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SOME SUGGESTIONS FROM JAPAN FOR REFORMING AUSTRALIA'S PERSONAL BANKRUPTCY LAW

STACEY STEELE AND CHUN JIN*

This article examines Japan's contemporary personal bankruptcy law reform experience in light of Australia's proposed reforms to the Bankruptcy Act 1966 *(Cth). Japan's personal insolvency legislation was substantially revised at the turn of the 21st century and a new proceeding for individual rehabilitation introduced. These innovations built on practical and procedural solutions pioneered in the courts especially in the late 1990s as the number of personal bankruptcies increased after the bursting of the bubble economy. The article shows that by comparison with Japanese approaches to discharge, investigation and continuing obligations, including requirements for income contributions, the proposed Australian reforms are conservative and not as debtor-friendly as those in Japan. The time between filing and discharge in Japan, for example, is flexible and typically no more than a few months. The Australian reforms merely suggest revising the default bankruptcy period from three years to a fixed one year. In practice, the article suggests that the obstacles of adverse credit histories and enforcement of personal guarantees against entrepreneurs remain problems for an entrepreneur seeking a fresh start in both jurisdictions.*

I INTRODUCTION: REFORMING PERSONAL BANKRUPTCY LAW

This article examines contemporary personal bankruptcy law reform experience in Japan, in light of the suggested reforms to personal bankruptcy law set out in the Australian government's proposals paper, *Improving Bankruptcy and Insolvency Laws*, released on 29 April 2016 ('Proposals Paper').[1] To date, Australian law reformers have not typically looked to Japan for insights or alternatives in the context of insolvency law, but this article argues that proposed Australian reforms could be reconsidered in light of Japanese experience. In particular, the proposal to reduce the default bankruptcy period from three years to one year and a proposal that would require bankrupts to make income contributions for three years, appear to be very conservative when it comes to consumer bankruptcies in light of Japanese developments. The article argues that despite the prevailing stigma attached to becoming

* Stacey Steele, LLB, LLM (Melbourne), Associate Director (Japan), Asian Law Centre, Melbourne Law School, Australia. Chun Jin, LLB (Renmin U of China), LLM, PhD (Kyoto), Associate Professor, Doshisha University Japan, Visiting Research Scholar, Asian Law Centre, Melbourne Law School (2015–2017), Visiting Professor at Renmin University of China (2017–2020). The authors acknowledge the financial support of a Grant for Social Science (2016) (Shakai kagaku josei) from the Nomura Foundation (*Nomura Zaidan*), Japan, and the Melbourne Law School International Collaboration Fund, and thank Mr Michael Murray and Professor Ros Mason, Queensland University of Technology, and other participants at the 'Personal Insolvency Conference', QUT, Brisbane, Australia, 7–9 September 2016 for their comments on earlier versions of this article. The authors also thank Ms Kaori Kano, Principal Research Assistant, Asian Law Centre, and Ms LI Ying, PhD Candidate, Osaka University, for their research assistance. Stacey Steele also thanks Mr Naoya Mori, Japaneasy Language School, for his assistance with Japanese language materials. This article reflects the authors' personal opinions. Statements do not represent the views or policies of employers, past or present, or any other organisation with which the authors are affiliated.

[1] National Innovation and Science Agenda (Aust), *Improving Bankruptcy and Insolvency Laws: Proposals Paper* (The Treasury, 2016) ('Proposals Paper') <https://treasury.gov.au/consultation/national-innovation-and-science-agenda-improving-bankruptcy-and-insolvency-laws/>.

bankrupt in Japan, the Japanese legislation is more encouraging of risk taking than the Australian legislation will be, if the proposed Australian reforms are adopted. The Japanese framework includes a quick procedure for individuals, whilst also making it easier and cheaper for entrepreneurs to file for personal and corporate insolvency at the same time. Moreover, the average time between filing a petition to commence a personal bankruptcy proceeding and a discharge becoming final and binding is about 100 days.[2]

After this introduction, the article begins by setting out the key legislative frameworks for Japanese personal insolvency proceedings.[3] This section focuses on the *Hasan hō* [Bankruptcy Act] (Act No 75, 2004) (Japan) ('*Bankruptcy Act*'), which corresponds generally with Australia's *Bankruptcy Act 1966* (Cth) in the sense that applicants seek a discharge from their debts on completion of the proceeding. This section examines three key features of the Japanese system: the system of simultaneous termination which refers to a proceeding where no trustee is appointed and the court provides an order to terminate the proceeding at the same time as giving an order for commencement; small-scale proceedings supervised by a trustee with a small fee payable to the court to cover the trustee's fixed fee; and the Japanese courts' approach to discharge. In addition, this section also analyses recent survey data about the number and type of bankruptcies collected by the Japan Federation of Bar Associations in relation to personal insolvency in Japan to provide context for readers from Australia.[4] In the third section, the article specifically examines Japan's approach to the issues and questions raised in the Australian Proposals Paper and provides some suggestions based on Japanese experience. Finally, the article argues that Japan's experience suggests that a key obstacle to entrepreneurs receiving a fresh start is the treatment of personal guarantees by financial institutions. This section introduces recent Japanese guidelines for financial institutions dealing with guarantees. The guidelines are designed to address the concern that a business person will be bankrupted due to a guarantee being called if she or he files for formal insolvency proceedings in respect of a related enterprise, and thus she or he would be discouraged from making the corporate filing.[5] This Japanese experience suggests that future Australian reforms need to give consideration to the role that personal guarantees play in the small and medium-sized enterprise ('SME') market for credit in Australia and how they are treated in any insolvency of the SME. The article argues that there may be lessons for Australia from this recent development in Japan.

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[2] Shōhisha mondai taisaku iinkai [Committee for Addressing Consumer Problems], *2014-nen hasan jiken oyobi kojin saisei jiken kiroku chōsa* [*2014 Survey of Records of Bankruptcy Cases and Individual Rehabilitation Cases*] (Japan Federation of Bar Associations, 2014).
<http://www.nichibenren.or.jp/library/ja/publication/books/data/2014/2014_hasan_kojinsaisei.pdf> 5.

[3] For an overview of Japan's insolvency law system, see Stacey Steele and Jin Chun, CCH, *Japan Business Law Guide* (at 26 November 2015) 19.140. English translations of the relevant insolvency legislation may be found on the Ministry of Justice's Japanese Law Translation website: Ministry of Justice (Japan), *Japanese Law Translation* <www.japaneselawtranslation.go.jp>. On the reliability and translation process for the Ministry of Justice translation project, see Carol Lawson, 'Found in Translation: The "Transparency of Japanese Law Project" in Context' (2007) 24 *Journal of Japanese Law* 187.

[4] See Committee for Addressing Consumer Problems, above n 2.

[5] *Keieisha hoshō ni kansuru gaidorain* [*Guidelines in Relation to a Business Owner's Personal Guarantee*] (2013) <http://www.jcci.or.jp/chusho/kinyu/131205guideline.pdf>. These guidelines became effective from 1 February 2014, and are available on the websites of various institutions and associations including the Japan Chamber of Commerce and Industry (Nihon Shōkō Kaigi Sho), the Japan Federation of Credit Guarantee Corporations (Zenkoku Shinyō Hoshō Kyōkai Rengō Kai), and the Japanese Bankers' Association (Zenkoku Ginkō Kyōkai).

II PERSONAL INSOLVENCY IN JAPAN

A *Overview of Japan's Legal Framework for Personal Insolvency*

Japanese personal insolvency legislation was substantially updated by a suite of reforms which were introduced over the course of about a decade.[6] The drivers for insolvency law reform in Japan were multifaceted. The late 1990s saw an upswing in the number of insolvency proceedings being dealt with in the courts as reflected in the figures shown in Table 1. Japan's economic malaise continued during this period and, at the same time, the Japanese consumer credit industry developed and expanded significantly. The reforms were also aimed at modernising Japan's insolvency law framework. The previous law was based on 19th century European statutes which were introduced to Japan in the early 20th century. The previous *Hasan hō* (Act No 71, 1922) (Japan) ('*Bankruptcy Act 1922*'), for example, was based on the German *Konkursordnung* [Bankruptcy Act] of 1877.[7] The Japanese personal insolvency law framework now includes a rehabilitation procedure, bankruptcy procedure and quasi-formal procedures involving court-led conciliation processes.[8] The courts also led non-legislative reform efforts around this time, such as the introduction of the small-scale proceedings supervised by a trustee for a fixed fee, as discussed further below. The procedure was pioneered by the Tokyo District Court, from the late 1990s.[9] Out-of-court workouts are also still popular in Japan, but difficult to quantify and examine, given that they are not typically public.[10] This section provides an outline of the civil rehabilitation procedure first, but focuses on the bankruptcy procedure, which is the most used legislative procedure with 65 393 filings in 2014.[11]

Table 1: Number of filings for personal bankruptcy (*kojin hasan jiken*) from 1988 to 2001[12]

Year	'88	'89	'90	'91	'93	'94	'95	'96	'97	'98	'99	'00	'01
Filings	9, 433	11, 480	23, 491	43, 394	43, 816	40, 613	43, 649	56, 802	71, 683	105, 468	123, 915	139, 590	160, 741

The *Minji saisei hō* [Civil Rehabilitation Act] (Act No 225, 1999) (Japan) ('*Civil Rehabilitation Act*') was the first legislation to be enacted during the legislative reform process. Civil rehabilitation is available to both individuals and corporations. The Act was amended in April 2001 to include special provisions for rehabilitation of individual debtors with small-scale debts (*shōkibo kojin saisei tetsuzuki* or 'small-scale individual rehabilitation procedure') and

[6] On the process of reform in Japan, see Steele and Chun, above n 3, 19.120–19.130.
[7] *Konkursordnung* [Bankruptcy Act] (Germany) 10 February 1877, RGBl, 1877, 351.
[8] Jin Chun, 'Kojin saimusha no tōsan tetsuzuki [Insolvency Proceedings for Individual Debtors]' in Fujimoto Toshihazu and Nomura Tsuyoshi (eds), *Kiso toreeningu tōsanhō* [*Bankruptcy: Examples and Explanations*], (Nihonhyoronsha, 2013), 235, 236.
[9] As discussed further below, the Tokyo District Court developed this proceeding as an alternative to the simultaneous termination proceeding which was developed in the 1980s by the Tokyo and Osaka District Courts: see Shibata Takeo and Kimura Yuji, 'Tajū saimusha kyūsai no hō to jitsumu: jikōhasan tetsuzuki "dōji haishi" o chūshin ni [Law and Practice in Assisting People with Multiple Debts: Focusing on the Personal Bankruptcy Proceeding Known as Simultaneous Termination]' (2015) 27(2) *Seigaku'in daigaku ronsō* 29, 35, 38.
[10] Specific individual guidelines are also available for application in relation to victims of the Great East Japan Earthquake. See Stacey Steele and Jin Chun, 'Insolvency Law Responses to a National Crisis: Great East Japan Earthquake and Guidelines for Individual Debtor Out-of-Court Workouts' (2012) 17(34) *Journal of Japanese Law* 43.
[11] *Saibansho dētabukku 2016* [*Court Data Book 2016*] (Supreme Court of Japan, 2016) <http://www.courts.go.jp/about/databook/index.html> 44–53.
[12] Ibid.

wage-earning debtors (*kyūyo shotokusha nado saisei tetsuzuki* or 'wage earner etc rehabilitation procedure').[13] These procedures allow individual debtors with a prospect of earning a future income to negotiate an individual rehabilitation plan with creditors if their general debts (excluding debts relating to a loan secured by their principal place of residence) are less than ¥50 000 000.[14]

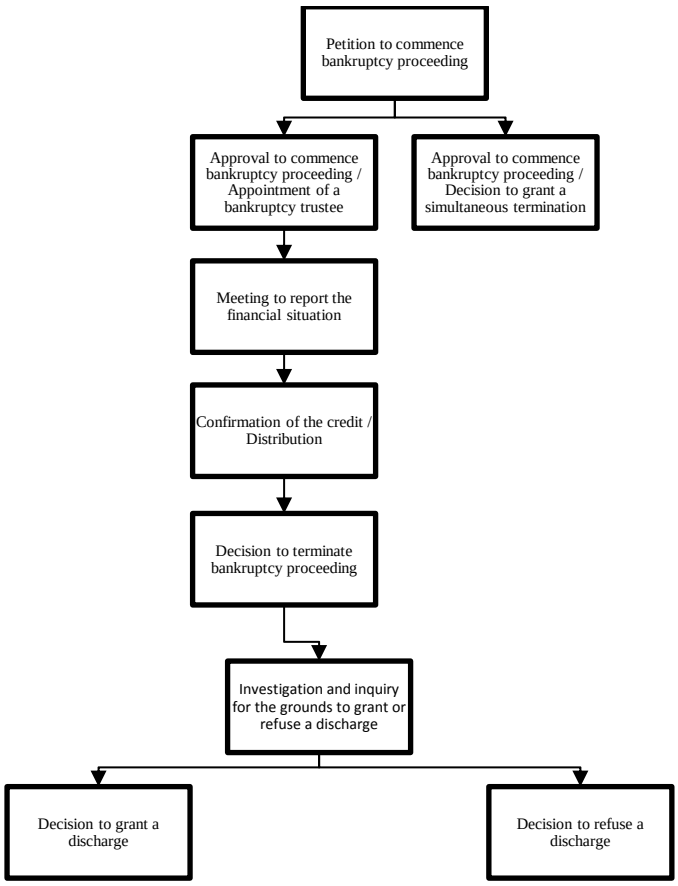
Civil rehabilitation does not prevent a secured creditor from enforcing a secured claim.[15] In the case of enterprise rehabilitation, however, where the collateral for that secured claim is indispensable to the continuation of the debtor's business, the court may order a stay of enforcement on the application of an interested party or of its own motion.[16] Moreover, the civil rehabilitation proceeding introduced an innovative mechanism designed to assist companies with assets which are secured for more than they are worth, known as the security interest extinguishing scheme (*tanpo ken no shōmetsu*).[17] The scheme also allows the debtor or relevant insolvency practitioner to use the threat of applying to court to extinguish a security interest after paying a certified value as leverage in negotiations with secured creditors.[18] However, these provisions relate to enterprise rehabilitation proceedings, and civil rehabilitation initially did not prevent a secured creditor in a proceeding relating to an individual from enforcing a secured claim. Special rules relating to individual rehabilitation debtors with a home loan were introduced in 2001, and these prevent secured creditors from exercising a security interest relating to a home loan and allow a debtor to keep her or his home as part of the proceeding in certain circumstances.[19]

The new *Bankruptcy Act* followed the introduction of the civil rehabilitation procedure and became effective in 2005. There is no distinction drawn between merchants and consumers in the Japanese *Bankruptcy Act*. The applicable jurisdiction is the debtor's local district court. Diagram 1 illustrates the life of a typical bankruptcy procedure in Japan, from filing to discharge. In summary, a bankruptcy procedure commences with a petition being filed. Both debtors and creditors may file a petition, and there is no threshold amount for a creditor's petition.[20] In practice, however, debtors file petitions, although there may be pressure from creditors to file. If the court accepts the petition, a meeting will be held to confirm the debtor's financial position and the claim information. These processes are then followed by an investigation into whether there are any grounds to object to a discharge and, if there are none, a discharge will be granted. Secured creditors do not have to participate in the bankruptcy

[13] *Minji saisei hō* [Civil Rehabilitation Act] (Act No 225, 1999) (Japan). Articles 221–38 of the *Civil Rehabilitation Act* provide for the individual debtor with small scale debt, and arts 239–45 provide for the wage-earning debtor.
[14] Ibid art 221.
[15] Ibid art 53.
[16] Ibid art 30.
[17] Ibid arts 148–53.
[18] See Stacey Steele, 'Too Hot to Handle: Extinguishing Secured Creditors' Interests in Insolvency Under Japan's Civil Rehabilitation Law' (2003) 8(16) *Journal of Japanese Law* 223. Recent empirical research on civil rehabilitation proceedings in Japan suggests that the 'security interest extinguishing scheme' has been applied in 15 out of 313 cases surveyed, and nine out of those 15 cases involved business transfers; it appears that the extinguishing of security interest is applied in relation to the business transfer. The application was approved in 11 cases: Mayumi Kurabe and Ken Yamamoto, 'Saisei tetsuzuki ni okeru betsujoken no shogū [Dealing with Rights of Separate Satisfaction in Rehabilitation Proceeding]' in Kazuhiko Yamamoto and Ken Yamamoto (eds), *Minji saisei hō no jisshōteki kenkyū* (*Empirical Research on the Civil Rehabilitation Act*) (Shōji hōmu, 2014) 215.
[19] *Civil Rehabilitation Act* arts 196–206.
[20] *Bankruptcy Act* art 18(1). On the personal bankruptcy procedure, see generally Steele and Chun, above n 3, 19.220–19.285; Junichi Matsushita, 'Japan's Personal Insolvency Law' (2007) 42 *Texas International Law Journal* 765.

proceeding and may execute on their security.[21]

Diagram 1: personal bankruptcy proceeding flowchart[22]



A key feature of Japan's personal bankruptcy law is the quick and simple *dōji haishi* procedure which is also illustrated in Diagram 1. The procedure provides for a bankruptcy proceeding to be terminated simultaneously with the commencement of the proceeding, without a trustee being appointed.[23] Accordingly, *dōji haishi* is often translated as 'simultaneous termination'. As Diagram 1 shows, the discharge process starts almost immediately in cases where there is an order (*kettei*) to grant a simultaneous termination, despite the legislation otherwise providing for certain time periods for the appointment of a trustee, and registration and investigation of claims.[24] The speedy resolution of the proceeding has merit for debtors. The procedure was introduced into the *Bankruptcy Act 1922*[25] and developed further during the 1980s and 1990s, based on practice in the Tokyo and Osaka District Courts for cases where the debtor had no or insufficient assets to cover the costs of the bankruptcy proceeding.[26]

In response to criticisms that bankrupts were not being investigated properly and were thus able to conceal assets from creditors, the Tokyo District Court adopted a revised procedure

[21] *Bankruptcy Act* arts 65.
[22] This diagram is a translated and adapted version of the diagram appearing in Chun, above n 8, 238.
[23] *Bankruptcy Act* art 216(1).
[24] Ibid arts 31(1), (2).
[25] See Makoto Ito, *Hasanhō minji saisei hō* [*Bankruptcy Act and Civil Rehabilitation Act*], (Yūhigaku, 3rd ed, 2014) 179.
[26] The Tokyo District Court developed *sokujitsu mensetsu* or same-day interviews from 1999 as discussed below. See Takeo and Yuji, above n 9, 35, 37.

known as a small-scale procedure supervised by a trustee (*shōgaku kanzai tetsuzuki*), in the late 1990s. For cases where a pre-petition representative *bengoshi* (attorney) has been appointed, this procedure provides for a comparatively simple and quick process once a petition for commencement has been made, because, for the most part, the investigation of the debtor's assets and creditors' claims, as well as the investigation of whether there are any reasons to refuse a discharge are carried out prior to filing. Accordingly, the court requires a lower payment into court (*yonōkin*) to cover the fees of the court-appointed trustee, because there should not be much work left for that trustee to do.[27] The involvement of a trustee also means that the trustee can perform the investigation into, and report on, any reasons for refusing a discharge, which reduces the court's workload.[28] The small-scale procedure supervised by a trustee (*shōgaku kanzai tetsuzuki*) thus supports the effective functioning of ordinary bankruptcy and discharge proceedings and seeks to balance the interests of debtors and creditors.[29] Scheduled fees for ordinary cases were substantially reduced in line with the reduction in the work required by the court and trustees. Currently, debtors are required to pay approximately ¥10 000 to ¥20 000 into court, an amount known as *yonōkin*, when a debtor files for a *dōji haishi* proceeding in the Tokyo District Court.[30] This amount is designed to cover public notification in the official gazette.[31] The cost of a small-scale procedure supervised by a trustee is typically ¥200 000, which includes the fee payable to the trustee.[32]

Simultaneous termination of the proceeding under a *dōji haishi* procedure does not amount to an order for a discharge, which typically comes a few months after the initial filing for commencement and termination as detailed further below. The investigation in relation to the existence of any grounds to refuse a discharge occurs during the period between termination and discharge. The *Bankruptcy Act* provides that certain claims may not be discharged, for example: certain taxes;[33] damages following a wilful tort; penalties and fines; and debts to a former spouse for child support.[34] Exempted assets include the debtor's household furnishings, household goods, apparel, household appliances, cash of up to ¥990 000 and the debtor's right to receive unpaid salary of up to ¥330 000 per month.[35] Prior to reforms in 2004, the amount of exempt cash was ¥660 000. The increase in the exempt cash amount to ¥990 000 was designed to encourage debtors to file for bankruptcy and demonstrate better support for the maintenance of the debtor's well-being and the goal of giving a debtor a fresh start.[36] In the

[27] See Takashi Sonoo et al (eds), *Shōgaku kanzainin tetsuzuki no riron to jitsumu* [*Small-Scale Procedure Supervised by a Trustee: Theory and Practice*] (Keizai hōrei kenkyūkai, 2001) 33; Ito, above n 25, 180; Kazuhiko Yamamoto, *Tōsan shorihō nyūmon* [*Introduction to Insolvency Workout Law*], (Yūhigaku, 4th ed, 2012) 126.

[28] Trustees are typically *bengoshi* (licensed attorneys) in Japan, but in some Japanese local jurisdictions *shihō shoshi* (judicial scriveners) are appointed. Accountants tend to be engaged by the trustee if necessary.

[29] See Ito, above n 25, 180.

[30] See Yamamoto, above n 27, 58. Tokyo District Court fees as at 2004 are listed by Ginza Seiwa Law Office: *Hasan jiken no tetsuzuki hiyō ichiran* [*Summary of Court Fees from Bankruptcy Cases*] (Ginza Seiwa Law Office, 2004) <www.ginzaseiwa.jp/feature/feature05_01.pdf>. For indigent cases, the *Bankruptcy Act* specifically provides for the complete waiving of costs: see *Bankruptcy Act* art 23.

[31] See Yamamoto, above n 27, 124.

[32] See Ito, above n 25, 180; Yamamoto, above n 27, 125.

[33] Unpaid taxes which have accrued and remain unpaid for a period up to 12 months before the commencement of a bankruptcy proceeding will be treated as administrative claims (*zaidan saiken*, also translated as 'estate claims'): *Bankruptcy Act* art 148(3). The rationale behind this limitation is that it is up to the tax authorities to ensure that they are seeking timely payment of taxes and in any event following up debtors where taxes remain unpaid at least on an annual cycle. Some commentators suggest that the reference to tax claims being unable to be discharged does not include those unpaid taxes treated as administrative claims. See Makoto Ito et al, *Jōkai hasanhō* [*Understanding the Provisions in the Bankruptcy Act*], (Kōbundō, 2nd ed, 2014) 1680.

[34] *Bankruptcy Act* art 253(1).

[35] Ibid art 34. See also Matsushita, above n 20, 766.

[36] *Bankruptcy Act* art 34 (3)(i).

context of a debtor's spending power in Japan, this was a large increase.[37]

Despite an initial increase in filings for personal bankruptcy in Japan around the time of the reforms and new judicial procedures, there was a significant decline in filings after 2011 (see Table 2). Some of the substantial increase in personal bankruptcy filings immediately before the new legislation became effective relates to the bankruptcy procedure's interaction with the civil rehabilitation proceeding which quickly became popular after it took effect in 2000.[38] Further, there was pent-up demand as debtors delayed filing until the new suite of insolvency legislation became effective. A key reason for the later decrease in the number of personal bankruptcies is a Supreme Court of Japan judgement against the money lending industry, which required money lenders to repay interest paid above the amount set under the *Risoku seigen hō* [*Interest Rate Restriction Act*] (Act No 100, 1954) (Japan). Some debtors have since been able to recover any overpayments and may thus avoid bankruptcy.[39] The decline over the last five years may also be attributed to Japan's low interest rate environment, improved economic circumstances and a renewed preference for out-of-court proceedings which do not involve the disadvantages presented by formal bankruptcy discussed further below.

Table 2: Number of filings for personal bankruptcy (*kojin hasan jiken*) from 2002 to 2015[40]

Year	'02	'03	'04	'05	'06	'07	'08	'09	'10	'11	'12	'13	'14	'15
Filings	214, 996	242, 849	211, 860	184, 23	166, 399	148, 524	129, 833	126, 533	121, 150	100, 736	82, 902	72, 287	65, 393	64, 081

B *Personal Bankruptcy Law in Japan in Practice: Survey Data from the Japan Federation of Bar Associations*

The practical contexts of Japanese personal bankruptcy legislation and judicial practice, as well as Japan's changing economic and demographic environment, are evidenced by survey data collected by the Committee for Addressing Consumer Problems (*shōhisha mondai taisaku iinkai*) ('Consumer Committee') of the Japan Federation of Bar Associations ('JFBA'). The Consumer Committee was established in September 1985 by the JFBA in the aftermath of incidents such as the Yoshida shōji case involving institutional defrauding of consumers and an increase in debtors who owed multiple debts to so-called *sara-kin* companies, or loan sharks.[41] The Committee's goal is to assist the JFBA in formulating its opinions and policies by collecting information in relation to problems relating to consumer protection, and conducting surveys and research.[42] Volunteer *bengoshi* (attorneys) conduct a review of official records held by district courts relating to bankruptcy matters and individual rehabilitation matters, and the Consumer Committee collates and publishes the combined results.[43] The survey has been published every few years since 1992.[44] The most recent survey results,

[37] Debtors may also retain household furnishings, household goods, apparel and household appliances: *Minji shikkōhō* [Civil Execution Act] (Act No 4, 1979) (Japan) art 131; *Bankruptcy Act* art 34(3).
[38] Civil rehabilitation proceedings may be transferred to bankruptcy proceedings under certain circumstances.
[39] Yamamoto, above n 27, 121.
[40] *Court Data Book 2016*, above n 11.
[41] Japan Federation of Bar Associations, *Shōhisha, Tajūsaimumondai* [*Consumer, Multiple Debt Problems*] <http://www.nichibenren.or.jp/activity/human/consumer.html>.
[42] Ibid.
[43] Committee for Addressing Consumer Problems, above n 2, 1.
[44] Ibid.

published in June 2014,[45] involved collecting data from 1 June 2013 to 30 November 2013. Twenty bankruptcy cases were chosen randomly from each district court jurisdiction, except where a district court is co-located with a high court, in which case 50 bankruptcy cases were randomly chosen from that district court's records to reflect the greater volume of cases in those busier districts.[46] Similarly, over the same period, 10 matters involving a petition for individual rehabilitation involving a small-scale individual rehabilitation and a wage earner etc rehabilitation were chosen from each district court jurisdiction, except where a district court is co-located with a high court, in which case 25 cases were randomly chosen.[47] The results published in 2014 captured available data from 47 prefectures and 50 district courts and 1240 bankruptcy cases and 708 individual rehabilitation cases (560 small-scale individual rehabilitation cases and 148 wage earner etc rehabilitation cases).[48] Whilst the data set is relatively small as a percentage of overall court filings, the survey's geographical coverage and breadth of information makes it an important source of insolvency data in Japan. Further, despite some variation in coverage over three decades, the data, particularly from 2002 onwards, consistently cover the vast majority of prefectures and administrative areas in Japan. Moreover, the same or very similar questions have been asked as part of the survey since 1997 to maintain consistency and provide opportunity for longitudinal comparisons.[49]

The survey results published in 2014 suggest that bankruptcy in Japan still tends to be a procedure for low income earners in financial difficulties: the average monthly income of a bankrupt at the time of filing was ¥131 612.[50] The majority of petitioners (60.48 per cent) earn less than the benchmark for receiving living assistance and less than ¥150 000 per month.[51] The difference between the financial position of men and women petitioners is stark, with 76.34 per cent of female petitioners earning less than ¥150 000 per month compared to 48.88 per cent of men earning that amount.[52] Petitioners typically had approximately ¥24 143 329 in debts at filing, but approximately half of petitioners (48.22 per cent) had less than ¥5 000 000.[53] Most bankrupts (80.65 per cent) have fewer than nine creditors and on average about 6.76 creditors.[54] These results suggest that debtors are increasingly unable to pay even small debts.[55] Moreover, in almost all cases creditors received no distribution. Since 2005, creditors receive a return of 2–3 per cent according to the data collected by the Consumer Committee.[56]

[45] Ibid (available on the JFBA's website, <http://www.nichibenren.or.jp/library/ja/publication/books/data/2014/2014_hasan_kojinsaisei.pdf>).
[46] Ibid.
[47] Ibid.
[48] Ibid. Each year the survey has varied slightly in terms of jurisdictions covered and number of cases reviewed: 1992 (21 district courts, 530 cases), 1994 (8 district courts, 779 cases), 1997 (43 district courts, 1089 cases), 2000 (47 district courts, 50 cases); and then 2002 (46 prefectures, 48 district courts), 2005 (44 prefectures, 47 district courts), 2008 (47 prefectures, 50 district courts), 2011 (47 prefectures, 50 district courts). Individual rehabilitation matters were included from 2002 after the introduction of individual rehabilitation proceedings by the *Civil Rehabilitation Act* in 2001.
[49] Committee for Addressing Consumer Problems, above n 2.
[50] Ibid 2. This amount is an increase on previous years. Earlier average monthly incomes were: ¥104 639 in 2002; ¥110 061 in 2005; ¥121 288 in 2008; ¥117 576 in 2011.
[51] Committee for Addressing Consumer Problems, above n 2.
[52] Ibid.
[53] Ibid 3.
[54] Ibid.
[55] Ibid.
[56] Ibid 6. Since 2005, the data evidences that creditors receive a return of two or three per cent.

The survey also considers the reasons why people are experiencing financial distress.[57] Lifestyle hardship / low income has consistently been the most commonly cited problem, typically accounting for approximately 60 per cent of cases reviewed since 2002, followed by illness and medical costs (typically accounting for approximately 20 per cent of cases reviewed).[58] After the so-called Lehman Shock in 2008, the number of people citing a reduction in income increased to 16.13 per cent in 2011, and 13.47 per cent in 2014, from approximately 11 per cent in 2005 and 2008. The number of people citing unemployment and change in work circumstances also increased in 2011 and 2014 to 19.77 and 19.84 per cent respectively, from 14.67 per cent in 2008.[59] People are also increasingly citing difficulty in repaying their home loans as a reason for filing for bankruptcy (9.59 per cent in 2008; 12.24 per cent in 2011; 16.05 per cent in 2014).[60] This result may be related to a spike in home purchases before the anticipated increase in consumption tax in Japan, which the Abe government has postponed.

The survey also reflects Japan's ageing society, with the number of bankrupts aged 60 or more years old reaching 18.71 per cent, the highest level for that age group since the survey's inception in 1992.[61] A typical bankrupt in Japan is in her or his forties (27.02 per cent) or fifties (21.05 per cent), but the median age is definitely increasing in line with Japan's ageing population. The increased number of elderly seeking bankruptcy may also be contributing to the increasing number of petitioners who are also welfare recipients (6.97 per cent in 2011, rising to 11.13 per cent in 2014).[62] Elderly people in Japan are also increasingly living by themselves, which could help to explain the rising number of petitioners who live alone (30.40 per cent in 2014 compared to 18.20 per cent in 2008 and 22.45 per cent in 2011).[63] In more recent years, the difference in the number of men and women filing for bankruptcy has also grown, with men increasingly more likely to use the procedure since 2011.[64]

III JAPAN'S APPROACH TO ISSUES RAISED IN THE AUSTRALIAN GOVERNMENT'S PROPOSALS PAPER

A *Issues Raised in the Australian Government's Proposals Paper*

This part of the article examines Japan's legislative and procedural approaches to the key issues raised in the Australian Proposals Paper, and highlights key differences and similarities. Despite Australian reformers typically looking to the United Kingdom or the United States of America for inspiration, this article argues that Japan offers a useful touchstone for Australia when considering the reform of personal bankruptcy law. Despite significantly different legal, economic and social contexts between Australia and Japan, there are also important similarities, and Australia's close relationship with Japan suggests that the countries could learn from each other. Japan is a fellow OECD high income country with a mature economy and

[57] Multiple reasons could be given by one person.
[58] Committee for Addressing Consumer Problems, above n 2, 1.
[59] Ibid. Previously, unemployment was 13 per cent in 2000, 14.14 per cent in 2002 and 18.12 per cent in 2005.
[60] Committee for Addressing Consumer Problems, above n 2.
[61] Ibid 2.
[62] Ibid 3.
[63] Ibid 44. For discussion of the elderly in the Japanese criminal justice system and living circumstances, see Stacey Steele, 'Elderly Offenders in Japan and the Saiban'in Seido (Lay Judge System): Reflections through a Visit to the Tokyo District Court' (2015) 35 *Japanese Studies* 223.
[64] Committee for Addressing Consumer Problems, above n 2, 2.

ageing society.[65] It is one of Australia's key trading partners and a recent signatory to a bilateral free trade agreement with Australia[66] and co-signatory to the Trans-Pacific Partnership.[67] Moreover, Japan has diligently and consistently worked to improve its approach to personal bankruptcy law over the last two decades in light of its economic malaise during the 1990s and 2000s, which has seen a cultural, procedural and operational shift in insolvency law practice.

The Australian government also hopes that its law reform proposals will contribute to a cultural shift in Australia; a shift in favour of entrepreneurship. The Australian Proposals Paper asserts that '[m]ore often than not, entrepreneurs will fail several times before they achieve success' and that Australians should be encouraged 'to embrace risk, learn from mistakes, be ambitious and experiment to find solutions'.[68] The Proposals Paper suggests reducing the default bankruptcy period and restrictions on discharged bankrupts travelling overseas from three years to one year. The government also asked for submissions in relation to the ongoing obligations of bankrupts, suggesting that a bankrupt be required to make income contributions for three years. The analysis below considers how Japan has approached similar issues and offers some suggestions for Australian reformers.

B *Reducing the Default Bankruptcy Period and Objections to Discharge*

The Australian government proposes to reduce the default period for bankruptcy from three years to one year and thus any related restrictions on a bankrupt will also typically be reduced to one year.[69] The Proposals Paper suggests that this reform 'will encourage entrepreneurial endeavour and reduce associated stigma' and 'acknowledges that bankruptcy can be a result of necessary risk-taking or misfortune rather than misdeed'.[70] The timeframes in Japan, however, are even shorter than the one year suggested for Australia in the Proposals Paper. The time between filing and receiving an order for commencement of a proceeding in Japan was typically between 10 and 30 days (43.09 per cent of cases), with a significant number (20.72 per cent of cases) taking between 30 and 45 days to receive a commencement order, the average being 33.6 days.[71] The average time between receiving an order for commencement and a discharge from bankruptcy was 68 days, with 99.23 per cent of cases receiving an order for discharge in less than four months.[72] Accordingly, the average time for a whole proceeding measured as the time between filing a petition and receiving a discharge is typically about 100

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[65] For high income countries classification, see Organisation for Economic Co-operation and Development, *Country Classification 2016 — As of 26 July 2016* (OECD, 2016) 9 <http://www.oecd.org/trade/xcred/2016-ctryclass-as-of-26-july-2016-rev1.pdf>.

[66] *Agreement Between Australia and Japan for an Economic Partnership*, Australia–Japan, [2015] ATS 2 (entered into force 15 January 2015). For full text of agreement, see Department of Foreign Affairs and Trade (Cth) ('DFAT'), *Japan–Australia Economic Partnership Agreement* <http://dfat.gov.au/trade/agreements/jaepa/official-documents/Pages/official-documents.aspx>; Ministry of Foreign Affairs of Japan ('MOFA'), *Japan–Australia Economic Partnership Agreement* <http://www.mofa.go.jp/policy/economy/fta/australia.html>.

[67] *Trans-Pacific Partnership Agreement Between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States of America and Vietnam*, signed 4 February 2016 [2016] ATNIF 2 (not yet in force). For full text see DFAT, *TPP Text and Associated Documents* <http://dfat.gov.au/trade/agreements/tpp/official-documents/Pages/official-documents.aspx>; MOFA, *Signing of the Trans-Pacific Partnership (TPP) Agreement* <www.mofa.go.jp/press/release/press4e_001013.html>.

[68] Proposals Paper, above n 1, 3.

[69] *Bankruptcy Act 1966* (Cth) s 149.

[70] Proposals Paper, above n 1, 5.

[71] Committee for Addressing Consumer Problems, above n 2, 4–5.

[72] Ibid 5.

days.[73] Whilst these data do not capture the work performed by the debtor and the pre-petition representative prior to filing, the survey results highlight the short timeframe required for the formal proceeding and the flexibility afforded to the court and parties in Japan where the legislation does not provide for a fixed period of bankruptcy.

To mitigate concerns about potential abuse of the bankruptcy process based on the shorter period of one year running from the time the bankrupt filed a statement of affairs to discharge, the Australian government proposes that a trustee retain the right to object to a discharge.[74] The trustee will also retain the right to extend the period of bankruptcy up to eight years.[75] The Proposals Paper notes that, 'courts currently do not have a direct role in extending the period of bankruptcy'.[76] A bankrupt, creditor or other affected person may, however, appeal to the court in relation to an act, omission or decision of a trustee.[77] The government has asked for submissions from the public 'on whether the criteria for lodging an objection and the standard of evidence to support an objection should be changed to facilitate a trustee's ability to object to discharge' in light of the shorter default bankruptcy period which it suggests may make it difficult to gather 'sufficient evidence to support lodgement of an objection'.[78]

The corresponding approach to discharge under the Japanese *Bankruptcy Act* places an emphasis on the debtor's behaviour, and gives the courts great discretion when it comes to granting a discharge. A Japanese court may refuse a debtor's request for a discharge if the debtor has concealed assets to defraud creditors, made false statements suggesting solvency when borrowing money, or failed to perform any duties required under the law or to cooperate with the trustee or the court. A discharge may also be denied if a debtor has been granted a discharge in a previous bankruptcy or individual rehabilitation case within certain time periods.[79] But even in those circumstances the court has discretion to grant a discharge.[80] All but five of the 1240 cases in the JFBA survey involved a petition for discharge and it is not clear from the JFBA's data why those five cases did not include such a petition. Of the 1235 cases that requested a discharge, the court granted a discharge in 96.44 per cent of cases.[81] There was only one case of a discharge being refused, with the other cases being withdrawn before a decision was made.[82]

To the extent that a trustee is appointed in Japan, the court expects the trustee to investigate whether there are any grounds for refusing to discharge the debtor.[83] A trustee will collect documentation which supports or refutes grounds for refusing a discharge. Such documentation may include information provided by the bankrupt, and a trustee may interview the bankrupt's family and other related persons and creditors, and demand that they provide documentation.

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[73] Ibid.
[74] Proposals Paper, above n 1, 6. For the grounds for an objection, see *Bankruptcy Act 1966* (Cth) s 149D.
[75] Ibid.
[76] Ibid.
[77] *Bankruptcy Act 1966* (Cth) s 178.
[78] Proposals Paper, above n 1, 6.
[79] Matsushita, above n 20, 767.
[80] *Bankruptcy Act* art 252(2).
[81] Committee for Addressing Consumer Problems, above n 2, 5.
[82] Ibid. The number of cases withdrawn also continues to increase, albeit from a low base. Results from earlier surveys are as follows: 0.65 per cent in 2000, 1.24 per cent in 2002, 0.70 per cent, 1.64 per cent in 2008, 2.19 per cent in 2011 and 2.82 per cent in 2014. Whilst not clear from the survey, this result may suggest that cases are increasingly being withdrawn by petitioners and their pre-petition representative legal counsel where the court indicates that it will not grant a simultaneous termination.
[83] *Bankruptcy Act* art 250(2).

The trustee may report on these investigations in writing or orally to the court.[84] In *dōji haishi* cases where no trustee is appointed, the court performs the investigation and may rely on work performed by a pre-petition representative.[85] Court clerks (*shokikan*) perform an important role in the investigation process, and will check that all documentation is in order and may ask for further information from the debtor and pre-petition representative. The debtor is required to cooperate with the court or trustee's investigation prior to any discharge and failure to do so is grounds for refusing a discharge.[86]

A trustee or creditor has two opportunities to challenge a debtor's petition for discharge. First, the trustee or creditor may provide an opinion to the court on whether a discharge should be granted.[87] Second, if a court grants a discharge, the trustee or creditor may appeal the court's decision.[88] There are no specific grounds for an appeal in the legislation. The types of circumstances that may give rise to an appeal would typically include those circumstances in which a court may have chosen not to grant a discharge had the court known of certain information. In practice, the trustee's report on whether grounds to refuse a discharge exist largely influences a creditor's decision whether to file an appeal or not.[89] Given the short timeframes involved in Japanese cases, the creditors must work quickly if they intend to lodge an objection or appeal. In fact, there are few cases of creditors objecting to a petition for discharge: 3–4 per cent annually over the last 15 years.[90]

The trust that the court and creditors place in the pre-petition *bengoshi* (attorney) representing the debtor and court-appointed trustees is key to the court's reliance on the information provided by the debtor and the decision to grant a simultaneous termination and discharge with minimum investigation or objections.[91] Recently, in many cases where a *bengoshi* has been engaged as a pre-petition representative, the practice has been to grant commencement of the bankruptcy proceeding and simultaneous termination of the proceeding on the same day as the petition is filed. This process is known as *sokujitsu mensetsu* or same-day interview.[92] The JFBA's survey results suggest that this procedure is used in the majority of cases filed in the Tokyo District Court, with the period between filing and commencement in those cases reportedly being one day and, in any event, commencement otherwise typically occurs within 10 days of filing.[93] Nationally, very few petitioners are self-represented (2.66 per cent in 2014), with most (84.11 per cent) using a *bengoshi* and a small proportion (13.06 percent) using a judicial scrivener (*shihō shoshi*).[94] Self-representation has decreased dramatically since 2000 when it was as high as 30.51 per cent of petitioners; the decline was particularly noticeable between 2005 (29.09 per cent of petitioners unrepresented) and 2008 (11.15 per cent of petitioners unrepresented).[95] The increase in representation reflects the courts' preference for

[84] Ibid art 250(1).
[85] Ito et al, above n 33, 1637.
[86] *Bankruptcy Act* art 252(1)(viii).
[87] Ibid art 251(1).
[88] Ibid art 252(5).
[89] Ito et al, above n 33, 1637.
[90] Committee for Addressing Consumer Problems, above n 2, 5.
[91] On the relationships between insolvency practitioners and courts in Japan, see Stacey Steele, 'Appointing and Remunerating Insolvency Practitioners in Japan: The Roles of Japanese Courts' (2017) 26 *International Insolvency Review* 82.
[92] Jin, above n 8, 238.
[93] Committee for Addressing Consumer Problems, above n 2, 33.
[94] Ibid 4. Similarly, *bengoshi* have been used consistently by petitioners in approximately 80 per cent of cases since 2008, with approximately 20 per cent of petitioners using a *shihō shoshi*. The number of self-represented petitioners in individual rehabilitation proceedings has been negligible since 2008: at 9.
[95] Committee for Addressing Consumer Problems, above n 2, 4.

represented petitioners, including its reduction of the filing fees for people using a representative.

So-called abuse of the system of *dōji haishi* is discouraged by the legislation, which provides that a debtor may not receive a further discharge within seven years, although that is a reduction from the 10-year period under the previous legislation.[96] This forward-looking approach should be contrasted with the Australian proposal to extend the fixed bankruptcy period in certain circumstances. In Japan, debtors are initially given the benefit of the doubt. Even in Japan, however, concerns were raised by creditors about the ease with which bankrupts could obtain a discharge. As the number of bankruptcy cases increased, creditors were concerned about the lack of review by a trustee who typically investigates if there were any acts of avoidance or other reason to dismiss the application for discharge.[97] Historically, approximately 90 per cent of personal bankruptcy cases were accepted as *dōji haishi*. Courts began to use the procedure known as a small-scale trustee procedure (*shōgaku kanzai tetsuzuki*) discussed above, instead of simultaneous termination, depending on certain criteria. The Tokyo District Court, for example, typically appoints a trustee if the debtor has more than ¥200 000 in cash, other than exempted assets, as there may be an opportunity to discover more assets through an investigation by a trustee. The Osaka District Court typically allows a *dōji haishi* case if the total amount of assets including cash, other assets such as savings and insurance, is less than ¥990 000, which is the amount of exempted cash provided for by law.

Dōji haishi cases still make up a significant number of personal bankruptcy cases in Japan, although the precise number depends on the relevant district court, and use of the procedure has decreased over time.[98] In the period from 2000 to 2005, more than 90 per cent of cases were dealt with under this procedure. Since 2011, according to the JFBA survey, this has dropped to about three quarters of cases nationally. The decrease in number may be explained by the introduction of the small-scale proceeding, where a trustee is appointed by the court, and an increase in the number of practitioners working in this area of law who are seeking to be appointed as pre-petition representatives.[99] A trustee was appointed by the court in about 20 percent of all cases in 2014.[100] The decreasing number of *dōji haishi* cases correlates to a slight increase in cases which are withdrawn over the same period. In particular, there was an increase in withdrawals, from 1.57 per cent in 2008 to 2.11 per cent 2011, which coincides with the period when *dōji haishi* cases dropped from 87.70 per cent (2008) to 76.82 per cent (2011).[101] This result supports the conclusion that creditors are not inclined to object, due to the scrutiny of debtors by the court, and pre-petition representatives and trustees who are typically *bengoshi*.[102]

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[96] *Bankruptcy Act* art 252(1)–(10).

[97] Tetsuo Sato, 'Hasan kanzainin no hōshū ni kansuru shiten to ronten [Point of View and Point of Discussion in Relation to Remuneration for Bankruptcy Trustees]' in *Kanami shinichi taishoku kinen ronshū* [*Collection in Memory of the Retirement of Shinichi Kanami*] (Ritsumeikan daigaku hōgakukai, 2017) (forthcoming).

[98] A recent report suggests that *dōji haishi* proceedings in the Tokyo District Court which has championed small-scale proceedings supervised by a trustee account for about 50 per cent of proceedings: Yamamoto, above n 27, 126.

[99] Steele, above n 91.

[100] Committee for Addressing Consumer Problems, above n 2, 5.

[101] Ibid.

[102] Note that the Republic of Korea adopted a *dōji haishi*-type procedure, beginning with courts in Seoul, after considering Japanese practice and bankruptcy petitions increased dramatically. Unlike Japan, however, pre-petition representatives are judicial scriveners, not *bengoshi*. Although debtors in Korea were found to have attempted to hide assets in only one per cent of all cases, Korean creditors expressed deep reservations about this one per cent case. In response, the courts in Korea also now typically appoint a trustee in almost all cases based on a fixed fee. See JFBA, Shōhisha mondai taisaku iinkai [Committee for Addressing Consumer

Table 3: Number of cases ending in simultaneous termination from 2000 to 2014[103]

Year	2000	2002	2005	2008	2011	2014
Simultaneous termination	93.56%	95.04%	93.03%	87.70%	76.82%	73.55%

C *Obligations in Relation to Income Contributions in Japan*

Although the Australian Proposals Paper suggests reducing the period for discharge, it also asks for submissions on which 'obligations on a bankrupt should continue even after a bankrupt is discharged'.[104] The provisions relating to income contributions are particularly worth considering in light of the Japanese provisions relating to this issue, which are more debtor friendly than the proposals. Currently, a bankrupt in Australia may continue to earn income during the period of bankruptcy,[105] but if the bankrupt's after-tax income exceeds a certain amount, then the bankrupt must pay half of that excess income to the trustee.[106] The trustee may then distribute that income to creditors. This rule currently applies for the duration of the default bankruptcy period, but the Proposals Paper recommends that bankrupts be required to pay income contributions for three years, which is equivalent to the current default period. Moreover, under the government's proposals, income contributions will continue to be payable if the period of bankruptcy is extended to five or eight years.[107]

After a bankruptcy proceeding commences in Japan, a bankrupt is required to provide explanations of matters relating to the bankruptcy proceeding upon request of the trustee, creditors' committee or creditors.[108] The debtor must provide information, including about her or his salary and living expenses.[109] If the bankrupt fails to provide the information or refuses to cooperate, this behaviour could form a reason for the court's refusal to grant a discharge as discussed above, and be a criminal offence.[110] A bankrupt's mail will also be redirected to the trustee after the commencement of a bankruptcy proceeding until the completion of the proceeding.[111] Once a discharge becomes final and binding, however, these obligations cease.[112] This legislative stance reflects the intention of the Japanese reformers to offer bankrupts a 'fresh start' and means that the obligations typically apply for only a few months.[113]

Problems], *Kankoku no hasan seido oyobi hoshōseido ni kansuru hōkokusho* [*Report in Relation to the Korean Bankruptcy System and Guarantee System*] (2014) <http://www.nichibenren.or.jp/library/ja/committee/list/data/2013kankoku_tyousa_report.pdf> 11. The report suggests that although the trustee's remuneration was fixed, the work required of a bankruptcy was not reduced, and trustees are finding it difficult to meet their responsibilities in light of the fixed fee.

[103] Committee for Addressing Consumer Problems, above n 102.

[104] Proposals Paper, above n 1, 7.

[105] Subject to certain licensing and industry restrictions.

[106] Ibid. See also *Bankruptcy Act 1966* (Cth) s 139K.

[107] Proposals Paper, above n 1, 7.

[108] *Bankruptcy Act* art 40.

[109] *Hasan Kisoku* [Bankruptcy Regulations] (Regulations No 14, 2004) (Japan) r 14(3).

[110] *Bankruptcy Act* arts 268(1)–(2).

[111] Ibid art 81.

[112] Ibid art 255(1).

[113] However, as discussed above, certain claims are not able to be discharged even with court consent: *Bankruptcy Act* art 253(1). There was debate about whether claims relating to unpaid taxes should be discharged to give a debtor a fresh start, but this suggestion was not adopted in the legislation, for reasons including on the basis that the government's income stream needed to be protected. In practice, however, tax claims which are treated as

Similar to the current debate in Australia, the treatment of income contributions was a contentious issue in Japanese reform debates. Under the final and current version of the legislation, any and all assets that the bankrupt holds at the time of commencement of a bankruptcy proceeding (irrespective of whether or not it exists in Japan) constitute the bankruptcy estate.[114] A bankrupt's income does not, however, form part of the bankruptcy estate and the bankrupt is free to use moneys received as income. A draft of the new *Bankruptcy Act* published for comment in June 2000 proposed three alternatives on the issue of the treatment of a debtor's income. First, a debtor would be able to choose freely between a bankruptcy proceeding or simplified rehabilitation proceeding. A second alternative provided that the debtor would be discharged from a bankruptcy proceeding only after attempting to repay her or his debts in a rehabilitation proceeding, if her or his expected disposable income exceeded a certain amount. A third alternative suggested that a debtor would be discharged from a bankruptcy proceeding only once she or he repaid debts from income up to a certain amount (a 'minimum payment rate standard' or 'disposable income standard' would apply), as if the debtor had chosen a simplified rehabilitation proceeding , where the expected disposable income of the debtor exceeded a certain amount.[115] The second and third alternatives were mooted because creditors, particularly consumer finance and credit card companies, usually look to a debtor's future income rather than a debtor's current assets.[116] The Insolvency Law Reform Committee eventually chose the first alternative, as reflected in the existing legislative mix, mainly because both the second and third alternatives would have been difficult to implement. Calculating an expected disposable income amount for a debtor with a perceived ability to repay more in all personal bankruptcy cases would have been time-consuming and not cost-effective.[117]

Prior to reforms to the *Bankruptcy Act* in 2004, unsecured creditors used procedures such as compulsory execution (*kyōsei shikkō*), provisional attachment (*kari sashiosae*) and provisional disposition (*kari shobun*) to collect debts, which included executing against a debtor's income.[118] Under the old legislation, a declaration of bankruptcy or filing for simultaneous termination did not prevent creditors from using these types of proceedings prior to a discharge order being confirmed. Accordingly, some creditors were able to obtain payment until discharge. The debtor's dilemma in these circumstances was another driver for the Tokyo District Court's introduction in the late 1990s of the small-scale proceeding, where a trustee is appointed for a fixed fee. The problem was also dealt with explicitly in the final and current version of the *Bankruptcy Act*. Article 249(1) of the *Bankruptcy Act* now stays and prohibits the types of compulsory execution proceedings used prior to 2004, where a debtor files for a discharge and a termination order such as a simultaneous termination order is made. Further, any stayed proceedings will become ineffective after the discharge is confirmed by the court.[119] Continued criticism of the approach which excludes income contributions was also one of the drivers for the scheme in the individual civil rehabilitation procedure, which provides for a debtor to agree to pay a portion of her or his salary for the benefit of creditors over a three to five year period.[120] In practice, however, over 80 per cent of individual insolvencies proceed as personal bankruptcy cases in Japan, and less than 20 per cent of insolvencies proceed as

administrative claims (*zaidan saiken*) are discharged, and accordingly any amount of undischarged tax claim is quite small: see Ito et al, above n 33.

[114] *Bankruptcy Act* art 34(1).

[115] Matsushita, above n 20, 769.

[116] Ibid 770.

[117] Ibid.

[118] Yamamoto, above n 27, 132.

[119] *Bankruptcy Act* art 249(2).

[120] *Civil Rehabilitation Act* arts 129–245.

individual civil rehabilitation cases, which means that these provisions are not commonly used.[121] Therefore, even today, there are still calls to introduce a new scheme in the bankruptcy procedure that requires a debtor to pay a certain amount of future income, when a debtor is expected to receive regular income over a certain amount determined by legislation.[122] Those future amounts will be paid in respect of a certain amount of debt which would not be discharged as a result of the bankruptcy proceeding. This proposal does not, however, include a suggestion that the time period and amount be set with reference to two or three years of future income; rather, the decision would be left to the court, based on its own investigation or an investigation by a trustee into a debtor's living circumstances and expectation of future income, after which the trustee provides an opinion to the court.[123] The majority of commentators in Japan today, however, still support the current formulation in the legislation, which reflects the fundamental importance of the integrity of the discharge system and allows a bankrupt to continue to use her or his income freely, and get a financial fresh start.[124]

Some critics argue that the exclusion of income contributions means that debtors who can expect a high and regular future income will choose a bankruptcy proceeding and discharge, over a rehabilitation proceeding. However, the results from the JFBA survey suggest that people with future financial potential typically use the individual rehabilitation proceedings under the Civil Rehabilitation Act rather than filing for a bankruptcy proceeding. The monthly income of rehabilitation petitioners (¥246 268) is substantially higher than for those petitioners filing for bankruptcy (¥131 612).[125] Further, over a quarter of rehabilitation petitioners in 2014 had an income of over ¥300 000.[126] The amount of debt held by petitioners is also substantially higher than for those seeking bankruptcy. Debts of between ¥10 000 000 and ¥40 000 000 account for approximately 45 per cent of proceedings.[127] These results reflect the nature of the rehabilitation proceedings, which require that a petitioner has the potential to continue to earn an income and there is a possibility of carrying out a payment plan.[128] It also reflects the higher cost of filing for and completing an individual rehabilitation proceeding when compared to a bankruptcy proceeding.[129] On average, a small-scale individual rehabilitation requires payment into court (*yonōkin*) of approximately ¥41 784, and a wage earner etc rehabilitation matter requires approximately ¥89 919 in *yonōkin*.[130]

Similar considerations may be important for a debtor in Australia when choosing between a debt agreement[131] and personal insolvency agreement[132] as opposed to bankruptcy. Debtors with a high expectation of future income may be more likely to choose a debt agreement proceeding over a bankruptcy proceeding despite the proposed reforms. Moreover, making a debtor's income available to creditors for up to three years is unlikely to give debtors an incentive to obtain new or better employment in future. This proposal also appears at odds with

[121] For example, there were 64 081 personal bankruptcy cases filed in 2015, in contrast to 8477 individual civil rehabilitation cases filed: see Court Data Book 2016, above n 11.
[122] Yoshinari Nagashima, 'Menseki [Discharge]' in Tōkyō Bengoshikai Tōsanhō Bu [Tokyo Bar Association, Insolvency Division] et al, *Tōsanhō kaisei tenbō* [*Insolvency Law Reform Outlook*] (Shoji Hōmu, 2012) 568.
[123] Ibid.
[124] Nagashima, above n 122, 569.
[125] Committee for Addressing Consumer Problems, above n 2, 7.
[126] Ibid.
[127] Ibid. These amounts may or may not include home loan obligations.
[128] Ibid.
[129] On the costs of filing generally, see Steele, above n 91.
[130] Committee for Addressing Consumer Problems, above n 2, 11.
[131] *Bankruptcy Act 1966* (Cth) Part IX.
[132] *Bankruptcy Act 1966* (Cth) Part X.

the Australian government's goal of giving a debtor a fresh start, particularly when considered in light of what is possible under the Japanese framework.

D *Restrictions on Access to Credit, Travel, Licences and Industry Associations for Bankrupts and Discharged Bankrupts*

The Australian Proposals Paper also suggests limiting the period of restrictions placed on bankrupts to the default bankruptcy period of one year, subject to a possible extension for misconduct.[133] The reform proposals are threefold. First, reduce the period for restrictions on obtaining credit.[134] However the government does not propose to change the practice of retaining a permanent record of bankruptcy in the National Personal Insolvency Index.[135] Second, the Proposals Paper suggests also reducing the period of restriction on travel overseas by bankrupts to one year.[136] Finally, the government proposes consulting with licensing and industry associations to also align requirements placed on employment or membership by such associations with the new default period.[137] Moreover, to the extent that restrictions are governed by Commonwealth law, the legislation would be reformed to reduce those restrictions to one year: for example, the exclusion from being a company director or a Member of Parliament.[138] The Japanese approach to each of these limitations analysed in this section highlights the impact of the shorter and flexible discharge period in Japan on the capacity of an individual to resume economic activity when compared to the suggestion of a one year period in Australia, but these benefits may be somewhat limited in the context of Japanese entrepreneurs who are also subject to practical limitations on obtaining future credit.

Similar to the situation in Australia, a bankrupt in Japan is prohibited from travelling without obtaining the permission of the court.[139] This provision has to be interpreted, however, in light of the Japanese constitutional guarantee of a certain level of freedom of movement.[140] The bankruptcy prohibition has been interpreted, for example, as allowing a debtor to travel overnight for business or to return to her or his hometown.[141] Domestic travel for two nights or more, however, is considered to be subject to the *Bankruptcy Act* prohibition and is likely to require court approval.[142] The Tokyo District Court, for example, expects a bankrupt to obtain permission for any domestic travel of three or more nights duration.[143] The interpretation in relation to travel overseas, however, is more rigid, with the Tokyo District Court expecting a bankrupt to seek permission for any travel overseas.[144] These restrictions will typically be short-lived, however, because they only apply until the discharge becomes final and binding which usually occurs a few months after filing.

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[133] Proposals Paper, above n 1, 8.
[134] *Bankruptcy Act 1966* (Cth) s 269.
[135] Proposals Paper, above n 1, 8.
[136] Ibid.
[137] Ibid 9.
[138] Ibid.
[139] *Bankruptcy Act* art 37.
[140] See *Nihon kokukenpō* [Constitution of Japan] art 22 (entered into force 3 May 1947): 'Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare. Freedom of all persons to move to a foreign country and to divest themselves of their nationality shall be inviolate.'
[141] Ito et al, above n 33, 324.
[142] Ibid.
[143] Ibid.
[144] Ibid.

Finally, a bankrupt is permitted to act as a director in Japan. Previously, a person was prohibited from acting as a director of a stock corporation (*kabushiki gaisha*) if they were or had been a bankrupt.[145] The new *Kaisha hō* [Companies Act] (No 86, 2005) (Japan) does not include such a prohibition, based on concerns that it was an obstacle to people obtaining a fresh start, particularly where an entrepreneur's personal bankruptcy was the result of a personal guarantee given in relation to a related business.[146] In practice, a director's employment agreement may terminate on the commencement of a bankruptcy proceeding and a company may otherwise remove a director for bankruptcy by a vote at a general meeting of shareholders.[147] However, these events do not prevent the discharged bankrupt from being hired by another company or starting a new business straight away. Other laws prohibit bankrupts from participating in a number of business occupations, including lawyer, patent attorney, certified public accountant, notary public, guardian, curator, executor of a will, trustee, and limited or general partner. These prohibitions have been criticised in Japan, and there are calls for more consideration to be given to the abolition of provisions restricting people from using their qualifications on the basis that they are bankrupt.[148] In practice, the prohibitions do not last for long, however, because they also cease after a discharge becomes final and binding after a few months.[149]

The recording of bankruptcy on credit databanks poses the biggest obstacle to a discharged entrepreneur's fresh start in Japan. The Australian Proposals Paper also refers to the 'practical difficulties in obtaining credit'.[150] In Japan, a person's credit rating will show whether she or he is a discharged bankrupt where a financial institution records that information with a credit information service.[151] There appears to be no legislative provision on the length of time that this information may be retained. The period seems to depend on the individual data collection service and be somewhere between five and 10 years.[152] In practice, these private reporting systems mean that the discharged bankrupt may be unable to obtain a credit card or new loan from a new bank for five to 10 years.[153] Accordingly, despite the shorter discharge period offered in Japan, the practical duration of a discharged bankrupt's financial incapacity may continue for a similar length of time to Australia. This aspect of Japanese practice drives some entrepreneurs to seek a private workout or restructuring under a civil rehabilitation proceeding,

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[145] *Kyūshō hō* [Old Company Act] (Act No 48, 1890) (Japan) art 254.2(2).

[146] *Kaisha hō* [Companies Act] (Act No 86, 2005) (Japan) art 331 sets out the limited list of persons who may not act as a director in Japan.

[147] Ito, above n 25, 177.

[148] See Miyagawa Tomonori, *Shōhisha kōsei no hōriron: saimusha kōseihō kōsō kakuron* [*Legal Theory of Consumer Rehabilitation: Debtor Rehabilitation Law Concepts and Debates*], (Shinzansha, 1997) 191ff. From the perspective of protecting a debtor's employment and thus assisting her / him to rehabilitate financially, Miyagawa emphasises that restrictions on a bankrupt acting in certain professional capacities should be abolished. Alternatively, assuming that complete abolition of any restrictions is politically impossible, Nishizawa argues that any restrictions should be limited to the absolutely necessary minimum: Munehide Nishizawa, 'Tōsansha no chii [The Status of Insolvents]' (1997) 1111 *Jurisuto* [*Jurist*] 169.

[149] *Bankruptcy Act* art 255(1).

[150] Proposals Paper, above n 1, 8.

[151] There are three credit information service institutions in Japan: Japan Credit Information Reference Centre Corporation (JICC), <http://www.jicc.co.jp/english/index.html>; Credit Information Centre (CIC), <http://www.cic.co.jp/en/index.html>; and Japanese Bankers Association (JBA), <http://www.zenginkyo.or.jp/en/>.

[152] JICC, CIC and JBA keep the records of negative credit information during the event and for up to five years from the completion of the event. See JICC, *Tōroku naiyō to tōroku kikan* [*Recorded Matters and Period of Recordings*] <http://www.jicc.co.jp/whats/about_02/index.html>; CIC, *CIC ga hoyūsuru shinyōjōhō* [*Credit Information that CIC Retains*] <http://www.cic.co.jp/confidence/posession.html#sst02>; JBA, *Retaining Term of Credit Information* <http://www.zenginkyo.or.jp/en/pcic/retaining/>.

[153] *Burakkuristo wa nannen tatstu to kieru nodeshōka?* [*How Many Years Does It Take to Be Removed from the Blacklist?*] <http://www.caldwellfn.com/005.html>.

and was an important driver for the establishment of the Guidelines for Individual Debtor Out-Of-Court Workouts in 2011.[154]

IV IMPACT OF PERSONAL GUARANTEES GIVEN BY ENTREPRENEURS

A *New Japanese Guidelines for Personal Guarantees Given by Entrepreneurs in Respect of an Enterprise*

Despite the passing of the *Civil Rehabilitation Act* in 1999[155] and reforms to the *Bankruptcy Act* which became effective in 2005, the implications for business people who give personal guarantees to financial institutions in respect of their companies' obligations also remained a significant issue for Japanese SMEs. Historically, Japanese financial institutions require small business owners to provide a personal guarantee for bank finance. On the basis of the JFBA surveys, guaranteed debt or third party obligations consistently appear as the reason for filing in approximately one quarter of cases.[156] Further, whilst the number of people owing money to registered money lending businesses has decreased after a Supreme Court of Japan decision in relation to grey-zone interest, the number of people owing money to guarantee companies saw a major increase from 6.33 per cent in 2008 to 11.21 per cent in 2011 and rose further to 15.10 per cent in 2014.[157] Criticism of early applications for legal workouts as being an abuse of the insolvency process and directors' concerns about the financial and reputational implications of personal bankruptcy, have also traditionally led debtors to simply reschedule repayments with key creditors.[158] Accordingly, by the time legal proceedings are instituted, the parties typically have no option other than bankruptcy, for both the company and the directors because it is too late for rehabilitation.

Recently, the Japanese Financial Services Agency ('FSA') has been pursuing a policy of requiring banks to lend without security or guarantees and rely instead on a thorough assessment of an enterprise's business prospects.[159] The FSA issued Administrative Guidance on 5 December 2013 to encourage financial institutions to refrain from enforcing personal guarantees given by directors and managers in relation to corporate debt, especially of SMEs, in certain circumstances.[160] The Guidelines became effective on 1 February 2014 and apply to

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[154] See Steele and Jin, above n 10.

[155] Please note that the Act became effective from 2000.

[156] Committee for Addressing Consumer Problems, above n 2. The method for categorising guaranteed debt dates from and including 2011.

[157] Ibid 3. On consumer credit and grey-zone interest, see generally Souichirou Kozuka and Luke Nottage, 'The Myth of the Cautious Consumer: Law, Culture, Economics and Politics in the Rise and Partial Fall of Unsecured Lending in Japan' in Johanna Niemi, Iain Ramsay, William C Whitford (eds), *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* (Hart Publishing, 2009) 199.

[158] On criticisms of using proceedings too early, see Takashi Sonoo, 'Hōteki seiri to shiteki seiri wa kongo doko ni mukau no ka — Tōsan jiken genshō no haikei to shōrai tenbō [Where are Legal Workout and Private Workouts Going Now? Background to Insolvency Case Phenomenon and Future Prospects]' (2016) 2050 *Kinyū hōmu jijō* 6, 14.

[159] 'Kigyō no kyūhaigyō kaizan saiō [Increase in Enterprises Being Wound Up or Dissolved]', *Nikkei Newspaper* (morning ed) (Tokyo), 14 January 2017, 5. This report suggests that many companies are being wound up by elderly entrepreneurs prior to insolvency and thus they avoid having to file for formal bankruptcy proceedings, the numbers of which have in turn decreased.

[160] Guidelines in Relation to a Business Owner's Personal Guarantee, above n 5. On the Guidelines, see Nobuaki Kobayashi, 'Keieisha hoshō ni kansuru gaidorain no gaiyō (ue) [Outline of the Guidelines in Relation to Business Owner Guarantees (Part One of Two)]' (2014) 1018 *New Business Law* 14; Nobuaki Kobayashi, 'Keieisha hoshō ni kansuru gaidorain no gaiyō (shita) [Outline of the Guidelines in Relation to Business Owner Guarantees (Part Two of Two)]' (2014) 1019 *New Business Law* 68; Zadankai [Roundtable discussion: Hiroshi Kato, Manabu Suzuki, Akimitsu Takai and Keizo Fujiwara], 'Keieisha hoshō gaidorain no unyō kaishi kara 2 nen wo mukaete

financial institutions as well as the government's Credit Guarantee Corporation (*Shinyō hoshō kyōkai*) which provides guarantees to financial institutions on behalf of SMEs who could not otherwise obtain a loan.[161] To the extent that the Credit Guarantee Corporation provided support, it was historically expected to insist on its rights as a creditor against the business owner if the Corporation was required to pay a financial institution when a guarantee was called.[162] In this respect, the Guidelines represent a change in government policy and institutions such as the Credit Guarantee Corporation are expected to comply with the Guidelines as administrative guidance, even though technically they are not binding rules.

One aim of the Guidelines is to encourage the winding up of struggling and so-called zombie companies, or companies with no foreseeable future growth prospects, by either formal or informal insolvency proceedings. The underlying obligor is typically a company (the principal debtor) which the guarantor has guaranteed in her or his capacity as director, chair, chief executive officer or owner of the principal debtor. The directors are given incentive to file in relation to the company because by using the Guidelines in relation to personal debt, the director should be able to avoid a formal personal bankruptcy filing. Because the director does not have to file for personal bankruptcy, her or his personal credit rating score is not affected. A debtor must disclose all personal assets and pay as many debts as possible to be eligible for relief under the Guidelines. Under the Guidelines, the financial institution and lawyer acting for the applicant investigates the debtor's payments and assets to assess the eligibility of the applicant. As an additional incentive, the Guidelines are also designed to allow entrepreneurs to keep more exempt assets than would otherwise be available to them in a formal bankruptcy proceeding. A director, for example, is typically able to retain a modest residential house and between ¥1 000 000 and ¥3 600 000 in cash and deposits to support the director's living expenses, which is more than the ¥990 000 provided for under the *Bankruptcy Act*.[163] For entrepreneurs to keep more exempt assets than would otherwise be available to them in a formal bankruptcy proceeding, however, there must be a corresponding benefit to creditors. The benefit is calculated by comparing the amount which is expected to be realised for distribution to creditors in the rehabilitation insolvency process in relation to the principal debtor (that is, the enterprise), and the expected realisation amount if the enterprise had been placed into formal bankruptcy proceedings. If the comparison leads to a positive amount, the guarantor is entitled to a greater amount as exempt assets than would be the case if the *Bankruptcy Act* provisions applied.[164] These provisions are designed to encourage an entrepreneur who has

— Junsokugata shiteki seiri tetsuzuki no tekiyō jirei ni okeru kadai to tenbō [Welcoming the Second Year from the Commencement of the Operation of the Guidelines in Relation to a Business Owner's Personal Guarantee — Issues and Outlook Based on Applied Examples under Rule-Based Private Workout Proceedings]' (2015) 2018 *Kinyū hōmu jijyō* 6. The Guidelines provide for four situations: promoting funding without relying on a personal guarantee; procedures when entering into a personal guarantee; procedures for reviewing an existing personal guarantee; and workout of a personal guarantee in parallel with the debt of the debtor.

[161] Established under the *Shinyo hoshō Kyōkai Hō* [Credit Guarantee Association Act] (Act No 196, 1953) (Japan). See also Zenkoku Shinyō Hoshō Kyōkai Rengōkai [Japan Federation of Credit Guarantee Corporations] <www.zenshinhoren.or.jp>.

[162] On the Japanese system of public credit guarantees, see Ichiro Uesugi, Koji Sakai and Guy M Yamashiro, 'The Effectiveness of Public Credit Guarantees in the Japanese Loan Market' (2010) 24 *Journal of the Japanese and International Economies* 457. For an analysis on loan guarantee schemes based on US data, see Diana Hancock, Joe Peek and James A Wilcox, 'The Repercussions on Small Banks and Small Business of Procyclical Bank Capital and Countercyclical Loan Guarantees' (Paper presented to AFA 2008 New Orleans Meetings, March 2007) <http://ssrn.com/abstract=973976> 1.

[163] Chūshō kigyō chō [The Small and Medium Enterprise Agency], *Keieisha hoshō ni kansuru gaidorain* [*Guidelines in Relation to a Business Owner's Personal Guarantee*] <http://www.chusho.meti.go.jp/kinyu/keieihosyou/>.

[164] See Kobayashi, 'Outline of the Guidelines Part Two', above n 160, 72.

guaranteed the debts of an enterprise to file for enterprise rehabilitation or enterprise liquidation as early as possible. This incentive is a key driver for the Guidelines.[165] If the entrepreneur uses the Guidelines and follows the payment plan, the entrepreneur's remaining debts will be discharged and there will be no record of the insolvency on credit information services. Accordingly, the entrepreneur may avoid the restrictions on access to credit discussed above.[166]

Consent of all creditors is not required for use of the Guidelines. It is possible that other creditors may not even know of the application, because the debtor will make an application directly to the financial institution which has the benefit of the guarantee. Accordingly, other creditors continue to be paid, although the Guidelines prohibit payments, including dividends, to family members or relatives of business owners. The ability to continue to pay trade creditors is also an advantage of using the Guidelines over a formal filing with the court.[167] After commencement of a proceeding, the *Civil Rehabilitation Act* and *Bankruptcy Act* prohibit payments of claims arising against the bankrupt or rehabilitation debtor in the future, based on a cause that has occurred prior to the commencement of proceedings, although the court may consent to such payments in some cases.[168]

Obtaining information about everyday practice under the Guidelines is difficult, because they are not a public procedure like a bankruptcy proceeding, although industry representatives have participated in roundtables and their comments have been published.[169] Knowledge of the Guidelines and how to apply them is increasing amongst legal professionals and is expected to lead to an increased use of the Guidelines. From a financial institution's perspective, the Guidelines provide potential benefits, such as possibly retaining restructured debtors as clients, and achieving a higher return for creditors by avoiding formal proceedings, which may damage enterprise asset prices. The FSA's influential support of the Guidelines and the expectation that the Credit Guarantee Corporation will cooperate should also overcome historical stalemates between various stakeholders, which prevented entrepreneurs and companies from being restructured. The government also provides legal assistance for clients who apply for relief under the Guidelines. The use of these types of administrative guidelines is common in Japan and the content of the Guidelines is unlikely to be legislated for at this stage.[170]

B *The Role of Personal Guarantees in Funding Entrepreneurs in Australia*

The prevalence of personal guarantees given by entrepreneurs to support business activity has also been noted in Australia, but the issue was not addressed by the Proposals Paper, and there is a general lack of research in this area in the context of insolvency law.[171] The role of housing

[165] Ibid
[166] Ibid 76.
[167] On financing small and medium-sized enterprises in Japan, see Kenshi Taketa and Gregory F Udell, 'Lending Channels and Financial Shocks: The Case of Small and Medium-Sized Enterprise Trade Credit and the Japanese Banking Crisis' (2007) 25 *Monetary and Economic Studies* 1. They analyse the different types of lending channels in Japan and how they were affected by the Japanese financial crisis. See also Hirofumi Uchida, Gregory F Udell and Nobuyoshi Yamori, 'How do Japanese Banks Discipline Small- and Medium-Sized Borrowers? An Investigation of the Deployment of Lending Technologies' (2015) *Institutional Approach to Global Corporate Governance: Business Systems and Beyond* (online) <http://dx.doi.org/10.1016/S1569-3767(08)09003-1> 57. This analysis focuses on the use of financial statement lending.
[168] *Bankruptcy Act* art 34(2); *Civil Rehabilitation Act* art 84(1).
[169] See eg, Zadankai [Roundtable discussion], above n 160.
[170] The Guidelines are not intended for general use by institutions not regulated by the FSA.
[171] On access to finance by small and medium-sized enterprises generally, see Gregory F Udell, 'SME Access to Intermediated Credit: What Do We Know and What Don't We Know?' (2015) *Reserve Bank of Australia Conference* 61. He differentiates between inside and outside collateral. Inside collateral refers to those assets

collateral, and thus personal guarantees, in small business lending in Australia, was considered by a paper presented at a Reserve Bank of Australia Conference in 2015.[172] The authors argued that 'higher housing prices increase the value of personal guarantees', because entrepreneurs use the value in their personal assets, such as residential property, as security for business debts, which are also supported by a guarantee.[173] Similarly to Japan, these researchers' interviews with Australian lenders suggests that a typical requirement for a loan to a small business is a personal guarantee, and Australian lenders are more likely to take a personal guarantee than lenders in the United States or the United Kingdom.[174] Australian lenders argue that they need the guarantee because Australia lacks robust personal credit reporting regimes, which is an argument that Japanese lenders have also used.

The issue of reform to the law relating to guarantees in an insolvency context generally was noted by the seminal Harmer Report in 1988.[175] The voluntary administration procedure introduced as a result of the Harmer Report provides that a guarantee or a liability of the company cannot be enforced as against a director, or spouse or relative of a director, during the administration except with the leave of the Court.[176] Courts are reluctant to grant leave to enforce under such a guarantee.[177] The stay on enforcement of personal guarantees for directors who file for voluntary administration was seen as an innovative solution to the problem of the chilling effect of guarantees on directors considering whether to seek assistance when their companies were in financial distress.[178] The mechanism was designed to encourage directors to appoint an administrator as early as possible, to give the company the best chance of recovery.[179] According to the corporate regulator, the Australian Securities and Investments Commission, the 'effect of the appointment of a voluntary administrator is to provide the company with breathing space while the company's future is resolved'.[180] The moratorium on enforcing director guarantees was designed with this goal in mind. However, once a proceeding finishes and a deed of company arrangement ('DOCA') is signed, a creditor may take action under the personal guarantee depending on the contents of the DOCA.[181] Accordingly, it is still important for a guarantor to obtain support for a DOCA from a creditor who holds a guarantee and ensure that any guaranteed debt is dealt with as part of that DOCA.[182]

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owned by the business entity, which are used to raise finance. Outside collateral is based on the entrepreneur's own assets and thus 'pierces the corporate veil of limited liability': at 91.

[172] Ellis Connolly, Gianni La Cava and Matthew Read, 'Housing Prices and Entrepreneurship: Evidence for the Housing Collateral Channel in Australia' (2015) *Reserve Bank of Australia Conference*, 115.

[173] Ibid 116.

[174] Ibid 119.

[175] Law Reform Commission (Aust), *General Insolvency Inquiry* (Report No 45, 1988) vol 1, 6–8 ('Harmer Report').

[176] *Corporations Act 2001* (Cth) s 440J.

[177] Michael Murray and Jason Harris, *Keay's Insolvency: Personal and Corporate Law and Practice* (Thomson Reuters, 9th ed, 2016) 682 [19.85].

[178] On the disadvantage to other creditors of the guarantor, see Colin Anderson and David Morrison, *Crutchfield's Corporate Voluntary Administration* (Lawbook Company, 3rd ed, 2003) 15.

[179] Ibid.

[180] For a summary of the procedure by ASIC, see 'Voluntary Administration: A Guide for Creditors' (Information Sheet No 74, Australian Securities and Investments Commission, December 2008) <http://download.asic.gov.au/media/1348514/Voluntary_administration_guide_for_creditors.pdf>.

[181] See Murray and Harris, above n 177, 682 [19.85].

[182] Anderson and Morrison, above n 178, 15, warn that beneficiaries of a guarantee 'should be careful to ensure that the right to subsequently call upon the guarantee in relation to the debt, as compromised, is not prejudiced by acceptance of the deed of company arrangement'. They also note (at 197) that a guarantor will be bound by the DOCA in the guarantor's capacity as a contingent creditor of the company. Any extinguishment of the principal debt under a DOCA does not, however, release the guarantor. A release of the guarantor in this context would

Apart from these reforms as part of the voluntary administration procedure, however, the authors of the Harmer Report refrained from making particular recommendations on the basis that the issue of the treatment of guarantees in an insolvency context in Australia required a further in-depth analysis and was outside the Commission's Terms of Reference.[183] Three decades have passed since the Harmer Report, but the matter of guarantees and their interaction with insolvency law is yet to be the subject of a law reform review.[184] The new Japanese Guidelines may suggest options to Australia, even if it is simply that it is time to reconsider the treatment of personal guarantees in the context of personal bankruptcy.

V CONCLUSION: WHERE TO FROM HERE FOR AUSTRALIA?

Australia's proposals for bankruptcy law reform aimed at giving debtors a fresh start are overall less debtor friendly than current legislation and practice in Japan. Reducing the default bankruptcy period and changes in relation to objections to discharge could focus more on the individual debtor's circumstances and less on a particular time period, whether that time period be one or three years, or some lesser period. The Japanese processes are predicated on a reliable and professional body of *bengoshi* (attorneys) who make up the majority of trustees and pre-petition representatives. The courts place a great deal of trust in the *bengoshi*, particularly in the case of simultaneous termination proceedings and small-scale proceedings supervised by trustees. Moreover, an obligation to make income contributions for three years under the Australian proposals appears conservative in light of recent Japanese debates, and detracts from the concept of a fresh start.

Recent Japanese government support for Guidelines in relation to guarantees also highlights the possibility of other continuing obstacles to a 'fresh start' in Australia. Even if restrictions on discharged bankrupts are eased and the time to discharge is shortened in Australia, to the extent that directors cannot avoid personal bankruptcy due to the prevalence of personal obligations which guarantee SME debt, the current reform proposals may not go far enough to achieve the goal of encouraging entrepreneurial activity. Further consideration should be given in Australia to the interaction between SME borrowing and personal guarantees given by directors, if Australia's reform goal of encouraging 'entrepreneurial endeavour' is to be achieved.

require a separate agreement as between the creditor and the debtor which discharges the debtor, thus discharging the guarantor: at 198.

[183] Law Reform Commission, above n 172, vol 1, 6–8.

[184] See generally Connolly, La Cava and Read, above n 171.