

PERSONAL INSOLVENCY IN AUSTRALIA: AN INCREASINGLY MIDDLE CLASS PHENOMENON

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I INTRODUCTION

In 2009, Australia experienced a record 'high' of 36 487 personal insolvencies.¹ The magnitude of this figure, which represents all bankruptcies, debt agreements, and personal insolvency agreements in that financial year, is augmented when placed in the context of the 300 per cent increase seen in the number of Australian personal insolvencies between 1990 and 2009.² This growth far exceeded the 28 per cent increase in the Australian population during that period.³ It is indisputable that personal insolvency is affecting a growing number of Australians.⁴

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¹ Insolvency and Trustee Service Australia, *Annual Report by the Inspector-General in Bankruptcy on the Operation of the Bankruptcy Act 2008-2009* (2009) 7 <<http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/about+us-%3Epublications-%3Eannual+reports>> at 24 July 2010. This article also draws in part on the findings of our research report on Australian personal insolvency: see Ian Ramsay and Cameron Sim, *Trends in Personal Insolvency in Australia* (2009) Centre for Corporate Law and Securities Regulation, The University of Melbourne <<http://cclsr.law.unimelb.edu.au/go/centre-activities/research/research-reports-and-research-papers/index.cfm>> at 24 July 2010. The report outlines the data on trends in Australian personal insolvency between 1990 and 2008. In this article, we analyse the key implications of the data from the report in relation to what we consider to be middle class personal insolvents.

² Ibid. The population figure is based on current Australian Bureau of Statistics estimates: see Australian Bureau of Statistics, *Australian Demographic Statistics December 2009*, Cat. No. 3101.0 Table 4 <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3101.0Dec%202009?OpenDocument>> at 20 August 2010.

³ Ibid.

⁴ See further Ian Ramsay and Cameron Sim, 'Personal Insolvency Trends in Australia 1990-2008' (2009) 17 *Insolvency Law Journal* 69.

This rise in the number of personal insolvencies took place over periods of economic expansion and low interest rates, as well as the converse. This indicates that the increase is not attributable solely to prevailing economic conditions.⁵ In this article we suggest that one important feature of the significant increase is that personal insolvency in Australia has become an increasingly middle class phenomenon. Whilst the concept of middle class is not readily quantifiable, we suggest that increases in the proportion of insolvents with certain characteristics reveals that personal insolvency is affecting a broad section of the population, and increasingly it is affecting those who might commonly be perceived to represent middle class Australians.

We begin with a brief explanation of Australian personal insolvency law. This is followed by background information including details on the methodology of our study; the increasing rate of Australian personal insolvencies; and the results of similar studies conducted in the US. Then we evaluate the concept of middle class, before considering several factors which we suggest indicate that personal insolvency in Australia is becoming a middle class phenomenon. We detail how insolvents are increasingly coming from higher status occupations; have increasing levels of personal income and household income; and have increasing asset and property ownership levels.⁶ Finally, we consider some implications of our findings for the role, function and importance of Australian personal insolvency laws and we also consider the connections between personal insolvency laws and broader social issues such as rising debt levels.

II AUSTRALIAN PERSONAL INSOLVENCY LAW

The *Bankruptcy Act 1966* (Cth) ('the Act') sets out Australian law relating to the insolvency of individuals, deceased debtors and partnerships.⁷ Under the Act, there are three regulated forms of personal insolvency: bankruptcies under Part IV and Part XI; debt agreements under Part IX; and personal insolvency agreements under Part X. Bankruptcies make up the large majority of personal insolvencies (27 483 or 75 per cent of personal insolvencies in 2009), followed by the increasingly popular debt agreements (8567 or 24 per cent in 2009) and the less frequent personal insolvency agreements (437 or 1 per cent in 2009).⁸ In this section we set out a brief summary of Australian personal insolvency law relating to Part IV bankruptcies and Part IX debt agreements.⁹

A Bankruptcy (Part IV of the *Bankruptcy Act*)

Bankruptcy offers debtors protection from creditors, however this protection comes with serious consequences for the debtor involved. A debtor may become bankrupt on

⁵ See further *ibid.*

⁶ For the purposes of our analysis we use the term 'insolvents' to include both bankrupts and debt agreement debtors. We exclude Part X insolvents as a result of their small numbers.

⁷ Corporate insolvency is governed by the *Corporations Act 2001* (Cth).

⁸ Insolvency and Trustee Service Australia, *Annual Report*, above n 1, 11.

⁹ A more detailed explanation of the Australian personal insolvency regime, including further detail on Part IV bankruptcies, Part IX debt agreements, bankruptcies under Part XI, and current and former Part X arrangements, is available in our report: see Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 29–38. See further Michael Murray, *Keay's Insolvency: Personal and Corporate Law and Practice* (6th ed, 2008).

either a voluntary or involuntary basis. If certain requirements are fulfilled,¹⁰ a creditor may petition the court to make a sequestration order against the estate of a debtor.¹¹ It is at the discretion of the court to make such an order, declaring the debtor to be bankrupt.¹² Alternatively, an individual debtor, partnership,¹³ or joint debtors,¹⁴ may voluntarily present a bankruptcy petition to the Official Receiver.¹⁵ The debtor becomes bankrupt on the day of acceptance of the petition by the Official Receiver.¹⁶ In 2009, 92 per cent of bankruptcies were on voluntary debtors' petitions.¹⁷

Upon bankruptcy, the property of the debtor vests in a trustee in bankruptcy,¹⁸ subject to certain exemptions,¹⁹ such as most ordinary household or personal items²⁰ and limited tools of trade.²¹ Aside from these exemptions, all other property of the debtor vests in the trustee in bankruptcy. The trustee will also investigate assets owned prior to bankruptcy.²² Certain conduct committed prior to and after bankruptcy may constitute an offence under the Act.²³

In addition, limitations are placed on the personal lives of bankrupts. A bankrupt is required to give their passport to the trustee,²⁴ and is unable to continue or commence legal proceedings.²⁵ Bankruptcy is also a bar to certain occupations, such as holding a parliamentary seat, or the management of a corporation,²⁶ and it may result in termination of the holding of a statutory office, or membership of a statutory authority. If the after tax income of a bankrupt exceeds a certain amount, they must pay contributions from this income to the trustee.²⁷ Details of the bankruptcy are permanently entered onto the National Personal Insolvency Index, available for public inspection.²⁸ When entering into certain transactions of A\$3000 or more, for example

¹⁰ *Bankruptcy Act 1966* (Cth) ss 40, 43, 44, 52.

¹¹ *Bankruptcy Act 1966* (Cth) s 43(1). The debtor must have committed an act of bankruptcy within six months before presentation of the petition (ss 40, 44(1)(c)), and the debt owed must be for a minimum of A\$2000 (s 44(1)(a)).

¹² *Bankruptcy Act 1966* (Cth) ss 43(2), 52.

¹³ *Bankruptcy Act 1966* (Cth) s 56A(1).

¹⁴ *Bankruptcy Act 1966* (Cth) s 57(1).

¹⁵ *Bankruptcy Act 1966* (Cth) s 55.

¹⁶ *Bankruptcy Act 1966* (Cth) ss 55(4A), 55(8).

¹⁷ Insolvency and Trustee Service Australia, above n 1, 7.

¹⁸ *Bankruptcy Act 1966* (Cth) s 54(1).

¹⁹ *Bankruptcy Act 1966* (Cth) ss 5(1), 58, 116. See also *Bankruptcy Regulations 1996* (Cth) sch 4A, pt 4.

²⁰ *Bankruptcy Act 1966* (Cth) s 116(2)(b).

²¹ *Bankruptcy Act 1966* (Cth) s 116(2)(c).

²² *Bankruptcy Act 1966* (Cth) ss 120, 121, 121A, 122.

²³ *Bankruptcy Act 1966* (Cth) s 271.

²⁴ *Bankruptcy Act 1966* (Cth) s 77(1)(a)(ii).

²⁵ *Bankruptcy Act 1966* (Cth) s 60.

²⁶ *Corporations Act 2001* (Cth) s 206B(3).

²⁷ *Bankruptcy Act 1966* (Cth) s 139P. On 1 August 2010, the indexed income threshold amount for a bankrupt with no dependants was A\$44 189.60; for a bankrupt with over four dependants, this amount was A\$60 097.86: Insolvency and Trustee Service Australia, *Indexed Amounts* <[http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/About+Us-%3EPublications-%3ECurrent+Amounts+Document/\\$FILE/Current_Amounts.pdf?OpenElement](http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/About+Us-%3EPublications-%3ECurrent+Amounts+Document/$FILE/Current_Amounts.pdf?OpenElement)> at 22 August 2010.

²⁸ *Bankruptcy Regulations 1996* (Cth) pt 13.

when obtaining credit,²⁹ bankrupts must inform other parties that they are an undischarged bankrupt.³⁰ Following discharge, which usually occurs after three years,³¹ the National Personal Insolvency Index is updated to reflect that the person is now a discharged bankrupt. Records of bankruptcies are also kept by credit reporting organisations.

B Debt Agreements (Part IX of the *Bankruptcy Act*)

One alternative to bankruptcy available for some debtors is to enter into a debt agreement under Part IX of the Act. An insolvent debtor³² may propose a debt agreement to the Official Receiver,³³ in which the debtor makes a 'best offer' to their creditors, who in turn vote on that offer.³⁴ The debtor must have a future expected after tax income,³⁵ unsecured debts,³⁶ and divisible property,³⁷ falling under prescribed limitations.³⁸ On 1 August 2010, these limitations were a future expected after tax income of less than A\$66 284.40;³⁹ unsecured debts of less than A\$88 379.20;⁴⁰ and divisible property valued at less than A\$88 379.20.⁴¹ The proposal of a debt agreement is an act of bankruptcy, which may be used by a creditor to apply to court for a sequestration order, even before creditors vote on the debt agreement.⁴² If the Official Receiver accepts the proposal for processing,⁴³ the proposal is sent to all creditors for voting by postal vote.⁴⁴ If a majority of creditors representing a majority in value vote in favour,⁴⁵ then all creditors are bound by the debt agreement,⁴⁶ and details of the debt agreement are entered onto the National Personal Insolvency Index.⁴⁷

²⁹ *Bankruptcy Act 1966* (Cth) s 269(1)(a).

³⁰ *Bankruptcy Act 1966* (Cth) s 269.

³¹ *Bankruptcy Act 1966* (Cth) ss 149, 149A(2)(a).

³² In the past ten years the debtor must not have been a bankrupt, had a debt agreement, or had a Part X arrangement: *Bankruptcy Act 1966* (Cth) s 185C(4)(a)(i)–(iii).

³³ *Bankruptcy Act 1966* (Cth) s 185C(1).

³⁴ The proposal may provide for any matter relating to the debtor's financial affairs: s 185C(3). However, the proposal must meet several requirements: *Bankruptcy Act 1966* (Cth) s 185C(2). One such requirement is that all provable debts in relation to the debt agreement must rank equally: s 185C(2)(d)(i).

³⁵ *Bankruptcy Act 1966* (Cth) s 185C(4)(d).

³⁶ *Bankruptcy Act 1966* (Cth) s 185C(4)(b).

³⁷ *Bankruptcy Act 1966* (Cth) s 185C(4)(c).

³⁸ *Bankruptcy Act 1966* (Cth) s 185C(4).

³⁹ *Bankruptcy Act 1966* (Cth) s 185C(4)(d); Insolvency and Trustee Service Australia, *Indexed Amounts*, above n 27.

⁴⁰ *Bankruptcy Act 1966* (Cth) s 185C(4)(b); Insolvency and Trustee Service Australia, *Indexed Amounts*, above n 27.

⁴¹ *Bankruptcy Act 1966* (Cth) s 185C(4)(c); Insolvency and Trustee Service Australia, *Indexed Amounts*, above n 27. Divisible property includes any equity held in property, which would include any equity held in the family home: *Bankruptcy Act 1966* (Cth) s 5.

⁴² *Bankruptcy Act 1966* (Cth) s 40(1)(ha).

⁴³ *Bankruptcy Act 1966* (Cth) s 185E(2).

⁴⁴ *Bankruptcy Act 1966* (Cth) s 185EA.

⁴⁵ *Bankruptcy Act 1966* (Cth) s 185EC.

⁴⁶ *Bankruptcy Act 1966* (Cth) s 185EC.

⁴⁷ *Bankruptcy Act 1966* (Cth) s 185H.

Following discharge or termination of a debt agreement, the debtor is released from provable debts in the same way as if the debtor had been discharged from bankruptcy immediately after the debt agreement proposal was recorded on the National Personal Insolvency Index.⁴⁸ The debtor is entitled to any property that was subject to the debt agreement but that was not distributed to creditors.⁴⁹ On a practical level, the debtor's credit rating will be affected, which will diminish the ability of the debtor to obtain further credit.

III BACKGROUND TO THE STUDY

In this section we set out information which forms the background for our contention on Australian personal insolvency and the middle class. First, we outline the methodology of our study. Second, we detail the growing rate of Australian personal insolvencies. Third, we consider research on bankrupts from the US, where a similar argument on bankruptcy and the middle class has been advanced.

A Methodology of the study

We obtained data from two sets of publications of the Insolvency and Trustee Service Australia ('ITSA'), the executive agency responsible for the administration and regulation of Australia's personal insolvency system. These were the *Annual Report of the Inspector-General in Bankruptcy on the Operation of the Bankruptcy Act* ('the Annual Reports') for each year between 1990 and 2009, as well as all *Profiles of Debtors* ('the Profiles') in existence.⁵⁰ We also obtained data from Australian Bureau of Statistics and Reserve Bank of Australia publications.

The socio-economic data in both the Annual Reports and the Profiles to which we refer is based on information contained in the Statements of Affairs of personal insolvents. These are lodged at different times in the process of the personal insolvency, depending on the nature of both the application for and form of insolvency.⁵¹ For our purposes, we assume that information given in the Statement of Affairs is truthful, as it is an offence to sign a false declaration made in the Statement of Affairs.⁵²

We base our analysis on the characteristics of personal insolvents using data between 1997 and 2007 (excluding occupational data) for two reasons. First, debt agreements came into existence on 16 December 1996, and so data from both the calendar and financial year 1997 represents the first data available for debt agreement debtors. Second, 1997 is the first year for which data contained in the Profiles is available and the latest available version of the Profiles is for 2007.

⁴⁸ *Bankruptcy Act 1966* (Cth) s 185NA(1).

⁴⁹ *Bankruptcy Act 1966* (Cth) s 185N(2).

⁵⁰ The Annual Reports are published pursuant to the *Bankruptcy Act 1966* (Cth) s 12. Copies of the Annual Reports from 1999 onwards are available at <<http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/About%20Us-%3EPublications-%3EAnnual%20Report%20Archive?OpenDocument>> and the Profiles of Debtors in 2002, 2003, 2005, and 2007, are available at <<http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/Statistics+%26+Research-%3EDebtor+Profiles>>.

⁵¹ See *Bankruptcy Act 1966* (Cth) ss 54(1)(a), 54(2)(a), 55(2)(b), 56B(1), 56F(1)(a), 56F(1)(b), 57(1), 185C(2B), 185D, 185M(1B), 185P(1B), 188(2C), 188(2D).

⁵² *Bankruptcy Act 1966* (Cth) s 267.

In this article, all data relating to the characteristics of personal insolvents comes from the Profiles and relates to the calendar year in question with certain exceptions. First, all data relating to the occupational status of insolvents, the causes of personal insolvency, the business/non-business classification of insolvency, and the number of personal insolvencies, comes from the Annual Reports and is based on the financial year in which the Annual Report was released. Hence we use data relating to occupational status for the financial year 2008 rather than 2007 so as to capture the most recent occupational data relating to calendar year data published in the 2007 Profiles. Second, all data from the Profiles in 2002 is based on financial year figures for the financial year 2001–02. The Profiles are not published annually, and so comparisons made in this article between the years 1997, 2002, 2003, 2005, and 2007 are chosen because those are the only years for which relevant data is available.

Further, we refer only to *new* personal insolvency administrations commencing in the relevant year. We do not refer to cumulative data. For example, whilst personal insolvencies from the Profiles in 2005 might still be in force in 2007, data relating to these existing administrations is not included in the 2007 data. It is therefore important to keep in mind that, when we refer to a certain number of personal insolvents in a given year, this is a reference to new personal insolvencies in that year and not the total number of personal insolvencies. Finally, data in the Profiles is based on whole numbers, and so occasionally data from the Profiles may not always add up to 100 per cent.⁵³

B Growing rate of Australian personal insolvencies

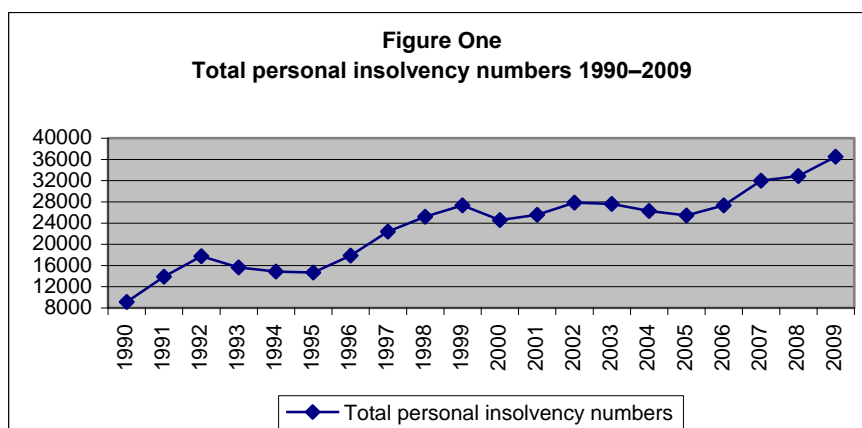
Between 1990 and 2009 there was a 300 per cent increase in the number of Australian personal insolvencies, significantly greater than the 28 per cent increase in the Australian population during that period.⁵⁴ In 1990, 0.05 per cent of the Australian population entered into personal insolvency, compared to 0.17 per cent in 2009.⁵⁵ This increase (which is illustrated by Figure One below) constitutes the background for our argument that Australian personal insolvency is becoming an increasingly middle class phenomenon, and therefore further discussion of this overall increase in personal insolvency is warranted.⁵⁶

⁵³ Further details on methodology are available in our research report: see Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 27–8.

⁵⁴ See above nn 2–3.

⁵⁵ Ibid.

⁵⁶ See further Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 9–26, 130–42; Ramsay and Sim, 'Personal Insolvency Trends in Australia', above n 4.



Personal insolvency numbers were rising significantly even before the introduction of debt agreements on 16 December 1996.⁵⁷ In 1990 there were 8552 bankruptcies, compared to 21 830 bankruptcies in 1997 and 27 483 bankruptcies in 2009.⁵⁸ Whilst it appears there were several factors behind the increase in personal insolvencies (including, among other factors, significant increases in bankruptcies in New South Wales and in personal insolvencies caused by excessive use of credit, ill health, and gambling or speculation),⁵⁹ perhaps the most influential factor behind the rise has been the increase in non-business related personal insolvencies.

Personal insolvency is business related if the personal insolvency is considered by the insolvent to be directly related to their proprietary interest in a business; otherwise it is non-business related.⁶⁰ The number of business related bankruptcies did not increase significantly between 1991 and 2009, in contrast to the increase in the number of non-business related bankruptcies. There were 304 more business related bankruptcies in 2009 than in 1991, compared to 14 696 more non-business related bankruptcies in 2009 than in 1991.⁶¹ On the figures available for debt agreements, there were 115 more business related debt agreements in 2003 than in 2009, yet there were 4132 more non-business related debt agreements in 2009 than in 2003.⁶² Therefore, the rise in the number of personal insolvencies is substantially attributable to an increase in the number of non-business related personal insolvencies.

The question then arises: why has Australia seen such a significant increase in personal insolvencies and, more specifically, non-business related personal insolvencies? Is the increase explicable in some broader context? We suggest that a

⁵⁷ See further Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 39–44.

⁵⁸ Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 9; Insolvency and Trustee Service Australia, *Annual Report* above n 1, 15.

⁵⁹ See further Insolvency and Trustee Service Australia, *Annual Report* above n 1, 13–7; see also Ramsay and Sim, 'Personal Insolvency Trends in Australia', above n 4.

⁶⁰ Insolvency and Trustee Service Australia, *Annual Report*, above n 1, 14.

⁶¹ *Ibid.* 15.

⁶² *Ibid.*

feature of this increase in Australian personal insolvencies is that personal insolvency is increasingly affecting middle class Australians. Before exploring this argument in further detail, it is useful to comment on similar findings made in the US.

C Bankrupts in the US

In depth studies on bankrupts in the US have been conducted for over three decades,⁶³ in stark contrast to a dearth of Australian research.⁶⁴ As a result of those studies in the US, it has been argued by Professor Elizabeth Warren and others that bankruptcy is a middle class phenomenon.⁶⁵ Based on educational achievements, occupational status, and the ability to buy homes, those who file for bankruptcy in the US are thought to be 'an overwhelmingly middle-class group, a cross-section of America that concentrates its numbers in the middle.'⁶⁶

The three indicia of middle class used to come to this conclusion were: first, whether bankrupts were homeowners or former homeowners; second, whether bankrupts had college or graduate school education level; and third, whether bankrupts had occupational prestige in the upper 80 per cent. The study found that 91.8 per cent of those filing for bankruptcy fulfilled at least one of those three criteria; 66.6 per cent met two or more criteria; and 27.4 per cent met all three criteria.⁶⁷ Bankrupts in the US were found to have educational achievements keeping pace with those of other Americans;⁶⁸ becoming more likely to be homeowners;⁶⁹ although

⁶³ There have been four major studies on consumer bankruptcy in the US: Consumer Bankruptcy Project I (1981); Consumer Bankruptcy Project II (1991); Consumer Bankruptcy Project III (2001); and Consumer Bankruptcy Project IV (2007). For a useful description of the Consumer Bankruptcy Projects, see Robert M Lawless et al, 'Did Bankruptcy Reforms Fail? An Empirical Study of Consumer Debtors' (2008) 82 *American Bankruptcy Law Journal* 349, 387–98. See further Teresa A Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* (1989); Teresa A Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, *The Fragile Middle Class: Americans in Debt* (2000).

⁶⁴ Others have pointed out this lack of research. See, eg, Rosalind Mason, 'Consumer Bankruptcies: An Australian Perspective' (1999) 37 *Osgoode Hall Law Journal* 449, 458; Rosalind Mason and John Duns, 'Developments in Consumer Bankruptcy in Australia' in Johanna Niemi-Kiesiläinen, Iain Ramsay and William Whitford (eds), *Consumer Bankruptcy in Global Perspective* (2003) 227, 227–8. A study that includes empirical research on consumer bankrupts in Melbourne between 1986 and 1987 is Martin Ryan, 'Consumer Bankrupts in Melbourne' (1993) 28 *Australian Journal of Social Issues* 34.

⁶⁵ Sullivan, Warren and Westbrook, *The Fragile Middle Class*, above n 63, 27. See further Sullivan, Warren and Westbrook, *As We Forgive Our Debtors*, above n 63; Elizabeth Warren, 'Bankrupt Children' (2002) 86 *Minnesota Law Review* 1003; Elizabeth Warren, 'Financial Collapse and Class Status: Who Goes Bankrupt?' (2003) 41 *Osgoode Hall Law Journal* 115; Elizabeth Warren, 'The Growing Threat to Middle Class Families' (2003) 69 *Brooklyn Law Review* 401; David U Himmelstein et al, 'Illness and Injury as Contributors to Bankruptcy' [February 2005] *Health Affairs* <<http://content.healthaffairs.org/cgi/reprint/hlthaff.w5.63v1>> at 28 July 2010; 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.

⁶⁶ Warren, 'Financial Collapse and Class Status', above n 65, 118.

⁶⁷ Ibid 143–4.

⁶⁸ Ibid 128.

remaining more concentrated in lower prestige jobs.⁷⁰ For this reason, Professor Warren has argued that her studies on bankruptcy reveal that Americans 'in the worst financial trouble are not the usual suspects'.⁷¹ According to Professor Warren, Americans who encounter the greatest financial difficulties

are not the very young, tempted by the freedom of their first credit cards. They are not the elderly, trapped by failing bodies and declining savings accounts. And they are not a random assortment of Americans who lack the self-control to keep their spending in check.⁷²

Taken as a whole, the studies reached the conclusion that US bankrupts were 'likely to be middle class people in terrible financial trouble'.⁷³

We are limited in our ability to draw comparisons between our data and the US data from which this conclusion was drawn. While we have data on occupations and property ownership, we do not have data on educational achievements.⁷⁴ Moreover, the data is not broken down for each individual insolvent, which means that we cannot verify how many insolvents would fulfil one or more criteria. Furthermore, the personal insolvency systems of Australia and the US vary, and comparisons between them are inherently difficult to make. There exist not only differences in the administration and regulation of personal insolvency, but also different statistical methodologies employed in the collation of data. Therefore, although the US findings are of interest, it is not possible to make direct comparisons between the Australian and US data.

IV MIDDLE CLASS PHENOMENON

In light of this background information, we now turn to develop our argument that personal insolvency in Australia is becoming an increasingly middle class phenomenon. First, we consider the concept of middle class. Second, we outline evidence to support our contention, by providing characteristics of personal insolvents vis-à-vis what in our view might commonly be perceived as middle class characteristics.

A The concept of middle class

The concept of middle class is not readily quantifiable. Many factors might be considered in defining middle class. These might include tangible factors, such as education, occupation, and income. They might also include intangible factors, such as beliefs, cultural factors, and social status. Class analysis is a political exercise insofar as it is concerned with the political nature of the social structure,⁷⁵ and in this sense it is

⁶⁹ Ibid 137. A recent study in the US found that parents were more likely than non-parents to file for bankruptcy in order to save their homes: see Eric S Nguyen, 'Parents in Financial Crisis: Fighting to Keep the Family Home' (2008) 82 *American Bankruptcy Law Journal* 229.

⁷⁰ Warren, 'Financial Collapse and Class Status', above n 65, 134.

⁷¹ Warren, 'The Growing Threat to Middle Class Families', above n 65, 402.

⁷² Ibid.

⁷³ Warren, 'Bankrupt Children', above n 65, 1005.

⁷⁴ See further nn 50–53 and accompanying text on methodology.

⁷⁵ R W Connell and T H Irving, *Class Structure in Australian History: Documents, Narrative and Argument* (1980) 1.

an analysis of power.⁷⁶ Perhaps for these reasons, and despite being a term with such wide usage, the problem of defining and understanding the middle class has been described as an 'old'⁷⁷ and 'vexatious'⁷⁸ dilemma, part of a 'conceptual muddle'⁷⁹ in a 'sociological minefield of conflicting analyses, ideologies and criticisms'.⁸⁰ Are classes to be defined in the Marxist conception as the relations between groups of people within the system of production, or should Weberian notions prevail, under which classes are seen as aggregations of individuals who receive similar rewards from the systems of distribution and consumption?⁸¹ Or is Australian society becoming so homogenous that it is no longer useful to analyse it in class terms?

We do not intend to contribute to debates concerning the definition of middle class.⁸² The concept of middle class evidently is not definitive. One alternative way to deal with the concept of middle class has been put forward to avoid asserting rival definitions. This is to present social class 'as *authors*' definitions rather than *the* definition'.⁸³ This approach allows the development of argument on phenomena affecting particular groups within society without being overly obstructed by a protracted definitional debate. Furthermore, this approach accords with common perception. It is arguable that significant numbers of Australians readily identify with the concept of middle class, even if perceptions over its boundaries may differ. Whilst there does not appear to be broad evidence on identification with class terms,⁸⁴ there does seem to be some acceptance that there is an Australian middle class,⁸⁵ even if it is divided between upper and lower middle class.⁸⁶ Indeed, Australia has even been labelled the most middle class nation in the world.⁸⁷

Professor Warren based her middle class criteria for US bankrupts on educational achievements, occupational status, and the ability to buy homes.⁸⁸ Australian data on education levels of personal insolvents is not available. However, data on occupational status and property ownership for personal insolvents is available, and these seem to be important middle class indicators. Other Australian studies have identified the significance of occupational status, not least because occupational aspirations

⁷⁶ Ibid 17.

⁷⁷ Tim Butler, 'The Debate Over the Middle Classes' in Tim Butler and Mike Savage (eds), *Social Change and the Middle Classes* (1995) 26, 26.

⁷⁸ John S Western, *Social Inequality in Australian Society* (1983) 10.

⁷⁹ K Roberts et al, *The Fragmentary Class Structure* (1977) 16.

⁸⁰ Craig McGregor, *Class in Australia* (2nd ed, 2001) 33.

⁸¹ Carolyn Howe, *Political Ideology and Class Formation: A Study of the Middle Class* (1992) 6.

⁸² For different conceptions of 'middle class' in Australian society see further Connell and Irving, above n 75, 1–30; Western, above n 78, 9–40; Leonard Broom and F Lancaster Jones, *Opportunity and Attainment in Australia* (1976) 60–84; R A Wild, *Social Stratification in Australia* (1978) 42–67; Leonard Broom et al, *The Inheritance of Inequality* (1980) 20–56. See generally McGregor, above n 80.

⁸³ Roberts et al, above n 79, 17. See also Chris Chamberlain, *Class Consciousness in Australia* (1983) x–xi.

⁸⁴ Clive Hamilton, Christian Downie and Yi-Hua Lu, 'The State of the Australian Middle Class' (Discussion Paper No 98, The Australia Institute, 2007) 9.

⁸⁵ See the various studies cited above n 82.

⁸⁶ McGregor, above n 80, 36–7; Wild, above n 82, 53; Chamberlain, above n 83, 39–42; Western, above n 78, 36–44.

⁸⁷ McGregor, above n 80, 19.

⁸⁸ Warren, 'Financial Collapse and Class Status: Who Goes Bankrupt?', above n 65, 118–9.

sometimes depend on family background and school experience,⁸⁹ but also because occupation plays a large role in socio-economic stratification.⁹⁰ Data is also available on both personal and household income levels for personal insolvents, which might play a role in class status.⁹¹ A 2007 study defined middle class solely on disposable household income,⁹² and a study in the year 2000 found that 93 per cent of Australians believed they were in the middle-income bracket.⁹³ Finally, data is available on levels of realisable assets of personal insolvents, which might also be seen as relevant to determining class status insofar as these levels concern the potential wealth of insolvents. Whilst these five characteristics of personal insolvents are by no means definitive factors in the determination of middle class status, we place reliance on these factors to argue that personal insolvency in Australia has become an increasingly middle class phenomenon.

B Middle class factors

During a time of significantly increasing numbers of personal insolvencies, simultaneous increases between 1997 and 2008 in the proportion of bankrupts and debt agreement debtors who are from higher prestige occupations and who have higher levels of personal income, household income, realisable assets, and property ownership, reveal that personal insolvency is spreading across many areas of Australian society and is upwardly mobile.⁹⁴

We do not discount the possibility that during this period the Australian middle class, as defined by those five characteristics, might also have increased as a proportion of the Australian population. However, any such growth does not appear to be a material explanation behind the significant increase in the number of Australian personal insolvencies and Australian personal insolvents fitting the definition of middle class.⁹⁵ For example, between 1999 and 2008, the proportion of employed Australians in the highest skilled occupations (which includes the occupations we define below to include the middle class) increased only from 25.8 per cent in 1999 to 28.8 per cent in 2008.⁹⁶

⁸⁹ Broom et al, above n 82, 13.

⁹⁰ Broom and Jones, above n 82, 118.

⁹¹ See also Warren, 'Financial Collapse and Class Status: Who Goes Bankrupt?', above n 65, 123–7.

⁹² In that study, the middle class was defined 'as those with disposable incomes higher than the bottom 30 per cent and lower than the richest 20 per cent'. See Hamilton, Downie and Lu, above n 84, 9.

⁹³ A further 6.4 per cent believed they were in the bottom 20 per cent income bracket, and 0.7 per cent believed they were in the top 20 per cent income bracket. See Peter Saunders, Cathy Thomson and Ceri Evans, *Social Change and Social Policy: Results From a National Survey of Public Opinion* (Discussion Paper No 106, Social Policy Research Centre, University of New South Wales, 2000) 19.

⁹⁴ For further detail on the data contained in this section, see Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1; see also Ramsay and Sim, 'Personal Insolvency Trends in Australia', above n 4.

⁹⁵ See above nn 82–93 and surrounding text for discussion of definitions of the middle class.

⁹⁶ Australian Bureau of Statistics, *Australian Social Trends*, Cat. No. 4102.0 (Work) <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/37099EF832916037CA257751001A4AE4/\\$File/41020_work_indicators_2009.xls](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/37099EF832916037CA257751001A4AE4/$File/41020_work_indicators_2009.xls)> at 23 August 2009.

1 Occupation

Australia has seen significant increases in the proportion of personal insolvents from higher prestige occupational groups. These insolvents are managers and administrators, professionals, and associate professionals, classified according to the *Australian Standard Classification of Occupations*.⁹⁷ Professionals include occupations such as accountants, lawyers, doctors, dentists, and teachers. Associate professionals include occupations such as shop managers, hotel and motel managers, and financial dealers and brokers. These occupations might be seen as having typically middle class qualities.⁹⁸

In 1999, 11.28 per cent of bankrupts were managers and administrators, professionals, or associate professionals.⁹⁹ In 2008, 27.34 per cent of bankrupts came from these occupational groups.¹⁰⁰

Although there were 406 fewer bankruptcies in 2008 than in 1999,¹⁰¹ in 2008, there were 4210 more bankrupts from these occupational groups than in 1999.¹⁰² This represents an increase of 142 per cent between 1999 and 2008. The greatest increase occurred in the proportion of bankrupts who are managers or administrators. 3.23 per cent of bankrupts were managers and administrators in 1999, which had increased to 12.55 per cent in 2008.¹⁰³ The increase in the proportion of bankrupts who are professionals and associate professionals is also significant. 4.09 per cent of bankrupts were professionals in 1999, which had increased to 6.18 per cent in 2008.¹⁰⁴ 3.96 per cent of bankrupts were associate professionals in 1999, which had increased to 8.62 per cent in 2008.¹⁰⁵

Similarly, an increasing proportion of debt agreement debtors come from these occupational groups. In 2002, 14.94 per cent of debt agreement debtors were managers and administrators, professionals, or associate professionals.¹⁰⁶ In 2008, 27.19 per cent came from these occupational groups, which represents an increase of 82 per cent between 2002 and 2008.¹⁰⁷ There were 2564 more debt agreement debtors in 2008 than in 2002,¹⁰⁸ and there were 1194 more debt agreement debtors from these occupational groups in 2008 than in 2002.¹⁰⁹

⁹⁷ Australian Bureau of Statistics, *Australian Standard Classification of Occupations*, (2nd ed, 1997) Cat. No. 1220.0 <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/0/5c244fd9d252cfc8ca25697e00184d35?OpenDocument>> at 16 August 2010.

⁹⁸ See, eg, Western, above n 78, 36–9, 44; Chamberlain, above n 83, 39–42.

⁹⁹ Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 96–100; see also Ramsay and Sim, 'Personal Insolvency Trends in Australia' above n 4.

¹⁰⁰ Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 98.

¹⁰¹ Ibid 41.

¹⁰² Ibid 97–8.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid 100–2; see also Ramsay and Sim, 'Personal Insolvency Trends in Australia', above n 4.

¹⁰⁷ Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 100–2.

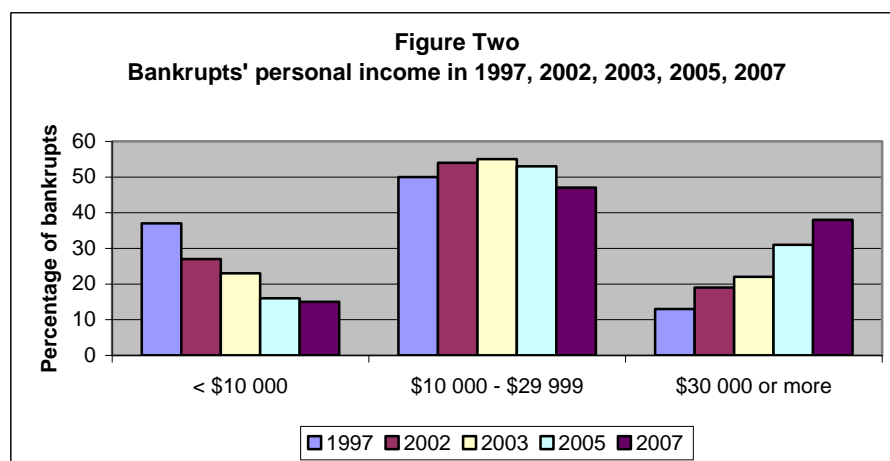
¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

2 Personal income

Personal insolvents have increasing levels of personal income. These increases in personal income levels may be related to increases in the proportion of insolvents who are employed (between 1997 and 2007 there was a 70 per cent increase in the employment rate of bankrupts and a 46 per cent increase in the employment rate of debt agreement debtors)¹¹⁰ and who are from higher prestige occupational groups. Our data relates to personal gross income between 1997 and 2007 and is declared by insolvents on their Statement of Affairs. By way of comparison, in 1998, Australian real net national disposable income per person was A\$31 600, compared to A\$40 400 in 2007, an increase of around 28 per cent.¹¹¹

In 1997, 37 per cent of bankrupts had personal income of less than A\$10 000, and 13 per cent had personal income of A\$30 000 or more.¹¹² By 2007, there was a significant change because by 2007 15 per cent of bankrupts had personal income of less than A\$10 000, and 38 per cent had personal income of A\$30 000 or more.¹¹³ Further, 9 per cent of bankrupts had personal income of A\$50 000 or more in 2005, compared to 13 per cent in 2007.¹¹⁴ Figure Two illustrates the increases between 1997 and 2007 in bankrupts' personal income.



¹¹⁰ In 1997, 33 per cent of bankrupts were employed, compared to 56 per cent in 2007. In 1997, 63 per cent of debt agreement debtors were employed, compared to 92 per cent in 2007. See Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 106–7.

¹¹¹ Australian Bureau of Statistics, *Australian Social Trends*, Cat. No. 4102.0 (Economic resources) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4102.0Jun%202010?OpenDocument>> at 23 August 2010. The references to dollars from previous years in this and subsequent sections have not been adjusted for inflation.

¹¹² Ramsay and Sim, *Trends in Personal Insolvency in Australia* above n 1, 107–9; see also Ramsay and Sim, 'Personal Insolvency Trends in Australia', above n 4.

¹¹³ Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 107–9.

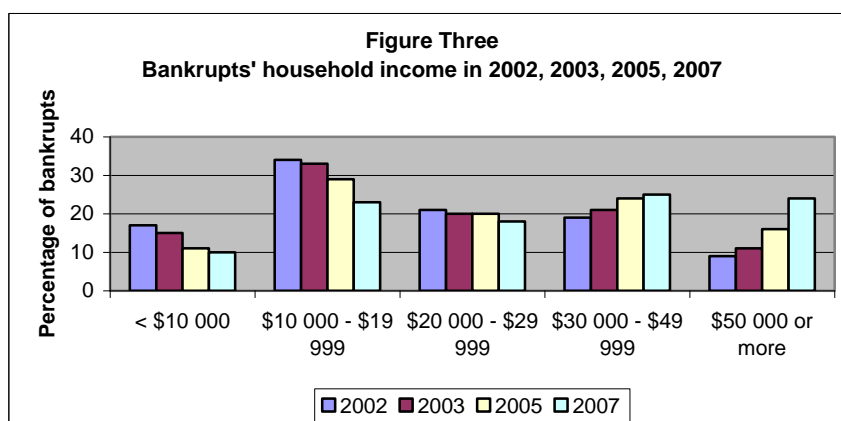
¹¹⁴ *Ibid.*

Income levels of debt agreement debtors are based on actual income in the past 12 months, excluding data from 2007, which relates to expected income in the 12 months following entry into the debt agreement. Eighty-five per cent of debt agreement debtors had personal income of less than A\$30 000 in 1997, and 15 per cent had personal income of A\$30 000 or more.¹¹⁵ By 2007, 31 per cent of debt agreement debtors expected personal income of less than A\$30 000, and 69 per cent expected personal income of A\$30 000 or more.¹¹⁶ Further, 12 per cent of debt agreement debtors had personal income of A\$50 000 or more in 2005, compared to 17 per cent in 2007 who expected personal income of A\$50 000 or more.¹¹⁷

It is clear from this data that significant increases occurred between 1997 and 2007 in the personal income levels of personal insolvents. These higher incomes are possibly being generated from those in higher prestige occupational positions, which strengthens our contention that personal insolvency has become an increasingly middle class phenomenon.

3 Household income

Similarly, between 1997 and 2007 there were increases in the levels of insolvents' household income. In 2002, 28 per cent of bankrupts had household income of A\$30 000 or more. This figure increased to 49 per cent in 2007.¹¹⁸ The greatest increase occurred in the proportion of bankrupts with household income of A\$50 000 or more. These represented 9 per cent of bankrupts in 2002, compared to 24 per cent in 2007.¹¹⁹ Figure Three illustrates the increases in bankrupts' household income between 2002 and 2007.



¹¹⁵ Ibid 109-10; see also Ramsay and Sim, 'Personal Insolvency Trends in Australia', above n 4.

¹¹⁶ Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 109-10.

¹¹⁷ Ibid.

¹¹⁸ Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 112-3; see also Ramsay and Sim, 'Personal Insolvency Trends in Australia' above n 4.

¹¹⁹ Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 112-3.

As with bankrupts, the household income levels of debt agreement debtors increased. Fifty-five per cent of debt agreement debtors had household income of A\$30 000 or more in 2002, compared to 73 per cent in 2007.¹²⁰ Again, the most significant increase occurred in the proportion of debt agreement debtors with household income of A\$50 000 or more. These represented 16 per cent of debt agreement debtors in 2002, compared to 36 per cent in 2007.¹²¹ Evidently, levels of household income of personal insolvents are increasing.

4 Realisable assets

There have also been increases in the levels of realisable assets of bankrupts and debt agreement debtors, which indicates that these insolvents are coming from wealthier sections of the community than was previously the case.

Although bankrupts' realisable asset levels increased between 2003 and 2007, during this time, most bankrupts declared they had either no or very modest levels of realisable assets. In 2003, 3 per cent of bankrupts declared realisable assets of A\$50 000 or more, compared to 7 per cent in 2007.¹²² In 2003, 2 per cent of bankrupts declared between A\$50 000 and A\$199 999 in realisable assets, compared to 4 per cent in 2007.¹²³ In 2003, only 1 per cent of bankrupts declared realisable assets of A\$200 000 or more, compared to 3 per cent in 2007.¹²⁴

Similarly, the majority of debt agreement debtors declare they have either no or very modest levels of realisable assets.¹²⁵ However, the proportion of debt agreement debtors with higher levels of realisable assets increased between 2003 and 2007. In 2003, 5 per cent of debt agreement debtors declared realisable assets of A\$20 000 or more, compared to 9 per cent in 2007.¹²⁶ In 2003, 2 per cent of debt agreement debtors declared realisable assets of A\$50 000 or more, compared to 4 per cent in 2007.¹²⁷

5 Property ownership

Between 2003 and 2007 there was an increase in the proportion of insolvents with property ownership. Property ownership is declared by insolvents in their Statement of Affairs. Insolvents must state whether they own or are purchasing any land or buildings in Australia or overseas, which includes any interest in vacant land, houses, units, or commercial properties (we refer to these interests collectively as 'property ownership'). Between 2003 and 2007 there was a 120 per cent increase in the proportion of bankrupts and a 200 per cent increase in the proportion of debt agreement debtors who declared property ownership.¹²⁸ Five per cent of bankrupts declared property

¹²⁰ Ibid, 113–4; see also Ramsay and Sim, 'Personal Insolvency Trends in Australia', above n 4.

¹²¹ Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 113–4.

¹²² Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 120–1; see also Ramsay and Sim, 'Personal Insolvency Trends in Australia', above n 4.

¹²³ Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 120–1.

¹²⁴ Ibid.

¹²⁵ Debt agreement debtors must have divisible property falling under prescribed limitations: *Bankruptcy Act 1966* (Cth) s 185C(4)(c).

¹²⁶ Ramsay and Sim, *Trends in Personal Insolvency in Australia* above n 1, 121; see also Ramsay and Sim, 'Personal Insolvency Trends in Australia', above n 4.

¹²⁷ Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 121.

¹²⁸ Ibid 122–3; see also Ramsay and Sim, 'Personal Insolvency Trends in Australia', above n 4.

ownership in 2003, compared to 11 per cent in 2007.¹²⁹ Five per cent of debt agreement debtors declared property ownership in 2003, compared to 15 per cent in 2007.¹³⁰

V IMPLICATIONS OF FINDINGS

It is clear from this data that Australian personal insolvents are coming from higher status occupations; have increasing levels of personal and household income; and have increasing levels of realisable assets and property ownership. These changing characteristics of Australian personal insolvents, coupled with the 300 per cent increase in personal insolvencies between 1990 and 2009, raise for consideration the policy underpinning the current Australian personal insolvency regime. We now discuss the role, function and importance of personal insolvency laws. We then consider connections between personal insolvency laws and broader social issues including rising debt levels and spending habits.

A The role, function and importance of personal insolvency laws

The changing demographics of Australian personal insolvents raise for consideration the role, function and importance of personal insolvency laws. The core policy objectives of the three forms of Australian personal insolvency administration (bankruptcies, debt agreements, and personal insolvency agreements) are the same, although these objectives are achieved in different ways.¹³¹ All three forms of administration regulate the management of insolvent debtors and seek to balance the interests of debtors and creditors. The role of personal insolvency laws in balancing the interests of debtors and creditors means that these laws fulfil an important economic and social function, but one that is inevitably contested. Treatment of insolvent debtors has been said to constitute 'the heart of what a society values'.¹³² The change in the demographics of Australian personal insolvents has implications for the merits of particular views on the core policy objectives of personal insolvency laws and whether it can be said that, in the context of the growth in the number of middle class personal insolvents, the interests of debtors and creditors remain adequately balanced.

The function of personal insolvency laws depends upon what their ultimate goal should be.¹³³ Australia has been placed in the liberal category of bankruptcy jurisdictions.¹³⁴ These jurisdictions are seen as offering levels of debt forgiveness with both a high degree of certainty and relative haste.¹³⁵ This is in contrast to many other jurisdictions, which have been categorised as taking either a conservative or moderate

¹²⁹ Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 122–3.

¹³⁰ *Ibid.*

¹³¹ See further nn 7–49 and accompanying text for discussion of these forms of insolvency.

¹³² Bruce H Mann, 'Failure in the Land of the Free' (2003) 77 *American Bankruptcy Law Journal* 1, 1.

¹³³ For a useful summary of varying positions, see Ziad Raymond Azar, 'Bankruptcy Policy: An Empirical Investigation of 50 Jurisdictions Worldwide' (2008) 82 *American Bankruptcy Law Journal* 407, 407–10.

¹³⁴ Rafael Efrat, 'Global Trends in Personal Bankruptcy' (2002) 76 *American Bankruptcy Law Journal* 81, 87–91.

¹³⁵ *Ibid.* Efrat identifies several other jurisdictions which have a similar approach, including the US, England and Wales, Canada, Hong Kong, New Zealand, Russia, Scotland, Taiwan, and the Netherlands.

approach to debt forgiveness, under which there is an absence of debt forgiveness provisions,¹³⁶ or the offer of debt forgiveness exists but is tempered by great uncertainty as to whether it will be granted.¹³⁷ Whereas these conservative or moderate approaches might be oriented towards creditors and informed by anti-debtor sentiment in societies that are intolerant of and punitive towards debtors,¹³⁸ the liberal approach prioritises the concept of a 'fresh start' for debtors.¹³⁹ Reflecting this observation, Australian courts have viewed the intention of Australia's bankruptcy laws as serving a fair distribution of a bankrupt's assets among creditors, as well as allowing bankrupt debtors to start afresh.¹⁴⁰ Consequently, personal insolvency laws reflect the attempted reconciliation of two competing goals: a fresh start for debtors and protection of the interests of creditors (together with equality of distribution for creditors).¹⁴¹

This liberal categorisation of Australia's personal insolvency laws reflects the approach taken to reform of these laws. In its first report on bankruptcy, the Australian Law Reform Commission ('ALRC') identified the need to strike a balance between the rehabilitation of debtors and the protection of the interests of creditors.¹⁴² In respect of the policy underpinning bankruptcy, the ALRC argued that the 'prime concern' of the process should be the rehabilitation of debtors.¹⁴³ It stated that honest bankrupts require education and assistance, not punishment.¹⁴⁴ In making its recommendations,¹⁴⁵ the ALRC stated that in cases of over commitment on the part of debtors, and also in cases where debtors experience a sudden change in financial circumstances,

the law must achieve a fair balance between the interests of the creditor and the debtor. It must uphold the general principle that debts which have been fairly incurred should be paid. But it must also deal humanely with those who suffer from overburdening debts. It must recognise that most insolvent debtors are honest and wish to pay their debts if they can. It must also recognise that their failure to seek help usually indicates ignorance, shame or embarrassment, not fraud or dishonesty.¹⁴⁶

This approach prioritises giving debtors a second chance and a clean slate with which to conduct their future financial affairs. Following the ALRC's report, the

¹³⁶ Ibid 82–84. Efrat includes jurisdictions such as China, Vietnam, Mongolia, Bulgaria, Ukraine, Hungary, Turkey, Saudi Arabia, Italy, Greece, Brazil, Mexico, Argentina, Bolivia, El Salvador, Honduras, Panama, Venezuela, the Czech Republic, Chile, and Egypt.

¹³⁷ Ibid 84–87. Efrat includes jurisdictions such as India, Pakistan, Japan, Singapore, the Philippines, Denmark, Norway, Sweden, Finland, Austria, Germany, France, Portugal, Spain, Israel, South Africa, Kenya, and Uganda.

¹³⁸ Ibid 91.

¹³⁹ Ibid 91–109.

¹⁴⁰ See, eg, *Storey v Lane* (1981) 147 CLR 549, 556–7 (Gibbs CJ); *Re McMaster; Ex parte McMaster* (1991) 33 FCR 70, 72–3 (Hill J).

¹⁴¹ Elizabeth Warren, 'A Principled Approach to Consumer Bankruptcy' (1997) 71 *American Bankruptcy Law Journal* 483, 483.

¹⁴² Australian Law Reform Commission, *Insolvency: The Regular Payment of Debts*, Report No 6 (1977).

¹⁴³ Ibid [142].

¹⁴⁴ Ibid.

¹⁴⁵ These included that non-business bankrupts should be discharged from bankruptcy six months after its commencement (and subject to objections to discharge): *ibid* [144] – [148].

¹⁴⁶ Ibid [3].

Bankruptcy Amendment Act 1980 (Cth) liberalised Australia's bankruptcy laws, creating an automatic discharge from bankruptcy after a period of three years (subject to objections).¹⁴⁷ It has been noted that this liberal approach corresponded to the deregulation of Australia's financial markets.¹⁴⁸

Issues associated with the timing of this liberalisation and deregulation shifts policy debate regarding personal insolvency laws away from a focus solely on balancing the interests of debtors and creditors to a broader debate in which personal insolvency laws might be seen, in part, as a substitute for consumer protection. In other words, personal insolvency laws might represent part of the regulation of consumer credit and its effects.¹⁴⁹ If liberalised consumer credit laws permit greater access to credit and this greater access leads to bankruptcy for some individuals, then personal insolvency laws allow a fresh start for debtors. However, this imposes a greater risk on credit providers who may not get paid all of the outstanding debt owed to them by personal insolvents. Credit providers may seek to pass this risk on to their customers in the form of higher interest rates. They may also seek more creditor-friendly personal insolvency laws. Consequently, there exists a dynamic tension between personal insolvency laws and the credit industry. It may be the case that greater access to credit for middle class Australians has contributed to the increase in personal insolvencies.

Personal insolvency laws might also be seen as functioning to a certain extent as a form of social insurance.¹⁵⁰ Personal insolvency laws might be seen as a transfer of risk from a debtor (the insured) to their creditor (the insurer), and even as providing protection to individuals who miss out on economic security through other means.¹⁵¹ In this sense, personal insolvency laws might be seen as a safety net, which fill in gaps in social insurance programs.¹⁵² Debtors who turn to personal insolvency administration may have encountered financial difficulties due to a lack of unemployment benefits or income protection insurance, or due to family breakups. In 2009, 33 per cent of non-business related bankrupts and 35 per cent of non-business related debt agreement debtors cited unemployment as the cause of their insolvency.¹⁵³ A further 11 per cent of non-business related bankrupts and 7 per cent of non-business related debt agreement debtors cited ill health as the cause of their insolvency.¹⁵⁴ In addition, 12 per cent of non-business related bankrupts and 11 per cent of non-business related debt agreement debtors cited domestic discord as the cause of their insolvency.¹⁵⁵ The use of Australia's personal insolvency regime by such

¹⁴⁷ *Bankruptcy Amendment Act 1980* (Cth) s 72.

¹⁴⁸ Efrat, 'Global Trends in Personal Bankruptcy', above n 134, 92.

¹⁴⁹ See, eg, David A Lander, 'It "is" the Best of Times, It "is" the Worst of Times: a Short Essay on Consumer Bankruptcy after the Revolution' (2004) 78 *American Bankruptcy Law Journal* 201. The issue of credit is considered further below — see nn 186–204 and accompanying text.

¹⁵⁰ See, eg, Adam Feibelman, 'Defining the Social Insurance Function of Consumer Bankruptcy' (2005) 13 *American Bankruptcy Institute Law Review* 129; Richard M Hynes, 'Non-Procrustean Bankruptcy' (2004) *University of Illinois Law Review* 301, 350–9.

¹⁵¹ Feibelman, above n 150, 130.

¹⁵² Jean Braucher, 'Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill?' (2004) 44 *Santa Clara Law Review* 1065, 1065–73.

¹⁵³ Insolvency and Trustee Service Australia, *Annual Report*, above n 1, 17.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

insolvents might mean that the regime at times functions as a form of social insurance for those who experience gaps in their financial safety nets during times of hardship. There is a question whether it is middle class insolvents who are increasingly citing such events as causes of their personal insolvency.

That personal insolvency laws might function as a form of consumer credit regulation, or provide a form of social insurance, indicates that personal insolvency laws have wide societal implications. More is at stake in the drafting and application of these laws than the traditional focus on the competing interests of creditors and debtors. The interpretation of the core policy objectives of Australia's bankruptcy laws may have fallen into this dichotomous state,¹⁵⁶ but attention needs to be drawn to other rationales personal insolvency laws might serve.

The ALRC's final report on insolvency laws included several guiding principles of contemporary Australian insolvency law which were used by the ALRC to formulate its specific recommendations.¹⁵⁷ The fundamental purpose was seen as provision of a fair and orderly process for insolvent individuals and companies.¹⁵⁸ The ALRC placed further emphasis on allowing debtors and creditors to participate with the least possible delay and expense in an impartial, efficient, and expeditious insolvency administration, with the end result, particularly for individual insolvents, of effective relief or release from the insolvent's financial liabilities and obligations.¹⁵⁹ At the same time, the ALRC felt that insolvency laws should support the commercial and economic processes of the community.¹⁶⁰

There is now an important question whether the original policy of Australian personal insolvency laws, as articulated by the ALRC and also by some courts, is still valid given the changing demographics of Australian personal insolvents. Australia's personal insolvency laws are affecting increasing numbers of Australians, in particular the middle class, and therefore the role these laws play in regulating the relationship between creditors and insolvent debtors and balancing the respective interests of creditors and debtors remains important. However, personal insolvency laws accomplish more than balancing these interests and this arguably includes credit market regulation and providing a form of social insurance. In order to understand the wider role that personal insolvency laws might play, it is important that connections between personal insolvency laws and broader social issues are analysed. This is the purpose of the following section where our intention is to place Australia's personal insolvency laws in a broader social context.

B Connections between personal insolvency laws and broader social issues

Our findings indicate that personal insolvency is having a growing presence within the Australian middle class. Determining the causes of personal insolvency in Australia is not something that has attracted much academic attention.¹⁶¹ There is a pressing need

¹⁵⁶ See, eg, *Storey v Lane* (1981) 147 CLR 549, 556–7 (Gibbs CJ); *Re McMaster; Ex parte McMaster* (1991) 33 FCR 70, 72–3 (Hill J).

¹⁵⁷ Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988).

¹⁵⁸ *Ibid* [33].

¹⁵⁹ *Ibid*.

¹⁶⁰ *Ibid*.

¹⁶¹ We have previously noted that others have pointed out the lack of research on Australian personal insolvency: see the authors cited in n 64.

for more detailed research on personal insolvency and related issues. The urgency of this call for further research is amplified not solely because of the significant increase in personal insolvency numbers, but also because the federal government recently reformed Australia's personal insolvency system through the Bankruptcy Legislation Amendment Act 2010 (Cth).¹⁶² In our view, reform of the *Bankruptcy Act 1966* (Cth) should always reflect detailed research and consultation, as well as a good understanding of the policy and function of personal insolvency laws. It has been viewed as potentially dangerous to make changes to bankruptcy laws based on 'possibly mistaken diagnoses', for these may result in the opposite results to those the reform intended to achieve.¹⁶³

The principle purpose of the Bankruptcy Legislation Amendment Act 2010 (Cth) is to modernise the personal insolvency system and to make it more efficient.¹⁶⁴ The amendments are an attempt to recognise that, in the federal government's view, the majority of bankruptcies relate to consumer debts and involve bankrupts with relatively few assets and little income.¹⁶⁵ Given this recognition, the federal government perceived that the system could do more to encourage informed decision making and access to alternative solutions, whilst giving debtors time to deal with all their creditors and review information which will assist in rational decision making.¹⁶⁶ The primary means to achieve these ends are to increase the minimum debt for a creditor's petition from A\$2000 to A\$5000;¹⁶⁷ and to increase the stay period that follows a declaration of intent to file a debtor's petition from seven days to 21 days;¹⁶⁸ whilst a proposal in the original Bill to increase the debt, income and asset test thresholds for debt agreements by 20 per cent was withdrawn.¹⁶⁹

It is unlikely these amendments to the *Bankruptcy Act 1966* (Cth) will lead to a significant decline in the numbers of personal insolvencies. The increase in the minimum debt for a creditor's petition (which has the objective of lessening the opportunity to use bankruptcy procedures as a debt collection process),¹⁷⁰ needs to be understood in the context that in 2009, only 8 per cent of bankruptcies originated from creditors' petitions.¹⁷¹ Increasing the stay period that follows a declaration of intent to file a debtor's petition will likely result in increasing numbers of debt agreements, because eligible debtors who may otherwise have turned to bankruptcy might, on reflection, opt instead to enter into a debt agreement.

¹⁶² The Bankruptcy Legislation Amendment Act 2010 (Cth) received Royal Assent on 14 July 2010.

¹⁶³ David A Moss and Gibbs A Johnson, 'The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?' (1999) 73 *American Bankruptcy Law Journal* 311, 343.

¹⁶⁴ Explanatory Memorandum, Bankruptcy Legislation Amendment Bill 2009 (Cth) 7.

¹⁶⁵ Explanatory Memorandum, Bankruptcy Legislation Amendment Bill 2009 (Cth) 8.

¹⁶⁶ Explanatory Memorandum, Bankruptcy Legislation Amendment Bill 2009 (Cth) 9.

¹⁶⁷ Bankruptcy Legislation Amendment Act 2010 (Cth) sch 4, pt 1.

¹⁶⁸ Bankruptcy Legislation Amendment Act 2010 (Cth) sch 4, pt 2. Under s 54(E) of the *Bankruptcy Act 1966* (Cth), a creditor may not apply for or enforce a remedy against a debtor's property for the stay period following acceptance by the Official Receiver of a debtor's declaration of intention to file a debtor's petition.

¹⁶⁹ Bankruptcy Legislation Amendment Bill 2009 (Cth) sch 4, pt 2.

¹⁷⁰ Explanatory Memorandum, Bankruptcy Legislation Amendment Bill 2009 (Cth) 133.

¹⁷¹ Insolvency and Trustee Service Australia, above n 1, 7.

The reforms focus on some aspects of the relationship between debtors and creditors, and not broader issues arising from that relationship or the wider role personal insolvency laws might serve.¹⁷² The catalyst seems to have been the 'tough economic times' experienced in the financial crisis,¹⁷³ rather than recognising a need to address the key policy issues underlying the personal insolvency regime. The focus on the need to educate and inform debtors of their legal position,¹⁷⁴ and on striking a balance between fairness and maintaining a strong economy,¹⁷⁵ while useful, is limited to only selected aspects of Australian personal insolvency laws. In this sense, the *Bankruptcy Legislation Amendment Act 2010* (Cth) represents piecemeal reform, which fails to address important policy issues underlying the personal insolvency system. In our view, reform of the current Australian personal insolvency regime should include consideration of issues relating to the need for improved personal insolvency data; rising levels of debt; the spending habits of Australians; and the relationship between personal insolvency and social security. We now consider each of these issues.

1 *The need for improved personal insolvency data*

Understanding the connections between personal insolvency laws and broader social issues, including how and why personal insolvency has extended its reach within the middle class, requires detailed data on the characteristics of personal insolvents and the causes of personal insolvency. There is a need for more research, beyond what has already been done, on the causes of personal insolvency and the characteristics of personal insolvents. This research is necessary in order to obtain a more comprehensive profile of Australian personal insolvents.

At present, some information is not requested of insolvents in their Statement of Affairs, and some data collated by ITSA from the Statement of Affairs is not released to the public.¹⁷⁶ In the absence of broad empirical studies into Australian personal insolvency, it is desirable that ITSA capture and release further data on the characteristics of personal insolvents in order to enable further research in this area.¹⁷⁷ Additionally, information profiling the socio-economic characteristics of personal insolvents can inform research on the economic progress of social groups, and how vulnerable certain groups are in an economic sense.¹⁷⁸ Personal insolvency is affecting an increasing proportion of Australians and there are strong reasons to enhance current reporting of the characteristics of Australian personal insolvents.

First, it would be useful for data to be reported in such a manner that would enable the determination as to what proportion of insolvents has a combination of certain

¹⁷² See, eg, Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Bankruptcy Legislation Amendment Bill 2009* (2010).

¹⁷³ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 28 October 2009, 11 168 (Robert McClelland, Attorney-General).

¹⁷⁴ See, eg, Legal and Constitutional Affairs Legislation Committee, above n 172, [3.52].

¹⁷⁵ Commonwealth of Australia, above n 173, 11 169.

¹⁷⁶ For information on Statements of Affairs, see *Bankruptcy Act 1966* (Cth) ss 54(1)(a), 54(2)(a), 55(2)(b), 56B(1), 56F(1)(a), 56F(1)(b), 57(1), 185C(2B), 185D, 185M(1B), 185P(1B), 188(2C), 188(2D), 267 and text accompanying above nn 51–52.

¹⁷⁷ The Senate Committee considering the *Bankruptcy Legislation Amendment Bill 2009* (Cth) commented in relation to debt agreement debtors that 'available statistics are somewhat confusing': see Legal and Constitutional Affairs Legislation Committee, above n 172, [3.50].

¹⁷⁸ Warren, 'Financial Collapse and Class Status', above n 65, 118.

characteristics. This might involve reporting on the characteristics of each individual debtor. This would then allow, for example, determination of the proportion of bankrupts who are professionals in the highest income bracket and declare property ownership, or what proportion of debt agreement debtors are aged less than 35 and have dependants. Warren was able to make such classifications on the US data (notably, by determining what proportion of bankrupts fulfilled the three criteria relating to middle class status).¹⁷⁹ Availability of such data would be beneficial to the study of Australian personal insolvents.

Second, the current Statement of Affairs should be expanded to include further socio-economic details of insolvents.¹⁸⁰ The level of education reached is one of the three criteria used by Warren to determine the middle-class status of US bankrupts,¹⁸¹ and such information would be useful in expanding the profile of Australian personal insolvents. The Statement of Affairs already contains questions on certain aspects of the ethnicity of Australian personal insolvents, such as whether insolvents are of Aboriginal or Torres Strait Islander origin; which country insolvents were born in; and which languages are spoken at home. Aside from making this information publicly available, a direct question on the ethnicity of the insolvent should be included, as important observations on ethnicity and bankruptcy have been made in the US.¹⁸² Furthermore, an additional question should be included in the Statement of Affairs as to whether the insolvent has used the services of a financial adviser to assist in determining what financial resources, if any, have been used.

Third, existing data collected in the Statement of Affairs should be included within ITSA's relevant publications to assist in enabling a better profile of Australian personal insolvents. Whilst information is available on the State and Territory breakdowns of personal insolvencies, this data should be expanded to include a breakdown of figures based on federal constituencies and urban/rural areas. This would enable a fuller understanding of the location of Australian personal insolvents. In addition, whilst some information is available on the proportion of insolvents with and without dependants, this data should be expanded to include the number of dependants, which would enable insight into whether the risk of personal insolvency increases with the number of dependants.¹⁸³ Data should be released on the proportion of insolvents

¹⁷⁹ See nn 63–73 and accompanying text.

¹⁸⁰ The insertion of s 77CA in the *Bankruptcy Act 1966* (Cth) contained in the *Bankruptcy Legislation Amendment Act 2010* (Cth) provides the Official Receiver with a specific power to compel a bankrupt to provide a Statement of Affairs. This has the potential to increase the level of publicly available data on Australian personal insolvents but the amendment does not deal with the need to increase the available data on the socio-economic details of insolvents.

¹⁸¹ Warren, 'Financial Collapse and Class Status', above n 65, 128.

¹⁸² A study in the US found that the self-employed in bankruptcy did not differ from the non-bankrupt self-employed on age, gender, or marital status, but that African Americans were overrepresented and Asian-Americans were underrepresented among the self-employed in bankruptcy. See Robert M Lawless, 'Who Are the Self-Employed in Bankruptcy?' (Working Paper, Social Science Research Network, 2008). Another study found that immigrant entrepreneurs are less likely to file for bankruptcy: see Rafael Efrat, 'Immigrant Entrepreneurs in Bankruptcy' (2008) 82 *American Bankruptcy Law Journal* 693.

¹⁸³ A study in the US found an increased risk of bankruptcies for families with more children: see Warren, 'Bankrupt Children', above n 65.

with government benefits and pensions, as well as private patient hospital cover, which would help ascertain the role that welfare and insurance plays in ameliorating financial difficulties.¹⁸⁴ Data currently collected by ITSA on the duration for which insolvents have experienced difficulty paying their debts would also be insightful, as it would assist in determining the period of time insolvents are able or prepared to experience financial difficulties before becoming a personal insolvent, with the consequences this entails.¹⁸⁵

2 Incurring of debt

In exploring connections between Australia's personal insolvency laws and broader social issues, one important matter is how central to the increase in middle class Australian personal insolvents is rising debt levels. A question is whether Australians, including middle class Australians, are being forced to access credit as a short-term solution to financial difficulties, or whether increases in credit usage are part of a problem of overconsumption. The financial vulnerability of individuals is heightened through greater access to credit, and it appears there is a connection between the rate of personal insolvencies and the extent of deregulation in the consumer credit market.¹⁸⁶ This gives rise to the need for further research on the incurring of debt. At present, it remains unclear precisely what type of debt is being incurred by insolvents, and in what circumstances this is occurring. Whilst debt might be incurred as part of overconsumption, it might also be the case that debt is incurred in the lead up to personal insolvency as part of an attempt to avoid some form of personal insolvency administration.

It has been suggested that bankruptcy represents one of the costs stemming from the extension of consumer credit,¹⁸⁷ and that bankruptcies are a by-product of excessive borrowing.¹⁸⁸ For this reason, it has been suggested that before amendments to bankruptcy laws are made, consideration should be given to whether reform to consumer borrowing and credit regulations might be more appropriate.¹⁸⁹ It has been argued that reforms to bankruptcy laws in the US, designed to make bankruptcy less

¹⁸⁴ A study in the US found an increased risk of bankruptcy for those with inadequate health insurance: see Himmelstein et al, above n 65.

¹⁸⁵ Information on the realisable asset levels of insolvents would be enhanced by ITSA releasing data on the proportion of insolvents who declare vehicle or share ownership or entitlements. In addition, data on the proportions of insolvents with accountants and solicitors should be published, as this would indicate the proportion of insolvents receiving financial and legal assistance in organising their affairs.

¹⁸⁶ Mason, 'Consumer Bankruptcy: An Australian Perspective', above n 64; Jaynendra Kumar, Rosalind Mason and Deborah Ralston, 'Consumer Bankruptcies: Causes and Implications for the Credit Industry' (1998) 17(3) *Economic Papers: A Journal of Applied Economics and Policy* 18; Deborah Ralston, Rosalind Mason and Jaynendra Kumar, 'Causes of Consumer Bankruptcy in Australia: a Macroeconomic Analysis' (Working Paper No 01/1, University of the Sunshine Coast Faculty of Business, 2001).

¹⁸⁷ Moss and Johnson, above n 163, 349.

¹⁸⁸ Ibid 350.

¹⁸⁹ Ibid 351.

desirable for consumers, have resulted in increased costs to consumers of credit cards.¹⁹⁰

It is possible that some unsecured debt declared by Australian personal insolvents has been incurred to fund basic living essentials. Available data indicates that even modest levels of unsecured debt can result in bankruptcy. In 2002 and 2007, 5 per cent of bankrupts had unsecured debt less than A\$2000, compared to 4 per cent in both 2003 and 2005.¹⁹¹ In 2002, 49 per cent of bankrupts had more than A\$2000 but less than A\$20 000 in unsecured debt, compared to 28 per cent in 2007. However, levels of unsecured debt greater than A\$20 000 among bankrupts increased between 2002 and 2007.

Related to the incurring of debt, there exists the need for more research on the credit industry and its practices.¹⁹² Between 1997 and 2009, there was an 87 per cent increase in the proportion of non-business related bankruptcies caused by excessive use of credit.¹⁹³ Between 2002 and 2009, there was a 31 per cent increase in the proportion of debt agreements caused by excessive use of credit.¹⁹⁴ In 2009, 25 per cent of non-business related bankruptcies and 43 per cent of non-business related debt agreements were caused by excessive use of credit.¹⁹⁵ Further, in 2007, 52 per cent of bankrupts' creditors and 61 per cent of debt agreement debtors' creditors were finance organisations.¹⁹⁶ Of creditors among finance organisations, the creditor subtype of cards (ie store cards and credit cards) in 2007 was high for both bankrupts (36 per cent) and debt agreement debtors (50 per cent).¹⁹⁷ The increase in personal insolvencies caused by excessive use of credit, and the high proportions of financial organisation creditors, coincides with increases in several forms of Australians' debt.

One issue relating to credit industry practices is the prevalence and expansion of the credit card industry. In January 1997, combined credit limits for credit cards (excluding charge cards and cards issued to businesses) with an interest-free period reached A\$19 585 million, with total value of outstanding balances owed on credit cards of A\$6581 million.¹⁹⁸ In January 2009, these credit limits had increased to A\$112 280 million with outstanding balances of A\$39 526 million.¹⁹⁹ Over these 12 years, and not taking into account the effect of inflation, this represents a 473 per cent

¹⁹⁰ Michael Simkovic, 'The Effect of BAPCPA on Credit Card Industry Profits and Prices' (2009) 83 *American Bankruptcy Law Journal* 1.

¹⁹¹ The statistics in this paragraph are from Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1.

¹⁹² See, eg, Kumar, Mason and Ralston, 'Consumer Bankruptcies: Causes and Implications for the Credit Industry', above n 186.

¹⁹³ Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 65; Insolvency and Trustee Service Australia, *Annual Report*, above n 1, 17.

¹⁹⁴ Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 68; Insolvency and Trustee Service Australia, *Annual Report*, above n 1, 17.

¹⁹⁵ Insolvency and Trustee Service Australia, *Annual Report*, above n 1, 17.

¹⁹⁶ Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 124–7.

¹⁹⁷ *Ibid.*

¹⁹⁸ Reserve Bank of Australia, *Payments Data (Credit and Charge Card Statistics – Additional Credit Card Statistics)* <<http://www.rba.gov.au/statistics/tables/xls/additional-credit-card.xls?accessed=Monday, 23-Aug-2010 04:50:40 EST>> at 23 August 2010.

¹⁹⁹ *Ibid.*

increase in credit limits and a 501 per cent increase in the amount of outstanding balances.

Another factor, resulting in part from this increase in credit card debt, is the increase in Australian household debt. The total amount of debt owed by Australian households rose almost six-fold between 2000 and 2008.²⁰⁰ Australian households had incurred A\$190 billion in debt in September 1990.²⁰¹ By September 2008, Australian households had incurred A\$1.1 trillion in debt in real terms (ie, adjusted to remove the effect of inflation).²⁰²

A further example of the growing ease of access to credit is the increasing incidence of margin lending, which is a form of debt. Margin lending involves borrowing to acquire financial products such as shares in companies. Between September 2000 and September 2008, margin lending in Australia increased by 309 per cent (from A\$6739 million to A\$27 553 million).²⁰³ During the same time, margin calls increased by 238 per cent.²⁰⁴ Margin calls may have led to personal insolvency when the amount borrowed was excessive.

There is, therefore, an important issue regarding links between increases in debt (such as credit card debt, household debt, and in margin lending) on the one hand, and the increase in personal insolvencies caused by excessive use of credit and the higher proportion of financial organisation creditors of personal insolvents on the other hand. Consequently, rising levels of debt and the circumstances in which this debt is incurred and by whom, including the Australian middle class, is part of the broader social context in which personal insolvency laws operate.

3 *Spending habits*

On a similar note, understanding the connections between personal insolvency laws and broader social issues requires exploration of spending habits. There is a relationship between personal insolvency and spending habits. Australians have increased levels of debt, and it seems logical that spending habits would form part of the equation as to why the demographics of Australian personal insolvents are changing and increasingly involving the middle class. It is unclear how personal insolvents, including those from the middle class, spent their money in the lead up to insolvency. Are Australians taking part in overconsumption and frivolous spending?²⁰⁵ Or are Australians being forced to access credit to buy essential household items as a short-term solution to financial difficulties? As mentioned above, a significant proportion of personal insolvents declare their insolvency to have been caused by excessive use of credit, but this does not determine that utilisation of credit is part of a problem of overconsumption. However, between 1997 and 2009 there was a

²⁰⁰ Australian Bureau of Statistics, *Australian Social Trends March 2009*, Cat. No. 4102.0, < [http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/C443436A5DEA4C4ECA2575830015EE48/\\$File/41020_householddebt.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/C443436A5DEA4C4ECA2575830015EE48/$File/41020_householddebt.pdf) > at 23 August 2010.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Reserve Bank of Australia, *Statistical Tables: Money and Credit Statistics (Margin Lending – D10)* <<http://www.rba.gov.au/statistics/tables/xls/d10hist.xls?accessed=2308-05:11:24>> at 23 August 2010

²⁰⁴ Ibid.

²⁰⁵ See, eg, Clive Hamilton and Richard Denniss, *Affluenza: When Too Much is Never Enough* (2005).

215 per cent increase in the proportion of non-business related bankruptcies caused by gambling or speculation.²⁰⁶ In 1997, gambling or speculation caused 1.30 per cent of non-business related bankruptcies, compared to 4.10 per cent in 2009.²⁰⁷ This indicates that, to a certain extent, overconsumption, as typified by gambling and other forms of speculation, has contributed to the increase in the number of personal insolvencies.

In the US, vociferous debate has taken place regarding whether increases in bankruptcy in that country are the result of increases in expenses for families, or increases in unnecessary overspending.²⁰⁸ An understanding of the relationship between the spending habits of Australians and personal insolvency is relevant to consideration of the role and function of personal insolvency laws. If personal insolvency laws serve a social insurance function, or assist in the regulation of the credit market, then information on the spending habits of personal insolvents will assist in determining whether the policy objectives of personal insolvency law require reconsideration. There are important policy questions relevant to spending habits that result in personal insolvency. For example, where gambling debts lead to personal insolvency, should this result in a longer period before discharge from personal insolvency than would be the case with other forms of debt, or should there be an exemption from release on discharge for gambling debts, based on the policy objective of deterring misuse of the personal insolvency regime?²⁰⁹ Answering these types of questions requires an understanding of the broader social context in which personal insolvency laws operate.

4 Social welfare benefits

One final issue relates to the interaction between social welfare benefits and personal insolvency. As mentioned above, data on government benefits and pensions paid to personal insolvents prior to their insolvency is collected by ITSA, and this data should be made available to enhance understanding of the role that social welfare benefits might have in ameliorating financial difficulties. It may be the case that welfare benefits have become less sufficient at assisting those who previously might have been able to avoid personal insolvency.

Australia has a limited social welfare regime compared to some other developed countries. A 2008 OECD report found that in a typical OECD country, 22 per cent of total income is from the government in the form of cash benefits, compared to 14 per cent in Australia.²¹⁰ Further, in Australia these cash benefits are concentrated more on low-income households than in any other OECD country, with 40 per cent of cash

²⁰⁶ Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 65; Insolvency and Trustee Service Australia, *Annual Report*, above n 1, 17.

²⁰⁷ Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 65; Insolvency and Trustee Service Australia, *Annual Report*, above n 1, 17. For further discussion of gambling and bankruptcy, see John Duns, 'Other People's Money: Gambling and Bankruptcy' (2007) 31 *Melbourne University Law Review* 87.

²⁰⁸ See further the debate on 'What's Hurting the Middle Class' on the Boston Review Forum <<http://bostonreview.net/forums/>> at 30 July 2009.

²⁰⁹ See further Duns, above n 207, who discusses these questions in the context of his analysis of bankruptcy and gambling.

²¹⁰ Organisation for Economic Co-operation and Development, *Growing Unequal? Income Distribution and Poverty in OECD Countries* (2008).

benefits going to the poorest 20 per cent of the population.²¹¹ That welfare is targeted at these lower-socio economic groups rather than the middle class might explain in part why Australian personal insolvency is becoming an increasingly middle class phenomenon.²¹²

One potential link between social welfare benefits and bankruptcy can be considered on already available data. Between 2005 and 2007, there was a significant rise in the proportion of bankrupts with dependants, rising from 35 per cent to 49 per cent, which represents an increase of 40 per cent in two years.²¹³ During this time, there was also an increase in the number of bankruptcies, from 20 501 in 2005 to 25 238 in 2007, an increase of 23 per cent. Whilst single bankrupts without dependants constituted the greatest proportion of bankrupts in 2002 (44 per cent), 2003 (44 per cent), 2005 (47 per cent) and 2007 (37 per cent), the proportion of bankrupts who were members of a couple with dependants increased from 20 per cent in 2005 to 32 per cent in 2007. This might constitute evidence that welfare benefits are becoming less sufficient at assisting those with dependants. An enhanced understanding of the interaction between social welfare benefits and personal insolvency is important to determine the sufficiency of welfare benefits in assisting those in financial need. One issue is whether greater financial support should be provided to those raising children, or whether assistance should be provided in bankruptcy by further restricting the items the trustee may seize.²¹⁴

VI CONCLUSION

Financial stress is affecting a growing number of Australians to the extent that an increasing proportion are entering into bankruptcy and debt agreements, despite the consequences these entail. Whilst the rise in personal insolvencies is not attributable solely to prevailing economic conditions, we expect in the context of the global financial crisis that the number of personal insolvencies will rise over the coming period. Personal insolvency is affecting, and will continue to affect, a growing number of Australians. This article has considered one important feature of the increase in personal insolvency — the way in which it is affecting to a greater degree the Australian middle class.

This finding should displace any assumptions informing stereotypical images of personal insolvents. If personal insolvency is becoming an increasingly middle class phenomenon, then it is not correct to assume that personal insolvents are only the chronically poor who have no other options, such as pensioners; neither is it correct to assume that personal insolvents are only the very wealthy who are avoiding meeting their financial obligations. Rather, our analysis indicates that personal insolvency is affecting the broad section of Australian society represented by the middle class.

²¹¹ Ibid.

²¹² Many welfare payments in Australia are subject to income and assets tests, including the Age Pension, the Carer Payment, the Child Care Benefit and Tax Rebate, the Disability Support Pension, the Family Tax Benefit, the Newstart Allowance, the Parenting Payment, the Sickness Allowance, the Special Benefit, and the Youth Allowance.

²¹³ The statistics in this paragraph are from Ramsay and Sim, *Trends in Personal Insolvency in Australia*, above n 1, 92–4.

²¹⁴ See further Warren, 'Bankrupt Children', above n 65, 1024–5.

Personal insolvents are increasingly coming from higher prestige occupations, such as managers and administrators, professionals, and associate professionals. Between 1999 and 2008 there was a 142 per cent increase in the proportion of bankrupts and an 82 per cent increase in the proportion of debt agreement debtors from these occupations. Personal insolvents have increasing levels of personal income. Between 1997 and 2007 there was a 192 per cent increase in the proportion of bankrupts and a 360 per cent increase in the proportion of debt agreement debtors with personal income of A\$30 000 or more. There have also been significant increases between 2005 and 2007 in the proportions of bankrupts (44 per cent increase) and debt agreement debtors (42 per cent increase) with personal income of A\$50 000 or more. Similarly, personal insolvents are coming from households with greater levels of income. Between 2002 and 2007 there was a 167 per cent increase in the proportion of bankrupts and a 125 per cent increase in the proportion of debt agreement debtors with household income of A\$50 000 or more. Personal insolvents also have increasing levels of realisable assets, with a 133 per cent increase in the proportion of bankrupts and a 100 per cent increase in the proportion of debt agreement debtors between 2003 and 2007 declaring realisable assets of A\$50 000 or more. Finally, property ownership levels increased between 2003 and 2007, with a 120 per cent increase in the proportion of bankrupts and a 200 per cent increase in the proportion of debt agreement debtors declaring property ownership.

Our findings have implications for the Australian personal insolvency regime, notably the policy underpinning personal insolvency laws. Whilst debate on Australian personal insolvency laws has usually focussed on balancing the interests of debtors and creditors, with emphasis on giving debtors a fresh start, personal insolvency laws might have broader societal functions, including regulating credit markets and providing a form of social insurance. In order to further investigate these functions and to consider how they might be related to the increase in middle class personal insolvencies, improvements should be made to the current Australian data on personal insolvency. It is also important to understand the broader social context in which personal insolvency laws operate. We have, in this article, explored the connections between personal insolvency and rising levels of debt; the spending habits of Australians; and social welfare benefits. Undoubtedly, more research is required. However, what is clear is that the reach of Australian personal insolvency has been expanding and is altering the demographics of Australian personal insolvents.