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The hidden dimension of business bankruptcy in Australia

Lucinda O'Brien, Ian Ramsay and Paul Ali*

This study is the first empirically based analysis of business bankruptcy to be conducted in Australia. It aims to identify key differences between debtors who declare business bankruptcy and those who declare non-business or "personal" bankruptcy, and to explore the extent to which there might be a "hidden" population of business debtors among those formally identified as personal debtors. This question is significant in light of the Government's imminent changes to bankruptcy law, which will reduce the period of bankruptcy from three years to one in a bid to promote entrepreneurship. Some commentators suggest that these reforms should only apply to business debtors. However the authors find strong evidence that there are clusters of "personal" debtors whose bankruptcies are in fact wholly or partly business-related. The authors conclude that any changes to the bankruptcy regime should apply to all debtors. Given the difficulty of drawing sharp distinctions between business and personal bankruptcy, this is both more practical and more desirable, as a matter of public policy.

I Introduction

This study constitutes the first empirically-based analysis of business bankruptcy to be conducted in Australia. It has two principal objectives. The first is to identify key differences between debtors who declare business bankruptcy and those who declare non-business or 'personal' bankruptcy.[1] The second is to explore the extent to which business and personal

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[1] The Australian Financial Security Authority ('AFSA'), the regulator of Australia's personal insolvency system, defines a 'business related bankruptcy' as 'one in which an individual's bankruptcy is directly related to his or her proprietary interest in a business'. AFSA, *Profiles of Debtors 2011* (2012) <https://www.afsa.gov.au/sites/g/files/net1601/f/profiles-of-debtors-2011.pdf> (*'Profiles'*) 15. AFSA draws a distinction between 'business related' and 'non business related' bankruptcies in its published statistics. See

bankruptcies overlap, including the extent to which there might be a 'hidden' population of business debtors among those formally identified as personal debtors. This question is significant in light of the Commonwealth Government's imminent changes to bankruptcy law, which will reduce the period of bankruptcy from three years to one in a bid to promote entrepreneurship.[2] Some commentators have suggested that these new laws may have 'unintended'[3] or 'perverse' consequences,[4] since they will make bankruptcy less onerous for both business and personal debtors. These critics suggest that the changes may lead to an increase in bankruptcy rates,[5] or reduce the 'disciplinary' effect of bankruptcy,[6] encouraging debtors to continue their excessive use of credit after discharge.[7] In particular, they object to the broad application of the proposed reforms, pointing out that the vast majority of bankruptcies are non-business, or personal, in nature.[8] Perceiving a risk that the measures will lead to an increase in personal bankruptcies, some commentators suggest that the new, shorter bankruptcy period should only be available to business debtors,[9] or even specific groups of business debtors.[10] Yet the Government has rejected these proposals, maintaining that the changes must apply to all debtors if they are to 'decrease the stigma of failure and encourage a culture of… innovation'.[11] Pointing out that many small business owners secure their business loans with personal assets, the Government contends that it is impossible to draw sharp distinctions between business and personal bankruptcy.[12]

This article explores the characteristics of personal and business debtors, in order to determine whether or not it is feasible to draw a clear distinction between the two groups. It draws upon a unique database obtained from the regulator, the Australian Financial Security Authority (AFSA). The database contains the de-identified records of 28,675 Australian bankruptcies, made up of 6,158 business bankruptcies and 22,517 personal bankruptcies, commenced between 2007 and 2016. Through statistical analysis of this data, the authors

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AFSA, 'Provisional business and non-business personal insolvency time series June quarter 2018', <https://www.afsa.gov.au/statistics/time-series-0>. See also Part II(b) below.

[2] Bankruptcy Amendment (Enterprise Incentives) Bill 2017 ('the Bankruptcy Bill').

[3] CPA Australia Ltd, Submission to the Treasury, *Improving Bankruptcy and Insolvency Laws*, 3 June 2016, 1 <https://static.treasury.gov.au/uploads/sites/1/2017/06/C2016-017_CPA_Australia.pdf>.

[4] King & Wood Mallesons, Submission to the Treasury, *Improving Bankruptcy and Insolvency Laws*, 27 May 2016, 38 <https://static.treasury.gov.au/uploads/sites/1/2017/06/C2016-017_King_Wood_Mallesons.pdf>.

[5] Australian Bankers' Association Inc. (ABA), Submission to the Treasury, *Improving Bankruptcy and Insolvency Laws*, 7 June 2016, 3 <https://static.treasury.gov.au/uploads/sites/1/2017/06/C2016-017_Australian_Bankers_Association.pdf>.

[6] King & Wood Mallesons, above n 4, 37.

[7] Jennifer Dickfos and Catherine Brown, Submission to the Treasury, *Improving Bankruptcy and Insolvency Laws*, 3-4 <https://static.treasury.gov.au/uploads/sites/1/2017/06/C2016-017_Griffith_University.pdf>. See also Law Council of Australia, Submission No 9 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Bankruptcy Amendment (Enterprise Incentives) Bill 2017*, 31 January 2018 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/BankruptcyAmendment/Submissions>.

[8] ABA, above n 5, 3.

[9] Dickfos and Brown, 'Submission', above n 7, 4.

[10] The ABA suggests that the reduced bankruptcy period should only be available to 'first time, business-related bankruptcies, involving debts below a sensible amount.' ABA, above n 5, 1.

[11] Commonwealth, *Parliamentary Debates*, 19 October 2017, 8030 (James McGrath).

[12] Ibid.

outline the salient features of debtors who identify their bankruptcies as business-related. They find that, in general, there are striking differences between personal and business debtors. They find that business debtors are typically older than personal debtors, and more likely to have spouses and dependants. They are concentrated in certain occupational categories, particularly managerial, professional and trades occupations. The authors also find that there are stark differences between the financial profiles of business and personal debtors, with the former reporting much higher assets, incomes and liabilities at the time of bankruptcy. Yet, against this background, the authors find strong evidence that within the personal bankruptcy population, there are clusters of debtors whose bankruptcies are in fact partly or wholly business-related. On the basis of these findings, the authors conclude that there is a pressing need for more comprehensive information regarding the causes of bankruptcy in Australia. They suggest changes to the Statement of Affairs lodged at the commencement of bankruptcy, to allow debtors to provide more detailed and accurate information about their circumstances. They also suggest that AFSA could create a new reporting category of 'partly business-related bankruptcy', to reflect the fact that many bankruptcies are due to multiple factors, some business-related and some personal. Finally, the authors conclude that there is little merit in 'target[ing]'[13] the Government's reforms by restricting them to business debtors. They conclude that such an approach would be impracticable and unjustifiable, given the evidence that business activity appears to play a role in many nominally personal, or non-business, bankruptcies.

II Background

a Current policy debates

The Commonwealth Government is currently enacting reforms to the *Bankruptcy Act 1966* (Cth) ('the Bankruptcy Act'), with the aim of promoting 'entrepreneurial' activity.[14] In a 2016 'proposals paper', entitled 'Improving Bankruptcy and Insolvency Laws', the Government observed that 'entrepreneurship is central to economic growth, job creation and future prosperity.'[15] It proposed to reduce the default period of bankruptcy from three years to one, in order to 'encourage entrepreneurial endeavour and reduce associated stigma [by] acknowledg[ing] that bankruptcy can be a result of necessary risk-taking or misfortune rather than misdeed…'[16] The paper did not cite any statistical data regarding the proportion of Australian bankruptcies that are attributable to business activity. Indeed it attracted criticism from some commentators, who pointed to AFSA's statistics indicating that between 75 and 85 per cent of Australian bankruptcies are 'caused by factors such as unemployment and excessive use of credit, rather than carrying on a business.'[17] These critics queried the rationale for the

[13] Law Council of Australia, above n 7, 2.
[14] Treasury, 'Improving Bankruptcy and Insolvency Laws' (Proposals Paper, April 2016) 5.
[15] Ibid 3.
[16] Ibid 5.
[17] Jennifer Dickfos and Catherine Brown, 'Reducing bankruptcy to 12 months ignores realities of insolvency', *The Conversation* (Melbourne, 15 June 2015) <https://theconversation.com/reducing-bankruptcy-to-12-months-ignores-realities-of-insolvency-60382>. See also ABA, above n 5, 3-4; Law Council of Australia, above n 7, 6-7; King & Wood Mallesons, above n 4, 39.

Government's proposed reforms, arguing that they would primarily benefit personal debtors, while doing little to promote entrepreneurship. Some argued that the proposed reduction in the bankruptcy period should be limited to business bankruptcies,[18] or even particular types of business debtors, such as those with comparatively modest debts.[19]

In proceeding to introduce legislation to reduce the bankruptcy period from three years to one, the Commonwealth Government asserted that it is impracticable to distinguish between business and personal bankruptcies, and that therefore the reforms must be applicable to all bankrupt debtors.[20] The Bankruptcy Amendment (Enterprise Incentives) Bill 2017 ('the Bankruptcy Bill') reduces the period of bankruptcy from three years to one for all debtors.[21] In his Second Reading Speech, introducing the new legislation, Senator James McGrath observed that '[o]wners of small businesses in Australia often need to secure business loans with their personal assets or provide personal guarantees. This blurs the distinction between personal and business liability…'[22] The Government's position drew some support from submissions received in response to the 2016 proposals paper and the draft legislation. In its submission on the proposals paper, Financial Counselling Australia (FCA) pointed out that bankruptcy is often the product of 'a very complex range of personal circumstances', such that 'there may be no single cause or it is difficult to know which came first.'[23] FCA observed that the rise of 'sub-contracting' across the economy means that businesses are now operated by many people 'who may previously have been employees'. Such people typically use 'personal credit to support a failing business', making it difficult to draw sharp distinctions between business-related and personal bankruptcy.[24]

b Public data

AFSA defines a 'business related bankruptcy' as 'one in which an individual's bankruptcy is directly related to his or her proprietary interest in a business'.[25] Its data is based upon information provided by debtors when completing the Statement of Affairs form, which must be lodged at the commencement of every bankruptcy.[26] On this form, each debtor is

[18] Dickfos and Brown, 'Submission', above n 7.
[19] ABA, above n 5, 1. See also Law Council of Australia, above n 7.
[20] Commonwealth, *Parliamentary Debates*, 19 October 2017, 8029-30 (James McGrath).
[21] Bankruptcy Bill cl 19.
[22] Commonwealth, *Parliamentary Debates*, 19 October 2017, 8030 (James McGrath); Legal and Constitutional Affairs Legislation Committee, Senate, *Bankruptcy Amendment (Enterprise Incentives) Bill 2017; Bankruptcy Amendment (Debt Agreement Reform) Bill 2018 [Provisions]* (2018) ('the Committee Report') 9. See also the evidence of Michael Johnson, Acting Assistant Secretary, Civil Law Unit, Attorney-General's Department, cited in the Committee Report, 10.
[23] Financial Counselling Australia, *Response to the Proposals Paper: Improving Bankruptcy and Insolvency Laws* (June 2016) <https://static.treasury.gov.au/uploads/sites/1/2017/06/C2016-017_Financial_Counselling_Australia.pdf> 2.
[24] Ibid. See also the evidence of the Attorney-General's Department to the Senate committee: Legal and Constitutional Affairs Legislation Committee, Senate, *Bankruptcy Amendment (Enterprise Incentives) Bill 2017; Bankruptcy Amendment (Debt Agreement Reform) Bill 2018 [Provisions]* (2018) 10.
[25] AFSA, *Profiles*, above n 1, 15.
[26] AFSA, *Statement of Affairs* (2016) <https://www.afsa.gov.au/insolvency/how-we-can-help/forms-list/statement-affairs>. In its submission on the Bankruptcy Bill, AFSA notes that '[a] debtor's self-assessment of the main cause of their insolvency (as recorded on their statement of affairs filed by a bankrupt with AFSA at the beginning of the bankruptcy) determines whether or not their bankruptcy is categorised as business related in

asked to specify the 'main cause' of his or her bankruptcy, choosing from a list of ten 'business related' and seven 'non business related' causes. The list of business-related causes includes 'economic conditions', 'lack of business ability', 'excessive interest payments', 'inability to collect debts' and 'seasonal conditions including flood and drought'. The list of personal causes includes 'unemployment', 'excessive use of credit' and 'relationship breakdown'. Above the list of business-related causes, the Statement of Affairs form warns debtors that this section 'only applies if you have personally operated a business'.[27] Yet as AFSA notes in its *Profiles of Debtors* report, the Statement of Affairs 'does not provide guidance' to debtors as to the meaning of 'business' or 'business related bankruptcy'. As such, AFSA notes that its data 'may be affected by differences in debtors' interpretations of what constitutes a business.'[28]

A further point of complexity arises in relation to debtors who do not select a single cause from the list provided. AFSA advises that some debtors select multiple causes of bankruptcy, with some selecting causes from *both* the business-related and non-business related categories.[29] Others identify a 'reason not listed',[30] using the free text box at the bottom of the list to describe their circumstances. Still others fail to select any cause or to provide any information about the cause of their bankruptcy. In most cases, AFSA allocates these debtors to one of two categories: 'other business reason or reasons unknown' (a sub-category of business bankruptcy) or 'other causes or causes unknown' (a sub-category of personal bankruptcy). To decide which category is more appropriate for each individual debtor, AFSA considers the cause or causes that the debtor has selected, any entries in the free text box and other relevant information, such as the types of liabilities and creditors the debtor has listed in other sections of the form. If a bankruptcy cannot be identified as business or personal,

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the AFSA statistics.' AFSA, Submission No 14 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Bankruptcy Amendment (Enterprise Incentives) Bill 2017*, 31 January 2018, 4 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/BankruptcyAmendment/Submissions>.

[27] AFSA, *Statement of Affairs* (2016) <https://www.afsa.gov.au/insolvency/how-we-can-help/forms-list/statement-affairs>. Question 18A on the Statement of Affairs offers seven causes under the heading, 'non business related': 'Unemployment or loss of income', 'adverse legal action', 'liabilities due to guarantees', 'gambling, speculation & extravagance in living', 'ill health or absence of health insurance', 'domestic discord or relationship breakdowns' and 'excessive use of credit facilities including losses on repossessions, high interest payments and pressure selling'. Below this, Question 18B lists nine business causes: 'Economic conditions affecting industry, including competition, credit restrictions, fall in prices or increases in costs'; 'Lack of business ability including underquoting or failure to assess potential of business'; 'Excessive interest payments on loan monies and capital losses on repayments'; 'Excessive drawings including failure to provide for taxation'; 'Inability to collect debts due to disputes, faulty work or bad debts'; 'Failure to keep proper books of account and costing records'; 'Lack of sufficient initial working capital'; 'Gambling or speculation'; and 'Seasonal conditions including floods and drought'. Under this heading, debtors are also invited to state '[an]other reason not listed'. The option to list another reason appears beneath both questions 18A and 18B, so it is possible that some people use this field to describe a reason for their *personal* bankruptcy that is 'not listed' under question 18A.

[28] AFSA, *Profiles*, above n 1, 15.

[29] Telephone discussion with River Paul, Statistician, AFSA (14 May 2018).

[30] AFSA, *Statement of Affairs* (2016) <https://www.afsa.gov.au/insolvency/how-we-can-help/forms-list/statement-affairs>.

following this procedure, it is attributed to a third category, 'not stated'.[31] This third category, 'not stated', is treated as a sub-category of personal bankruptcy, for statistical purposes. This has the effect of making personal bankruptcy the default classification for those bankruptcies that have no identifiable cause.

Despite these points of ambiguity, AFSA's published data affords considerable insight into the characteristics of Australian business bankruptcies. In its most recent *Profiles of Debtors* report, published in 2012, AFSA noted that business related bankruptcies constituted 15 per cent of total bankruptcies in 2009 and 22 per cent in 2011.[32] At that time, the most commonly nominated cause of business related bankruptcy was '[e]conomic conditions affecting industry, including competition & price cutting, credit restrictions, fall in prices, increases in costs.'[33] In more recent statistics, published on its website, AFSA indicates that the proportion of business-related bankruptcies has continued to grow, from 22 per cent in the financial year ending in 2015, to 24 per cent in 2016 and 25 per cent in 2017.[34] 'Economic conditions' remain by far the most common cause of business related bankruptcy in Australia.[35] AFSA's published data indicates that business debtors are more likely to be male.[36] It also shows that business bankruptcies are concentrated in particular occupations. In the 2016-2017 financial year, the most common occupational categories for debtors entering business-related

[31] Telephone discussion with River Paul, Statistician, AFSA (14 May 2018). AFSA advises that its data also includes a fourth category, 'unknown (Statement of Affairs not received)'. The 'unknown' and 'not stated' categories are very small. In 2016-2017, for example, there were 389 debtors in the 'unknown' category and 10 in the 'not stated' category. By way of comparison, in that year, there were 11,945 personal debtors and 4,708 business debtors, bringing the total number of debtors to 17,052. This data was supplied to the authors by AFSA. See also AFSA, *Profiles*, above n 1, 15.

[32] AFSA, *Profiles*, above n 1, 15.

[33] This cause was cited by 42 per cent of debtors in the business category. The second most common response was 'other'. This option was selected by 28 per cent of debtors who selected a 'business related' cause in 2011. AFSA, *Profiles*, above n 1, 16.

[34] In the financial year ending on 30 June 2015, there were 13,933 personal bankruptcies and 3,838 business related bankruptcies, making 17,771 in total. In the year ending 30 June 2016, there were 13,445 personal bankruptcies and 4,323 business related bankruptcies, making 17,768 in total. In the year ending 30 June 2017, there were 12,620 personal bankruptcies and 4,219 business related bankruptcies, making 16,839 in total. See AFSA, 'Provisional business and non-business personal insolvency time series June quarter 2018', <https://www.afsa.gov.au/statistics/time-series-0>. See also AFSA, Submission No 14 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Bankruptcy Amendment (Enterprise Incentives) Bill 2017*, 31 January 2018, 4 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/BankruptcyAmendment/Submissions>.

[35] The website states that '[i]n 2015, 29% of male debtors entered a business related bankruptcy compared to 18% of female debtors.' AFSA, *Causes: Business Related* (2016) <https://www.afsa.gov.au/statistics/causes-business-related>.

[36] AFSA, *Bankrupts* (2016) <https://www.afsa.gov.au/statistics/bankrupts>. Similarly, AFSA notes that in 2008, '21% of male debtors' entered into a business bankruptcy, compared with '11% of female debtors', suggesting that this gender disparity is consistent over time. Apart from gender, AFSA's website does not provide any data the demographic characteristics of business debtors, as distinct from personal debtors. AFSA's online data on the ages of debtors discusses the ages of 'bankrupts', 'debt agreement debtors' and 'insolvent debtors' generally, but does not provide separate figures for average ages in business and personal bankruptcies. AFSA, *All Debtors* (2016) <https://www.afsa.gov.au/statistics/all-debtors-0>.

bankruptcy were, in order of prevalence, 'construction trades workers', 'road and rail drivers', 'hospitality, retail and services managers' and 'other technicians and trades workers'.[37]

c Previous scholarship

To date, the only academic studies of business related bankruptcy have been carried out by US scholars.[38] In an article published in 2005, Robert Lawless and Elizabeth Warren take issue with what they describe as the 'myth of the disappearing business bankruptcy'.[39] Lawless and Warren observe that, according to official statistics, business bankruptcy is in decline, dipping from 19 per cent of total bankruptcies in 1983 to six per cent in 1995 and less than three per cent in every year from 1999 onwards.[40] Yet they argue that this data[41] significantly understates the extent of business bankruptcy in the US,[42] and draw upon their own empirical research to argue that the rate is far higher.[43] More recently, Lawless has published a study of the distinctive features of business-related bankruptcy,[44] in which he points out that, 'compared with other bankruptcy filers, the self-employed are in a deeper financial hole'.[45] He notes that debtors with a history of self-employment 'owe more, have pledged a greater percentage of their assets as collateral, and have higher debt-to-income ratios' than those who do not.[46] Within this group, those who directly attribute their bankruptcy to self-employment are in 'the

[37] In 2013-2014, there were 669 'construction trades workers', 353 'road and rail drivers', 289 'hospitality, retail and services managers' and 282 'other technicians and trades workers' in the business debtor category. See AFSA, *Commentary: business-related* (2016) <https://www.afsa.gov.au/statistics/commentary-business-related>.

[38] To date no Australian scholarship has focussed specifically on the phenomenon of business bankruptcy or the distinction between business and personal bankruptcy. In one of the leading Australian textbooks on insolvency, Michael Murray and Jason Harris note that '[m]ost bankruptcies relate to consumer unemployment, income and use of credit. Business-related factors are responsible for over 20% of all bankruptcies… These are often sole traders, partners and directors who each can be personally liable for debts incurred by a business.' Murray and Harris note that '[t]he occurrence of business related personal insolvencies varies within different sectors of the economy, with construction workers representing the highest number of debtors entering a business related personal insolvency….' However they do not elaborate further on the factors that might lead to business bankruptcy or the distinction between business and personal bankruptcy. Michael Murray and Jason Harris, *Keay's Insolvency: Personal and Corporate Law and Practice* (Lawbook Co, 9th ed, 2016) 36.

[39] Robert M Lawless and Elizabeth Warren, 'The Myth of the Disappearing Business Bankruptcy' (2005) 93 *California Law Review* 743.

[40] Ibid 751. Since the publication of Lawless and Warren's article, business bankruptcy filings have constituted between two and four per cent of total bankruptcies. See American Bankruptcy Institute, *Annual Business and Non-Business Filings By Year (1980 – 2017*) (2018) <https://s3.amazonaws.com/abi-org/Newsroom/Bankruptcy_Statistics/Total-Business-Consumer1980-Present.pdf>.

[41] This data is based upon the documents filed by debtors and their legal representatives: Lawless and Warren, above n 39, 757-64.

[42] Lawless and Warren attribute the declining numbers of reported business bankruptcies to a 'systematic bias' in the data published by the Administrative Office of the US Courts: ibid 768. They point out that US bankruptcy lawyers have come to rely increasingly upon a range of software applications to complete the highly detailed and technical forms associated with an application for bankruptcy (764). Lawless and Warren point out that a substantial majority of these software products include a default setting that automatically identifies all bankruptcies as personal unless otherwise indicated (764). This means, they point out, that '[i]nertia, laziness, or indifference' on the part of lawyers and their staff 'does not lead to random error', but instead artificially inflates the number of 'consumer' bankruptcies reported to by the courts (765).

[43] Ibid 769-83.

[44] Robert M Lawless, 'Striking Out On Their Own: The Self-Employed in Bankruptcy' in Katherine Porter (ed), *Broke: How Debt Bankrupts the Middle Class* (Stanford University Press, 2012) 101-16.

[45] Ibid 109.

[46] Ibid.

very deepest' financial trouble, with much higher levels of unsecured debt than other debtors.[47] This US research illustrates the difficulty of drawing sharp distinctions between business and personal bankruptcy. As Lawless points out, most small business owners assume personal responsibility for the fortunes of their businesses. They finance their businesses with personal savings; use personal lines of credit (such as credit cards); sign personal guarantees for the debts of their businesses; or use their assets, such as family homes, as security for their business debts.[48] Lawless notes that in his own study, 95 per cent of the owners of incorporated businesses had used personal finances to fund their businesses, exposing themselves to significant risk.[49] As such, he concludes, it usually 'makes no sense to talk of a business with a separate existence apart from its owner'.[50]

III Aims and methodology

This article explores the extent to which business and personal bankruptcies overlap or intermingle, as has been suggested in recent policy debates.[51] It employs statistical analysis to establish the distinctive demographic and financial profiles of debtors whose bankruptcies are formally identified as business-related. Drawing on an extensive data set provided by AFSA, the authors develop a detailed profile of the typical debtor who declares a business-related bankruptcy. Employing the techniques of statistical analysis, including regressions, the authors proceed to examine certain groups of debtors in the *personal* bankruptcy sample, looking for evidence that some debtors in this group may have engaged in business activity prior to bankruptcy. Looking at the demographic and financial profiles of debtors in these groups, the authors consider the extent to which their overall circumstances resemble those of the typical business debtor. On the basis of these similarities, the authors infer that some of these debtors in the personal bankruptcy sample have engaged in business activity that contributed, either in whole or in part, to their financial problems.

The authors hypothesise that three specific groups within the personal bankruptcy sample are likely to include some debtors whose bankruptcies are wholly or partly business-related. The first of these groups is the cohort of debtors in the occupational category, 'construction trades workers'. As noted above, this is by far the most common occupation in the business debtor group.[52] On this basis, it seems likely that if there are 'hidden' business bankruptcies within the personal bankruptcy sample, they will tend to be concentrated in this occupational category. The second group selected for analysis includes all debtors who indicate on their Statement of Affairs that they have been the director of a company, a member of a partnership or a sole trader within the five years prior to bankruptcy.[53] Since 98 per cent

[47] Ibid 109, 113.
[48] Ibid 110.
[49] Ibid.
[50] Ibid 109. See also Lawless and Warren, above n 39, 760, 774-75.
[51] Legal and Constitutional Affairs Legislation Committee, Senate, *Bankruptcy Amendment (Enterprise Incentives) Bill 2017; Bankruptcy Amendment (Debt Agreement Reform) Bill 2018 [Provisions]* (2018) 9.
[52] See AFSA, *Commentary: business-related* (2016) < https://www.afsa.gov.au/statistics/commentary-business-related>.
[53] This information is provided by debtors in response to questions 41 and 43 in the Statement of Affairs.

of business debtors report that they have held at least one of these roles, in the five years leading up to bankruptcy,[54] the authors infer that they will also be strong indicators of business activity in the personal bankruptcy sample. The third group selected for analysis is the group of debtors in the personal bankruptcy sample whose bankruptcies are classified as being due to 'other causes or causes unknown'. As outlined above, debtors in this category are those who chose more than one cause of bankruptcy, nominated a 'reason not listed' on the Statement of Affairs, or provided no information about the cause of their bankruptcy at all. The authors hypothesise that some of these debtors might have found it difficult to nominate a single cause from the list on the Statement of Affairs because they identified *both* business and personal factors as having played a role in their bankruptcies. The authors compare these three cohorts with the other debtors in the personal bankruptcy sample, in order to establish whether or not they reveal any distinctive attributes. They consider the extent to which the distinctive financial and demographic attributes of these groups resemble those of debtors in the business sample.

To conduct this analysis, the authors draw upon a unique data set provided by AFSA for the purposes of research. In line with its privacy policies and its commitment to facilitating bankruptcy research, AFSA supplied the authors with a data set of 28,675 de-identified records of individual bankruptcies initiated between 1 July 2007 and 20 June 2016.[55] The data is based upon information provided by debtors in their Statement of Affairs forms, lodged at the commencement of bankruptcy.[56] It includes each debtor's gender, age, occupation, income, source of income, family situation and, if appropriate, spouse's income. The data includes details of each debtor's unsecured assets and liabilities at the time of bankruptcy. It lists the primary source from which each debtor obtained information about bankruptcy and whether or not the debtor had a prior history of bankruptcy. It also records the cause of bankruptcy nominated by each debtor. The data sample represents ten per cent of all bankruptcies filed during this period, selected randomly so as to be broadly representative of the debtor population as a whole.

While this data set is extremely rich, it is subject to certain limitations. Since the data is primarily gathered from the Statement of Affairs, it is likely that some records are inaccurate or incomplete, due to oversight or misunderstanding on the part of individual debtors. AFSA advises that the data relating to real estate and mortgage debt is particularly problematic in this respect.[57] Other limitations relate to the format in which the data is recorded. Debtors'

[54] See Part IV(a) below.

[55] 1 July 2007 was the date on which AFSA adopted its current data management and reporting system. The data file was produced on 20 June 2016 and includes all records entered up until that date.

[56] In cases of involuntary bankruptcy, initiated by creditors, this information is supplied by creditors. AFSA advises that this information is updated as more details become available; for example, when AFSA receives the debtor's Statement of Affairs.

[57] AFSA has advised that when debtors complete the Statement of Affairs, they frequently record a mortgage but no real property asset. Others list their homes as assets, but do not list a corresponding mortgage debt, though in subsequent dealings with AFSA they disclose that they do in fact have mortgage debts. Still others fail to record either real property assets or mortgage debts, though these are subsequently identified by AFSA. AFSA speculates that this may be due to debtors misunderstanding the form, or, in some cases, being unsure of value of their homes or the extent of their mortgage debts. For this reason, AFSA has devised its own formula to determine whether or not a debtor owned or was purchasing real property, by gathering and cross-referencing information from various parts of the Statement of Affairs. The authors used the same method to gauge the extent of real property ownership among personal and business debtors in the sample.

incomes, assets and unsecured liabilities are recorded by AFSA in bands, such as '$0.01-$4999.99', rather than in precise figures. This tends to reduce the accuracy of statistical calculations such as means and medians. A further limitation relates to the causes of bankruptcy assigned to each debtor by AFSA. As outlined above, AFSA uses two categories to classify bankruptcies for which a single cause cannot be identified. These are 'other causes or causes unknown', within the personal bankruptcy sample, and 'other business reason or reasons unknown', within the personal bankruptcy sample. For the reasons outlined above, it is possible that some of these bankruptcies have been inappropriately classified, due to the inadequacy or ambiguity of information provided by debtors in the Statement of Affairs. This will be discussed further below.

IV Analysis of the AFSA data

This section discusses the results of statistical analysis carried out on the de-identified debtor records provided to the authors by AFSA.

a Characteristics of business debtors

Seventy-nine per cent of the records provided by AFSA (22,517)[58] related to personal bankruptcies, while the remaining 21 per cent (6,158) related to business bankruptcies.[59] The data showed some stark demographic differences between business and personal bankruptcies. The business debtors in the sample were predominantly male[60] and were older than personal debtors.[61] They were more likely to have spouses and to be supporting dependants.[62] They were concentrated in certain occupational categories. Managers and professionals were somewhat more likely than others in the sample to declare a business bankruptcy,[63] while technicians and trades workers were substantially more likely to declare business bankruptcy.[64] Community and personal service workers and clerical and administrative workers were much

[58] All figures have been rounded to the nearest whole number.

[59] AFSA excluded debtors in the 'unknown' category (those who did not submit a Statement of Affairs) when generating the authors' data set. See n 31 above.

[60] While women made up 46 per cent of personal debtors in the sample, they constituted only 29 per cent of business debtors. This difference was statistically significant at the 0.01 level. Henceforth, all differences marked with an asterisk (*) are statistically significant at the 0.01 level. Differences marked with two asterisks (**) are statistically significant at the 0.05 level.

[61] The median age of personal debtors was 42, while the median age of business debtors was 47. The mean age of personal debtors was 43.4, while the median age of business debtors was 45.7 (*).

[62] Thirty per cent of business debtors were single without dependants, compared with 45 per cent of personal debtors (*). Eight per cent of business debtors were single with dependants, compared with 14 per cent of personal debtors (*). Twenty-four per cent of business debtors had spouses but no dependants, compared with 17 per cent of personal debtors (*). Thirty-seven per cent of business debtors had spouses and dependants, compared with 24 per cent of personal debtors (*).

[63] Managers and professionals each made up eight per cent of personal bankruptcies, but 14 and 12 per cent of business bankruptcies, respectively (*)

[64] Technicians and trades workers made up 12 per cent of personal bankruptcies, but 24 per cent of business bankruptcies (*). Within the ANZSCO classification system, 'technicians and trades workers' is an overarching category that includes the sub-category of 'construction trades workers', described above. Due to the large number of sub-categories within the ANZSCO classification system, statistical analysis at the sub-category level (for example, comparing the number of construction trades workers in the business and personal bankruptcy samples) did not yield statistically significant results.

more likely to declare personal bankruptcy than those in other occupational groups.[65] Almost all debtors in the business sample, 98 per cent, reported that they had been directors of a company, members of a partnership or sole traders in the five years leading up to bankruptcy, while one fifth of personal debtors reported activity of this kind.[66]

Table 1: Gender and family situation of business and personal debtors

	Business (%)	**Personal (%)**
Male	71	54
Female	29	46
Single with no dependants	30	45
Single with dependants	8	14
With spouse but no dependants	24	17
With spouse and dependants	37	24

Table 2: Selected occupational categories of business and personal debtors

	Business (%)	**Personal (%)**
Managers	14	8
Professionals	12	8
Technicians and trades workers	24	12
Community and personal service workers	7	11
Clerical and administrative workers	8	12

Business and personal debtors also revealed different financial profiles. Debtors in business bankruptcy reported higher individual and household incomes than those in personal bankruptcy.[67] They also reported higher assets overall.[68] While the most common source of

[65] Community and personal service workers made up 11 per cent of personal bankruptcies but only seven per cent of business bankruptcies (*). Clerical and administrative workers made up 12 per cent of personal bankruptcies but eight per cent of business bankruptcies (*).

[66] Twenty per cent of personal debtors indicated that they had been directors of a company, members of a partnership or sole traders in this period (*).

[67] While the median gross annual income of personal debtors was $27,500, that of business debtors was $37,500. The mean annual income of debtors in personal bankruptcy was $34,510, compared with $41,733 for debtors in business bankruptcy (*). This disparity was also reflected in the spousal incomes reported by these groups. Sixty-nine per cent of personal debtors reported that their spouses earned no income, compared with 56 per cent of business debtors. The spouses of personal debtors also earned less than those of business debtors: the mean annual income of personal debtors' spouses was $32,332, compared with $35,894 for spouses of business debtors (*). Accordingly, the overall household incomes of those in business bankruptcy were higher than those in personal bankruptcy: the former reported a mean household income of $80,388, while the latter reported household income of $72,245 (*).

[68] While personal debtors reported mean assets of $154,722 business debtors reported mean assets of $382,964 (*). These figures are likely to be distorted by a small number of individual debtors with very significant assets. Each group's median assets were much lower, though again these figures showed considerable disparity between the assets of personal and business debtors. Personal debtors reported median assets of $12,500 while business debtors reported median assets of $57,500.

income for both types of debtor was 'gross wages and salary',[69] business debtors were much more likely than personal debtors to cite self-employment or business earnings as their main source of income.[70] Personal debtors were far more likely to report that they relied upon government wages or pensions.[71] Business debtors reported more assets than personal debtors in several specific asset categories, including monies owing,[72] tools of trade,[73] vehicles,[74] funds in bank accounts,[75] superannuation and life insurance policies.[76] They were more likely to own, or be purchasing, real property.[77] At the same time, business debtors reported average liabilities more than three times higher than those reported by personal debtors.[78] They were more likely to owe debts in several specific categories,[79] particularly taxation debts[80] and trade debts.[81] While almost three quarters of debtors in both groups had credit card debts, personal debtors were far more likely to report personal loan debts.[82] In both the credit card and personal

[69] Forty-eight per cent of personal debtors and 45 per cent of business debtors cited wages and salary as their primary source of income, at the time of bankruptcy.

[70] Twenty-three per cent of business debtors cited self-employment as their primary source of income, while four per cent cited 'business earnings'. By contrast, only three per cent of personal debtors cited self-employment while a further one per cent cited business earnings (*).

[71] Forty-six per cent cited this as their primary source of income, compared with 26 per cent of business debtors.

[72] Six per cent of business debtors reported that they were owed more than $10,000, compared with one per cent of personal debtors (*). Of those who reported assets in this category, the business debtors reported median debts owed of $42,500, while personal debtors reported median debts owed of $27,500.

[73] Thirty-eight per cent of business debtors reported assets in this category, compared with ten per cent of personal debtors (*).

[74] Seventy-two per cent of business debtors reported that they owned a vehicle, compared with 64 per cent of personal debtors (*).

[75] Eighty-two per cent of business debtors reported that they held funds in bank accounts, compared with 77 per cent of personal debtors (*).

[76] Fifty-six per cent of business debtors reported owning superannuation or life insurance policies, compared with 50 per cent of personal debtors (*). Of those who reported assets in this category, business debtors reported mean asset of $73,129, compared with $53,290 for personal debtors (*). Business debtors were also more likely to report that in the five years prior to bankruptcy, they had sold, transferred or made a gift of assets. Twenty-eight per cent of business debtors reported that they had made a sale, transfer or gift of assets in the five years prior to bankruptcy, compared with 14 per cent of personal debtors (*). The mean value of sales, transfers and gifts reported by business debtors was $424,076, compared with $321,753 for personal debtors (*). Sixteen per cent of business debtors reported having sold, transferred or gifted assets worth $200,000 or more, compared with seven per cent of personal debtors (*).

[77] Twenty-five per cent of personal debtors owned or were purchasing real property, according to AFSA's formula. By contrast, 45 per cent of business debtors owned or were purchasing real property (*). See n 54, above.

[78] Overall, personal debtors reported mean liabilities of $147,916, while business debtors reported mean liabilities of $450,392 (*). As with assets, these figures are likely to be inflated by a small number of debtors with exceptionally large debts. The median liabilities of personal debtors amounted to $37,500, while the median total liabilities of business debtors added up to $107,500.

[79] This finding corroborates the results of an earlier analysis of the data, published in Paul Ali, Malcolm Anderson, Lucinda O'Brien and Ian Ramsay, 'The Incidence and Causes of Personal Bankruptcy in Australia' (2016) 4 *JASSA: The Finsia Journal of Applied Finance* 27-35.

[80] Fifty-six per cent of business debtors reported tax debts, compared with 14 per cent of personal debtors. Seventeen per cent cited tax debts of $100,000 or more, compared with only three per cent of personal debtors (*).

[81] Twenty-one per cent of business debtors reported owing debts to trade creditors, compared with only four per cent of personal debtors. Thirteen per cent reported owing trade debts of $10,000 or more, compared with only two per cent of personal debtors. (*)

[82] Seventy-three per cent of personal debtors and 72 per cent of business debtors reported some credit card debt. Forty-five per cent of personal debtors reported personal loan debt, compared with 28 per cent of business debtors.

loan categories, business debtors reported higher debts, but personal debtors owed more, as a proportion of their overall liability.[83]

Table 3: Median gross incomes, assets and liabilities of business and personal debtors

	Business ($)	**Personal ($)**
Income	37,500	27,500
Assets	57,500	12,500
Liabilities	107,500	37,500

Table 4: Average gross incomes, assets and liabilities of business and personal debtors

	Business ($)	**Personal ($)**
Income	41,733	34,510
Assets	382,964	154,722
Liabilities	450,392	147,916

Table 5: Selected liabilities of business and personal debtors

	Business (%)	**Personal (%)**
Taxation	56	14
Trade-related	21	4
Personal loan	28	45
Credit card	72	73

A further point of contrast emerged in relation to the causes of bankruptcy identified by business and personal debtors in their Statement of Affairs. Business debtors were much more likely than personal debtors to select multiple causes of bankruptcy, to identify causes not listed on the Statement of Affairs form or to identify no cause at all. AFSA allocated 27 per cent of business bankruptcies in the sample to the category 'other business reason or reason unknown'. By contrast, only nine per cent of personal bankruptcies were allocated to the category, 'other causes or causes unknown'. It is possible that, in comparison with personal debtors, business debtors found it more difficult to ascribe their bankruptcy to a single cause listed on the Statement of Affairs.

b Construction trades workers

Within the personal bankruptcy sample, the 670 individuals who were classified as 'construction trades workers' revealed a number of distinguishing demographic features,

[83] Business debtors' average personal loan debt was $18,428, whereas personal debtors' average personal loan debt was $12,075 (*). Yet personal loan debt represented only eight per cent of business debtors' total debt, while it made up 21 per cent of all debts owed by personal debtors (*). Business debtors also reported higher average credit card debts: $26,939, compared with $19,383 for personal debtors. Yet here, again, personal debtors' credit card debts made up a larger proportion of their overall debt. On average, credit card debt made up 36 per cent of personal debtors' total debt, but only 23 per cent of business debtors' total debt (*).

similar to those of the debtors in the business sample. Like business debtors, the debtors in the 'construction trades workers' group were overwhelmingly male[84] and were more likely than others in the personal bankruptcy sample to have spouses.[85] The financial profiles of 'construction trades workers' in the sample also resembled those of business debtors. Like the business debtors, they were less likely to cite government benefits or pensions as their main source of income[86] and almost eight times more likely to cite self-employment.[87] They reported less personal loan and credit card debt than others in the personal bankruptcy sample, as a proportion of their overall debt.[88] At the same time, they were more likely than others in the personal bankruptcy sample to report trade-related debts and three times more likely to report tax debts.[89] More than half the debtors in the 'construction trades workers' group reported company directorships, partnerships or activity as a sole trader in the five years prior to bankruptcy, a rate more than double that of others in the personal bankruptcy sample.[90] Construction trades workers were also more likely than others in the personal bankruptcy sample to attribute their bankruptcies to 'other causes or cause unknown'.[91]

c Company directors, partners and sole traders

There were also striking similarities between the business debtors and those in personal bankruptcy sample who reported that they had been directors of a company, members of a partnership or sole traders in the five years leading up to bankruptcy. 4,602 personal debtors out of the total 22,517, or just over 20 per cent, indicated that they had either been the director of a company, a member of a partnership or a sole trader during this period. This group, the 'directors group', exhibited several demographic characteristics that aligned them more closely with the business debtors than with other debtors in the personal bankruptcy sample. Like the business debtors, they were older,[92] more likely to have spouses[93] and more likely to be

[84] Ninety-nine per cent of construction trades workers ('the construction group') were male, compared with 53 per cent of others in the personal bankruptcy sample (*).
[85] Forty-five per cent in the construction group had spouses, compared with 41 per cent of others in the personal bankruptcy sample (*).
[86] Thirty-seven per cent of those in the construction group cited government benefits as their main source of income, compared with 46 per cent of others in the sample (*).
[87] Twenty per cent of those in the construction group cited self-employment as their main source of income, compared with 2.6 per cent of others in the personal bankruptcy sample (*).
[88] For debtors in the construction group, personal loan debt made up 13 per cent of total debt, whereas it made up 22 per cent of total debt for others in the personal bankruptcy sample (*). For debtors in this group, credit card debt made up 28 per cent of total debt, whereas it made up 36 per cent of all debt for others in the personal bankruptcy sample (*).
[89] Forty-three per cent of those in the construction group reported that they owed a tax debt, compared with 14 per cent of others in the personal bankruptcy sample (*). Ten per cent reported trade-related debts, compared with three per cent of others in the personal bankruptcy sample (*).
[90] Fifty-three per cent of those in the construction group indicated that they had been a company director, member of a partnership or a sole trader, compared with 20 per cent of others in the personal bankruptcy sample (*).
[91] Fourteen per cent of construction workers were classified as having attributed their bankruptcies to 'other causes or causes unknown', compared with nine per cent of other debtors in the personal bankruptcy sample (*).
[92] The mean age of debtors who had been directors, partners or sole traders was 46, whereas the mean age of other debtors in the personal bankruptcy sample was 43 (*).
[93] Fifty-seven per cent of debtors who had been directors, partners or sole traders had spouses, compared with 37 per cent of other debtors in the personal bankruptcy sample (*).

supporting dependants.[94] They were more likely to be managers, professionals or technicians and trades workers, all occupations with a high concentration of business debtors.[95] They were less likely to be community and personal service workers or clerical and administrative workers, occupational categories with a relatively low concentration of business debtors.[96] The financial profiles of those in the directors group also resembled those of business debtors. Like the business debtors, those in the directors group were much more likely to describe their main source of income as self-employment and less likely to describe their main income as a government benefit or pension.[97] They reported higher incomes,[98] more assets[99] and much more extensive liabilities[100] than others in the personal bankruptcy sample, reflecting the higher incomes, assets and liabilities of business debtors. Like the business debtors, they were much more likely to include trade debts[101] and tax debts[102] among their liabilities.

Debtors in the directors group were also much more likely than others in the personal bankruptcy sample to attribute their bankruptcies to 'other causes or causes unknown'. Debtors in the directors group were ten times more likely than others in the personal bankruptcy sample to fall into this category. 'Other causes or causes unknown' was the most common classification for debtors in the directors group, constituting 30 per cent of the total.[103] By way of comparison, 23 per cent of those in the directors group ascribed their bankruptcies to unemployment, 13 per cent to excessive use of credit and nine per cent to domestic discord.[104]

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[94] Forty-three per cent of debtors who had been directors, partners or sole traders had dependants, compared with 37 per cent of other debtors in the personal bankruptcy sample (*).

[95] Fifteen per cent were managers, compared with six per cent of others in the personal bankruptcy sample (*). Thirteen per cent were professionals, compared with seven per cent of others in the personal bankruptcy sample (*). Nineteen per cent were technicians and trades workers, compared with 10 per cent of others in the personal bankruptcy sample (*).

[96] Seven per cent were community and personal service workers, compared with 11 per cent of others in the personal bankruptcy sample (*). Ten per cent were clerical and administrative workers, compared with 12 per cent of others in the personal bankruptcy sample (*).

[97] The most commonly cited source of income was wages or salary: 50 per cent cited wages or salary as their main source of income, compared with 48 per cent of others in the personal bankruptcy sample (**). Thirteen per cent reported self-employment as their main source of income, compared with one per cent of others in the personal bankruptcy sample (*). Thirty-one per cent cited government benefits or pensions as their main source of income, compared with 50 per cent of others in the sample (*).

[98] Debtors in this group reported mean incomes of $40,421. Other debtors in the personal bankruptcy sample reported mean incomes of $32,992 (*).

[99] Debtors in this group reported mean assets of $392,725. Other debtors in the personal bankruptcy sample reported mean assets of $93,584 (*).

[100] Debtors in this group reported mean liabilities of $518,120. Other debtors in the personal bankruptcy sample reported mean liabilities of $52,817 (*).

[101] Twelve per cent of debtors in this group reported trade debts, compared with one per cent of other debtors in the personal bankruptcy sample (*).

[102] Forty-one per cent of debtors in this group reported tax debts, compared with eight per cent of other debtors in the personal bankruptcy sample (*).

[103] By contrast, only three per cent of other personal debtors attributed their bankruptcies to 'other causes' (*).

[104] Twenty-three per cent cited unemployment, compared with 37 per cent of others in the personal bankruptcy sample (*). Thirteen per cent listed 'excessive use of credit' as the cause of their bankruptcy, compared with 27 per cent of others in the personal bankruptcy sample (*). Nine per cent attributed their bankruptcies to domestic discord, compared with 14 per cent of others in the personal bankruptcy sample (*). Seven per cent cited liability due to guarantees, compared with one per cent of others in the personal bankruptcy sample (*), while seven per cent cited adverse legal action, compared with three per cent of others in the personal bankruptcy sample (*).

d Debtors who attributed their bankruptcies to 'other causes'

There were further striking similarities between the debtors in the business sample and the 1,954 debtors in the personal bankruptcy sample whose bankruptcies were attributed to 'other causes or causes unknown.' Like the business debtors, the debtors in this group were more likely than others in the personal bankruptcy sample to be male.[105] They were also older[106] and more likely to have children and spouses.[107] Debtors in the 'other causes' group were clustered in occupational categories that are more common among business debtors than personal debtors. Compared with others in the personal bankruptcy sample, debtors in this group were more likely to be professionals, managers and technicians and trades workers.[108] They were less likely to be community and personal service workers or clerical and administrative workers.[109] Financially, the debtors in this group were also strikingly similar to those in the business sample. They had higher incomes,[110] more assets[111] and more extensive liabilities[112] than others in the personal bankruptcy sample. They were more likely to identify their chief source of income as self-employment or earnings from a business.[113] They were also less likely to identify government benefits or pensions as their main source of income.[114] Like business debtors, debtors in the 'other causes' group were substantially more likely to include tax and trade debts among their liabilities.[115] Like business debtors, they reported higher average credit card debts than others in the personal bankruptcy sample, but these debts

[105] Sixty-seven per cent of debtors in the 'other causes' group were male, compared with 53 per cent of others in the personal bankruptcy sample (*).

[106] The average age of debtors in the 'other causes' group was 47. The average age of others in the personal bankruptcy sample was 43 (*).

[107] Forty-four per cent of those in the 'other causes' group had dependants, compared with 38 per cent of others in the personal bankruptcy sample (*). Sixty per cent had spouses, compared with 39 per cent of others in the personal bankruptcy sample (*).

[108] Seventeen per cent were managers, compared with seven per cent of others in the personal bankruptcy sample (*). Eleven per cent were professionals, compared with eight per cent of others in the personal bankruptcy sample (*). Seventeen per cent were technicians and trades workers, compared with 12 per cent of others in the personal bankruptcy sample (*).

[109] Seven per cent were community and personal service workers, compared with 11 per cent of others in the personal bankruptcy sample (*). Nine per cent were clerical and administrative workers, compared with 12 per cent of others in the personal bankruptcy sample (*).

[110] The median gross annual income of those in the 'other causes' group was $37,500. The median gross annual income of others in the personal bankruptcy sample was $27,500. The mean annual income of debtors in the 'other causes' group was $41,986, compared with $33,800 for other debtors in the personal bankruptcy sample (*).

[111] The median assets of those in the 'other causes' group were $62,500. The median assets of others in the personal bankruptcy sample were $12,500. The mean assets of those in the 'other causes' group were $425,760, while the mean assets of others in the personal bankruptcy sample were $128,966 (*).

[112] The median liabilities of those in the 'other causes' group was $117,500. The median assets of others in the personal bankruptcy sample were $32,500. The mean assets of those in the 'other causes' group were $577,656, while the mean assets of others in the personal bankruptcy sample were $107,079 (*).

[113] Seven per cent cited self-employment as their chief source of income, compared with three per cent of others in the personal bankruptcy sample (*). Three per cent cited business earnings, compared with one per cent of others in the personal bankruptcy sample (*).

[114] Thirty per cent cited government benefits and pensions as their chief source of income, compared with 47 per cent of others in the personal bankruptcy sample (*).

[115] Thirty-nine per cent reported tax debts, compared with 12 per cent of others in the personal bankruptcy sample (*). Seventeen per cent reported trade debts, compared with two per cent of others in the personal bankruptcy sample (*).

made up a smaller proportion of their overall indebtedness.[116] Seventy-one per cent of debtors in this group reported company directorships, partnerships or sole trading activity in the five years prior to bankruptcy.[117]

V Further analysis and policy implications

a Business-related bankruptcies within the personal bankruptcy sample

The data presents compelling evidence that a substantial proportion of debtors in the personal bankruptcy sample have engaged in business activity prior to bankruptcy. As noted above, 98 per cent of debtors in the *business* sample reported a company directorship, partnership or activity as a sole trader in the five years prior to bankruptcy. By comparison, 20 per cent debtors in the *personal* bankruptcy sample reported company directorships, partnerships or sole trading activity in the five years prior to bankruptcy. Within this sub-group of personal debtors, 13 per cent reported 'self-employment' as their primary source of income at the time of their bankruptcy. This represents clear evidence that a considerable number of debtors in the personal bankruptcy sample have engaged in business activity in the years leading up to their bankruptcies. Statistical analysis also indicates that, within the personal bankruptcy sample, there are some specific groups of debtors whose overall circumstances closely resemble those of business debtors. Within the personal bankruptcy sample, there are several groups of debtors who more closely resemble the typical business debtor than the typical personal debtor: those who have been company directors, partners or sole traders; construction trades workers; and those who attribute their bankruptcies to 'other causes or causes unknown'. These debtors tend to be older, with spouses and children. They are more likely to cite self-employment as their primary source of income. They tend to report higher levels of tax and trade-related debts and, in the case of the 'directors' and 'other causes' groups, higher incomes, assets and debt levels.

Statistical analysis also reveals a strong correlation between business activity and uncertainty regarding the cause of bankruptcy. As noted above, 27 per cent of business debtors select multiple causes of bankruptcy, identify causes not listed on the Statement of Affairs or identify no cause at all. Debtors in personal bankruptcy are, on the whole, more specific regarding the causes of their bankruptcies: only nine per cent of personal bankruptcies were attributed to 'other causes or causes unknown'. Yet within the personal bankruptcy sample, debtors in the directors group were ten times more likely than other debtors to cite 'other causes or causes unknown'. Among those debtors in the personal group whose bankruptcies were due to 'other causes or causes unknown', 71 per cent reported that they had acted as company directors, members of a partnership or sole traders in the five years prior to bankruptcy. These

[116] Debtors in this group reported average credit card debts of $29,898, while others in the personal bankruptcy sample reported average credit card debts of $18,384 (*), however for debtors in this group, credit card debt constituted only 25 per cent of total liabilities, whereas for others in the personal bankruptcy sample, it constituted 37 per cent of total liabilities (*).

[117] By contrast, only 16 per cent of other debtors in the personal bankruptcy sample reported company directorships, partnerships or sole trading activity in the five years prior to bankruptcy (*).

findings strongly suggest that debtors who have engaged in business activity, prior to bankruptcy, are more likely to be uncertain regarding the cause, or causes, of their bankruptcy.

To some extent, this may reflect debtors' uncertainty regarding the definition of a business-related bankruptcy. As AFSA observes, the Statement of Affairs provides no guidance to debtors on this point, leaving individual debtors to decide which category more accurately describes their circumstances.[118] It is also possible that some debtors are unable to identify a single cause of bankruptcy, perceiving that their bankruptcies are due to a number of causes, some business-related and others personal in nature. As noted above, debtors completing the Statement of Affairs are required to choose a single cause from a list of 'business related' or 'non business related' causes, with the option of citing a further 'reason not listed' in a free text box. In practice, however, some debtors select multiple causes, while others make no selection from the list provided, preferring to use the free text box to provide information about the causes of their bankruptcies. These causes are recorded by AFSA as being due to 'other business reason[s] or reasons unknown' or 'other causes or causes unknown'.[119] In making this assessment, AFSA draws upon information from other parts of the Statement of Affairs. However, in some cases, there may be insufficient information to enable AFSA to identify the cause of bankruptcy. Some debtors may provide conflicting information, suggesting that both business and personal factors played a part in the bankruptcy. In these circumstances, it is conceivable that some bankruptcies might be classified by AFSA as personal, when they are in fact partly or wholly business-related.[120]

b Policy implications

These findings suggest that AFSA's published data underestimates the extent to which bankruptcy is business-related in Australia. This hidden cohort of business bankruptcy may be quite large, relative to the cohort of debtors whose bankruptcies are currently identified as business-related. As noted above, 20 per cent of debtors in the personal bankruptcy sample disclose that they have been company directors, members of a partnership or sole traders in the five years leading up to bankruptcy. This cohort numbers 4,602 debtors in total, between 1 July 2007 and 20 June 2016. The group of debtors whose bankruptcies are attributed to 'other causes' is also substantial. In the personal bankruptcy sample, 1,954 personal bankruptcies are attributed to 'other causes', representing nearly nine per cent of all personal bankruptcies. Even if only a portion of these bankruptcies are wholly or partly business-related, they could number in the thousands. Given that only 6,158 individuals are formally identified by AFSA as business debtors, over the same period, this suggests that business-related bankruptcy is substantially more prevalent than official figures suggest.

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[118] AFSA, *Profiles*, above n 1, 15.

[119] Telephone discussion with River Paul, Statistician, AFSA (14 May 2018). See also AFSA, *Profiles*, above n 1, 15.

[120] It is also possible that some debtors categorise themselves as personal debtors because their debts are secured by personal guarantees, even though these debts were predominantly taken out for business purposes. It is significant that within the directors group, seven per cent attributed their bankruptcies to 'liabilities due to guarantees', seven times the rate of other debtors in the personal bankruptcy sample. The authors are grateful to Gregory Mowle for identifying this as a possible source of confusion among debtors, drawing on his own empirical research.

This potential hidden cohort illustrates the need to clarify and standardise AFSA's data-collection and reporting processes, so that the extent of business-related bankruptcy in Australia can be more accurately measured. While AFSA's data collection and reporting processes are rigorous, this study suggests that some debtors do not provide sufficient information to enable AFSA to categorise their bankruptcies accurately. In the first instance, it may be desirable to conduct an audit of AFSA's data entry practices, to ensure that where a debtor provides incomplete or ambiguous information, this information is recorded in a consistent fashion. More importantly, this study suggests the Statement of Affairs form should be redesigned. A redesigned Statement of Affairs should enable debtors to select more than one cause of bankruptcy from a list of possible causes. This list should be reformulated, with clearer and more specific causes, such as 'loss of a job', 'inadequate working hours or wages', or 'loss of spouse's income'. This redrafted Statement of Affairs would not require debtors to state categorically whether their bankruptcies are 'business related' or 'non business related'. Instead, the form could include two new questions, asking debtors whether or not they have engaged in business activity and whether or not they consider that this activity played *some role* in their bankruptcies. Following this change, it may be desirable to amend AFSA's reporting methods, to include a new category of 'partly business-related bankruptcy'. This change would recognise the fact that bankruptcy can be the result of several factors, some commercial and others more personal in nature, and that some debtors might find it difficult to identify a single or preeminent cause.[121]

These findings have important implications for the Government's impending changes to the Bankruptcy Act. They offer support for the Government's view that these reforms must apply to all debtors, not just those who identify their bankruptcies as business-related. As discussed above, some critics of the Bankruptcy Bill have argued that these reforms are unduly generous to personal debtors. These critics have suggested that the new bankruptcy laws should apply solely to business debtors if they are to promote entrepreneurial activity.[122] Yet this study lends support to the Government's view that the distinction between personal and business bankruptcy is a tenuous one. Given that there appears to be considerable overlap between the circumstances of business debtors and some groups of personal debtors, a reform that applied only to business debtors would be difficult to implement in practice. If business debtors were eligible for more lenient treatment, such as an earlier discharge, it is likely that more debtors would choose to identify their bankruptcies as business-related. It would fall to AFSA to ensure that each bankruptcy was genuinely linked to the debtor's business activities, a process that would be resource-intensive and, in many cases, highly subjective. This study suggests that a bankruptcy regime that imposed different rules for business and personal debtors would also be difficult to justify as a matter of public policy. If it is accepted that an early discharge acts as an incentive to entrepreneurship, then this incentive should be offered to all businesspeople, including those who declare personal bankruptcy. Indeed, it could be

[121] Financial Counselling Australia, *Response to the Proposals Paper: Improving Bankruptcy and Insolvency Laws* (June 2016) <https://static.treasury.gov.au/uploads/sites/1/2017/06/C2016-017_Financial_Counselling_Australia.pdf> 2; Legal and Constitutional Affairs Legislation Committee, Senate, *Bankruptcy Amendment (Enterprise Incentives) Bill 2017; Bankruptcy Amendment (Debt Agreement Reform) Bill 2018 [Provisions]* (2018) 10.

[122] Dickfos and Brown, 'Reducing', above n 17.

argued that businesspeople who go bankrupt for purely personal reasons are especially deserving of lenient treatment, since they have not demonstrated any inherent lack of business ability.

VI Conclusion

This study presents the first empirically-based study of business bankruptcy to be conducted in Australia. It identifies several demographic differences between business and personal debtors, finding that, in general, business debtors are older, more likely to have partners and dependants, and more likely to be found in managerial, professional or trades occupations. The article also identifies important differences between the financial circumstances of business debtors and personal debtors, finding that business debtors have substantially higher incomes, assets and liabilities, with a much higher incidence of tax and trade-related debts. Yet the study also finds evidence of considerable overlap between the categories of business and personal bankruptcy. It finds that, within the population of personal debtors, there are clusters of debtors whose overall circumstances strongly resemble those of business debtors. In particular, the study finds striking similarities between business debtors and those in the personal bankruptcy sample who state that they have been company directors, members of a partnership or sole traders in the five years prior to bankruptcy. It finds similar parallels between business debtors and those in the personal bankruptcy sample whose bankruptcies are attributed to 'other causes or causes unknown'. It also identifies some of the features of business bankruptcy among personal debtors who work as construction trades workers, the occupation most commonly cited by debtors in business bankruptcy. These findings suggest that there is a considerable cohort of debtors whose bankruptcies are currently defined as personal, but which are in fact wholly or partly business-related.

In light of these findings, the authors conclude that the current Statement of Affairs form does not enable debtors to provide sufficiently accurate information regarding the cause, or causes, of their bankruptcies. They suggest changes to the Statement of Affairs, to enable AFSA to gather more accurate data regarding the proportion of Australian bankruptcies that are wholly or partly business-related. They also suggest the creation of a new reporting category, that of the 'partly business-related bankruptcy', to recognise that some bankruptcies are both personal and business-related. Drawing on their findings, the authors conclude that there is considerable merit in the Government's decision to implement reforms to the Bankruptcy Act that apply equally to personal and business debtors. Given the extent to which these two categories overlap, a regime that applies equally to business and personal debtors is both more practical and more desirable, as a matter of public policy, than a regime that attempts to discriminate between the two.