> They observe that, allowing for inflation, the average US household assumes much greater financial risk than it did a generation ago.<sup>324</sup> In the context of rising house prices, less job security, high child care costs and growing reliance on the working mother's wage to meet fixed expenses, this average household now has less discretionary income than its equivalent in the 1970s. This places it at much greater risk in the event of a setback such as illness or unemployment and, by extension, more likely to resort to bankruptcy.<sup>325</sup> While the analysis offered by Warren and Tyagi is, in some respects, specific to the US,<sup>326</sup> it is also highly pertinent to Australia, where household debt is exceptionally high by global standards.<sup>327</sup> Like Warren and Tyagi, Australian scholars have identified a marked increase in bankruptcy rates among 'middle class' consumers, including those in 'prestig[ious] occupational groups' with relatively high incomes.<sup>328</sup> This suggests that bankruptcy rates are not solely a function of personal 'over-consumption' or irresponsibility.<sup>329</sup> Rather, it suggests that bankruptcy rates act as a 'barometer of social change',<sup>330</sup> reflecting, among other things, rises in the cost of living and the near universal use of consumer credit.<sup>331</sup>

322 See Teresa A Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, *The Fragile Middle Class: Americans in Debt* (Yale University Press, 2000); Warren and Tyagi, above n 320; Ian Ramsay and Cameron Sim, 'Personal Insolvency in Australia: An Increasingly Middle Class Phenomenon' (2010) 38 *Federal Law Review* 283. See also Elizabeth Warren, 'Financial Collapse and Class Status: Who Goes Bankrupt?' (2003) 41 *Osgoode Hall Law Journal* 115.

323 Warren and Tyagi, above n 320, 8.

324 Ibid.

325 Ibid 50–2; see also at 15–54. Warren and Tyagi consider that the problem is most acute for families with children, with single mothers facing especially high chances of bankruptcy. They write that although 'women are advancing on multiple fronts – economic, political, educational, legal – the number of single mothers going broke has increased by more than 600 per cent, and the gap between single mothers and everyone else continues to widen. If current trends persist, *more than one of every six single mothers will go bankrupt by the end of the decade*': at 105 (emphasis in original). See also Elizabeth Warren, 'The Growing Threat to Middle Class Families' (2004) 69 *Brooklyn Law Review* 401; Elizabeth Warren, 'Families Alone: The Changing Economics of Rearing Children' (2005) 58 *Oklahoma Law Review* 551. More recently, Warren and her colleagues have pointed to the increasing financial pressure on Americans aged over 55, as reflected in bankruptcy rates: Deborah Thorne, Elizabeth Warren and Teresa A Sullivan, 'The Increasing Vulnerability of Older Americans: Evidence From the Bankruptcy Court' (2009) 3 *Harvard Law and Policy Review* 87, 87.

326 One example is their discussion of medical costs and the high out-of-pocket expenses sustained by those who do not have adequate health insurance: Warren and Tyagi, above n 320, 84.

327 David Uren, 'Historic Debt Level Sparks Fears of What May Happen in New GFC', *The Australian* (online), 16 March 2015 <<http://www.theaustralian.com.au/business/historic-debt-level-sparks-fears-of-what-may-happen-in-new-gfc/story-e6frg8zx-1227263826846>>; see also Kathryn Diss, 'Australian Household Debt Has Tripled in 25 Years', *ABC News* (online), 18 June 2015 <<http://www.abc.net.au/news/2015-06-17/australian-household-debt-triples/6551352>>.

328 Ramsay and Sim, 'Trends', above n 132, 100; Ramsay and Sim, 'Middle Class', above n 322, 293–8.

329 Warren and Tyagi, above n 320, 15. See also Elizabeth Warren, 'The Over-Consumption Myth and Other Tales of Economics, Law, and Morality' (2004) 82 *Washington University Law Quarterly* 1485.

330 Sullivan, Warren and Westbrook, *Fragile*, above n 322, 14.

331 See Paul Ali, Cosima McRae and Ian Ramsay, 'Consumer Credit Reform and Behavioural Economics: Regulating Australia's Credit Card Industry' (2012) 40 *Australian Business Law Review* 126.

Simply drawing attention to these historical trends may not necessarily reduce bankruptcy stigma. For proponents of the ‘declining stigma hypothesis’,<sup>332</sup> outlined above,<sup>333</sup> the wider use of credit has led to a gradual softening of attitudes towards bankruptcy. Efrat typifies this approach in holding that ‘society [has become] more sympathetic towards and understanding of the financially troubled individual who incur[s] debt for consumption or other legitimate purposes’.<sup>334</sup> Yet an alternative, equally plausible hypothesis is that bankruptcy stigma might become *more* entrenched as debt becomes increasingly central to middle class life.<sup>335</sup> Warren and Tyagi adopt this latter view, suggesting that bankruptcy stigma serves to alleviate widespread anxiety concerning high levels of household debt.<sup>336</sup> In a chapter entitled ‘The Myth of the Immoral Debtor’, they argue that the stigma, or ‘myth’, surrounding bankruptcy serves to deflect attention from the societal and systemic causes of debt. At the same time, it ‘nourish[es] the unspoken idea that families who have lost their financial footing are a tainted group, some “other” who are different from the rest of us’.<sup>337</sup> In this sense, rather perversely, the ‘Myth of the Immoral Debtor’ may have a salutary effect on the average consumer who considers himself or herself financially secure. By associating bankruptcy with moral failure, the myth creates a ‘comforting illusion’ that heavy debt is not, in itself, a source of risk.<sup>338</sup>

Though Warren and Tyagi do not cite Goffman’s work, their argument is entirely consistent with his classic account of stigma. In a society in which the ‘normal’ citizen is imagined as a responsible, rational economic actor, the figure of the profligate, dissolute bankrupt may be regarded as a kind of doppelganger or dark double – the figure one ‘is normal *against*’.<sup>339</sup> Just as every ‘normal’ person secretly fears being found ‘unworthy’ in Goffman’s account, so the non-bankrupt perceives that he or she could fall victim to economic misfortune – a perception Warren and Tyagi describe as ‘that frightening there-but-for-the-grace-of-God-go-I realization’.<sup>340</sup> By imputing blame to individual bankrupts, the ‘normal’ represses this knowledge, insisting that financial failure could only

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332 Sullivan, Warren and Westbrook, ‘Less Stigma’, above n 102, 233.

333 See above Part II(C).

334 Efrat, ‘Shifting Norms’, above n 16, 495.

335 Warren and Tyagi, above n 320, 88–9. See also Sullivan, Warren and Westbrook, ‘Less Stigma’, above n 102.

336 Warren and Tyagi, above n 320, 88–9.

337 Ibid 89.

338 Ibid. The belief that one’s own debts will *not* lead to financial distress can be regarded as an instance of ‘optimism bias’, in economic parlance. In the context of consumer credit, Anthony Duggan writes that ‘[o]ptimism bias means that at the time of acquiring [a] credit card, consumers may underestimate the risk of future hardships that may necessitate borrowing – for example, accident, illness, or unemployment’: Anthony Duggan, ‘Consumer Credit Redux’ (2010) 60 *University of Toronto Law Journal* 687, 697. The effect of this bias may explain why the notion of individual responsibility for financial failure causes individuals to feel less anxious about their own debts – even if it may be more rational to shift responsibility for financial hardship to creditors’ lending practices, higher living costs and other external factors. See also Ali, McRae and Ramsay, above n 331.

339 Goffman, above n 2, 16 (emphasis added).

340 Warren and Tyagi, above n 320, 89.

result from personal weakness. In this sense, it may be argued that bankruptcy stigma, or the 'Myth of the Immoral Debtor', plays a role in legitimising economic circumstances that push middle class consumers into ever-increasing levels of debt. By attributing blame to individual debtors, it normalises the institutional lending practices,<sup>341</sup> government policies<sup>342</sup> and other socio-economic factors<sup>343</sup> that contribute to high rates of household indebtedness. It suggests, as Warren and Tyagi write, that 'the rest of us are safely distanced from financial collapse', even as it closes off debate about the structural and systemic causes of indebtedness.<sup>344</sup> This invites a somewhat fatalistic conclusion that bankruptcy stigma is permanent and unavoidable. If Goffman is right in suggesting that stigma is a fundamental aspect of social organisation, there may be little scope to reduce bankruptcy stigma in contemporary Australia. In the context of pervasive household indebtedness, bankruptcy stigma may be seen as an understandable, if irrational, collective response to an intractable social problem.

There is, however, another conclusion to be drawn from Warren and Tyagi's account. If, as they suggest, bankruptcy stigma reflects widespread social anxiety regarding high levels of household debt,<sup>345</sup> it might be possible to counter such stigma either by reducing this indebtedness, challenging cultural stereotypes attaching to debt or, more ambitiously, by promoting public debate about the social and economic factors that make debt increasingly burdensome on ordinary households. Warren and Tyagi advocate the first strategy, recommending various government policies to reduce the financial pressure on middle class families,<sup>346</sup> and urging readers to reduce their own 'fixed expenses' by making significant changes to their lifestyles.<sup>347</sup> They also implicitly pursue the second strategy, by providing numerous real-life examples of ordinary, 'respectable' people who became bankrupt after some unpredictable event caused their tenuous finances to collapse.<sup>348</sup> With these case studies, they seek to recast bankruptcy as a rational,

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341 For a discussion of deregulation of the US consumer credit markets, see *ibid* 123–62; see especially 126–32. In Australia, the provision of consumer credit is more tightly regulated, though this has not prevented a rapid increase in levels of credit card debt over the last two decades: see Ali, McRae and Ramsay, above n 331.

342 In Australia, tax concessions for real estate investors are widely regarded as a cause of rising property prices: see, eg, John Flaherty and Jason Choo, 'Why We Should Topple the Sacred Cow of Negative Gearing', *The Conversation* (online) 3 June 2011 <<https://theconversation.com/why-we-should-topple-the-sacred-cow-of-negative-gearing-1565>>; Greg Jericho, 'Negative Gearing: A Legal Tax Rort for Rich Investors that Reduces Housing Affordability', *The Guardian* (online), 19 March 2015 <<http://www.theguardian.com/business/grogonomics/2015/mar/19/negative-gearing-a-legal-tax-rort-for-rich-investors-that-reduces-housing-affordability>>.

343 Warren and Tyagi cite the 'stagnat[ion]' in Americans' real wages since the 1970s as a driver of household debt: Warren and Tyagi, above n 320, 201.

344 *Ibid* 89.

345 *Ibid*.

346 These include measures to restrict the interest charged on consumer loans: *ibid* 146–7; a freeze on university tuition fees: at 44–6; and the creation of publicly funded preschool programmes: at 39.

347 Warren and Tyagi advise their readers to delay the purchase of a new car, consider placing their children in 'a less expensive preschool', and even contemplate moving to a 'cheaper house' to reduce their household debt: *ibid* 164–5.

348 *Ibid* 1.

constructive way out of financial crises, rather than a morally dubious means of evading obligations. They also pursue the third approach described above, presenting debt and bankruptcy as social and collective, rather than individual, problems. In this sense, they contribute to a growing field of literature that seeks to move beyond strictly legal or economic formulations of debt, to consider its social, historical, moral and psychological dimensions. It is beyond the scope of this article to summarise this field, which includes the work of historians,<sup>349</sup> anthropologists,<sup>350</sup> literary scholars<sup>351</sup> and public intellectuals.<sup>352</sup> Still, these academic and popular texts may serve as important resources for future academic work on bankruptcy stigma. It is also possible, though by no means certain,<sup>353</sup> that they may eventually prompt a more critical public debate about rising household debt and its causes. This wider view of debt, and its social consequences, may alleviate some of the stigma attaching to bankruptcy, while also potentially opening the way for more constructive public policy debates.<sup>354</sup>

## VI CONCLUSION

Bankruptcy law has always combined economic pragmatism with varying degrees of moral censure. From the earliest bankruptcy statutes until the late nineteenth century, English and American legislators sought to reconcile the practical benefits of debt discharge with a desire to punish and stigmatise those who did not repay their debts. Breaking with this tradition, the framers of

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349 See, eg, Margot C Finn, *The Character of Credit: Personal Debt in English Culture, 1740–1914* (Cambridge University Press, 2003).

350 See, eg, David Graeber, *Debt: The First 5,000 Years* (Melville House, 2011). Graeber, a professor of anthropology and anarchist activist, writes that '[i]f history shows anything, it is that there's no better way to justify relations founded on violence, to make such relations seem moral, than by reframing them in the language of debt': at 5. Graeber's text has reached a wide audience and prompted considerable debate: see Mike Beggs, 'Debt: The First 500 Pages' [2012] [7]–[8] *Jacobin* 35 <<https://www.jacobinmag.com/2012/08/debt-the-first-500-pages/>>.

351 See Amanda Bailey, *Of Bondage: Debt, Property, and Personhood in Early Modern England* (University of Pennsylvania, 2013).

352 Booker Prize-winning Canadian novelist and poet Margaret Atwood gave her 2008 Massey Lectures on the subject of debt. These lectures have been published in a book: Margaret Atwood, *Payback: Debt and the Shadow Side of Wealth* (Anansi, 2008).

353 Graeber observes morosely that such a discussion seemed possible for a 'moment', in the wake of the Global Financial Crisis, but that the prospect quickly receded in the months and years that followed: Graeber, above n 350, 15.

354 To date, in Australia at least, public discourse about household debt has been largely confined to gloomy predictions of a housing market 'bubble' and assertions that Australians are 'living beyond their means': See 'RBA Warns Against Household Debt Amid Concerns Over House Price Bubble', *The Guardian* (online), 18 May 2015 <<http://www.theguardian.com/australia-news/2015/may/18/rba-warns-against-household-debt-amid-concerns-over-house-price-bubble>>; Diss, above n 327. See also Uren, above n 327; Pat McGrath, 'Household Debt the Big Threat to Australian Economy', *ABC News* (online), 8 May 2014 <<http://www.abc.net.au/news/2014-05-07/household-debt-the-big-threat-to-australian-economy/5435844>>; Mark Mulligan, 'Australian Households Awash with Debt: Barclays', *The Age* (online), 16 March 2015 <<http://www.smh.com.au/business/the-economy/australian-households-awash-with-debt-barclays-20150315-1lzyz4.html>>.

Australian bankruptcy legislation have largely focussed on the economic and administrative benefits of bankruptcy law, either ignoring the stigma attaching to bankruptcy or explicitly disavowing it. Yet in marked contrast to the stated objectives of the *Bankruptcy Act*, bankruptcy remains a source of significant stigma in Australia, involving a range of harsh legal, economic and social consequences. While the UK has enacted legislation seeking to reduce bankruptcy stigma, these measures have so far met with limited success. This can be attributed to the practical challenges involved in distinguishing 'culpable' bankrupts from 'honest' ones, and in encouraging lenders to alter their business practices accordingly. However, it is arguable that other, more intangible factors also contribute to the persistence of bankruptcy stigma. It is possible that by stigmatising bankruptcy, and associating it with moral weakness, heavily indebted individuals nurture a 'comforting illusion' that they themselves are safe from financial failure.<sup>355</sup> If this is correct, any efforts to combat bankruptcy stigma will require a wide-ranging public discussion about the causes and consequences of pervasive household debt.

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355 Warren and Tyagi, above n 320, 89.