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CANT' PAY YOUR DEBTS, MATE?
A COMPARISON OF THE AUSTRALIAN AND AMERICAN PERSONAL BANKRUPTCY SYSTEMS

by
Paul B. Lewis*

INTRODUCTION

The United States has one of the most debtor-friendly personal bankruptcy vehicles in the industrialized world. At the heart of the American system is the firmly-rooted belief in maintaining the prospect of a fresh start for the honest but unfortunate debtor. Not all bankruptcy regimes give such primacy to maintaining the fresh start. In this Article, I compare the United States personal bankruptcy approach to that utilized in Australia. While both American and Australian bankruptcy law arose from the same common law roots, the two systems now have significant differences in their approach to personal bankruptcy.

The reasons for the disparities between the systems are numerous. This Article examines some of the critical distinctions and the justifications that have been proffered for each country's approach. Part I provides some bankruptcy history. Part II briefly outlines the current American approach to personal bankruptcy under both chapter 7 and chapter 13 of the Bankruptcy Code. Part III describes the personal bankruptcy system in Australia. Part IV discusses the two most critical distinctions between the systems as indicia of the significant underlying philosophical differences as to what should form the core of personal bankruptcy law.

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I. SOME BANKRUPTCY HISTORY

Australian and American bankruptcy law share the same common law roots. American bankruptcy law, however, departed markedly from the English model early in this country's history. The result is a vast divergence between both the basic goals of American and Australian bankruptcy law and the mechanisms used to achieve those goals.

Bankruptcy law has Roman origins. The earliest bankruptcy laws were entirely procreditor in nature; they allowed for either an insolvent debtor or defrauded creditors to demand transfer of the debtor's estate to the debtor's creditors. Creditors had to elect one of their own to manage the estate. The manager's primary duty was to convey good title to the property to a vendee. The manager advertised the property for sale and sold the estate as a whole to the highest bidder, who then succeeded to all of the rights and obligations of the estate. Each step in the process was designed to aid creditor recovery. Nothing in the law assisted rehabilitation of the honest but unfortunate debtor, nor was such an end expressly contemplated.

The earliest English "bankruptcy" statute, passed in 1542 during the reign of Henry VIII, did little more than provide for collective action proceedings for merchants' creditors. When a debtor committed certain acts deemed to raise concerns over whether conventional debt collection mechanisms could successfully compel repayment, the statute provided additional rights to creditors as a group which they did not individually possess. These acts of the debtor were called acts of bankruptcy. When a debtor committed an act of bankruptcy, creditors could petition the Lord Chancellor and request that the debtor's assets be

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1 Max Radin, Handbook of Roman Law 315 (1927).
2 Id.
3 Id. at 315-16. During the Middle Ages, the commercial cities in Italy began to develop a form of collectivized debt collection to avoid fraud and facilitate equality among creditors. These laws were an adaptation of Roman law's bankruptcy procedure where the entire property of the debtor was divided equally among creditors. 8 William Holdsworth, A History of English Law 229 (1966). See also Jan H. Dalhuisen, The Development of Bankruptcy in Western Europe in the Middle Ages, Renaissance, and Thereafter, Up to the Codification, in European Bankruptcy Laws 11, 13 (I Arnold Ross ed., 1974).
4 See 34 & 35 Hen. 8, c. 4 (1542) (Eng.); 8 Holdsworth, supra note 3, at 236.
5 See 34 & 35 Hen. 8, c. 4.
gathered and distributed. If the creditors were still not fully repaid as a result of this action, creditors retained the ability to resort to those rights afforded individual creditors to compel payment. Again, the law had no debtor rehabilitation component; rather, it was designed solely to prevent debtor fraud.

The first law designed as a true bankruptcy statute rather than as a fraud prevention law was enacted in 1570. It applied only to traders, and it defined what should be regarded as acts of bankruptcy. The Chancellor was given authority to appoint an individual with rights to exercise the powers of the Chancellor over the bankrupt's person and property. These "commissioners" essentially liquidated the debtor's assets and distributed the proceeds from these assets to creditors. The law provided no opportunity for discharge, and a debtor who committed fraudulent acts of bankruptcy faced possible imprisonment.

The concept of discharge first appeared in English law in the early eighteenth century. According to the law, bankrupt traders who surrendered to the commissioner and conformed to his dictates or who were apprehended and then conformed were to "be discharged from all debts by him, her, or them due at the time he, she, or they did become bankrupt." In addition, provisions

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6 See id.
7 8 HOLDSWORTH, supra note 3, at 236-37.
8 13 Eliz., c. 7 (1570) (Eng.). The first English statute employing the term "bankrupt" was enacted several years earlier. See 34 & 35 Hen. 8, c. 4 (1542-43) (Eng.).
9 Others were treated merely as insolvents under common law. See Samuel Williston, The Effect of a National Bankruptcy Law Upon the State Laws, 22 HARV. L. REV. 547, 551 (1909).
10 13 Eliz., c. 7, § 1.
11 Id. § 2.
13 The Act held that creditors who were not paid in full retained the right to proceed against the future effects of the bankrupt for the unpaid balance. 13 Eliz., c. 7, §§ 9-10.
14 See 8 HOLDSWORTH, supra note 3, at 237. The focus of most bankruptcy legislation in England in the sixteenth and seventeenth centuries was to increase penalties on noncompliant debtors. Debtor's homes could be invaded to assist in repayment, and noncompliant debtors could be maimed. See, e.g., 21 Jam., c. 19, § 8 (1623); 1 Jam., c. 15, § 9 (1604).
15 See 4 Ann., c. 17, § 8 (1705) (Eng.). The bill was introduced in 1705, and this is the date customarily cited. Discharge was available, though, only to traders, and the process could only be invoked by creditors. See John C. McCoid, II, Discharge: The Most Important Development in Bankruptcy History, 70 AM. BANKR. L.J. 163, 163, n.2 (1996).
16 4 Ann. c. 17, § 8.
allowed for conforming bankrupts to not only obtain a discharge, but also to receive a monetary allowance in the hopes they might again become productive members of society.\textsuperscript{17}

At the time of the American Constitutional Convention, the English statute in operation was the 1732 statute of George II.\textsuperscript{18} This law largely followed the lead of the Act of 1705 in attempting to create incentives for compliance from debtors. Discharge and retention of some property remained an option for the compliant debtor; extremely harsh treatment remained the norm for the noncompliant debtor.\textsuperscript{19} Most English bankruptcy practices, including the prospect of imprisonment for debt, were imported to America and were widely used in the Colonies prior to the framing of the Constitution.\textsuperscript{20}

II. AMERICAN BANKRUPTCY LAW—A PRIMER

The United States Constitution gives Congress the right to establish “uniform Laws on the subject of Bankruptcies throughout the United States.”\textsuperscript{21} However, the Constitutional Convention

\textsuperscript{17} Id. Debtors could receive an allowance, not to exceed 200 pounds, or 5 pounds per hundred of the net estate recovered, so long as creditors received at least 8 shillings per pound owed. Id. §§ 8-9. McCoid, supra note 15, at 167. It has been noted, however, that the introduction of the discharge provision into English law served a creditor interest as well. By demanding conformity in order to obtain discharge, the law was designed to ease creditor recovery. See Charles Jordan Tabb, The Historical Evolution of the Bankruptcy Discharge, 65 AM. BANKR. L.J. 325, 336 (1991).

\textsuperscript{18} See 5 Geo. 2, c. 30 (1732) (Eng.).

\textsuperscript{19} Though the laws remained procreditor throughout the seventeenth century in England, a different attitude regarding bankrupts seemed to be appearing. For example, according to Blackstone:

“A bankrupt . . . was formerly considered merely in the light of a criminal . . . . But at present the laws of bankruptcy are considered as laws calculated for the benefit of trade, and founded on the principles of humanity as well as justice; and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself.”

\textsuperscript{20} WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 471-72 (1725). See also Tabb, History, supra note 12, at 12.


U.S. CONST. art., I, cl. 8. The Constitution almost did not do that; the bankruptcy power was not included in the original draft of the Constitution. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1100 (Da Capo Press ed., 1970). The subject was not even discussed until very late in the Convention when the Bankruptcy power was proposed as an addition to the Full Faith and Credit Clause. See CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 4-5 (DeCapo Press ed., 1972).
provided little guidance as to the substantive parameters of any future bankruptcy law. The only objection to the bankruptcy power set forth at the Convention was based on a desire to ensure that in the United States—unlike in England at the time—debtors could not be put to death.  

See 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 489 (Yale University Press ed., 1966). Nor is there any suggestion as to why the Bankruptcy Clause is so brief. Scholars have subsequently advanced two primary theories to explain its brevity. The first argument is that the drafters intended to create an entirely new federal system, and Congressional statute, not the Constitution, was the appropriate forum for the details to be fleshed out. This argument is based on the fact that under the Confederation, the states possessed the sole authority to create bankruptcy laws. See ARTICLES OF THE CONFEDERATION art. II (reserving to the states all rights not expressly delegated to the United States). The dissimilarity of the laws in the different states caused a multitude of problems. See 3 STORY, supra note 21, §§ 1101-03. Many of these state laws were passed in part to relieve debtors from imprisonment, a problem that had grown due to the consequences of the war and other monetary disorders. Kurt Nadelmann, On the Origin of the Bankruptcy Clause, 1 AM. J. LEGAL HIST. 215, 223-24 (1957). Records of the Prison Discipline Society reflect that in 1830, thousands of people had been imprisoned for debt, including "3,000 in Massachusetts, 10,000 in New York, 7,000 in Pennsylvania, and 3,000 in Maryland," and an estimated 50,000 additional people in the northern and middle states. Richard Ford, Imprisonment for Debt, 25 MICH. L. REV. 24, 29 (1926).

The issue naturally arose as to whether a statute in one state could protect a debtor if he ventured into another state. This question was often litigated in the years leading up to the Constitutional Convention. See, e.g., James v. Allen, 1 Dall. 188, 191-92 (C.P. Phila. County 1786) (holding that an order protecting a debtor in New Jersey had no effect outside of that state); Millar v. Hall, 1 Dall. 229, 231-33 (Pa. 1788) (Pennsylvania Supreme Court considered the effectiveness of a Maryland statute granting debtor a discharge). James Madison discussed the importance of a national bankruptcy code to prevent individuals from fleeing to other states with impunity:

The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.

The power of prescribing by general laws, the manner in which the public acts, records and judicial proceedings of each State shall be proved, and the effect they shall have in other States, is an evident and valuable improvement . . . . The power here established may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States, where the effects liable to justice may be suddenly and secretly translated in any stage of the process within a foreign jurisdiction.


An additional argument that a completely new law was intended stems from the fact that the bankruptcy clause speaks of "uniform laws" rather than one "uniform law." James Monroe Olmstead, Bankruptcy, A Commercial Regulation, 15 HARV.L.REV. 829, 831 (1902). This leads to the inference that Congress was free to create different laws for different types of debtors. Id.

The second argument is that the American system of bankruptcy was adopted with the English system in mind; therefore, the drafters just assumed that the United States system would mirror that of England. Id. This argument is based on the fact that the principal
For most of the nineteenth century, there was no federal bankruptcy law. The Bankruptcy Act of 1800 was repealed in 1803; the Bankruptcy Act of 1841 survived an even shorter time. In 1867, Congress passed a bankruptcy statute which lasted until 1878. Each of these laws was passed in response to a particular economic crisis. Finally, in 1898, Congress passed a lasting, comprehensive bankruptcy statute, the Bankruptcy Act of 1898. The current Bankruptcy Code, enacted in 1978, subsequently supplanted this enactment.

Bankruptcy law is provided by federal statute in the United States. Unlike Australian law, the provisions for both personal bankruptcy and corporate insolvency are codified together. Their provisions are found overwhelmingly in Title 11 of the United States Code, known as the Bankruptcy Code (the "Code"). Under the Code, there are two primary forms of proceedings. In the first, a debtor, either individual or corporate, liquidates its assets and the resulting proceeds are distributed to creditors. This type of proceeding typically occurs under chapter 7 of the Code. In the other, a debtor attempts to "reorganize" under either chapter 11, 12, or 13 of the Code. In a reorganization, the goal is to confirm a

sponsors of the clause were both trained in the English system. Id. Therefore, the argument goes, the framer's intent was to limit congressional power over bankruptcy legislation to law "analogous to the English bankruptcy laws in force at the end of the eighteenth century." Williston, supra note 9, at 551. The English system at that time was confined to traders and provided only for involuntary bankruptcies. Id.

26 The Depression of 1793 brought about the Bankruptcy Act of 1800. The panics of 1837 and 1857 brought about the Acts of 1841 and 1867, respectively. The first two statutes were intended to be only temporary measures. See David A. Skeel, Jr., The Genius of the 1898 Bankruptcy Act, 15 BANKR. DEV. J. 321, 323 (1999). For a full discussion, see WARREN, supra note 21.
27 Act of July 1, 1898, ch. 541, 30 Stat. 544, repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. The Act provided for, inter alia, both voluntary and involuntary proceedings and allowed state exemption laws based on domicile to be in effect. It also required debtor cooperation for discharge and identified certain debts as nondischargeable.
30 Chapter 11 deals primarily with reorganization of corporate entities. See 11 U.S.C.
plan providing for various payment streams to prepetition creditors in return for a discharge of outstanding prepetition debt. An individual debtor generally chooses between filing under chapter 7 and chapter 13. The remainder of the Code, chapters 1, 3, and 5, contain general provisions broadly applicable to all forms of bankruptcy.

A. The Chapter 7 Approach

Chapter 7 has historically provided debtors a simple and potentially inexpensive method of obtaining a bankruptcy discharge. Its core feature is that it allows debtors to obtain a discharge of all prepetition bankruptcy debts without incurring future debt payment obligations. The only financial obligation imposed on the debtor is that she relinquish all nonexempt assets owned at the time of bankruptcy for distribution to creditors. The most common assets fully or partially exempted by law that a chapter 7 debtor may retain are family residences, household furnishings, clothing, personal effects of the debtor and his family, the family car, and life insurance. The vast majority of bankruptcy

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32 As noted, liquidating corporations may also use chapter 7.

33 See, e.g., 11 U.S.C. § 727(b) ("Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter . . . .").

34 See, e.g., id. §§ 541(a), 726.

35 See id. § 522. Exemptions under United States bankruptcy law are an anomaly in that they are a nonuniform component of an otherwise uniform system. Before the enactment of the current Bankruptcy Code in 1978, bankruptcy law followed state and nonbankruptcy federal law on exemptions. This resulted in a problem of nonuniformity of state law exemptions because of the great variance in the dollar amounts of certain exemptions allowed by different states in the same property.

In enacting the 1978 Code, a compromise was reached between those who favored a single, exclusive, uniform set of exemptions and those who favored individual state exemptions that could provide for regional differences in the cost of living. Section 522(b) of the Code gives a bankrupt the choice between a set of exemptions contained in the Bankruptcy Code and the exemptions that would otherwise be available under nonbankruptcy law. 11 U.S.C. § 522(b). The anomaly is that unlike the rest of the Code, pursuant to § 522(b)(1) of the Code, individual states may opt out of this provision and demand that their own set of exemptions be employed.

This choice between the federal exemptions and state exemptions can be meaningful, as there is a wide range of exempt property under state law. For example, the Code allows for a
cases in the United States are filed under chapter 7, and many have voiced concern over chapter 7 being employed as a vehicle for debtor abuse. For example, a debtor with a high future income and limited nonexempt assets may obtain a chapter 7 discharge without devoting any available future income to repaying creditors.

Chapter 7 cases may be voluntary or involuntary. The filing of an involuntary petition has much the same effect as filing a voluntary petition. An estate is created just as under voluntary


State law exemptions typically take one of three forms. A debtor is allowed to exempt either (1) a certain dollar amount of property of whatever kind he or she chooses; (2) certain types of property, irrespective of their value; or (3) certain types of property, but only up to certain dollar amounts. The most common state law exemptions are similar to those under the Code (family residences, household furnishings, clothing and personal effects, the family car, insurance, and certain qualified retirement accounts). The effect of exempting property is specified in § 522(c). Once property is exempt, essentially only three types of creditors may access the property, (1) certain tax claimants, (2) creditors with claims for child support or support of a former spouse, and (3) creditors with a lien on the property in question. However, in this last case, the lien can be avoided if certain requirements are met. See 11 U.S.C. § 522(f)(1)(B).

For example, during the twelve-month period ending September 30, 2001, just over one million cases filed were filed under chapter 7, 412,272 were filed under chapter 13, 10,519 were filed under chapter 11, and 379 were filed under chapter 12. American Bankruptcy Institute, U.S. Bankruptcy Filing Statistics (2001), at http://abiworld.org/stats/newstatsfront.html. See also 38 Bankruptcy Court Decisions, No. 18 (Dec. 18, 2001).

This concern has been one of the forces behind the ongoing attempt to achieve bankruptcy reform in the United States. For a fuller discussion of the issue of bankruptcy reform, see infra note 53 and accompanying text.

There are several requirements that must be met to place a debtor in bankruptcy involuntarily. First, as a general matter, there must be three or more petitioning creditors, each of whom holds a claim that is neither contingent as to liability nor subject to a bona fide dispute, and who together hold total claims of at least $10,775. 11 U.S.C. § 303(b)(1). The rationale for the three creditor requirement is that it prevents creditors from harassing an honest debtor, for example, by attempts to force the debtor into making preferential payments by threatening an involuntary proceeding. However, if there are fewer than twelve claimants, a single creditor can put an entity into bankruptcy. Id. § 303(b)(2).

If the petition is contested, an order for relief will still be granted if the debtor is generally not paying his debts as they become due. See id. § 303(h)(1). This means for involuntary bankruptcy, unlike for voluntary bankruptcy, there is something akin to an insolvency requirement.
bankruptcy, and the automatic stay immediately goes into effect. As a general matter, an involuntary case can be filed against any debtor, though there are a few exceptions.

The mechanics of a chapter 7 case are straightforward. In all chapter 7 cases, a trustee is appointed promptly after the bankruptcy petition is filed. The trustee’s duties, set forth in § 704 of the Code, are geared to the compilation and distribution of the debtor’s estate.

The debtor’s nonexempt assets are liquidated, and the property of the estate is distributed to creditors according to priority as determined by statute.

A successful chapter 7 debtor obtains a discharge. The discharge extinguishes the debtor’s personal liability on claims.

See 11 U.S.C. § 541(a). Section 541(a) (1) states that the estate is comprised of “all legal or equitable interests of the debtor in property as of the commencement of the case.” In the case of divided property interests, this definition only encompasses the debtor’s interest in the property. See Board of Trade of Chicago v. Johnson, 264 U.S. 1, 10-11 (1924). Exceptions to what becomes property of the estate are listed in § 541(b). In the case of a chapter 7 filing, § 541 draws a distinction between existing assets and future wages. The idea is for an individual who files chapter 7 to get a “fresh start” by preserving all assets acquired postpetition. For chapter 13 cases, the definition of property of the estate is broadened to include postpetition wages. See 11 U.S.C. § 1306(a)(2).

11 U.S.C. § 362(a). Filing a bankruptcy petition operates as a stay against a wide variety of actions.

See id. § 303(a). However, creditors can only place a debtor involuntarily into chapters 7 and 11, so, for example, municipalities and family farmers are exempt. In addition, an individual cannot be placed involuntarily into chapter 13. This is because chapter 13 requires payment out of future income, and forcing a debtor into chapter 13 involuntarily would too closely resemble involuntary servitude, which violates the Thirteenth Amendment. See, e.g., Toibb v. Radloff, 501 U.S. 157, 165-66 (1991).

11 U.S.C. § 701. An interim trustee is initially appointed; at the § 341 meeting of creditors, either another individual is elected trustee or the status of the interim trustee is changed to permanent. Id. § 702.

The trustee’s duties include, without limitation, (1) collecting and liquidating all property of the estate and closing the estate as expeditiously as is consistent with the best interests of the various parties, (2) being accountable for all property so received, (3) investigating the debtor’s financial affairs, (4) examining and objecting to the allowance of improper proofs of claim, (5) when advisable, opposing the debtor’s discharge, (6) filing required reports, providing required information, and 7) distributing the liquidated assets of the estate to the creditors in accordance with their priorities and claims. Id. § 704.

See id. § 726.

See id. § 727. Section 727(a) states the general rule that the court shall grant the debtor a discharge, and provides a number of exceptions to the general rule. Section 727(b) provides that effect of the discharge is to discharge the debtor from all debts that arose before bankruptcy. See also id. § 524.

See id. § 524(a) (2) (discharge operates against an “act to collect, recover, or offset any such debt as a personal liability of the debtor”).
The Code provides that the discharge serves as an injunction against collection acts against the debtor or his property in connection with claims that arose prior to the bankruptcy filing. The injunction is permanent, and it effectively replaces the automatic stay. Creditors violating the injunction can be sanctioned. The impact of the discharge is to give the honest and cooperative debtor a financial "fresh start." By doing so, it serves to motivate debtors to energetically seek financially productive economic roles. By making a debtor again financially viable, it thus provides him or her an incentive to work and become a productive member of society. To the extent that a discharge may be denied for debtor misconduct, it motivates debtors to cooperate with the bankruptcy procedure.

A debtor who employs chapter 7 may face certain obstacles to obtaining discharge. Section 707(a) of the Code allows a filing to be dismissed "for cause," although precisely what constitutes cause is not fully articulated in the statute. In addition, in a much debated clause, § 707(b) states that a court may dismiss a case of an individual with consumer debts if it finds that granting relief would be a substantial abuse of chapter 7. Again, the meaning of "substantial abuse" is left open by the Code. There are a few reported decisions where a court has held that a debtor capable of repaying some debt who files under chapter 7 rather than chapter 13 is subject to this provision. The question of whether § 707(b)
should be uniformly employed when a debtor has significant income and can repay part of his or her debt from such income is at the heart of the American bankruptcy reform debate.53

Bankruptcy reform has been under discussion for several years in the United States. Prior to the events of September 11, 2001, which caused Congress to place bankruptcy reform on the back burner, it appeared likely to finally be consummated in 2001. As of this writing, it is unclear when Congress will resume full efforts to address the issues of reform.

Both the House and the Senate passed versions of bankruptcy reform in 2001. See H.R. 333, 107th Cong. (2001); S. 420 107th Cong. (2001). The two bills are largely consistent. They address the following major areas that impact personal bankruptcy:

(A) Both bills would employ a method of means testing. In each instance, § 707(b) of the Code would be amended to provide for dismissal of chapter 7 cases upon a finding of abuse, or with the debtor’s consent, conversion to chapter 13. See H.R. 333 § 102, S.420 § 102.

Abuse could be shown in one of two ways. First, a presumption of abuse may be invoked based on a means test. Any party in interest, including the U.S. trustee or bankruptcy administrator, or a judge, could assert that the presumption applies, but only as to debtors whose income exceeds a defined state median. The means test is designed to determine the extent of a debtor’s ability to repay general unsecured claims and has the three following elements: (1) a definition of “current monthly income,” measuring the total income a debtor is presumed to have available; (2) a list of allowed deductions from current monthly income for purposes of support and repayment of higher priority debt; and (3) defined “trigger points” at which the income remaining after the allowed deductions would result in the presumption of abuse.

The allowed monthly deductions from income vary slightly between the bills. However, the primary deductions are the same. They include (a) set allowances for food, clothing, personal care, transportation, housing and entertainment, as established by the Internal Revenue Service for negotiating the repayment of delinquent tax obligations (the “National and Local Collection Standards”), except that any portion of these allowances reflecting repayment of debt is not to be counted; (b) actual expenses of the debtor in categories recognized by the IRS but as to which no specific allowance has been set (the “Other Necessary Expense Standard”); (c) 1/60 of all secured debt due in the five years following the bankruptcy filing and of all past due debt secured by property necessary for support; (d) 1/60 of all priority debt; and (e) as under current law, charitable contributions of up to fifteen percent of gross income.

There are two distinct trigger points: (1) if the debtor has at least $166.67 in monthly income available after the allowed deductions, abuse is presumed regardless of the amount of the debtor’s general unsecured debt, and (2) if the debtor has at least $100 of such income, abuse is presumed if the income is sufficient to pay at least twenty-five percent of the debtor’s general unsecured debt over five years. Thus, a debtor with $100 in monthly income after allowed

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deductions would be subject to a presumption of abuse if the debtor had general unsecured debt of $24,000 or less; a debtor with $150 in monthly income after deductions would be subject to the presumption with general unsecured debt of $36,000 or less; and a debtor with income of $200 after deductions would be subject to the presumption regardless of how much unsecured debt was owed.

To rebut the presumption, a debtor would have to prove exigent circumstances that would decrease income or increase expenses so as to bring the debtor's income after expenses below the trigger points.

The second basis for a finding of abuse, applicable where the presumption does not exist or has been rebutted, is that the debtor filed the petition in bad faith or that the totality of the debtor's financial circumstances indicates abuse. The U.S. trustee, bankruptcy administrator, or judge can assert this basis for finding abuse in any case; creditors are limited to asserting it in cases where the debtor's income is above the defined state median.

(B) Both bills impact priority distributions. In each bill, family support obligations of the debtor would have first priority in distribution, ahead of the costs of administering the estate. See H.R. 333 § 212, S.420 § 212.

(C) Successive filings would be affected. See H.R. 333 § 312, S.420 § 312. Under both bills, a chapter 7 debtor would be subject to denial of discharge under § 727 if the debtor received a chapter 7 or 11 discharge in a case filed within eight years of the filing of the pending case.

The treatment of chapter 13 debtors varies between the two bills. Under H.R. 333 § 312, chapter 13 debtors would be denied discharge if their case was filed within five years of the filing of any other bankruptcy case in which the debtor received a discharge. Under S. 420 § 312, there would be a denial of discharge if a chapter 13 debtor received (a) a discharge in a case under chapter 7, 11, or 12, filed within three years of the pending case filing (without exception), or (b) a discharge in a prior chapter 13 case filed within two years of the pending case filing (subject to an exception of extreme hardship).

(D) Debtor education would be introduced. Under both bills, individuals would be ineligible for relief under any chapter of the Code unless they had received credit counseling within 180 days of their bankruptcy filing. See H.R. 333 § 106, S.420 § 106. The counseling must be through a service approved by the United States trustee or bankruptcy administrator and must include, at least, a briefing on the opportunities for credit counseling and assistance in performing an initial budget analysis. Exceptions would be made (1) for districts in which adequate services were unavailable, and (2) for debtors with exigent circumstances requiring filing before the counseling could be obtained—within five days after the debtor requested it—in which case the debtor would be required to complete the counseling within thirty days after the bankruptcy filing.

In addition, pilot educational programs for debtor financial management would be tested in six judicial districts over an eighteen-month period, and thereafter evaluated for effectiveness and cost. See H.R. 333 § 105, S.420 § 105. At the same time, all chapter 7 debtors would be subject to denial of discharge under § 727, and chapter 13 debtors would not be granted a discharge if they failed to complete an instructional course concerning personal debt management (unless the United States trustee or bankruptcy administrator determined that approved courses were inadequate). See H.R. 333 § 106, S.420 § 106.

(E) The extent of the automatic stay could be impacted. Under both bills, if a chapter 7, 11, or 13 case is filed within one year of the dismissal of an earlier case
Under certain circumstances, a debtor may be denied a discharge, either in the entirety or for certain individual debts. Denial of discharge in its entirety is warranted when the debtor has engaged in conduct that could potentially undermine the integrity of the bankruptcy process, such as fraud or destroying or withholding pertinent information.\(^4\)

Even when a discharge is obtained, individual debts may be nondischargeable. The Code establishes a list of eighteen types of debts that may be excepted from discharge.\(^5\) These include debts owed creditors who never received proper notice of the bankruptcy, obligations arising from alimony or child support obligations, claims resulting from willful and malicious injury, certain educational loans, and claims resulting from a debt incurred under false pretenses.

A chapter 7 discharge has a broad but not an unlimited effect. The discharge serves to protect a debtor from personal liability on claims incurred before the filing of the bankruptcy petition, and it operates as an injunction against the pursuit of such claims. The discharge does not in and of itself avoid any valid lien on property that secures payment of a debt.\(^6\) That is, a lien, unless otherwise

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\(^4\) See 11 U.S.C. § 727(a) (2000). The justification for denying discharge in these circumstances is that bankruptcy is an equitable forum, and those with unclean hands should not be able to avail themselves of such equitable relief.

\(^5\) See id. § 523.

avoided in bankruptcy,\footnote{57} passes through bankruptcy and can be enforced against the property. Thus, the debt is not actually...
Can't Pay Your Debts, Mate?

There are a number of ways in which the chapter 7 discharge is protected. First, the discharge serves as an injunction preventing collection acts against the debtor in connection with claims that arose prior to the bankruptcy filing. Any creditor who violates the injunction can be sanctioned. Second, certain forms of governmental and private discrimination based "solely" on the fact that a person had been a debtor in bankruptcy or had failed to repay debts discharged in bankruptcy are forbidden. Third, while the Code does allow a debtor involved in a bankruptcy proceeding to "reaffirm" a debt and become legally bound to repay a debt that would otherwise have been discharged, any reaffirmation agreement must comply with detailed requirements intended to ensure that the reaffirmation agreement is not inconsistent with the debtor's best interests.

The Code allows a chapter 7 debtor to redeem property under certain circumstances. To redeem property secured by a lien, the debtor must pay the full amount of the allowed secured claim. The effect is that redemption is allowable if the other statutory requirements are met by the paying of either the debt or the value of the collateral, whichever is less.

One final element worth noting is that the Code places certain limitations on repeat bankruptcy filings for chapter 7 debtors. There are three express prohibitions. First, § 109(g) prohibits repeat filings within 180 days of a dismissal of a prior bankruptcy.

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58 Discharge affects only the personal liability of the debtor. See 11 U.S.C. § 524(a)(1).
59 Id.
60 Id. § 525. For a fuller discussion of bankruptcy discrimination, see Douglass G. Boshkoff, Bankruptcy-Based Discrimination, 66 AM. BANKR. L.J. 387 (1992); Douglass G. Boshkoff, Private Parties and Bankruptcy-Based Discrimination, 62 IND. L.J. 159 (1986); John C. Chobot, Anti-Discrimination Under the Bankruptcy Laws, 60 AM. BANKR. L.J. 185 (1986).
61 See 11 U.S.C. § 524(c). Under this section, a debtor may become legally bound to pay a prebankruptcy debt notwithstanding the discharge. Both secured and unsecured debts may be reaffirmed. The Code provides a number of safeguards to ensure that reaffirmation is in the debtor's best interest, including that the reaffirmation promise must be in writing, the promise must contain a clear and conspicuous statement advising the debtor of his right to rescind for sixty days, the agreement needs to be accompanied by an attorney affidavit when it is filed in court, and if the debtor files pro se, the bankruptcy judge must approve the reaffirmation agreement. Id. § 524(c)-(d).
62 See id. § 722.
63 Id.
case for failure to abide by court orders or to properly appear, or if the dismissal was voluntary following a request for relief from the automatic stay. Second, the Code prohibits the filing of a chapter 7 petition within six years of a prior chapter 7. Finally, the Code prohibits the filing of a chapter 7 petition within six years of the filing of a chapter 12 or a chapter 13 petition.

B. The Chapter 13 Approach

In contrast to a chapter 7 liquidation, chapter 13 affords a qualified individual debtor the opportunity to reorganize his or her financial affairs and repay a portion of his or her indebtedness from future earnings over a three-year period pursuant to a court approved plan. Unlike a chapter 7 debtor, a debtor in chapter 13 is not required to relinquish any nonexempt assets.

Chapter 13 cases also move expeditiously. A debtor in a chapter 13 case must file a plan of reorganization within fifteen days of filing the bankruptcy petition, unless an extension of time is

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64 Id. § 109(g).
65 Id. § 727(a)(8). This limitation also applies to a chapter 11 petition.
66 Id. § 727(a)(9).
67 The primary requirements for being a debtor under chapter 13 are set out in 11 U.S.C. § 109(e). Section 109(e) provides that a chapter 13 bankruptcy petition may be filed only by (1) an individual (2) with regular income (3) who owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debt less than $269,250, and noncontingent, liquidated, secured debt less than $807,750.
68 This of course requires a broader definition of property of the estate than that included in § 541. Accordingly, § 1306 defines property of the estate for chapter 13 cases to include, in addition to all property covered by § 541(a), after-acquired property obtained up until such time as the case is closed, dismissed or converted. 11 U.S.C. § 1306.
69 Under current law, individuals tend to opt for chapter 13 over chapter 7 for a number of reasons, including: (1) the debtor possesses substantial nonexempt property which would be liquidated under chapter 7 for distribution to creditors (This rationale is particularly pertinent when applicable exemption law places dollar limits on the value of the exemption of the home.); (2) the debtor seeks to discharge debts which are not dischargeable under chapter 7 but which may be discharged under chapter 13 (Of the eighteen categories of nondischargeable claims in chapter 7, only three—alimony and child support obligations, certain educational loans, and claims arising from death or personal injury caused while operating a motor vehicle while intoxicated—may not be discharged in chapter 13. 11 U.S.C. § 1328(a)(2)); (3) the debtor may believe that chapter 13 involves less stigmatization or may have a lesser impact on the debtor's credit rating; or (4) chapter 7 discharge may be unavailable to the debtor. For example, a debtor may obtain a chapter 7 discharge only once every six years, while there is no limit on the frequency of obtaining discharge under chapter 13. Id. § 727(a)(8).
Can't Pay Your Debts, Mate?

In addition, the debtor must commence making payments to the Trustee within thirty days after the plan is filed, even though the plan is not yet confirmed. Within twenty to fifty days of the filing of the petition, the United States Trustee must call a meeting of creditors pursuant to § 341, and proofs of claim are due within ninety days thereafter. Unlike with chapter 7, discharge is not obtained in chapter 13 until all payments have been made pursuant to the plan. Chapter 13 plans typically run three years, but they can be extended to as long as five years with court approval. There are three mandatory provisions for a chapter 13 plan and six requirements for plan confirmation.

The plan is funded by submitting “future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan.” In the event that a trustee or unsecured creditor objects to confirmation, the plan must conform with the projected disposable income requirement. In essence, this requirement mandates that the plan provide for the debtor's entire projected disposable income for a three-year period to be applied to payments under the plan. The projected disposable income calculation requires a projection of how much the debtor will earn over the period of the three-year plan and a deduction from that amount of expenses that are

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70 FED. R. BANKR. P. 3015(b) (2000).
72 Id. 3002(c).
73 Id. § 1322(d).
76 Id. § 1322(a)(1).
77 See id. § 1325(b)(1)(B).
reasonably necessary for support of the debtor and his dependants. The remaining amount must be used to fund the plan. There is an additional factor for unsecured creditors—they must receive at least what they would be paid in a chapter 7 liquidation.

Secured claims are given treatment in chapter 13, which provides incentives for debtors to look to that chapter as a method of curing defaults on secured loans and retaining encumbered property. Most secured loans contain acceleration clauses stating that in the event of a default the entire balance is immediately due and payable. The effect of acceleration clauses is to make the prospect of curing a default an impossibility for most people. Chapter 13 provides two methods by which a debtor may deal with an accelerated secured loan. The first is modification. The second is reinstatement and cure.

Modification constitutes a legally imposed alteration to the terms of the loan. There are three alternative ways in which the holder of a secured claim can be bound by a modification. The first is if the creditor accepts the plan. The second is if the debtor surrenders the collateral to the creditor. The third is if the plan provides for repayment of an amount, as of the effective date of the plan, that at least equals the amount of the allowed secured claim. Under American law, the amount of the secured claim cannot exceed the value of the collateral. If the collateral is worth less than the outstanding debt, payment is based on the collateral value, not the debt value. This is sometimes referred to as the “cram down” effect of chapter 13.

Modification is of tremendous use to people who own encumbered property. It allows the debtor to retain possession of the collateral without the consent of the creditor, as long as the

79 Id. § 1325(b)(2)(A).
80 Id. § 1325(a)(4). This is commonly known as the “best interests” rule. Even if the § 1325(b) analysis suggests that there is no extra money to pay off unsecured creditors, § 1325(a)(4) still protects their interest up to the amount they would receive in a chapter 7. Id.
81 See id. § 1322(b)(2).
82 See id. § 1325(a)(5).
83 Id.
84 See id. § 506(a).
86 Though it is worth noting that this is not the case in regard to one’s primary residence, as the Code prohibits modification of home mortgages. See 11 U.S.C. § 1322(b)(2); Nobelman v. Am. Sav. Bank, 508 U.S. 324 (1993).
debtor can pay off the amount of the secured claim plus interest over the life of the plan. Accordingly, a chapter 13 debtor can do what a chapter 7 debtor cannot—redeem the collateral by paying off its value in installments.

The second principle method of treating secured claims in chapter 13 is reinstatement and cure. Unlike modification, this is a return to the initial terms of the loan. The default is deemed cured, and the loan is deemed reinstated. When this happens, the debtor takes on two obligations. First, any obligation that is overdue must be cured within a reasonable time; and second, any obligation that has not yet become due remains payable on the original due date. Reinstatement and cure tend to be used far more frequently in the chapter 13 context than modification because, unlike modification, reinstatement and cure may be used for personal residences.

The Code contains only one express limitation on repeat chapter 13 filings, and that is the §109(g) prohibition against a repeat filing within 180 days of the dismissal of a prior bankruptcy case for failure to abide by court orders or to properly appear, or if the dismissal was voluntary following a request for relief from the automatic stay. The ability of a chapter 13 debtor to quickly repeat as a bankrupt, where a chapter 7 debtor cannot, reflects the belief that the chapter 13 debtor—who allegedly is making a fuller attempt to repay his or her obligations than is a chapter 7 debtor—is entitled to certain enhanced forms of relief.

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88 See id. § 1322(b)(5).
89 What is reasonable depends on the facts and circumstances of the particular case. See generally 8 COLLIER ON BANKRUPTCY ¶ 1322.09(5) (15th Rev. ed.).
91 See 11 U.S.C. § 1322(c)(1). Reinstatement and cure can be used for personal residences up until the time of a foreclosure sale.
92 One area which has received much attention is the so-called “chapter 20” bankruptcy. While the Code contains no chapter 20, these filings are so named because they consist of the filing of a chapter 7 bankruptcy followed in close succession by the filing of a chapter 13. Chapter 20 cases are typically employed in two situations. The first is a bankrupt who wishes to circumvent the debt limitation for chapter 13 filings. To employ chapter 13, a bankrupt must have no more than U.S. $269,250 in noncontingent, liquidated, unsecured debts and no more than U.S. $807,750 in noncontingent, liquidated, secured debts. 11 U.S.C. § 109(e). Some potential chapter 13 bankrupts who exceed these debt limitations, but are otherwise eligible to employ chapter 13, first file a petition under chapter 7 solely to discharge some (typically unsecured) debt in order to meet the chapter 13 debt limitation requirements. Shortly after receiving a chapter 7 discharge, the bankrupt follows with a chapter 13 petition. This is particularly enticing to a bankrupt who could not retain his or her home or car under
III. AUSTRALIAN BANKRUPTCY LAW—AN OVERVIEW

Bankruptcy Law in Australia is also federal. The statute governing Australian personal bankruptcy law is the Bankruptcy Act of 1966. Unlike in the United States, personal bankruptcy law is codified separately from corporate bankruptcy law in Australia.

chapter 7 but could do so under chapter 13 by reinstating and curing an accelerated secured loan.

The second situation where chapter 20 cases are common is when a bankrupt has no particular need for chapter 13 but for his or her inability to discharge certain debts under chapter 7. As noted, chapter 13 provides for a broader discharge than does chapter 7, so a bankrupt may file the chapter 13 shortly following the completion of the chapter 7 in order to attempt to discharge in chapter 13 a debt that could not be discharged in chapter 7.

In 1991, the United States Supreme Court considered the question of whether a chapter 20 filing should be dismissed as bad faith in Johnson v. Home State Bank. 501 U.S. 78 (1991). Writing for the Court Justice Marshall stated:

Congress has expressly prohibited various forms of serial filings... The absence of a like prohibition on serial filings of chapter 7 and chapter 13 petitions, combined with the evident care with which Congress fashioned these express prohibitions, convinces us that Congress did not intend categorically to foreclose the benefit of chapter 13 reorganization to a debtor who previously has filed for chapter 7 relief.

An additional question which remains unresolved is the propriety of a bankrupt filing a chapter 13 case after a discharge has been granted but before the formal closing of a preceding chapter 7. While there is no express statutory bar against two bankruptcy cases pending at the same time, courts have taken essentially three different views. One view is that as long as the debtor meets all other eligibility requirements, the fact that a prior case technically remains open is not a bar to filing. See, e.g., In re Hodurski, 156 B.R. 353, 356 (Bankr. D. Mass. 1993); In re Kosenka, 104 B.R. 40, 51 (Bankr. N.D. Ind. 1989). A second, opposite approach is that such a filing is in bad faith and should be barred. See, e.g., Norwalk Savings Society v. Peia (In re Peia), 204 B.R. 310, 314 (Bankr. D. Conn. 1996); In re Heywood, 39 B.R. 910, 911 (Bankr. W.D.N.Y. 1984). The third view—something of a hybrid position—is that since there is no express statutory prohibition against having two bankruptcy cases simultaneously pending, the filing of a chapter 13 under these circumstances is not per se impermissible, but rather is a factor to be considered should a creditor move for the case’s dismissal. However, in no instance may the two cases simultaneously pending seek to discharge the same debt. Turner v. Citizens Nat’l Bank (In re Turner), 207 B.R. 373, 378-79 (B.A.P. 2d Cir. 1997).

The Commonwealth is given power with respect to bankruptcy and insolvency by § 51 (xvii) of the Constitution of the Commonwealth of Australia.

The first Commonwealth Bankruptcy Act was enacted in 1924. See Bankruptcy Act, 1924 (Austl.). The present law, the 1966 Act, underwent significant amendments in 1991 and...
In many ways, the Australian and American bankruptcy systems mirror one another. Each system allows both creditors and debtors to commence a bankruptcy proceeding, and both require some action on the part of the debtor to trigger the possibility of an involuntary filing. Each system requires full debtor disclosure of pertinent financial matters upon the debtor filing for bankruptcy protection. Both systems provide for a moratorium period which, with a few exceptions such as for alimony and child support, prevents unsecured creditors from enforcing their rights against the person or property of the bankrupt following the date of bankruptcy. Each system divides debt obligations and the

1996. See Bankruptcy Amendment Act, 1991 (Austl.); Bankruptcy Legislation Amendment Act, 1996 (Austl.). It has also recently been subject to additional amendment debate. See note infra.

96 Company insolvency law is found within Australia’s Corporations Act 2001 at Parts 5.3A-5.7B.
96 This includes recent unsuccessful (as of this writing) attempts to reform the bankruptcy laws. Proposed reforms in Australia were not passed by Parliament before the Prime Minister called the November 10, 2001 elections. As a result the bills lapsed and will have to be reconsidered by the incoming administration.

The reform bills contained a number of significant features, including the following. First, a thirty-day “cooling off period” was proposed during which a debtor could withdraw a bankruptcy petition. Second, Official Receivers would have been given discretion to reject debtor’s petitions if it appeared that the debtor could in fact pay all debts listed. Third, the current potential for early discharge within six months would be abolished. Fourth, the objections to discharge provisions would have been strengthened. Fifth, alternatives to bankruptcy would be available to people with a higher income than is currently the case. For a fuller discussion of the proposed reforms, see Don Costello, Bankruptcy Reforms Package, 11 NEW DIRECTIONS IN BANKR. 14 (Mar. 2001), available at http://www.law.gov.au/aghome/commaff/itsa/framepubs.html.

Compare 11 U.S.C. § 303(h)(1) (2000) (general failure by the debtor to pay debts as they become due is grounds for involuntary bankruptcy) with Bankruptcy Act, 1966, § 40 (Austl.) (listing acts of bankruptcy that can lead to a sequestration order against an Australian bankrupt’s estate).

Compare Fed. R. Bankr. P. 1007(a)(1) (2000) (“In a voluntary case, the debtor shall file with the petition a list containing the name and address of each creditor unless the petition is accompanied by a schedule of liabilities.”) with Bankruptcy Act, 1966, § 55(2) (Austl.) (“A petition presented by a debtor under this section: (a) shall be in accordance with the approved form; and (b) shall be accompanied by a statement of the debtor’s affairs and a copy of that statement.”).

Compare 11 U.S.C. § 362(a) with Bankruptcy Act, 1966, § 58(3) (Austl.)

Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:

(a) to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt; or
(b) except with the leave of the Court and on such terms as the Court thinks fit, to commence any legal proceeding in respect of a provable debt or take
bankruptcy estate into prebankruptcy and postbankruptcy filing categories, though the definition of property of the estate in Australia is comparable to the broader definition used in American chapter 13 cases.¹⁰⁰ Both systems define those debts which may be recovered in bankruptcy¹⁰¹ broadly to include future and contingent liabilities, though in the United States, unlike Australia, unliquidated rights to payment are also included.¹⁰² Each system allows for preferential transfers to be voided and made available for general distribution to creditors.¹⁰³ Finally, like chapter 13, the typical period until discharge in Australia is three years.¹⁰⁴

The basic effect of bankruptcy in Australia is likewise very similar to that in the United States—it vests the property the bankrupt owns at the time of bankruptcy in the Official Trustee or the registered trustee.¹⁰⁵ In addition, property acquired by the bankrupt during the period of the bankruptcy vests in the Official Trustee or the registered trustee immediately upon the property being acquired by the debtor.¹⁰⁶ All property of the debtor must be disclosed to the trustee. As in the United States, certain assets may be protected, including necessary household goods, a vehicle up to

any fresh step in such a proceeding.

Bankruptcy Act, 1966, § 58(3).

¹⁰⁰ Compare 11 U.S.C. § 541(a)(1) (Property of the estate is comprised of “all legal or equitable interests of the debtor in property as of the commencement of the case.”) and 11 U.S.C. § 1306 (Property of the estate in chapter 13 cases includes all property “the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted.”) with Bankruptcy Act, 1966, § 116(1)(a) (Austl.) (Property divisible among creditors includes “all property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy, or has been acquired or is acquired by him or her, or has devolved or devolves on him or her, after the commencement of the bankruptcy and before his or her discharge.”).

¹⁰¹ In the United States these are known as “claims.” See 11 U.S.C. § 101(5). In Australia, they are known as “provable debts.” See Bankruptcy Act, 1966, § 82 (Austl).


¹⁰⁴ Compare 11 U.S.C. § 1322(d) with Bankruptcy Act, 1966, § 149(2) (Austl.). In Australia, however, it is possible both to obtain an early discharge and to have the bankruptcy period extended. Six months after the debtor files a statement of affairs with the Insolvency and Trustee Service Australia, he can apply for an early discharge if thirteen conditions have been met. In addition, the trustee can extend the bankruptcy period to either five or eight years for certain reasons, such as failure to provide information, to assist the trustee, to disclose income to the trustee or to pay contributions, failure to explain how money was spent or to disclose assets or creditors.

¹⁰⁵ Bankruptcy Act, 1966, § 58(1)(a) (Austl.).

¹⁰⁶ Id. § 58(1)(b).
a prescribed dollar amount, tools of trade up to a prescribed dollar amount, personal injury compensation money, and normal superannuation and life insurance.\textsuperscript{107}

There are, however, a number of critical differences between the two countries' systems. In many ways, the Australian personal bankruptcy system's critical features resonate back to the historical English model of the sixteenth and early seventeenth centuries, when the concept of an act of bankruptcy was created. As a result, there are a number of distinct differences between the American and Australian systems.

To begin with, the structure of the Australian system differs from the American system. All bankruptcy districts in Australia, which presently are drawn along state and territorial lines, have an Official Receiver\textsuperscript{108} and officers to assist the Official Receiver in the performance of the Official Receiver's functions.\textsuperscript{109} In addition, there must be a trustee.\textsuperscript{110} The Official Receiver may or may not serve as the Official Trustee.\textsuperscript{111} Like in the United States, bankruptcy in Australia may be initiated by either the debtor\textsuperscript{112} or by

\begin{itemize}
  \item [107] Id. § 116(2).
  \item [108] Id. § 15.
  \item [109] The Official Receiver may delegate powers or functions to an officer of the department. Id. § 15(4). The Official Receivers act on behalf of the Official Trustee and are in turn overseen by the Inspector-General. The Inspector-General is responsible for the general administration of the Act and has the powers conferred on him by the Act. Because the Inspector-General is empowered to review decisions of the Official Receivers, the Inspector-General may exercise any of the powers of the Official Receivers. Id. § 11 (2)-(3).
  \item [110] See Bankruptcy Act, 1966, § 18 (Austl.). The duties of the trustee of the estate of the bankrupt are contained in § 19, which was amended and simplified by the 1996 amendments. The duties include the following: (1) "notifying the bankrupt's creditors of the bankruptcy" and providing information to creditors; (2) "determining whether the estate includes property that can be realized to pay a dividend to creditors"; (3) reporting to creditors within three months on their likelihood of a dividend; (4) determining whether the debtor has made a voidable transfer of property; (5) recovering property for the benefit of creditors; (6) ensuring that the debtor discharges his or her duties; (7) reporting possible offenses to be prosecuted; and (8) avoiding any unnecessary expense in the administration of the estate. Id. § 19. It is possible in Australia to have two trustees appointed. In such circumstances, property vests in the trustees as joint tenants. Id. § 158.
  \item [111] Id. § 18(8). If the trustee is a private individual, the person is known as a "registered trustee." See id. § 154A.
  \item [112] Id. § 54. The presentation of a debtor's petition for bankruptcy must be preceded by presentation of a declaration of intention to present a petition. Id. § 54A. Before accepting the declaration, the Official Receiver must ensure that the debtor is aware of procedures for dealing with the debtor's financial affairs and the availability of advice and guidance about how the debtor can deal with her financial difficulties. Id. § 54D. So long as it appears to the Official Receiver that the debtor is entitled to present the declaration and it is in the
\end{itemize}
creditors. If the debtor voluntarily becomes bankrupt, she may choose the trustee. If a creditor imposes bankruptcy, the creditor chooses the trustee and may move to appoint a registered trustee to the office of trustee in place of the Official Trustee. Trustees are given broad powers over the debtor's assets.

A debtor may voluntarily become bankrupt by presenting a debtor's petition to the Official Receiver. There are three primary types of debtor's petitions that may be received—those by individual debtors, those by partners of a partnership, and those by joint debtors who are not partners. The Official Receiver must accept the petition unless one of three exceptions is present. When the Official Receiver endorses the petition, the debtor is officially bankrupt.

The creditor can achieve the same result by obtaining a sequestration order against the estate of the debtor. But unlike in the United States, for a creditor to commence the bankruptcy, the petition must be founded on an act of bankruptcy. This act of

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prescribed form, then the declaration will be accepted. *Id.* § 54C.

113 *Compare* 11 U.S.C. § 303(b) *with* Bankruptcy Act, 1966, § 44 (Austl.).

114 Bankruptcy Act, 1966, § 157 (Austl.).

115 *See* id. §§ 134-35. For example, they can sell property, carry on a bankrupt's business, institute and defend legal proceedings, and lease the debtor's property.

116 *Id.* § 55(1). Like in the United States, a statement of affairs must accompany the petition. *Id.* § 55(2).

117 *Id.* § 56A.

118 *Id.* § 57.

119 The three reasons for rejecting the petition under current law are that it fails to comply with the approved form, that there is no accompanying statement of affairs, or that the Official Receiver views the statement of affairs as being inadequate. *Id.* § 55(3). When accepting a debtor's petition, the Official Receiver is obligated to provide the debtor with certain information prescribed by applicable regulations. *See* id. § 55(3A).

120 *Id.* § 55(4A).

121 *See* id. § 43.

122 In the United States, the standard to initiate an involuntary proceeding is that the debtor is not paying his or her debts as they become due. *See* 11 U.S.C. 303(h)(1) (2000).

123 Bankruptcy Act, 1966, § 43 (Austl.). Section 40 of the Bankruptcy Act defines acts of bankruptcy as follows:

(1) A debtor commits an act of bankruptcy in each of the following cases:

(a) if in Australia or elsewhere he or she makes a conveyance or assignment of his or her property for the benefit of his or her creditors generally;

(b) if in Australia or elsewhere:

(i) he or she makes a conveyance, transfer, settlement or other disposition of his or her property or of any part of his or her property;
(ii) he or she creates a charge on his or her property or on any part of
his or her property;
(iii) he or she makes a payment; or
(iv) he or she incurs an obligation;
that would, if he or she became a bankrupt, be void as against the trustee;
(c) if, with intent to defeat or delay his or her creditors:
(i) he or she departs or remains out of Australia;
(ii) he or she departs from his or her dwelling-house or usual place of
business;
(iii) he or she otherwise absents himself or herself, or
(iv) he or she begins to keep house;
(d) if:
(i) execution has been issued against him or her under process of a
court and any of his or her property has, in consequence, either
been sold by the sheriff or held by the sheriff for 21 days; or
(ii) execution has been issued against him or her under process of a
court and has been returned unsatisfied;
(da) if the debtor presents to the Official Receiver a declaration under section
54A;
(e) if, at a meeting of any of his or her creditors:
(i) he or she consents to present a debtor’s petition under this Act and
does not, within 7 days from the date on which he or she so
consented, present the petition; or
(ii) he or she consents to sign an authority under section 188, and does
not, within 7 days from the date on which he or she so consented,
sign such an authority and inform the chairman of the meeting, in
writing, of the name of the person in whose favour the authority has
been signed;
(f) if, at a meeting of any of his or her creditors, he or she admits that he or
she is in insolvent circumstances and, having been requested by a
resolution of a majority of the creditors present at the meeting either in
person or by attorney to bring his or her affairs under the provisions of
this Act, he or she does not, within 7 days from the date of the meeting,
either:
(i) present a debtor’s petition; or
(ii) sign an authority under section 188 and inform the chair of the
meeting, in writing, of the name of the person in whose favour the
authority has been signed;
(g) if a creditor who has obtained against the debtor a final judgment or final
order, being a judgment or order the execution of which has not been
stayed, has served on the debtor in Australia or, by leave of the Court,
elsewhere, a bankruptcy notice under this Act and the debtor does not:
(i) where the notice was served in Australia—within the time specified
in the notice; or
(ii) where the notice was served elsewhere—within the time fixed for
the purpose by the order giving leave to effect the service;
comply with the requirements of the notice or satisfy the Court that he or
she has a counter-claim, set-off or cross demand equal to or exceeding the
amount of the judgment debt or sum payable under the final order, as the
bankruptcy must have occurred within six months of the presentation of the petition.\textsuperscript{124} These acts include the intentional act to delay or defeat creditors, failure to have an execution against the debtor satisfied, and failure to comply with a bankruptcy notice, by far the most common act of bankruptcy.\textsuperscript{125} A bankruptcy notice is essentially a document issued by the Official Receiver that demands payment by a specified period of time.\textsuperscript{126} The Official Receiver may
issue a bankruptcy notice following receipt of an application by a creditor who has obtained a final judgment against the debtor.\textsuperscript{127}

Creditors' meetings are somewhat different in Australia than in the United States. The trustee may convene a meeting of creditors at any time in order to obtain their views,\textsuperscript{128} but the trustee is only required to convene a meeting under certain circumstances, including if the creditors so direct the trustee pursuant to a resolution, if one-quarter of the creditors measured by the dollar amount of the debt they hold make a written request, or if less than one-quarter of the creditors make a written request and also provide security sufficient to cover the costs of holding the meeting.\textsuperscript{129} Notice of the creditors' meetings is to be given in writing to all creditors of the debtor of whom the trustee is aware.\textsuperscript{130}

Australian bankruptcy law is in essence a hybrid of American chapter 7 and chapter 13. It imposes the financial obligations of each American chapter on the Australian debtor. Australian bankrupts must relinquish certain nonexempt property,\textsuperscript{131} as must American chapter 7 debtors. Australian bankrupts must also, if able, repay their debts from future income,\textsuperscript{132} as is required of chapter 13 debtors in the United States. The critical difference is that American debtors must do one or the other. No American debtor is legally obligated to do both.

In Australia, as soon as an individual becomes bankrupt, all of his property that will be divisible among his creditors, including all rights in relation to the property that the bankrupt could have exercised had he not become bankrupt, vests immediately in the registered trustee of the bankruptcy estate. This generally includes

\textsuperscript{127} Id. § 41. The judgment must be final, and the order cannot have been stayed.

\textsuperscript{128} By contrast, in the United States the meeting of creditors is mandatory. 11 U.S.C. § 341(a) (2000) ("Within a reasonable time after the order for relief . . . , the United States trustee shall convene and preside at a meeting of creditors.").

\textsuperscript{129} Similarly, Creditors' Committees, known as Committees of Inspection, are also discretionary and are typically appointed only when the trustee believes that some of the creditors have special knowledge that will be of assistance in administering the estate. See Bankruptcy Act, 1966, § 70 (Austl.).

\textsuperscript{130} Id. § 64A. The notice must set out the full name and residential address of the bankrupt and, in the case of a first meeting, any trade or business name used by the bankrupt. The notice must advise creditors of the time, date, and place of the meeting and must include the agenda. Id. § 64B.

\textsuperscript{131} Id. § 116(1).

\textsuperscript{132} Id. § 139P.
any property of the bankrupt obtained after filing but prior to discharge.\(^\text{138}\)

Debtors in Australia with sufficient income such that they meet the “actual income threshold amount” \(^\text{134}\) must contribute part of that income for repayment of debt. There is no provision analogous to chapter 7, whereby a debtor, irrespective of income, can opt to retain all future income. However, similar to the American system, income is defined broadly for bankruptcy purposes.\(^\text{135}\) Debtors must provide the trustee with details of all income, including fringe benefits. Applying the Bankruptcy Act’s prescribed formula, if the income exceeds the threshold amount, the debtor must contribute a specified percentage of every dollar earned above that amount.\(^\text{136}\) If the debtor’s income is below the threshold amount, the debtor need not contribute income toward the repayment of debt.\(^\text{137}\) In calculating the threshold amount, the trustee must take into account the debtor’s dependants. The contribution assessment period for such payments is twelve months, beginning on the date of bankruptcy and continuing on a yearly basis until discharge.\(^\text{138}\) When a debtor is obligated to pay a contribution, the debtor may not leave Australia without court consent.\(^\text{139}\)

Like in the United States, certain property in Australia is exempt from creditors.\(^\text{140}\) Common exemptions in both countries are household furnishings, some tools of trade, a motor vehicle up

\(^{138}\) *Id.* § 58(1).

Subject to this Act, where a debtor becomes a bankrupt:

(a) the property of the bankrupt, not being after-acquired property, vests forthwith in the Official Trustee or, if, at the time when the debtor becomes a bankrupt, a registered trustee becomes the trustee of the estate of the bankrupt by virtue of section 156A, in that registered trustee; and

(b) after-acquired property of the bankrupt vests, as soon as it is acquired by, or devolves on, the bankrupt, in the Official Trustee or, if a registered trustee is the trustee of the estate of the bankrupt, in that registered trustee.

*Id.* See also *id.* § 116(1).

\(^{134}\) The amount depends on how many dependants the debtor has and is tied to the consumer price index. *Id.* § 139K.

\(^{135}\) *See id.* § 139L. Income includes annuity and pension payments, voluntary payments to the debtor, and employment termination payments.

\(^{136}\) *Id.* § 139P. Noncompliant debtors may have their wages or bank accounts garnished by the trustee.

\(^{137}\) *Id.*

\(^{138}\) *Id.* § 139K.

\(^{139}\) *Id.* § 139ZU.

to an established dollar amount, and insurance policy benefits.\footnote{Compare 11 U.S.C. § 522(d) with Bankruptcy Act, 1966, § 116(2)-(d) (Austl.).} One notable distinction between the countries relates to home exemptions. While homes are not exempt in Australia,\footnote{Bankruptcy Act, 1966 § 116 (Austl.).} in the United States they are typically exempt up to a certain dollar amount, and in a few jurisdictions—most notably Texas and Florida—there is an unlimited homestead exemption.\footnote{See FLA. CONST. art. X § 4 (2001); TEx. CONST. art. XVI §§ 50-51 (2002).}

The registered trustee is charged with managing the bankrupt’s estate in a manner that yields the best return for creditors with a provable debt.\footnote{A creditor with a provable debt has shown that the amount is legally owed by the debtor and is also legally recoverable as a bankruptcy debt. See Bankruptcy Act, 1966, § 82 (Austl.).} Typically, this means an immediate liquidation of all nonmonetary property for distribution to creditors. However, the trustee may continue the bankrupt’s business as needed to effectively wind it up.\footnote{Id. § 134(1)(b).} As is the case in the United States, the trustee may also disclaim or abandon property that has no monetary value to the bankrupt’s estate, such as property encumbered by a lien whose value exceeds the value of the collateral.\footnote{Compare 11 U.S.C. § 554 (2000) with Bankruptcy Act, 1966, § 133 (Austl.).}

Generally, once a debtor has been adjudged bankrupt, an unsecured creditor cannot enforce a provable debt against the debtor or his or her property,\footnote{Compare 11 U.S.C. § 522 with Bankruptcy Act, 1966, § 116(2)-(d) (Austl.).} nor can the unsecured creditor undertake any legal proceedings against the debtor without court approval.\footnote{Bankruptcy Act, 1966, § 58(3)(a) (Austl.); see also id. § 5(1) (defining “property” to include property excluded from the bankruptcy estate).} For unsecured creditors who have proved their debts, the general rule in both America and Australia is one of pro rata distribution.\footnote{Id. § 58(3)(b).} However in each case an extensive list of priority payments precedes any general distribution to unsecured creditors.\footnote{Compare 11 U.S.C. § 726(b) with Bankruptcy Act, 1966, § 108 (Austl.).} As soon as the trustee has realized sufficient money, she may begin distributing the estate according to the established priorities. The bankrupt is entitled to any surplus that remains following payment in full of all administrative costs and proved debts (including interest where applicable).
While unsecured creditors in American and Australia are treated largely alike, the same cannot be said for secured creditors. In the United States the automatic stay generally applies to secured creditors as well.\textsuperscript{151} By contrast, in Australia there are effectively four courses of action available to secured creditors,\textsuperscript{152} and the most common approach largely removes the creditor from the bankruptcy proceeding. The first approach is for the creditor to rely entirely on the security without lodging a proof of debt; that is, the creditor may just foreclose, with the caveat that any excess realized by the creditor must be returned to the trustee.\textsuperscript{153} The second option is that the secured creditor may acquire the security independent of the bankruptcy, and prove for any deficiency amount which remains.\textsuperscript{154} Essentially, the secured portion of an undersecured creditor's claim may be realized outside of the bankruptcy process, with the unsecured portion of the claim dealt with in bankruptcy. The third option is for the creditor to surrender the security to the trustee to benefit all creditors and prove for the entire value of the debt.\textsuperscript{155} The final option is for the

\textsuperscript{151} 11 U.S.C. § 362(a). The American Bankruptcy Code is concerned primarily with preserving the value of the secured creditor's lien. According to the legislative history when the Code was drafted, "[s]ecured creditors should not be deprived of the benefit of their bargain." H.R. REP. NO. 95-595, AT 339 (1977), REPRINTED IN 1978 U.S.C.C.A.N. 5963, 6295; see also Bankers Life Ins. Co. v. Alyucan Interstate Corp. (In re Alyucan Interstate Corp.), 12 B.R. 803, 808 n.11 (Bankr. D. Utah 1981). This language should be interpreted in terms of economic value, not strict contractual benefits. In re Alyucan Interstate Corp., 12 B.R. at 808 n.11. Congress went on to add, "Though the creditor might not receive his bargain in kind, the purpose of the section is to insure that the secured creditor receives in value essentially what he bargained for." H.R. REP. NO. 95-595, AT 339; see also In re Alyucan Interstate Corp., 12 B.R. at 808 n.11. Thus, the Code presumes that the stay will continue to apply to secured creditors during the pendency of the bankruptcy unless that value is in question. The most common method of a secured creditor proving the jeopardy of its financial interest is by showing a lack of "adequate protection," meaning that the value of the creditor's property interest is being diminished by the bankruptcy proceeding. See 11 U.S.C. §§ 361, 362(d)(1). A secured creditor who can prove a lack of adequate protection may have the stay lifted and can immediately foreclose. To do so, as a practical matter, the creditor must show both that it is undersecured and that the value of its collateral is declining in value. Even if this can be proved, the debtor may still maintain the stay in regard to the secured creditor by providing the creditor with some value that maintains the creditor's economic position, such as replacement liens on other property or periodic cash payments. 11 U.S.C. § 361.

\textsuperscript{152} See Bankruptcy Act, 1966, § 90 (Austl.).

\textsuperscript{153} Id. § 90(1). This allows an oversecured creditor in all instances to obtain payment outside of bankruptcy. See id. § 107.

\textsuperscript{154} Id. § 90(3).

\textsuperscript{155} Id. § 90(2). This is typically done only when the creditor is vastly undersecured. See DENNIS ROSE, LEWIS' AUSTRALIAN BANKRUPTCY LAW 119 (11th ed. 1999).
creditor to estimate the security's value and prove for the difference between the debt and that value. The second option is the norm. Unlike the United States, where the secured creditor must participate in the bankruptcy absent relief from the automatic stay, this second option allows the secured creditor to remove itself from the bankruptcy except for the need to prove for any deficiency.

While Australian debtors are generally discharged from bankruptcy three years after they file their statement of affairs, there are two noted exceptions. First, objections to the discharge may be lodged by the trustee or the Official Receiver. Objections typically question whether the debtor has cooperated and behaved appropriately throughout the bankruptcy. The filing of the objection may delay discharge. Second, in limited circumstances, a debtor may apply for early discharge six months after filing the statement of affairs. Once the discharge is obtained, as in the United States, the debtor is discharged from most, but not all, provable debts. Nondischargeable debts include those incurred

156 Bankruptcy Act, 1966, § 90(4)-(5) (Austl.).
157 Id. § 149(4).
158 Id. § 149B.
159 Id. § 149D(1).
160 Such actions may delay discharge until five or eight years after the prescribed date, which is typically the date of the filing of the statement of affairs. See id. § 149A(2).
161 Id. § 149S (Austl.). Subdivision C of Division 3 sets out the criteria for eligibility for early discharge, which include the following: when the application is made there is no money to pay the trustee's compensation and expenses or the creditors' dividends; there has been no voidable transaction on the part of the debtor; and the income likely to be derived from the debtor during the year following the application will not likely exceed the threshold income amount. Id. at § 149T.
162 Bankruptcy Act, 1966, § 153 (Austl.). Section 153 provides in relevant part:

(2) The discharge of a bankrupt from a bankruptcy does not:

(a) release the bankrupt from:

(i) a debt on a recognizance; or

(ii) a debt with which the bankrupt is chargeable at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of a person prosecuted for an offence against a law of the Commonwealth or of a State or Territory of the Commonwealth;

(aa) release the bankrupt from liability to pay an amount to the trustee under subsection 139ZG(1);

(b) release the bankrupt from a debt incurred by means of fraud or a fraudulent breach of trust to which he or she was a party or a debt of which he or she has obtained forbearance by fraud;

(c) subject to any order of the Court made under subsection (2A), release the bankrupt from any liability under a maintenance agreement or maintenance order; or...
by fraud or stemming from a maintenance agreement or order.\textsuperscript{163} Moreover, the discharge does not affect the rights of secured creditors, who may look to the security to obtain repayment for a debt not proved in bankruptcy.\textsuperscript{164}

Two notable areas where Australian law is more debtor-friendly than that of the United States are (1) repeat or serial bankruptcies, and (2) the nondischargeability of certain debts. As to the former, serial filings are not expressly limited by Australian bankruptcy law with the sole exception of section 55 of the Bankruptcy Act, which provides some limitations on individuals who wish to petition when their creditors have already petitioned against them.\textsuperscript{165} This not only applies to the period after securing a bankruptcy discharge, but also to the period during which the person is an undischarged debtor. As a result, repeat bankrupts now form a significant number of the bankruptcies filed in Australia each year.\textsuperscript{166} As to the

\begin{itemize}
\item[(d)] release the bankrupt from any liability under a pecuniary penalty order or interstate pecuniary penalty order.
\item[\textsuperscript{2A}] The Court may order that the discharge of a bankrupt from bankruptcy shall operate to release the bankrupt, to such extent and subject to such conditions as the Court thinks fit, from liability to pay arrears due under a maintenance agreement or maintenance order.
\item[(3)] The discharge of a bankrupt from a bankruptcy does not affect the right of a secured creditor, or any person claiming through or under him or her, to realize or otherwise deal with his or her security:
\begin{itemize}
\item[(a)] if the secured creditor has not proved in the bankruptcy for any part of the secured debt—for the purpose of obtaining payment of the secured debt; or
\item[(b)] if the secured creditor has proved in the bankruptcy for part of the secured debt—for the purpose of obtaining payment of the part of the secured debt for which he or she has not proved in the bankruptcy;
\end{itemize}
and, for the purposes of enabling the secured creditor or a person claiming through or under him or her so to realize or deal with his or her security, but not otherwise, the secured debt, or the part of the secured debt, as the case may be, shall be deemed not to have been released by the discharge of the bankrupt.
\item[(4)] The discharge of a bankrupt from a bankruptcy does not release from any liability a person who, at the date on which the bankrupt became a bankrupt:
\begin{itemize}
\item[(a)] was a partner or a co-trustee with the bankrupt or was jointly bound or had made a joint contract with the bankrupt; or
\item[(b)] was surety or in the nature of a surety for the bankrupt.
\end{itemize}
\item[(5)] Where a bankrupt has been discharged from a bankruptcy, all proceedings taken in or in respect of the bankruptcy shall be deemed to have been validly taken.
\end{itemize}

\textsuperscript{163} Id. § 153(2)(b).
\textsuperscript{164} Id. § 153(3).
\textsuperscript{165} See id. § 55.
\textsuperscript{166} The Insolvency and Trustee Service in Australia in a relatively recent study found that
latter, Australian law provides for far fewer nondischargeable debts than does American law.\textsuperscript{167}

IV. TWO MANIFESTATIONS OF A PHILOSOPHICAL DEMARCATION

While there are many differences between the two bankruptcy systems, I would like to focus briefly on two primary areas that reflect very different philosophical concepts of what a personal bankruptcy system should accomplish. The first is the broader emphasis on preserving the fresh start in America. The second—a related point—is the greater flexibility afforded secured creditors in Australia in realizing their security.

A. The Fresh Start

The concept of a fresh start for an individual debtor can be broken into three component parts, all of which have been discussed previously in some depth. Each of these parts is treated differently by United States and Australian bankruptcy law. The first relates directly to what must be contributed by a debtor to obtain a discharge of prebankruptcy obligations and to obtain the benefits of the accompanying injunction to prevent postbankruptcy collection efforts by prebankruptcy creditors. The second component is the degree to which certain property is exempted. The third element is the protection the law provides against certain forms of discrimination against bankrupts.\textsuperscript{168}

eight percent of all filings were repeat bankrupts. See Insolvency and Trustee Service Australia, Profiles of Debtors: Who Became Bankrupt or Entered into Debt Agreements in 1997, at 19 (Canberra: Insolvency and Trustee Service Australia 1998).

\textsuperscript{167} Compare 11 U.S.C. § 523 (eighteen nondischargeable debts) with Bankruptcy Act, 1966, § 153(2) (Austl.), see supra note 162.

\textsuperscript{168} A fourth and related element is the question of repeat filings. There is no question that repeat filing by bankrupts exacts costs. The societal costs of repeated, abusive bankruptcy filings have been noted in a number of contexts. For example, while taxes benefit everyone by providing resources for health care, education, security, and other services, repeat bankruptcy filings have been used, at least in part, to avoid a tax liability or to avoid paying an acknowledged tax debt. A related point is that when debt is discharged, it generally raises the cost of doing business for any creditor against whom the debt has been discharged. To compensate for these increased costs, creditors are likely to raise the cost of credit by charging all future borrowers more in the form of a higher interest rate. For a fuller discussion of this problem, see Paul B. Lewis, The Repeat Bankruptcy Filer: Some Economic Considerations, 10 New Directions in Bankr. 18 (Aug. 2000), available at http://www.law.gov.au/aghome/commaff/itsa/frame_pubs.html.
Under current American law, the concept of a fresh start discharge is broad. The United States on the whole takes the fresh start a degree further than does Australia or any other industrialized nation. The idea of a fresh start for the honest but unlucky debtor is firmly rooted in Anglo-American bankruptcy jurisprudence. As early as 1706, English Parliament passed a bankruptcy act that contained a provision for the discharge of the debtor from prebankruptcy debts. Blackstone stated that through

Discharge is largely embodied in § 524 of the Code, which provides a bankrupt a post-discharge injunction against any collection effort of a debt that has been discharged in bankruptcy. The injunction is permanent; it replaces the automatic stay which prevented collection efforts against the bankrupt for prepetition obligations during the course of the bankruptcy. Any creditor who violates the injunction can be sanctioned. And while a bankrupt may voluntarily opt to "reaffirm" a debt to restore the legal obligation to repay a debt that would otherwise have been discharged in bankruptcy, this reaffirmation must be bankrupt-initiated and can only be accomplished following the employment of detailed procedures intended to ensure that the reaffirmation agreement is consistent with the debtor's best interests.

It is worth emphasizing that despite the dominant role the idea of a fresh start plays in bankruptcy rhetoric, it is not absolute and unconditional, and in places, American law is more limiting than Australian law. There are four primary exceptions to the right to a fresh start in the United States. The first, embodied in § 707(b) of the Code, is when the granting of relief would be a substantial abuse of the Code. The second, contained in § 523, is that some liabilities, such as for financing obtained under false pretenses, for maintenance of a child or a former spouse, or for willful and malicious injury—are excluded from discharge. American law provides for eighteen nondischargeable debts, far more than does Australian law. Compare 11 U.S.C. § 523 with Bankruptcy Act, 1966, § 153(2). The third—based on a long history in American jurisprudence that discharge only be available to honest debtors—is that discharge can be denied for debtor misconduct during the bankruptcy process. And the fourth is that the right to bankruptcy and the accompanying fresh start can be denied for certain repeat, or serial bankruptcy filers. As for the second and fourth exceptions, United States law places greater hurdles on access to a fresh start than does Australian law.

In common law countries, the fresh start is a significant concern of bankruptcy policy. For example, the Australian Law Reform Commission stated that one of the principles to guide modern insolvency law in Australia is that "[t]he end result of an insolvency administration, particularly as it affects individuals, should, with very limited exceptions, be the effective relief or release from the financial liabilities and obligations of the insolvent." Australian Law Reform Commission, GENERAL INSOLVENCY INQUIRY, I ALRC REP. No. 45 at para. 33 (1988).

By contrast, in civil law countries, bankruptcy is generally either not an option or available only after the exhaustion of all other avenues of relief and, where available, retains a significant stigma. See Johanna Niemi-Kiesiläinen, Changing Directions in Consumer Bankruptcy Law and Practice in Europe and USA, 20 J. CONSUMER POL'Y 133 (1997); Johanna Niemi-Kiesiläinen, Consumer Bankruptcy in Comparison: Do We Cure a Market Failure or a Social Problem?, 37 OSGOODE HALL L.J. 473 (1999). For an extensive discussion of the breadth of the fresh start globally, see Rafael Efrat, The Fresh-Start Policy in Bankruptcy in Modern Day Israel, 7 AM. BANKR. INST. L. REV. 555, 571-77 (1999).

See 4 Ann. c. 17, § 8 (1705) (Eng).
the discharge "the bankrupt becomes a clear man again; and, by the allowance and his own industry, may become a useful member of the commonwealth."173 According to the United States Supreme Court in Local Loan Co. v. Hunt, bankruptcy "gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."174 Related to giving the debtor a second chance, of course, is the decreased likelihood that the debtor will ultimately become dependent upon public support.

Other justifications for a broad discharge have been offered as well. First, the discharge shifts the burden of overextensions of credit from debtors to creditors, who are better able to bear these costs. Second, requiring payment of future income comes too close to a violation of the involuntary servitude provision of the Thirteenth Amendment.175 Third, the Australian model, which requires payment from future income, is based on historical and cultural factors that do not exist in the United States—namely, the focus on bankruptcy as primarily a mechanism for creditor debt collection.176 And fourth, the discharge is ethical and humane.

By contrast, the Australian discharge is narrower. This results primarily from the presence of a single bankruptcy approach that presumes a potential mandatory repayment out of future earnings. There has been little support for a single chapter approach for all consumer debtors in the United States.177 The narrower treatment

173 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *484.
174 292 U.S. 234, 244 (1934).
175 The Thirteenth Amendment provides in part: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 2.
177 In discussing the National Bankruptcy Review Commission's Working Group on Consumer Bankruptcy, Professor Elizabeth Warren wrote: "Ultimately the single chapter concept served the quite remarkable function of demonstrating that old enemies could become good friends when concepts for sweeping change were in the air. For perhaps the only time in the consumer bankruptcy debates, debtors, creditors, judges, and trustees could reach consensus: they did not want—indeed, would not tolerate—a single chapter consumer bankruptcy system." Elizabeth Warren, A Principled Approach to Consumer Bankruptcy, 71 Am. BANKR. L.J. 483, 489 (1997). But see Hon. Dorothy Eisenberg, Consumer Debtors: Combining Chapters 7 and 13, 4 AM. BANKR. INST. L. REV. 511, 511 (1996) ("It may now be appropriate to
afforded an Australian debtor's "fresh start" appears to provide a number of disincentives to file for bankruptcy. The obvious disincentive is the requirement that any debtor may potentially need to make compulsory monetary contributions out of future income. There are, however, other factors that serve to narrow the Australian fresh start. For example, the Australian bankrupt is required to reveal his or her status as a bankrupt when applying for credit which exceeds a certain dollar amount, surrender his or her passport to the bankruptcy trustee during the period in bankruptcy, and critically for a debtor engaged in business, an Australian bankrupt cannot manage a business without obtaining court approval to do so.

The second element of the fresh start is exemption law, which serves to protect certain statutorily identified property. As noted, exemption laws form a core feature of U.S. debtor-creditor law, both under state law and the Code, seen, for example, in the broad range of allowable homestead exemptions. In Australia, the home is not exempt. The inability of an Australian debtor to save his home marks a major difference in the philosophy of the fresh start policy in Australia and the United States.

As for the third element, Australian bankruptcy law does not provide for the protections against bankrupts that are found in the Code. Section 525 of the Code forbids certain forms of governmental and private discrimination solely because a person was a debtor in bankruptcy or failed to repay debts discharged in bankruptcy. While these protections are not absolute, they are

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178 Bankruptcy Act, 1966, § 269 (Austl.).
179 Id. § 77(a)(ii).
181 Exemptions have formed a part of American bankruptcy law from its beginning. For example, the Bankruptcy Act of 1800 contained wholly federal exemptions. Bankruptcy Act of 1800, ch.19, 2 Stat. 19, 30-31, 54.
182 All states currently have exemption statutes. The Bankruptcy Code has its own. See 11 U.S.C. § 522 (2000).
183 See supra note 35.
184 For example, they provide no protection from discrimination for anyone who has not been a debtor in bankruptcy. Thus, those who have not been debtors in bankruptcy can presumably be discriminated against for their failure to repay their debts. Second, even as to
meaningful contributing factors to insure that American debtors get a broader fresh start than their Australian counterparts.

The critical question in analyzing the fresh start and its ramifications is when the "fresh start" instead becomes a "head start." When the fresh start tilts in that direction, it impacts the balance between debtor and creditor interests that always exist in the bankruptcy context. The ongoing concern is that while in isolation the fresh start looks wholly desirable, an increased benefit to debtors will result in a corresponding harm to creditors, and this corresponding harm to creditors ultimately will be borne by all future borrowers in the form of reduced availability of credit, more expensive credit, or both. There is thus a delicate balance to strike. The Australian limitation on discharge relative to the American approach reflects different values at the core of the question of how bankruptcy costs should be allocated.

B. Treatment of Secured Creditors

The second area that reflects different basic concepts of how losses should be allocated is the respective treatment each country gives secured creditors. Secured creditors in Australia are given broader latitude in dealing with bankrupt debtors than are their American counterparts. The norm for secured creditors is to

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8 See, e.g., Laracuente v. Chase Manhattan Bank, 891 F.2d 17, 23 (1st Cir. 1989) ("[A] fundamental element of a § 525(b) claim is that the insolvency, the filing of bankruptcy, or the discharge of a debt is the sole reason for discriminatory treatment by an employer."); Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264, 1268 (9th Cir. 1990); Will Rogers Jockey & Polo Club, Inc. v. Okla. Horse Racing Comm'n (In re Will Rogers Jockey & Polo Club), 111 B.R. 948, 953 (Bankr. N.D. Okla. 1990). In addition, although the fact that a person was a debtor in bankruptcy may not be the sole basis for the types of adverse conduct covered by § 525, the facts and circumstances that led the debtor to file bankruptcy may be. Thus, if a person was led to bankruptcy because of his financial irresponsibility or substance abuse, the person may legally be discriminated against because of the financial irresponsibility or substance abuse. Finally, the limitation on nongovernmental discrimination is narrow and forbids adverse treatment of bankrupt debtors only in regards to employment.

The term "head start" was employed by Justice Harlan to describe debtors whom he believed received too good of a deal. Lines v. Frederick, 400 U.S. 18, 21 (1970) (Harlan, J., dissenting).

185 Recall that Australian secured creditors have four primary options. They may (1) rely
largely opt out of the bankruptcy.\textsuperscript{187} If the creditor is undersecured, as is most commonly the case, it can look directly to the collateral to realize the secured portion of the obligation, and then participate in the bankruptcy only to attempt to collect on the undersecured portion of its claim that cannot be realized directly from the collateral. The Australian opt-out option for secured creditors is absolute—courts cannot prevent such secured creditors from so acting.

This opt-out option does not exist in the United States. American bankruptcy law forbids it.\textsuperscript{188} The rationale for this, presumably, is that no one would agree to be a part of a bankruptcy proceeding unless the proceeding were mandatory for all creditors.\textsuperscript{189} The result is that American secured creditors bear bankruptcy related costs that their Australian counterparts do not.

Two related points follow: first, the availability of credit will likely be entirely on the security without lodging a proof of debt, (2) realize the security independent of the bankruptcy, and prove for any deficiency amount which remains, (3) surrender the security to the trustee to benefit all creditors and prove for the entire value of the debt, or (4) estimate the security's value and prove for the difference between the debt and that value. Bankruptcy Act, 1966, § 90(2)-(5).

\textsuperscript{187} See supra notes 152-56 and accompanying text. See also KEAY, supra note 125, at 137-38.

\textsuperscript{188} The only real exception is that the stay may be lifted by a secured creditor pursuant to 11 U.S.C. § 362(d) either for cause, including the lack of adequate protection, or if the debtor has no equity in the property and the property is not needed for an effective reorganization.

\textsuperscript{189} See generally JACKSON, supra note 52. In addition, courts have uniformly held that it violates public policy for a party to agree to waive the right to file a bankruptcy petition. See In re Jenkins Court Assoc., 181 B.R. 33, 36 (Bankr. E.D. Pa. 1995) (ipso facto clauses precluding right to seek bankruptcy protection per se invalid). It may, however, be possible to waive the bankruptcy automatic stay, though a motion for a court order enforcing the waiver is necessary. See In re Cheeks, 167 B.R. 817, 818-19 (Bankr. D.S.C. 1994) (enforcing prepetition agreement stating that mortgagor would not oppose mortgagee's relief from stay motion in the event of bankruptcy). Increasingly, courts have seen prepetition waivers of the stay as just one factor in considering whether they should ultimately grant relief from the stay. Compare In re Powers, 170 B.R. 480, 482-83 (Bankr. D. Mass. 1994) (enforcing prepetition waiver) with Farm Credit of Cent. Fla., AGA v. Polk, 160 B.R. 870, 873-74 (M.D. Fla. 1993) (refusing to enforce prepetition waiver). For a more complete discussion of this issue, see Marshall E. Tracht, Contractual Bankruptcy Waivers: Reconciling Theory, Practice, and Law, 82 CORNELL L. REV. 301 (1997).
affected, and second, secured creditors' costs will be reflected in the increased interest rates charged future borrowers.

**CONCLUSION**

Personal bankruptcies have never been more common in the United States. Numerous factors undoubtedly explain this phenomenon. Whether specific elements of bankruptcy law directly impact the rate of filing is a subject of debate. A comparison with other bankruptcy systems and the incentives they provide for bankruptcy filing may be instructive. The Australian approach to personal bankruptcy strikes a different and interesting balance between the rights of debtors and creditors, and in doing so reflects a different ideology at the core of its bankruptcy system than is seen in the United States.

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190 The Australians have expressly noted this concern. The Australian Law Reform Commission stated: "[A]s a matter of economics, it would be undesirable to impede the flow of credit by devaluing the security or other rights which a creditor may require as a condition of giving credit." Australian Law Reform Commission, GENERAL INSOLVENCY INQUIRY, 1 ALRC REP. No. 45, at para. 97 (1988).

191 For a lengthy discussion of how opt-out options for secured creditors effect corporate bankruptcy in the United States and Australia, see Paul B. Lewis, Trouble Down Under: Some Thoughts on the Australian - American Corporate Bankruptcy Divide, 2001 UTAH L. REV. 189.

192 According to recent data, "[t]he number of new bankruptcies filed during the second quarter of calendar year 2001 (April 1 to June 30) rose 24.5 percent over the same period [of 2000.] Filings increased from 321,729 to 400,394, making this the highest three-month period ever," and putting bankruptcy filings for 2001 on a pace to eclipse the largest total ever set in 1998, when 1,442,549 new cases were filed. During the twelve-month period ending June 30, 2001, there were 972,659 chapter 7 filings and 403,418 Chapter 13 filings. Press Release, American Bankruptcy Institute, New Bankruptcy Filings Break Quarterly Record (Aug. 24, 2001) (citing the Administrative Office of the U. S. Courts), at http://www.abiworld.org/stats/ ag2401.html.
