



**International Association of Insolvency Regulators
Consumer Debtors: Member Questionnaire
www.insolvencyreg.org**

CONSUMER DEBTORS

**The collective responses of a survey of the members
of IAIR relating to the approaches taken to the
treatment of non-trading individual debtors**



**The IAIR is a world-wide organisation of government departments, ministries,
agencies and public authorities with responsibility for insolvency policy and
legislation, regulation and/or practice and administration**

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INTRODUCTION

1. At its 2006 meeting in Mexico, the IAIR agreed to undertake a project to examine the treatment of non-trading bankrupts, often referred to as “consumer bankrupts” in member jurisdictions.
2. Countries around the world are considering the way in which personal insolvency systems treat non-trading bankrupts. The background to this is based upon a growth in the availability of consumer credit. It should not be forgotten that the majority of credit transactions are successful. The availability of credit continues to make a vital contribution to the economies by driving economic activity, by allowing consumers flexibility in how they choose to access the marketplace and allowing them to manage their finances more effectively.¹
3. The purpose of this project is to establish the extent to which member countries provide solutions for individuals with debt problems, whether any recent changes have been made to the law and the drivers for those changes.
4. It is in this context that this survey was undertaken.
5. The report contains summaries of the responses received to the survey.

MEANING OF “CONSUMER DEBTOR”

6. For the purposes of clarity, in the survey and this report the term “Consumer Debtor” should be taken as meaning a private individual who is insolvent and who is a non-trader or non-business debtor.

BACKGROUND

7. Some policymakers have taken the view that the personal insolvency regime in a jurisdiction should allow for the rehabilitation of the “consumer debtor” and for the discharge of debts as soon as is reasonable, subject to the requirement that creditors should receive the highest return possible on their debts. Other regimes do not allow for the insolvency of non-trading individuals at all and some only allow the partial discharge of debts.
8. In the United Kingdom, the view has been taken by Government that as the availability of credit and consequent levels of debt have increased, the personal insolvency regime should be amended accordingly (this has been described as a relaxation in favour of debtors in some quarters).²

¹ “Society facilitates the creation of credit, and thereby multiplies the risk of insolvency” – The Report of The Review Committee known as “The Cork Report” (United Kingdom 1982 – paragraph 23).

² In “Personal Insolvency Law After the Enterprise Act: An Appraisal” [4/05 Journal of Corporate Law Studies] Professor Adrian Walters states “in a society experiencing record levels of personal

The Growth of Credit - The UK Example

- In 1974 there was 1 credit card available in the UK and there were total outstanding balances of £2m at a time when there were 4,500 personal insolvencies. By 2004, there were over 1350 credit cards available in the UK, with £56 billion outstanding and a total of 55,000 personal insolvencies.
- In early 2006 there were about 69m credit cards in circulation in the UK, which accounted for about 55% of the European total. In the same year there were over 100,000 personal insolvencies.

9. The consumer debtor phenomenon, at least as reflected in the number of formal personal insolvencies, has been seen in a number of regimes at different times over the last 40 years, the USA from the 1970s, Canada from the 1980s, Australia from the 1990s, Hong Kong SAR in 2001-03 and more recently in the UK.

10. It is interesting to note that, numbers having risen rapidly in the USA, Canada and Australia, they appeared to level off after between 5-10 years; and Hong Kong SAR's numbers fell rapidly in 2004 (although only back to the level of 2001). In the UK, there were significant increases in numbers between 1989 and 1993 after banking and financial services were opened up, followed by an economic recession with rising unemployment and record high interest rate levels: thereafter numbers fell (although still above the level of 1989); and then started to increase markedly again in 2004.

11. The issues in and around increasing numbers of consumer debtors have presented a significant challenge for governments in striking the right balance between debtors and creditors in trying to apply sometimes centuries-old bankruptcy regimes to a relatively new phenomenon. Different jurisdictions have shown different philosophical approaches to the treatment of consumer debtors, reflecting different cultures and different attitudes, and perhaps in some jurisdictions the resources which governments are prepared to commit to the administration of bankruptcies: those approaches have changed over time.

12. What is not in doubt (although this is not unanimously agreed even among IAIR member countries) is the need to recognise and to respond appropriately to the growth in consumer debt and consumer debtors³: a clear, strong personal insolvency system is, or becomes for the new market economies, a matter of economic necessity, and benefit.

indebtedness, there is an increasing need to ensure that the available legal responses to individual financial distress are appropriate and fit for purpose.”

³ In “The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation” Natalie Martin states “The current American bankruptcy system grew directly out of the US’s unique capitalist system, which rewards entrepreneurialism as well as extensive consumer spending.”

13. The trend over the last twenty years in many jurisdictions has been towards shortening the period of the bankruptcy and providing for automatic discharge after a specified period, subject in some instances to suspension or extension where the bankrupt has failed to co-operate or to make a full disclosure or where the insolvency administrator (trustee) or creditors object.

14. More recently, some jurisdictions have refined their approach by:

- Introducing restrictions on those whose bankruptcy is found to have been due to their irresponsible, reckless or fraudulent conduct;
- Placing increased emphasis on payments being made by bankrupts from their earnings;
- Highlighting increased enforcement action taken against those who have failed to comply with the requirements imposed on them or have committed criminal offences; and
- Actively promoting alternatives to formal bankruptcy for those able to enter into an arrangement with their creditors for payment, in full or in part, over a period of time, typically three-five years.

15. But at the same time, some jurisdictions have looked to tighten up access to, or extend the period of, bankruptcy. Examples of this include Australia and the United States. It is these differences in approach, which reflect the challenges for governments in trying to maintain a balance between the rights and interests of debtors and creditors.

16. The origins of bankruptcy law were for the benefit of creditors and to achieve repayment of the debt owing to them.⁴ However, over time, “social policy” has become more and more influential in determining the aims of bankruptcy law e.g. the relief from debt and its effects. This has been achieved, amongst other things, by allowing self-petitioning, exempt assets and discharge outside of creditor control.

17. Over the years, insolvency systems have been designed by legislators and judges to meet the needs of their own days. The problem is that those needs have often been conflicting depending on who the stakeholder is. It is difficult for policy-makers to get a balance and to take account of those diverse, often conflicting, interests.

18. An interesting comment from the 2001 Consumer Debt Report of INSOL, illustrates the continuing consideration of the conundrum:

“A law offering discharge should however not be seen as an easy way out. For the law to be respected, the legislators should seek to avoid a dichotomy between the debtor and society. The barriers to obtain a discharge should on the one hand not be so high that the debtor is discouraged from using the procedure. On the other hand,

⁴ In “Bankruptcy Origins in Debtor Perpetrated Crime” [2000] Joseph Pomykala says that historically, bankruptcy was defined as a form of debtor fraud. Under early English and American jurisprudence, debtors were defendants accused of committing “Acts of Bankruptcy”

sufficient recognition of the system should be created so that society is willing to forgive and permit a fresh start.”

AREAS COVERED BY THIS SURVEY

19. The aims of bankruptcy law were described by Brown, as early as 1900, in *The Journal of Comparative Legislation* as:

- Punishment of the fraudulent debtor;
- Rehabilitation of the unlucky but innocent debtor; and,
- Equitable distribution of the assets.⁵

20. The propositions have not changed that much over time, those propositions being that debtors who are unable to pay their debts can seek protection from their creditors, their assets should be collected and distributed fairly amongst their creditors, their affairs should be subject to examination and they should obtain relief from their debts if the situation warrants it.

21. Subject to that analysis being correct, the first area of this study is whether those propositions continue to underpin bankruptcy regimes or the extent to which they have been modified in at least some jurisdictions which have moved away from a “one size fits all” approach.

22. There is a related issue to the “practical effects” question above, of how more relaxed or more stringent regimes are viewed by debtors. Along with that, have debtors learnt anything from their experience.

23. A number of jurisdictions have introduced alternatives to bankruptcy where the debtor is able to put forward a proposal for payment, in whole or in part, to his/her creditors; and some jurisdictions are currently reviewing and revising their alternatives. This section of the survey seeks information about, and access to, alternatives to bankruptcy, including the costs and the benefits for debtors and creditors and how straightforward the procedures are; and on the basis of the recent USA amendments, who initiates an alternative.

24. The opportunity has also been taken to seek statistics from IAIR members about the numbers of personal insolvencies in their jurisdiction.

25. Lastly, in addition to provisions to deal with consumer debtors with assets and/or income, proposals have emerged in some jurisdictions to deal with consumer debtors with relatively low levels of debt and who have few, if any, assets and no, or little, surplus income, where there is no evidence of misconduct on their part; where it would seem unnecessary and inappropriate to apply the formal, and costly, mechanisms of bankruptcy; and where there are recognised as being adverse socio-economic consequences of being in debt and being too poor to pay.

⁵ “Comparative Legislation in Bankruptcy”, *Journal of the Society of Comparative Legislation* [1900]

AUSTRALIA

The Availability of Statutory Insolvency Procedures to Non-trading Debtors

26. There are statutory insolvency procedures available to individuals, irrespective of whether an individual is a trader or a non-trader. The *Bankruptcy Act 1966*, which deals exclusively with individual or personal bankruptcy, commenced on 4 March 1968. The first Commonwealth bankruptcy legislation, which provided for personal bankruptcy, was the *Bankruptcy Act 1924* which commenced in 1928. Prior to that each colony (later State) had enacted bankruptcy legislation based on the prevailing English bankruptcy statutes. The colonial legislation provided for both the bankruptcy of individuals as well as arrangements without sequestration. Both features were included in the 1924 Commonwealth legislation.

27. The Australian individual insolvency regime seeks to ensure that debtors who are unable to pay their debts can seek protection from their creditors, whilst their assets should be collected and distributed fairly amongst their creditors. The system allows for the individual's affairs to be subject to examination and provides relief from their debts.

The Law as it Relates to Non-trading Debtors⁶

28. The *Bankruptcy Act 1966* deals exclusively with personal bankruptcy and formal alternatives to bankruptcy. The Act provides for bankruptcy to commence upon the filing of a petition by either the debtor or a creditor. The Act also provides for arrangements with creditors without sequestration – debt agreements (Part IX) and personal insolvency agreements (Part X). These alternatives are dealt with in more detail in later responses

29. The *Bankruptcy Legislation Amendment Act 2002* (which commenced in May 2003) was aimed at addressing perceptions that bankruptcy had become 'too easy' and encouraging more people to consider alternatives to bankruptcy. The key amendments were:

- abolition of early discharge so that the standard bankruptcy period is always 3 years;
- introduction of a limited discretion for the Official Receiver to reject a debtor's petition where it appears that the debtor could pay debts within a reasonable time and is either unwilling to pay or has previously been bankrupt;
- stronger objections to automatic discharge; and
- increase in the income limit for debt agreements to allow more debtors to consider this option.

30. The *Bankruptcy Legislation Amendment Act 2004* was primarily aimed at improving the operation of Part X (arrangements without sequestration). These amendments were principally made to prevent abuses of those arrangements and to

⁶ The law relating to personal insolvency can be found at the following link:
<http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/reform->current+law>current+law?opendocument>

protect the interests of creditors by ensuring proper disclosure (including relationships between the debtor and creditors and the debtor and the insolvency practitioner).

31. The *Bankruptcy and Family Law Legislation Amendment Act 2005* aimed to resolve longstanding difficulties which arose where bankruptcy and family law proceedings were in progress simultaneously. The purpose of the amendments was to ensure that the proceedings were brought together in the same Court (in this case, the Family Court of Australia) without making any fundamental changes to the policy underpinning bankruptcy or family law.

32. The *Bankruptcy Legislation (Anti-Avoidance and Other Measures) Act 2006* aimed to strengthen the ‘clawback’ provisions and provide the trustee with greater access to property acquired by a third party using the bankrupt’s resources as a means of avoiding payment to creditors.

33. The *Bankruptcy Legislation Amendment (Superannuation Contributions) Act 2007* ensures that trustees can recover pre-bankruptcy superannuation contributions made prior to bankruptcy. This will ensure that superannuation is treated in the same way as other property transferred to defeat creditors.

34. The *Bankruptcy Legislation Amendment (Debt Agreements) Act 2007* follows a comprehensive review of the operation of debt agreements. The amendments are designed to ensure that debt agreements remain a viable option for debtors with unmanageable debt who can afford to make some payments to creditors and want to avoid bankruptcy. The amendments also address the high failure rate of debt agreements and concerns about lack of regulation of debt agreement administrators. These amendments are covered in more detail under the section on “Alternatives to Bankruptcy”.

35. ITSA and the Attorney-General’s Department have recently completed a review of offences under the *Bankruptcy Act 1966*. The Government has announced amendments resulting from this review which relate principally to a review of penalties to ensure they are appropriate and consistent with the penalties for similar offences in other Commonwealth legislation and improving compliance with some of a bankrupt’s fundamental obligations (such as filing a statement of affairs).⁷

The Policy Behind Recent Law Changes

36. The focus of the most recent bankruptcy reform in Australia has been on protecting the interests of creditors and reinforcing the consequences for the debtor of obtaining relief through bankruptcy. The principal aims of recent reforms have been to maximise returns to creditors, to ensure that the debtor cannot be seen to have taken the ‘easy way out’ and to remove avoidance opportunities.

Safeguards Against Potential Abuse

37. There has been no recent relaxation of the regime for individual insolvency.

⁷ Details of the offences review can be found at <http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/reform->offences+review?opendocument>

Practical Effects of Any Recent Changes

38. There have been no additional restrictions, or benefits, incorporated into the recent reforms.

Debtors' Views on Any Recent Changes

39. ITSA undertakes a client opinion survey approximately every two years. Although this survey does not ask specific questions of debtors about their views on reforms, it does elicit information about their experience generally in interacting with ITSA, which may include comments about amendments that have affected them. The last client opinion survey was undertaken in 2005.⁸

40. Two surveys of debtors who have been party to a debt agreement have been carried out. On both occasions, debtors reported very high levels of satisfaction with their experience, including with the services provided by their debt agreement administrator. The 2005 survey included debtors whose proposals were rejected by creditors, or whose agreements had been terminated. A significant majority of those debtors reported a positive experience that revealed that many debtors in financial distress want to attempt an arrangement with creditors rather than declare bankruptcy. For many of these debtors, it was obviously important that they attempted to 'do the right thing' by their creditors. Although a majority of debtors surveyed has been informed by their administrator about the process and consequences, it was significant that a large number only sought advice from one administrator, did not appreciate that the debt agreement would have a negative effect on their credit rating and were not regularly informed about progress and payments to creditors. These issues led, in part, to the recent review of debt agreements and subsequent amendments.

Do Debtors Learn From Their Experiences?

41. The most recent information on "repeat bankrupts" was published in the 2005 Profile of Debtors (published by ITSA every two years). Of those who became bankrupt during 2005, 10% had been bankrupt once before, 1% had been bankrupt twice before and 1% had been bankrupt at least three times before. The 2003 Profile of Debtors reveals that, of those who became bankrupt during that year, 12% has been bankrupt once before and 1% had been bankrupt more than once before.⁹

Creditors' views on Any Recent Changes

42. The ITSA client opinion survey that is carried out approximately every two years also seeks the views of creditors. Although this survey does not ask specific questions of creditors about their views on reforms, it does elicit information about their experience generally in interacting with ITSA, which may include comments about amendments, which may have affected them. The last client opinion survey was undertaken in 2005.

⁸ <http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/about+us-%3Epublications-%3Edebtor+profiles?opendocument>

⁹ A copy of the 2003 Profile report can be found at the same link as in footnote 8.

43. Creditors' views are actively sought in developing reforms. The Attorney-General has established a Bankruptcy Reform Consultative Forum comprising the key stakeholder groups with an interest in personal insolvency. This includes bodies representing banks, finance companies and credit unions/mutual societies as well as the Australian Taxation Office. The Forum is chaired by ITSA and meets at least twice yearly to consider proposals for reform.¹⁰

44. All of the recent amendments outlined above were developed following extensive public consultation including with individual creditors and organisations representing creditors. This was essential as recent reforms have been aimed at improving the position of creditors in bankruptcy.

45. Creditors have been supportive of reforms which ensure that their rights are protected and that encourage debtors to consider alternatives to bankruptcy. The review of debt agreements, which led to recent amendments, occurred largely in response to a lack of confidence on the part of creditors in the ability and performance of debt agreement administrators (evidenced by high failure rates and lack of regulation). The amendments have been welcomed by creditors. Creditors are keen to support debt agreements as a cost-effective means of recovering debts.

Creditor Involvement in the Insolvency Process

46. Creditors are able to commence bankruptcy proceedings by filing a creditor's petition, which can lead to a sequestration order. The petition process is generally preceded by the issuing of a bankruptcy notice through ITSA.

47. Creditors are also in control of approving the trustee's remuneration in bankruptcy. The trustee puts a resolution to creditors, which if approved, will provide the basis of that remuneration. As a general rule, creditors almost always approve resolutions relating to remuneration.

48. After bankruptcy, it is open to the debtor to put forward a proposal for annulment of the bankruptcy by entering into an arrangement or composition (typically involving an injection of funds from some third party). Such proposals must be accepted by creditors.

49. The legislation provides creditors with other opportunities to take part in the administration of bankrupt estates (such as the formation of a Committee of Inspection, a requirement for the trustee to take account of any lawful direction given by creditors or a Committee of Inspection or the right to make reasonable requests for information) but these are rarely used.

50. Creditor approval is required for a debtor to make a debt agreement or personal insolvency agreement. Creditor approval is also required for variation to these agreements and creditors can also be asked to agree to termination. Generally, the large institutional creditors are engaged in these processes and will vote on proposals.

¹⁰ Details of the Bankruptcy Reform Consultative Forum can be found at <http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/reform->consultative+forum+contacts->consultative+forum+contacts?opendocument>

Alternatives to Bankruptcy

51. There are two formal alternatives to bankruptcy provided for by the *Bankruptcy Act 1966*:

- debt agreements under Part IX
- personal insolvency agreements under Part X

52. Debt agreements were introduced in 1996. Arrangements of the type provided for in Part X have existed since 1924 under Commonwealth legislation and also existed in the earlier State and Colonial bankruptcy legislation (when they variously known as deeds of arrangement, deeds of assignment and compositions).

53. Amendments to improve the operation of debt agreements commenced on 1 July 2007. The key amendments are:

- introduction of a registration requirement for debt agreement administrators administering more than five debt agreements (registration decisions are made by the Inspector-General in Bankruptcy);
- duties of a debt agreement administrator set out in the Act – these cover informing the debtor about available options, ensuring proposal is sustainable and that debtor has made full disclosure, keeping creditors informed about the progress of debt agreements, and handling and accounting for money;
- administrator required to be remunerated proportionately over the life of the agreement (rather than in priority to creditors as was previously the case);
- special resolution requirement removed – debtor’s proposal will now be accepted if a majority in value of creditors who vote agree that it should be accepted;
- creditors will be required to receive dividends proportionately based on the amount of their debts (as opposed to providing different rates of return for individual creditors as was previously the case); and
- more effective mechanisms for dealing with default by the debtor during the agreement.¹¹

54. Debtors are able to choose which procedure they enter into unless a creditor institutes bankruptcy proceedings. A creditor cannot initiate a debt agreement or personal insolvency agreement on behalf of a debtor.

55. Many of the restrictions which apply to a bankrupt do not apply to debt agreement or personal insolvency agreement debtors, such as ability to travel overseas without approval, managing a business declaring bankruptcy when obtaining credit.

56. Whilst ITSA does not charge any fee in relation to the processing of debtors’ petitions and debt agreement proposals, it does charge a \$200 fee for processing a proposal for a personal insolvency agreement.

¹¹ <http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/reform->amendments->amendments?opendocument>

57. ITSA monitors the rate of acceptance of debtors' proposals, completion and termination rates and amounts transferred to creditors through debt agreements and personal insolvency agreements. These are the measures against which the success of the system are measured. ITSA will be required to conduct a further review of debt agreements in 2010 and will be focussing particularly on creditors' acceptance of the system and whether there has been an improvement in completion rates by debtors.

58. Debt agreements were introduced in 1996. However, they were not used by a significant number of debtors until 2001, following which there was a rapid growth in numbers. This growth was largely the result of marketing by commercial debt agreement administrators who continue to promote debt agreements actively. This has led to criticism on the basis that administrators have a financial incentive to encourage a debt agreement over other (potentially more suitable) options. Recent amendments have addressed this by imposing a duty on the administrator to ensure the debtor is informed about all available options and that the debtor can afford the proposal over the life of the agreement.

Measures Aimed at Preventing Debt Problems

59. ITSA provides information to debtors about bankruptcy and its alternatives and refers debtors to financial counsellors. The Australian Government has also introduced a Financial Literacy Foundation¹² which promotes education and related activities concerning responsible financial management and dealing with debt.

Statistics¹³

	Bankruptcies (including bankrupt deceased estates)	Debt agreements	Part X arrangements
1999/2000	23373	802	406
2000/2001	23902	1223	409
2001/2002	24114	3258	313
2002/2003	22639	4445	251
2003/2004	20497	5382	175
2004/2005	20501	4682	158
2005/2006	22299	4866	173
2006/2007	25238	6516	217

¹² www.understandingmoney.gov.au

¹³ <http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/about+us->statistics->statistics?opendocument>

The Availability of Statutory Insolvency Procedures to Non-trading Debtors

60. Bankruptcy legislation in BVI dates back to the 19th century. The legislation was recently modernised within the Insolvency Act 2003, which came into force in August 2004. The Insolvency Act 2003, supported by the Insolvency Rules 2005, covers both corporate and individual insolvency and is available to both trading and consumer debtors.

61. The BVI individual insolvency regime seeks to ensure that debtors who are unable to pay their debts can seek protection from their creditors, whilst their assets should be collected and distributed fairly amongst their creditors. The system allows for the individual's affairs to be subject to examination and provides relief from their debts.

The Law as it Relates to Non-trading Debtors

62. The Insolvency Act 2003 covers all personal bankruptcy and does not distinguish between trading and consumer bankrupts. That legislation, which came into force in August 2004, replaced 19th century legislation with regard to bankruptcy.

63. The new legislation provides a comprehensive modern insolvency regime, including provisions for:

- The licensing and regulation of insolvency practitioners;
- The establishment of an Official Receiver's office;
- A directors disqualification regime;
- A wide range of liquidation and rehabilitation options (rehabilitation options are carefully designed to safeguard the interests of secured creditors); and
- Assistance in multi-jurisdictional insolvency situations

64. There are no plans for further reforms at present.

The Policy Behind Recent Law Changes

65. The regime has not been relaxed or tightened under the new 2003 legislation so much as modernised and brought into line with the principals underlying corporate insolvency procedures.

66. Personal insolvency procedures are extremely rare in the BVI. There have been no bankruptcies or Individual Creditor Arrangements commenced under the new law since it was brought into force in 2004. Nor are there any statistics on bankruptcy procedures commenced under the old legislation, but they are believed to have been equally rare (lawyers cannot remember when the last one took place!).

Practical Effects of Any recent Changes

67. Because there have been no individual insolvencies in recent years, we cannot make any comment about the effectiveness of the new legislation as it is untested.

Debtors' Views on Any Recent Changes

68. As bankruptcy procedures are so rare, there has been no attempt to seek the views of debtors.

Do Debtors Learn From Their Experiences?

69. As stated above, individual insolvencies are so rare, repeat bankruptcies are non-existent.

Creditors' views on Any Recent Changes

70. As bankruptcy procedures are so rare, there has been no attempt to seek the views of creditors.

Creditor Involvement in the Insolvency Process

71. Bankruptcy in the BVI is essentially a court-initiated process. However, the law allows, for example, for the trustee to call creditors' meetings (although it is not compulsory to do so), for creditors to requisition creditors' meetings, for the establishment of a creditors' committee and for creditors to apply to court for the removal of a trustee. We have no basis for comment on the actual exercise of creditors' rights, as bankruptcies are so rare.

Alternatives to Bankruptcy

72. All relevant provisions are contained in the Insolvency Act 2003. The Act is still relatively new and included provisions for Individual Creditor Arrangements, which allow a compromise to be agreed between a debtor and his/ her creditors as an alternative to bankruptcy.

73. The choice as to which option to seek is made by the debtor, although the creditors must agree to the implementation of an Individual Creditor Arrangement. However, the proposal is made by the debtor. There are no particular incentives for the debtor to use an Individual Creditor Arrangement other than bankruptcy may be avoided.

74. The cost of an Individual Creditor Arrangement is has not yet been tested as there have been no cases yet. However, we anticipate that the cost would not be less than US\$3,000.

75. The alternative to bankruptcy would be provided by the private sector. However, as there is little or no market for the service (or for bankruptcy), we have not seen any aggressive marketing campaigns by the private sector.

Measures Aimed at Preventing Debt Problems

76. There are no measures of significance. Neither is there any significant supporting infrastructure at present, either provided by public services or by charitable bodies.

Statistics

77. As explained above, there have been no recent bankruptcy or Individual Creditor Arrangement cases.

CANADA

The Availability of Statutory Insolvency Procedures to Non-trading Debtors

78. Canada has had insolvency legislation since 1869 with *An Act Respecting Insolvency*, which covered bankruptcy and compositions and applied only to traders. In 1919, Canada passed the *Bankruptcy Act*, which included, among other reforms, provisions for an individual to become bankrupt. The Act has since been renamed the *Bankruptcy and Insolvency Act (BIA)*; however, the provision that deals with individual bankrupts remains essentially the same.

79. Since 1919 when the *Bankruptcy Act* came into force, non-trading individual debtors are able to obtain relief from their debts either through the bankruptcy system or by making a proposal to their creditors to compromise their debts.

80. Debtors access the bankruptcy system voluntarily by filing for bankruptcy or involuntarily by being placed into bankruptcy as the result of their creditors' obtaining a court order. The vast majority of bankruptcies are voluntary. In addition to debt relief through the bankruptcy system, non-trading individuals can settle their debts with creditors through the proposal provisions.

81. In 1992, Parliament introduced legislation that provided for a more simplified regime for non-trading debtors to compromise their debts by filing a consumer proposal with an administrator. The regime for a consumer proposal is set out in Division II of Part III of the *Bankruptcy and Insolvency Act*.¹⁴

82. This more streamlined consumer proposal regime allows the consumer debtor to make a proposal and avoid the stigma of bankruptcy where his or her debts do not exceed \$75,000, excluding real estate mortgages on his or her residence.

¹⁴ A copy of the BIA can be found at <http://laws.justice.gc.ca/en/showtdm/cs/B-3>

83. The objective of the Canadian insolvency system is to promote investors' confidence in the Canadian marketplace by providing a fair and effective system for:

- The restoration of assets to productive use;
- A framework for debtor rehabilitation, including the debtor's return to the marketplace as a productive member of society with skills that will help him or her avoid a repeat bankruptcy
- A deterrent to fraud; and
- A public record of estates.

The Law as it Relates to Non-trading Debtors

84. The *Bankruptcy and Insolvency Act* is the legislation in Canada that deals with bankruptcy of both commercial and consumer debtors. Consumer debtors may become bankrupt in one of two ways: (1) voluntarily filing an assignment in bankruptcy; or (2) involuntarily being placed into bankruptcy by creditors who have obtained a bankruptcy order from the court.

85. Initially, the consumer debtor discusses his or her financial situation with a trustee in bankruptcy. The trustee in bankruptcy is required under the Superintendent of Bankruptcy's *Directive 6R, Assessment of an Individual Debtor*, to perform a financial appraisal interview, to describe to the debtor the statutory and non-statutory options available, and to discuss and review the merits and consequences of the debtor's choice of procedure. If the debtor chooses to file an assignment in bankruptcy, the trustee prepares on behalf of the debtor the assignment, a statement of affairs and an estate information summary form. These documents are filed with the official receiver in the area in which the consumer debtor resides or carries on business.

86. Once the debtor becomes bankrupt, the role of the trustee in bankruptcy is to sell the non-exempt assets, if any, and distribute the proceeds to creditors according to the provisions of the Act. The trustee may require the debtor who has surplus income to contribute to the estate some of the income that is earned after the date of the bankruptcy but prior to the discharge of the debts. Debtors who are required to pay surplus income to their estates represent approximately 20% of all consumer debtors. The method for determining whether a debtor has surplus income and the amount that the debtor must contribute to the estate is set out in the Superintendent of Bankruptcy's *Directive 11R, Surplus Income*, which has the force of law.

87. First-time bankrupts without an obligation to pay surplus income into the estate are automatically discharged nine months after the assignment in bankruptcy unless the discharge is opposed by a creditor, the trustee or the Superintendent of Bankruptcy. Prior to this discharge, the trustee files with the Superintendent of Bankruptcy a report that summarizes the material aspects of the bankruptcy, including the debtor's conduct and the factors leading to the assignment. The trustee also reports on whether the debtor has made the required surplus income payments, if applicable, and whether the debtor could have made a viable proposal to his or her creditors but chose to file an assignment in bankruptcy instead.

88. If the bankrupt's discharge is opposed, a judge or a bankruptcy registrar holds a hearing. The judge or registrar may delay or refuse the discharge or make a conditional order requiring the debtor to make future payments into the estate.

89. Two regimes for the administration of bankruptcies exist: summary administration and ordinary administration. Either regime may apply to the consumer bankrupt.

90. The more streamlined summary administration applies to those cases where the unsecured, non-exempt assets of the debtor are less than \$10,000. In a summary administration, meetings are held only if requested by the creditors. Meetings in a summary administration are uncommon. Approximately 90% of consumer bankruptcies fall into this category.

91. The ordinary administration process applies to those cases where the unsecured, non-exempt assets of the debtor are greater than \$10,000. The creditors meet and have an opportunity to confirm the appointment of the trustee or to substitute with a trustee of their choice. The creditors can vote for the appointment of inspectors to represent them and may give directions to the trustee about the administration of the bankrupt's estate.

92. In 1992 an amendment was made to the *Bankruptcy and Insolvency Act* to add the requirement that the legislation shall be reviewed every 5 years. No changes to the *Bankruptcy and Insolvency Act* have been brought into force within the last 5 years.

93. On November 25, 2005, *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act*¹⁵ and the *Companies' Creditors Arrangement Act and to make consequential amendments to other Acts* received Royal Assent, thereby becoming *chapter 47 of the Statutes of Canada, 2005*. This Act makes several amendments to the consumer bankruptcy process. However, this Act has not yet been proclaimed into force. In addition, technical amendments were required to correct some technical errors with the above-noted Act without changing the underlying policy. Those technical amendments were contained in Bill C-62, an *Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and Chapter 47 of the Statutes of Canada, 2005* (Bill C-62).

94. On June 12, 2007 Bill C-62 was introduced in the House of Commons and passed all three readings in the House of Commons on June 13 and 14, 2007, receiving first reading in the Senate on June 14, 2007. However, Parliament was prorogued in September 2007 and this bill died on the order paper. The amendments were reintroduced in the new session of Parliament as Bill C-12 on Thursday, October 25, 2007, on a motion that was approved by all parties. The Bill passed all three readings in the House of Commons on October 29, 2007, and received Royal Assent on December 14, 2007, thereby becoming *Chapter 36 of the Statutes of Canada, 2007* (Chapter 36).

¹⁵ <http://laws.justice.gc.ca/en/showtdm/cs/W-0.8>

95. The provisions in this legislation with respect to consumer bankrupts are as follows:

Bankrupts with High Income Tax Debt

96. Bankrupts with personal income tax debt in an amount exceeding \$200,000, representing 75% or more of total unsecured proven claims, will not be eligible for an automatic discharge. In the calculation of the amount of tax debt, liabilities as a director are not included.

Surplus Income

97. First-time bankrupts who have surplus income will be required to contribute the surplus to their estate for 21 months (for second-time bankrupts they will contribute for 36 months), subject to a change in circumstances that impacts on the surplus income obligation.

Definition of Income

98. The definition of “total income” is amended to include lump sum amounts received by the bankrupt between the date of bankruptcy and the date of discharge including amounts for wrongful dismissal, pay equity settlements or workers’ compensation. The definition will not include amounts received in the same time frame as a gift, inheritance or other windfall because these amounts would be considered to be assets. A requirement to pay surplus income is enforceable against income that would otherwise be exempt, and income earned but not yet received is included in the definition of “total income.”

Income Tax Refunds

99. Before the amendments, the income tax refund for only the pre-bankruptcy period formed part of the estate of the bankrupt. If the proposed amendments come into force, the income tax refunds for both the pre- and post-bankruptcy periods will form part of the estate of the bankrupt. There is a carve out for the portion of the income tax refund that is garnishable money under a summons for child and spousal support.

Post-discharge Payment Agreements

100. Agreements regarding the payment of trustees’ fees and expenses will become permissible and enforceable post-discharge provided that: (1) the bankrupt’s income is below the level where a surplus income obligation would arise; (2) the amount to be paid under the terms of the agreement does not exceed a prescribed amount; and (3) the payments do not extend beyond 12 months following discharge. The policy intent of this amendment is to enable bankrupts who have low incomes to still have access to the services of trustees by providing these bankrupts with a longer though limited period in which to pay the trustees’ fees.

Registered Retirement Savings Plan (RRSP) Exemptions

101. Amounts held in RRSPs will be exempt from seizure in bankruptcy subject to a possible clawback for contributions made in the 12 months prior to bankruptcy. Where provincial legislation exempts RRSPs from execution, the provincial legislation will apply. Where provincial legislation is silent regarding the treatment of RRSPs, they will be exempt subject to the clawback referred to above.

Discharge of Second-time Bankrupts

102. Currently, second-time bankrupts are not eligible for an automatic discharge but must apply to the court for a discharge after 12 months. After a hearing of the application, the court may either grant or refuse an absolute order of discharge or suspend the operation of the order for a specified time, or grant a conditional order of discharge. Under the proposed amendments, second-time bankrupts will be eligible for an automatic discharge after 24 months (or 36 months if they have surplus income). In many cases this amendment will lengthen the period of time before which a bankrupt will be discharged.

Student Loans

103. The waiting period before which a student loan may be discharged will be reduced from 10 years to 7 years. The period before which an application may be made to court to request a discharge on the basis of hardship will be reduced from 10 years to 5 years. The new time frame of 7 years will apply to all those who file for bankruptcy after the coming into force date and to undischarged bankrupts, i.e., student loan borrowers who have become bankrupt before the coming into force of the proposed provision but who have not yet been discharged. Also, the hardship provision will be available to all bankrupts including those who have been discharged prior to the coming into force of the provision.

104. A separate bill has also been introduced by a Senator that would change the waiting period before student loan debts may be discharged. This bill would reduce the waiting period to two years and, in the case of hardship, no waiting period would apply.

Debts Not Released by Order of Discharge

105. Debts for services obtained through false pretences or fraudulent misrepresentation are included as undischARGEABLE debts. Also, equity claims resulting from false pretences or fraudulent misrepresentation are carved out from the list of undischARGEABLE debts.

Collection Against Undischarged Bankrupts

106. Creditors may realize against the property of the bankrupt without leave of the court if the trustee has been discharged and the bankrupt remains undischarged.

Mandatory Counselling

107. Bankrupts who have refused to attend mandatory counselling will not be eligible for an automatic discharge.

The Policy Behind Recent Law Changes

108. The aspects of the legislation that have been relaxed are the provisions dealing with RRSP exemptions and student loans. Please note that these legislative amendments are not yet in force.

109. The provision dealing with RRSPs would render them as assets exempt from the bankruptcy proceeding. The rationale behind this policy choice is to encourage retirement savings. It would also serve to level the playing field between employees who can accumulate exempt retirement savings through employment pension plans and self-employed individuals who must rely on RRSPs.

110. The provision dealing with student loans would shorten the waiting period before which an application for their discharge could be made as well as shorten the period before which a hardship application could be made to the court. The rationale for this policy change is that it was felt that the ten-year periods provided for in the current legislation is too onerous. These ten-year waiting periods were introduced in 1997, whereas prior to 1997, student loans were discharged along with most other debts

111. The aspects of Canada's insolvency regime that are proposed to be tightened are the provisions dealing with bankrupts with high income tax debt and surplus income. These proposed changes are aimed at reducing the opportunity for real or perceived abuse of the bankruptcy system.

112. The provision dealing with bankrupts with a personal income tax debt exceeding \$200,000, representing 75% or more of total unsecured proven claims, would render the bankrupt ineligible for an automatic discharge. The rationale for this policy choice stems from a concern that debtors with high personal income tax debts are perhaps abusing the insolvency system. The provision will require that the trustee apply to the court for the hearing of the bankrupt's discharge application.

113. The provision dealing with surplus income will clearly specify the number of months that the bankrupt must contribute surplus income to the estate. The rationale for this policy is to stipulate in the legislation the time frame during which the bankrupt with surplus income must contribute to the estate.

Safeguards Against Potential Abuse

114. Although the proposed amendments to the legislation are not in force, where it is proposed to relax the regime for consumer bankrupts, sufficient mechanisms are already in place to guard against abuse. For example, the student loan provision currently specifies that an application must be made to the court with respect to hardship. The court will scrutinize the application and determine what is appropriate.

Practical Effects of Any recent Changes

115. The changes to the legislation and the proposed changes are not yet in force; therefore, it is too soon to measure their effects on the individual debtor.

Debtors' Views on Any Recent Changes

116. Prior to proposing changes to the legislation, two separate studies were conducted on various issues in the insolvency system.

117. The first study was conducted by the Personal Insolvency Task Force (PITF) and published in the *Personal Insolvency Task Force Final Report* August 2002¹⁶.

118. The PITF was an advisory group created in the fall of 2000 by the Superintendent of Bankruptcy to study and suggest ways of reforming the personal insolvency provisions of the *Bankruptcy and Insolvency Act*. The Task Force members were mainly comprised of judges, lawyers, bankruptcy trustees, creditor representatives, academics and credit counsellors. It is within this context that consumer advocacy groups were asked to provide their views on the personal insolvency system and to suggest areas for improvement.

119. The second study was conducted by the Standing Senate Committee on Banking, Trade and Commerce, the results of which were published in November 2003 in their report entitled, *Debtors and Creditors Sharing the Burden: a Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*¹⁷. The Senate Committee heard from various witnesses on a broad range of topics dealing with both consumer and commercial insolvency issues. These witnesses included consumer advocacy groups.

120. In general, the stakeholders are supportive of the amendments although some divergent views exist with respect to the proposed provisions for the treatment of Registered Retirement Savings Plans and student loans.

¹⁶ The PITF report can be found at <http://strategis.ic.gc.ca/epic/site/bsf-osb.nsf/en/br01285e.html>

¹⁷ See IAIR member profile for Canada at http://www.insolvencyreg.org/sub_member_profiles/canada/index.htm

Do Debtors Learn From Their Experiences?

121. Although no survey has been taken, the following statistics are available:

Repeat Bankruptcies: Number of consumer bankruptcies filed where there was a declaration of having filed a previous bankruptcy.

Year	Repeat bankruptcies	% of consumer bankruptcies
2000	7,667	10.2%
2001	8,500	10.7%
2002	8,728	11.2%
2003	9,990	11.9%
2004	10,512	12.5%
2005	11,118	13.1%
2006	11,047	13.9%
2007	11,849	14.8%

122. The above table provides statistics on the number of consumer bankruptcies filed that included a declaration of having filed a previous bankruptcy. Please note that these figures do not include the number of consumer bankruptcies where there was a declaration of having filed a previous proposal.

123. In general, the trend of repeat consumer bankruptcies has been increasing. In 2000, 10.2% of all consumer bankrupts stated that they had filed a previous bankruptcy. In 2007, the percentage of consumer bankrupts who had filed a previous bankruptcy rose to 14.8%.

Creditors' views on Any Recent Changes

124. Prior to proposing changes to the legislation, creditors and other stakeholders were invited to express their views to the Personal Insolvency Task Force and the Standing Senate Committee on Banking, Trade and Commerce. Their comments were included in the *Personal Insolvency Task Force Final Report* August 2002 and in the Senate Committee's report, *Debtors and Creditors Sharing the Burden: a Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*.

125. Given that the legislative amendments are not yet in force, it is too soon to determine the creditors' attitudes toward the changes.

Creditor Involvement in the Insolvency Process

126. Creditors have a number of rights and remedies available to them in the bankruptcy system:

- Secured creditors may realize on their security as provided for in the legislation;
- At the first meeting of creditors, creditors can confirm the appointment of the trustee or substitute another trustee. They can also appoint inspectors to supervise the trustee and to instruct the trustee to take whatever steps they consider appropriate in order to protect the estate and the creditors. However, in a consumer bankruptcy, inspectors are not generally appointed;
- Creditors have the right to inspect the books and records of the bankrupt and to examine the bankrupt;
- Creditors may also complain to the Superintendent of Bankruptcy whose mandate includes keeping a record of all complaints and making investigations into those complaints; and,
- Creditors may oppose the bankrupt's discharge on any ground that relates to misconduct on the part of the bankrupt or the commission of certain facts as set out in the section 173(1) of the *Bankruptcy and Insolvency Act*.

Alternatives to Bankruptcy

127. The section of the *Bankruptcy and Insolvency Act* that provides alternatives to bankruptcy is found in Part III of the Act. Prior to 1992, the Act made no distinction between a commercial and a consumer proposal. In 1992, Part III was amended to provide two divisions for the making of proposals to creditors: Division I of Part III is a general scheme for proposals and is intended to apply to commercial proposals; and, Division II applies to consumer proposals. This inclusion of Division II permits a natural person—a consumer debtor—to make a proposal to his or her creditors as an alternative to bankruptcy through a more streamlined, less costly process. In 1997, amendments were made to Division II to allow for joint consumer proposals in the appropriate circumstances.

128. A “consumer debtor” has been defined to mean an insolvent natural person whose aggregate debts do not exceed \$75,000, excluding the debts secured by the debtor's principal residence. If recent legislative amendments come into force, this debt limit will be increased to \$250,000. Individuals with debts which exceed the stated limit are permitted to make a proposal to creditors under Division I of Part III. The consumer debtor's proposal must provide that the terms be performed within five years and that certain claims be paid in priority together with the payment of all prescribed fees and expenses of the administrator arising out of the proposal. Once the consumer proposal has been filed with the Office of the Superintendent of Bankruptcy, a stay of proceedings goes into effect against all creditors.

129. The administrator of the consumer proposal investigates the consumer debtor's property and financial affairs in order to be able to assess the financial situation and the cause of insolvency, provide counselling to the debtor, and prepare

and file the proposal with the official receiver. In general, proposals provide that the debtor pay a monthly sum to the administrator for distribution to the creditors.

130. The consumer proposal regime is a more streamlined process in an attempt to reduce the costs of administration. For example, a meeting of creditors is not required unless specifically requested by at least 25% of the creditors who have a provable claim. Also, much of the communication is performed by mail and, if after 45 days after the filing of a consumer proposal, no obligation has arisen, the proposal is deemed to be accepted by the creditors and deemed to be approved by the court. The administrator's fees are predetermined and set out in the *Bankruptcy and Insolvency General Rules*. Finally, if the consumer proposal fails, the debtor is not automatically placed into bankruptcy.

131. In addition to consumer proposals, other options exist outside of the bankruptcy regime. For example, debtors can access credit counselling services provided by non-profit organizations. These organizations are community based and are dedicated to helping individuals and families overcome serious debt problems. The services include: personal debt management; credit counselling; debt repayment programs; money management and budgeting; credit re-establishment; and credit education. Also, some provinces have implemented a program called the Orderly Payment of Debts whereby a debtor may apply to the clerk of the court for a consolidation order.

132. Recent legislative amendments have been made to the consumer proposal process in the *Bankruptcy and Insolvency Act*; however, these amendments are not yet in force.

133. The proposed amendments would change the definition of a consumer debtor to increase the amount of debts that a consumer debtor may have in order to qualify for this streamlined proposal process. The ceiling would be raised from \$75,000 to \$250,000. Consumer debtors would also be required to complete a statement of affairs and undergo mandatory counselling in order to receive a certificate of full performance. The requirement for a statement of affairs in consumer proposals reflects current best practices.

134. In general, debtors have the choice between bankruptcy and a proposal. To aid in the decision, the trustee has an obligation under the Superintendent of Bankruptcy's *Directive 6R, Assessment of an Individual Debtor*, which has the force of law, to explain to the debtor the options available and to discuss the merits and consequences of the options. The trustee must also be confident that the debtor has made the appropriate choice.

135. In addition, debtors can also be placed involuntarily into bankruptcy by creditors who apply to the court for a bankruptcy order and are successful on their application. These involuntary bankruptcies are very rare.

136. One incentive for the debtor to make a proposal rather than filing for bankruptcy was introduced in the 1997 amendments to the *Bankruptcy and Insolvency Act*. The amendments required the trustee to prepare a report and recommend whether or not the bankrupt should be eligible for an automatic discharge or a

conditional discharge. Factors to be considered include whether the bankrupt could have made a viable proposal but chose to proceed to bankruptcy instead. This led to an increase in the number of consumer proposals filed.

137. Another incentive for the debtor to make a proposal rather than filing for bankruptcy stems from the surplus income provisions. Under the proposed amendments, the surplus income provisions would be strengthened by requiring debtors to pay for a longer period. If a debtor is required to make surplus income payments for a longer period anyway, the debtor might be encouraged to make a proposal instead.

138. Finally, proposals have a slightly less negative impact on the debtor's credit rating than bankruptcies do.

139. The fees and expenses of the administrator of a consumer proposal is set out in the *Bankruptcy and Insolvency General Rules*. They are as follows:

- \$750, payable on filing a copy of the consumer proposal with the official receiver;
- \$750, payable on the approval or deemed approval of the consumer proposal by the court;
- 20% of the money distributed to creditors under the consumer proposal, payable on the distribution of the money;
- the costs of counselling, which is \$85 per session where counselling is provided on an individual basis, and \$25 per person per session where counselling is provided on a group basis;
- the fee for filing a consumer proposal, which is \$100;
- the fee payable to the registrar for all court services to be rendered to the administrator in a consumer proposal, which is \$50; and
- the amount of applicable federal and provincial taxes for goods and services

140. We seek to measure the success of proposals by maintaining a database of both bankruptcies and proposals filed by individuals. This database can be queried to determine the number of completed proposals for a given time period.

141. The success of a proposal could be measured at two distinct stages in the insolvency process. The first measure of success could be defined as the stage at which the parties vote in acceptance of the proposal. The second measure of success could be defined as the stage at which all the terms of the proposal have been fulfilled.

142. All proposals and bankruptcies are provided by administrators or trustees from the private sector. Credit counselling services are also provided by the private sector. A study on their marketing strategies, aggressive or otherwise, has not been conducted.

Measures Aimed at Preventing Debt Problems

143. Although financial education is not a component of the regulatory mandate of the Office of the Superintendent of Bankruptcy, this office has produced a number of

educational materials targeted to young persons and aimed at increasing the awareness of the importance of good financial management and budgeting skills.

144. Other federal government agencies that work toward educating consumers are the Office of Consumer Affairs and the Financial Consumer Agency of Canada. The Office of Consumer Affairs produces a number of information products aimed at informing and protecting consumers. The Financial Consumer Agency of Canada works to protect and educate consumers in the area of financial services.

145. Finally, other community-based, non-profit organizations offer financial counselling and educational materials.

Statistics¹⁸

Number of Bankruptcies and Proposals in Canada – 2000-2008

Bankruptcies	2001	2002	2003	2004	2005	2006	2007	2008
Consumers	79383	78163	84232	84408	84602	79245	79847	28501
Individual Business	7987	7396	6753	6176	5691	4892	4403	1482
Corporate	<u>2412</u>	<u>2067</u>	<u>2096</u>	<u>1960</u>	<u>1846</u>	<u>1855</u>	<u>1890</u>	<u>769</u>
Total Bankruptcies	<u>89782</u>	<u>87626</u>	<u>93081</u>	<u>92544</u>	<u>92139</u>	<u>85992</u>	<u>86140</u>	<u>30752</u>
Proposals								
Consumer Div. II	12813	13749	14946	15137	16147	17284	19205	7046
Consumer Div. I	1223	1404	1540	1511	1855	1959	2241	817
Individual Business								
Div. II	534	500	449	408	405	347	314	119
Individual Business								
Div. I	477	499	518	504	529	440	400	141
Corporate Div. I	<u>838</u>	<u>910</u>	<u>862</u>	<u>819</u>	<u>709</u>	<u>637</u>	<u>605</u>	<u>226</u>
Total Proposals	<u>15885</u>	<u>17062</u>	<u>18315</u>	<u>18379</u>	<u>19645</u>	<u>20667</u>	<u>22765</u>	<u>8349</u>

Note: 2008 includes January to April.

146. The following is a brief explanation of each procedure included in the headings in the table:

- (1) “Consumers” are individuals who file for bankruptcy and report that more than 50% of their liabilities are not business related.
- (2) “Individual Business” means an individual with more than 50% of the total liabilities related to operating a business.
- (3) “Corporate” refers to incorporated businesses that file for bankruptcy.
- (4) “Consumer Div. II” refers to consumers/individuals who file a proposal under Division II of Part III of the *Bankruptcy and Insolvency Act*. In order to be eligible to file under this section of the Act, which is a streamlined proposal process, the individual’s aggregate debts, excluding debts that may be owed on a principal mortgage, must not exceed \$75,000.

¹⁸ http://strategis.ic.gc.ca/epic/site/bsf-osb.nsf/en/h_br01011e.html

- (5) “Consumer Div. I” refers to individuals whose debts are not mainly business-related and who filed a proposal under Division I.
- (6) “Individual Business Div. II” means an individual with more than 50% of the total liabilities related to operating a business where those liabilities are less than \$75,000 (excluding debts that may be owed on a principal mortgage).
- (7) “Individual Business Div. I” means an individual with more than 50% of the total liabilities related to operating a business who filed a proposal under Division I.
- (8) “Corporate Div. I” refers to incorporated businesses that file a proposal under Division I.

CZECH REPUBLIC

The Availability of Statutory Insolvency Procedures to Non-trading Debtors

147. The new Act on Insolvency allows an individual to become bankrupt. The legislation has not yet come into force, and is going to come into effect on 1 January 2008. Czech legislation has included a statement that individuals should be able to go bankrupt since 1992. The Act on Insolvency, which is going to come into effect next year will allow for both trading and non-trading individuals to go bankrupt.

148. The Czech law does not distinguish between fraudulent and non-fraudulent debtors. However, Czech criminal law does include crimes that may be perpetrated by insolvent debtors. These crimes are addressed in a separate criminal procedure.

149. In personal insolvency there is the possibility of rehabilitation for the debtor through “discharge of debts”. This provision is aimed at non-trading individuals.

150. Equitable distribution of the assets is found in the Czech law dealing with bankruptcy as well as in the Act on Insolvency coming into force in January 2008.

151. The Act on Insolvency will be more effective in dealing with the bankruptcy of individuals than the old provisions, especially with consumer bankruptcy cases.

The Law as it Relates to Non-trading Debtors

152. The law that deals with consumer bankrupts is the Bankruptcy Act. In January 2008 the new Act on Insolvency comes into force.

The Policy Behind Recent Law Changes

153. Not available.

Safeguards Against Potential Abuse

154. In the new Act on Insolvency there is provision for dealing with consumer bankrupts and allowing for the discharge from their debts. There are conditions that must be fulfilled by the debtor in order to receive discharge from their debts. For example, the debtor must act honestly and the agreement of creditors if they are to

receive less than 30 % of the value of their debts. These conditions can be seen as safeguards to guard against abuse because not all debtors will be able to fulfil them.

Practical Effects of Any Recent Changes

155. The main change for non-trading individual debtors is the possibility of discharge from their debts. This will come into effect in January 2008. Practical effects are unknown at this time.

Debtors' Views on Any Recent Changes

156. Not available.

Do Debtors Learn From Their Experiences?

157. Not available.

Creditors' views on Any Recent Changes

158. Not available.

Creditor Involvement in the Insolvency Process

159. The Bankruptcy Act was criticised because of the limited opportunity for creditor involvement in the proceedings. In the new Act on Insolvency there are many powers that creditors may use during the proceedings.

Alternatives to Bankruptcy

160. There is no alternative to consumer bankruptcy in the new proposed Czech law. However, within the Act on Insolvency there are three possible resolution methods: bankruptcy, reorganization and discharge from debts.

161. The choice of resolution method is the debtor's, but the final decision will usually be made by the creditors. There is no particular incentive for the debtor to use an alternative to bankruptcy. The cost of alternatives to bankruptcy is not known.

Measures Aimed at Preventing Debt Problems

162. Not available.

Statistics

163. The only statistic available is the number of all bankruptcies dealt with by the courts. It includes all completed cases that have been finished and all open cases. Statistics for individual (or consumer) debtors is not available.

General statistics

2000 – 10 560 (4 650)
2001 – 10 387 (4 036)
2002 – 10 217 (4 002)
2003 – 9 744 (3 918)
2004 – 8 876 (3 643)
2005 – 8 135 (3 882)
2006 – 7 456 (4 227)
2007 – 7 024 (2 227)*

*First 6 months

FINLAND

The Availability of Statutory Insolvency Procedures to Non-trading Debtors

164. Statute has allowed for the insolvency of individuals since the 18th century and is now known as Bankruptcy Law (BL). Since 8 February 1993 non-trading individuals have had access to a statutory systems allowing relief from their debts. This is known as Debt Adjustment Law (DAL).¹⁹

165. The Finnish individual insolvency regime seeks to ensure that debtors who are unable to pay their debts can seek protection from their creditors, whilst their assets should be collected and distributed fairly amongst their creditors. The system allows for the individual's affairs to be subject to examination. However, BL does not include discharge of debts.

The Law as it Relates to Non-trading Debtors

166. The BL is the general law of bankruptcies and deals with both companies and individuals, and trading and non-trading debtors. However, BL is very seldom used in non-trading personal insolvencies, as it does not allow for the discharge of debts.

167. A new BL came into force on 1 September 2004 replacing the old BL that had been in place 1868. However, the new law did not bring any major change in the position of the consumer bankrupt.

168. There are no current initiatives for further reform of consumer bankruptcy law.

¹⁹ For further information see IAIR Member profile at http://www.insolvencyreg.org/sub_member_profiles/finland/index.htm

Alternatives to Bankruptcy

169. The law in Finland relating to alternatives to bankruptcy for consumer debtors is the Debt Arrangement Law 1993.

170. On 1 January 2007 the debtors' obligation to pay creditors a dividend from extra income was reduced from two-thirds of surplus income to half.

171. Debtors have a choice between bankruptcy and debt adjustment. Bankruptcy is always possible for the debtor. Debt adjustment is possible if there are no obstacles, such as dishonesty towards creditors, the debtor's probable inability to follow the debt payment plan or the existence of a prior debt adjustment. On 1 January 2003 it was made possible to start a debt adjustment even though there is an obstacle described in law. However, this would require a very good reason, such as a long period of time since a debt was incurred, the debtor has made an honest attempt to pay the debts or illness.

172. The main incentive for a debtor to use debt adjustment rather than bankruptcy is that discharge of debts is available after approximately five years of adhering to a payment plan. Under certain circumstances it is possible for a debtor to retain his residence in debt adjustment.

173. The cost to the debtor of a debt adjustment is only the administrator's fee. That fee cannot be higher than 4 months surplus income of the debtor during the course of the payment plan.

174. There is no official measurement of the success of debt adjustments. Approximately 93 % of those who apply for debt adjustment obtain a payment plan. Plans are very seldom interrupted. Of the debtors seeking debt adjustment, 57 % have a surplus that can be paid to creditors, with an average surplus available to creditors of 130 euros month.

175. Debt adjustment and bankruptcy are provided by court. Whilst there are a variety of voluntary arrangements available in the private sector, there is no competition between these different procedures. If a voluntary arrangement succeeds everyone is happy. If not, either the debtor or a creditor can take the case to the court.

Measures Aimed at Preventing Debt Problems

176. A law dealing with financial counselling came into force on 1 September 2000. Counselling is provided by municipalities and financed by the state. There has also been some discussion about whether financial matters should be taught at school.

Statistics

Year	Debt Adjustment Applications	Company reorganizations for trading companies and individuals	Bankruptcy (mainly used with trading debtors)
1993	10,285	572	6,681
1994	13,874	424	7,391
1995	14,003	393	5,545
1996	11,905	340	4,700
1997	5,250	218	4,296
1998	4,206	194	3,318
1999	3,699	217	3,080
2000	3,335	266	2,908
2001	3,341	319	2,794
2002	2,804	285	2,885
2003	4,282	332	2,769
2004	4,450	317	2,428
2005	4,291	269	2,278
2006	3,702	302	2,285
2007	3,010	306	2,258

HONG KONG

177. The first Bankruptcy Ordinance that allowed for the bankruptcy of an individual was enacted in 1864. There were subsequent amendments to the Bankruptcy Ordinance, and the bankruptcy law in Hong Kong was basically modelled on the UK Bankruptcy Act 1914.

178. Under the Bankruptcy Ordinance, the discharge of a bankrupt releases him/her from all debts provable in bankruptcy with the exception of certain debts, such as debts incurred by means of fraud or fraudulent breach of trust. A composition or scheme of arrangement enables the bankrupt to avoid bankruptcy proceedings.

179. The Bankruptcy Ordinance was amended in 1996 to, among other amendments, introduce the new form of automatic discharge. Under the law after the 1996 amendment, there are provisions for automatic discharge of a first time bankrupt after 4 years, subject to suspension of the running of the bankruptcy period for a further period of not exceeding 4 years given by the court after hearing objections on specified grounds. Under the old law, bankruptcy normally lasted a lifetime. The position on release of debts is largely the same after the 1996 amendments except that composition and scheme of arrangement are replaced by voluntary arrangements. The 1996 amendments came into effect on 1 April 1998.

180. The Hong Kong individual insolvency regime seeks to ensure that debtors who are unable to pay their debts can seek protection from their creditors, whilst their assets should be collected and distributed fairly amongst their creditors. The system allows for the bankrupt's affairs to be subject to examination and provides relief from their debts.

181. The bankruptcy provisions do not distinguish between non-trading debtors and trading debtors whether before or after the 1996 amendments except as to certain bankruptcy offences which apply only to trading debtors. No separate provisions for non-trading debtors are currently being considered.

The Law as it Relates to Non-trading Debtors

182. The bankruptcy law generally applies to all bankrupts.

183. There have been no material changes in the bankruptcy provisions in the last 5 years. There was a recent amendment providing for the outsourcing of the administration of bankruptcy estates by the Official Receiver to private sector insolvency practitioners. This amendment came into effect on 10 December 2007.

The Policy Behind Recent Law Changes

184. There has been no relaxation or tightening of the law since the 1996 amendments to the Bankruptcy Ordinance

Safeguards Against Potential Abuse

185. Not Applicable.

Practical Effects of Any recent Changes

186. Not Applicable.

Debtors' Views on Any Recent Changes

187. Not Applicable.

Creditors' views on Any Recent Changes

188. Not Applicable.

Alternatives to Bankruptcy

189. The Bankruptcy Ordinance provides for the mechanism of voluntary arrangement whereby the debtor makes a proposal for his creditor's approval. The arrangement is subject to the court's supervision and is administered by a nominee, who is usually a private sector insolvency practitioner. This provision was introduced under the 1996 amendment and applies to both non-trading debtors and trading

debtors. Prior to this, the Bankruptcy Ordinance contained provisions for compositions and schemes of arrangement.

190. It is up to the debtor to make a proposal for voluntary arrangement. The law does not impose an obligation on the debtor to make one. If the voluntary arrangement is approved, the court may annul any bankruptcy order made against the debtor.

191. *Outline of Costs for Voluntary Arrangement*

- Court fees for application of interim order:
Rates on the gross amount of proposal –
 - (i) on every HK\$1,000 (or part) up to HK100,000 HK\$15.00
 - (ii) on every HK\$1,000 (or part) beyond HK100,000 HK\$ 7.50
- Deposit to nominee: HK\$12,150
- Solicitor’s fees for court application. Between HK\$30,000 to HK\$40,000
- Nominee’s administration fees, which is negotiable and is stated in the proposal.

192. There has been no attempt to measure the success of any alternatives to bankruptcy in our jurisdiction.

193. The nominee who implements the voluntary arrangement is from the private sector. The Official Receiver has ceased to accept new nomination as nominee since 2 September 2002.

Measures Aimed at Preventing Debt Problems

194. There are voluntary organisations, such as Caritas Family Crisis Support Centre and Tung Wah Group of Hospitals (Health Budgeting Family Debt Counselling) to provide financial counselling services.

Statistics

<u>Year</u>	<u>Bankruptcy Orders</u>	<u>IVAs</u>
2000	4,606	1
2001	9,151	4
2002	25,328	520
2003	24,922	2,662
2004	13,593	2,323
2005	9,810	1,066
2006	10,324	1,524
2007	11,063	1,949
2008 (up to April)	3,464	800

Miscellaneous

195. The bankruptcy law makes no material distinction between non-trading debtors and trading debtors. Generally speaking, most bankrupts can be effectively relieved from their liabilities after they are discharged from bankruptcy.

IRELAND

The Availability of Statutory Insolvency Procedures to Non-trading Debtors

196. Bankruptcy was introduced into Ireland at the same time as it was introduced in the United Kingdom. Originally it was introduced by the Chancery Courts in the Middle Ages and was subsequently codified in legislation, most recently in the Bankruptcy Act, 1988. That legislation allows for the bankruptcy on both traders and non-traders.

197. The general propositions apply in Ireland. The Irish individual insolvency regime seeks to ensure that debtors who are unable to pay their debts can seek protection from their creditors, whilst their assets should be collected and distributed fairly amongst their creditors. The system allows for the individual's affairs to be subject to examination and provides relief from their debts. However, the more recent innovations, which are suggested above, have not been applied in Ireland.

The Law as it Relates to Non-trading Debtors

198. In Ireland, individual insolvency is called "Bankruptcy", the legislation for which is contained in the Bankruptcy Act, 1988. The vast majority of insolvencies are corporate insolvencies. In 2005, for example, only 7 people were adjudicated bankrupt in Ireland.

Bankruptcy proceedings

199. There is no obligation on an individual to enter bankruptcy proceedings.

200. In bankruptcy, a person may commit an "act of bankruptcy" in a number of ways including primarily by failing to pay debts as they fall due, by failing to pay debts in accordance with a required notice and by making a fraudulent transfer of property. The creditors (or in very rare instances, the debtor) file a petition which results in the person being summonsed to Court at which time he may be adjudicated bankrupt.

201. There is no minimum figure of debt required although a Court is unlikely to grant a petition where the sum due is less than €1,904.61.

202. The petitioning creditor must post sufficient funds to enable the administration of the estate to commence, approximately €5,000. If such funds are not available from the creditor or from the bankrupt's estate, the bankruptcy will not proceed.

203. Upon opening of the bankruptcy proceedings, control over the individual's assets is transferred to a Court -appointed Official Assignee. The Official Assignee is obliged to collect the individual's assets, establish a list of the bankrupt's creditors and discharge the expenses of the bankruptcy and the bankrupt's creditors.

204. The residual debt remains until the bankrupt is discharged. Discharge is granted at the discretion of the Court normally after the majority of the original debt has been discharged. Bankruptcies and discharges from bankruptcy are publicised in the Official Gazette and on the public register of the High Court.

205. There have been no substantial changes to the bankruptcy law in the past five years. There are no current policy initiatives nor are any proposed changes to the law dealing with consumer bankrupts planned

The Policy Behind Recent Law Changes

206. There have been no recent law changes.

Safeguards Against Potential Abuse

207. Not applicable.

Practical Effects of Any recent Changes

208. Not applicable.

Debtors' Views on Any Recent Changes

209. Not applicable.

Do Debtors Learn From Their Experiences?

210. Although no survey has been carried out of debtors in Ireland, because the numbers of bankrupts are relatively low, there is little recidivistic behaviour.

Creditors' views on Any Recent Changes

211. Not applicable.

Creditor Involvement in the Insolvency Process

212. Bankruptcy is normally commenced by a creditor. However, creditors generally have minimal powers to intervene in the bankruptcy process once this has been commenced. Their interests are represented by the official assignee in bankruptcy, as part of the collective insolvency process. They are of course entitled to apply to the court to have various matters brought to the attention of the Court and to seek directions from the Court in relation to those matters. They are also entitled to participate by means of voting where a settlement proposal is proposed by the bankrupt.

Alternatives to Bankruptcy

Reorganisation Out of Court

213. Individuals are entitled to reorganise their affairs out of court. Out-of-court reorganisation is an arrangement primarily under private law between debtor and creditors without court involvement. In general, the creditors voluntarily waive part of the debt and the rate can be freely arranged with the creditors.

214. In bankruptcy, the method used is by Deed of Arrangement where the property of the person is transferred to an assignee who realises the property and discharges the creditors. This is sanctioned by the individual consent of each of the creditors. The person retains full control over the assets until they are transferred. If the agreed sum is paid in due time, the debtor will be discharged from the residual debt. Failing this, the debts will be reinstated and this failure normally constitutes sufficient grounds upon which insolvency or bankruptcy proceedings may be commenced.

Court Controlled Reorganisation

215. A Court may order that an individual be placed under the protection of the Court. During that period the individual cannot dispose of, mortgage or otherwise deal with his property.

216. The Court directs the calling of a meeting of the creditors at which the debtor makes a proposal. If the compromise is approved by 60% in value and number of those present and voting, subject to the discretion of the Court it becomes binding on all creditors. On such approval, an official of the Courts Service called the "Official Assignee" collects and distributes the person's property in accordance with the compromise.

217. If there is default in complying with this process or if no approval is obtained, the Court may adjudicate the debtor "bankrupt".

Court Supervised "Bankruptcy" Compromises

218. If Bankruptcy has commenced as set out above, an individual may seek a compromise with his creditors. The Court may stay the bankruptcy proceedings to enable the bankrupt to call a meeting of his creditors. If the creditors approve this settlement by 60% in value and number attending the meeting, then the compromise binds all creditors. If he makes payments according to the compromise, he will be discharged from bankruptcy.

219. Debtors have the choice between bankruptcy and the possible alternatives. The primary incentives for the debtor in choosing an alternative to bankruptcy are that the alternative processors are less formalised, and in consequence, the process is less expensive than the formal process.

220. The costs are dependent upon the alternative process, which is utilised by the debtor. For example, the costs of a scheme of arrangement entered into by a debtor with his creditors, if he arranges it himself may be minimal. However, the costs of a

Court supervised bankruptcy compromise may be substantial, depending on the value of the estate in bankruptcy.

221. There are no objective criteria for management of success in bankruptcies in Ireland.

222. Whilst there has been no aggressive marketing of individual alternatives to bankruptcy, there has been an increase in advertisements by debt consolidation companies.

Measures Aimed at Preventing Debt Problems

223. There are various state sponsored initiatives including the Money Advice and Budgeting Service, which counsel creditors and consumers relating to credit transactions. In addition, the issuing of credit to consumers is also regulated by the National Consumer Agency²⁰, the Central Bank and Financial Supervisory Authority.

Miscellaneous

224. The core issue relating to consumer bankruptcies is not the provision of adequate remedies in individual insolvencies. From our analysis, an increase in consumer bankruptcies is directly related to the failure of the financial markets to moderate unsecured credit to consumers.

225. Consequently, we consider that an amendment of the bankruptcy regime is not required where there is adequate regulation of the financial markets

JERSEY

The Availability of Statutory Insolvency Procedures to Non-trading Debtors

226. A procedure allowing for the insolvency of individuals in Jersey was created under the common law in 1797. The statutory system came into force in April 1991 and covers both trading and non-trading individuals.

227. The individual insolvency regime in Jersey seeks to ensure that debtors who are unable to pay their debts can seek protection from their creditors, whilst their assets should be collected and distributed fairly amongst their creditors. The system allows for the individual's affairs to be subject to examination and provides relief from their debts.

The Law as it Relates to Non-trading Debtors

228. The statutory system came into force in April 1991 under the Bankruptcy (Désastre) (Jersey) Law 1990 ("the 1990 Law").²¹

²⁰ www.consumerconnect.ie

²¹ [http://www.gov.je/Viscount/Desastre+\(Bankruptcy\)](http://www.gov.je/Viscount/Desastre+(Bankruptcy))

229. Judicial pronouncements have provided for a form of bankruptcy now known as “social *désastres*”. Theoretically, social *désastres* could include consumer debtors.

230. Possible proposed changes to the law dealing with “consumer bankrupts” are currently under review.

The Policy Behind Recent Law Changes

231. The principal aim of recent changes has been the admission into bankruptcy of asset-less debtors.

Safeguards Against Potential Abuse

232. The main safeguard against abuse is the vetting of bankruptcy applications by the Viscount and close judicial scrutiny thereafter. Debtors who have lived beyond their means or who have been irresponsible will not generally be admitted into the social *désastre* regime.

Practical Effects of Any recent Changes

233. There have been no perceived changes since the most recent changes.

Debtors’ Views on Any Recent Changes

234. No formal feedback has been received from debtors.

Do Debtors Learn From Their Experiences?

235. Second time bankrupts are very rare. Third time bankrupts are unknown in this jurisdiction.

Creditors’ views on Any Recent Changes

236. Creditors generally have the opportunity to make submissions to the court and tend to rely on the decisions of the court.

Creditor Involvement in the Insolvency Process

237. Formal rights for creditors are strictly limited. However, the Viscount frequently consults principal and majority creditors on their views and expectations. Such creditors sometimes finance ongoing activity by the Viscount: in the majority of cases, if such finance were to be withdrawn, the ongoing activity would generally cease.

Alternatives to Bankruptcy

238. No formal procedures are available to debtors, but voluntary workouts and arrangements are possible, subject to the agreement of creditors. Any choice that the debtor might have between bankruptcy and other alternatives would depend on the goodwill and forbearance of creditors.

239. The disabilities to which a debtor is subject under the 1990 Law obviously do not apply outside a bankruptcy. It is perceived that an element of stigma still applies in the case of personal bankruptcy. If the debtor wished to pursue an alternative to bankruptcy then the debtor would have to find the means to discharge the fees of service-providers duly engaged.

240. No measure of the success, or otherwise, of alternatives to bankruptcy are undertaken, the incidence of bankruptcy being so low (less than 10 cases per year).

Measures Aimed at Preventing Debt Problems

241. A consultation within Government by way of a “Social Study” is currently being undertaken.

Statistics

242. Bankruptcy case numbers are very low, currently less than 10 a year.

RUSSIA

The Availability of Statutory Insolvency Procedures to Non-trading Debtors

243. The Federal Act on Insolvency (bankruptcy) of 2002 provides rules for the bankruptcy of individuals, including traders. But rules on consumer insolvency have not yet come into force. Amendments, which will allow for the filing of bankruptcy for all individuals including non-trading debtors have already been drafted.

244. According to existing law the completion of the insolvency proceeding means that the debtor is relieved from his debts, except debts regarding compensation for an injury or moral damages, alimony claims and other claims connected the debtor’s personality. If any assets are concealed by the debtor then creditors are entitled to demand their claims to be satisfied at the expense of those assets. In accordance with the draft law if the bankruptcy assets do not realize at least 100,000 rubles or more, then the debtor is not discharged from his/debts.

245. The main purpose of the draft law and its amendments are to protect the debtor’s interests, to enable him to be financially rehabilitated and to distribute the debtor’s assets fairly amongst creditors.

The Law as it Relates to Non-trading Debtors

246. The new law is The Federal Act On Insolvency (Bankruptcy) of 2002. Chapter X, which is the relevant part, has not yet come into force for consumer debtors.

247. Chapter X of the act provides for peculiarities of bankruptcy proceeding involving individuals. The main points are:

- 1) A debtor is entitled to propose a debt restructuring plan if there are no objections from creditors (instead of financial improvement and external management proceedings which are applied to legal entities). In this case the proceedings are suspended;
- 2) Non-liquid and some other assets can be excluded from the bankruptcy assets;
- 3) The sale of a debtor's assets can be carried out either by an officer of the court or the liquidator;
- 4) Alimony claims have the same priority as claims concerning compensation for an injury or moral damages;
- 5) As a result of liquidation proceedings the debtor is relieved from his debts, except debts concerning compensation for an injury or moral damages, alimony claims and other claims connected with the debtor's personality if not discharged during the proceeding;
- 6) If any assets are concealed by the debtor creditors are entitled to demand their claims to be satisfied at the expense of that assets;
- 7) A debtor is not allowed to file his bankruptcy repeatedly during the period coming from the date of completion of the previous proceeding; and,
- 8) If during the abovementioned period new bankruptcy case is filed by creditors the debtor is not relieved from his debts.

248. There have not been any further changes since the act referred to above has been passed, other than the amendments referred to.

249. As stated above, the main purposes of the amendments to the draft law are to protect a debtor's interests, to enable him to access rehabilitation proceedings and to distribute the debtor's assets fairly amongst creditors. The major improvements aimed at these purposes are as follows:

- 1) The rights and duties of the insolvency practitioner can be carried out by the debtor personally, if the creditors' consent;
- 2) The creditors' meeting can be held in the creditors' absence by postal voting; and,
- 3) A debt restructuring plan proposed by the debtor may be approved by the arbitration court without creditors' consent if:
 - The plan provides full satisfaction of secured creditors' claims;
 - Creditors will get no less than would be the case if the debtor's assets were sold immediately plus 6 months income; and
 - The term of the plan doesn't exceed 5 years;
- 4) The plan may be cancelled by the arbitration court where infringements are committed by the debtor if they are not corrected before the date of the court sitting;
- 5) If the debtor does not offer a debt restructuring plan or if the plan is cancelled then the arbitration court opens liquidation proceeding;
- 6) There is a list of extra assets, which are excluded from the debtor's bankruptcy assets to enable a "fresh start"; and,
- 7) Where the bankruptcy estate is less than 100,000 rubles and unsatisfied debts remains on completion of liquidation proceeding, the debtor is not relieved from his debts unless he proves that the failure to pay is because of unfavorable life circumstances.

The Policy Behind Recent Law Changes

250. Pursuant to the draft referred to above, the regime is going to be relaxed. The main goals were mentioned above and they are:

- To protect debtor's interests;
- To enable him to resort to rehabilitation proceeding;
- To distribute debtor's assets fairly.

Safeguards Against Potential Abuse

251. The abovementioned draft law is aiming to relax the regime in respect of debtors who act in good faith, and who receive relief from their debts when the proceedings are completed. They will also be allowed to retain some assets. If after the bankruptcy proceedings are completed it proves to be a fraudulent bankruptcy then the debtor will be required to pay off all his/her debts and his property can be sold.

Practical Effects of Any recent Changes

252. No answer provided.

Debtors' Views on Any Recent Changes

253. No survey concerning debtors' views has been conducted.

Creditors' views on Any Recent Changes

254. No survey concerning creditors' views has been conducted.

Alternatives to Bankruptcy

255. The Federal Act On Insolvency (Bankruptcy) of 2002 provides for rules concerning rehabilitation proceedings but they are not yet in force. These proceedings enable the debtor to propose a plan of payment known as a "rehabilitation proceeding". If the draft is passed then the debtor will be entitled to propose a debt restructuring plan after bankruptcy proceedings are filed.

256. As compared with The Federal Act On Insolvency (Bankruptcy) of 2002, the draft provides more favourable rules in respect of the debtor. According to the draft, a debt restructuring plan offered by the debtor can be approved by the arbitration court regardless of creditors' consent if:

- the plan provides full satisfaction of secured creditors' claims;
- creditors will get no less than they would if the debtor's assets were sold immediately plus 6 months income; and
- the term of the plan does not exceed 5 years.

257. The draft allows for the filing of bankruptcy proceedings both by the debtor and by creditors. The debt restructuring plan is a voluntary proceeding and can be proposed by the debtor. The advantage for the debtor offering a debt restructuring plan is the possibility to postpone payments to creditors and to restore his solvency. No additional incentives are provided for the debtor.

258. It is not intended that the debt restructuring plan should impose extra costs on the debtor.

259. There is no measure of success or otherwise of a debt restructuring plan as we have no experience in this field.

Measures Aimed at Preventing Debt Problems

260. No particular measures have been taken.

Statistics

261. No statistics were provided.

UNITED KINGDOM (ENGLAND & WALES)

The Availability of Statutory Insolvency Procedures to Non-trading Debtors

262. The Bankruptcy Act 1571 enabled “commissioners of bankrupts” to be appointed for insolvent traders. Other types of insolvent debtor have been able to petition for their own bankruptcy since 1861. The current legislation (the Insolvency Act 1986, which superseded the Bankruptcy Act 1914) was amended by the Enterprise Act 2002²² to give us the regime we have today.

263. The individual insolvency regime in England & Wales seeks to ensure that debtors who are unable to pay their debts can seek protection from their creditors, whilst their assets should be collected and distributed fairly amongst their creditors. The system allows for the individual’s affairs to be subject to examination and provides relief from their debts.

The Law as it Relates to Non-trading Debtors

264. The Insolvency Act 1986 provides for a debtor who is “unable to pay his debts” to petition the court for his bankruptcy. Alternatively a creditor owed £750 or more may present a petition. The legislation allows for an equitable distribution of assets and surplus income (where there are any) amongst the creditors and provides, in most cases, for an automatic discharge of the debts within 12 months –often earlier in less complex cases.

²² The text of the Enterprise Act 2002 can be found at <http://www.opsi.gov.uk/acts/acts2002/20020040.htm>

265. There is provision within the legislation to tackle misconduct by the debtor – both in terms of criminal behaviour in relation to the insolvency, where the debtor may be prosecuted, and behaviour, which is culpable but not necessarily criminal – where bankruptcy restrictions may be imposed for between 2 and 15 years.

266. Whilst subject to a bankruptcy order the debtor is subject to various restrictions, the one of the most significant being the inability to obtain credit beyond a prescribed amount (currently £500) without disclosing his status.

267. In addition to bankruptcy, the Insolvency Act 1986 also allows a consumer to seek an individual voluntary arrangement (IVA) which is administered by an insolvency practitioner and allows for distribution of the debtor's assets and income in accordance with a proposal agreed by the creditors. Typically such arrangements last for about 5 years and allow for a partial write off of the debts.

268. The Enterprise Act 2002²³ amended the Insolvency Act 1986 with effect from April 2004. The principle changes relating to consumer debtors were a reduction in the automatic discharge period from 3 years to 12 months, with a facility for the official receiver to file a certificate in less complex cases to allow for an earlier discharge, the introduction of a facility for a debtor to make payments out of his income for the benefit of his creditors by agreement with the trustee rather than by court order, and the introduction of a system of restrictions orders (or agreements) for those debtors who are culpable. Such orders impose bankruptcy restrictions for between 2 and 15 years.

269. In relation to bankruptcy, we are giving consideration as to whether or not the order making process could be removed from the court, with the official making the order administratively, but this is at the very early stages. This will, if it goes ahead, streamline the upfront procedure.

270. We are in the process of introducing a new regime of Debt Relief Orders (DRO) for debtors who owe relatively little (i.e. unsecured debts of £15,000 or less) and have nothing with which to pay their creditors. An order made administratively (rather than by the court) will provide relief from enforcement of the debts, which will be discharged after 12 months. Whilst subject to the order, the debtor will face the same restrictions as in bankruptcy.

271. The provisions to introduce DROs were part of the Tribunals, Courts and Enforcement Act 2007. That Act received Royal Assent on 19 July 2007 and the Part that relates to DROs will come into force on 6 April 2009. Further information about DROs can be found on the Insolvency Service website.²⁴

The Policy Behind Recent Law Changes

272. The regime has been relaxed to the extent that the discharge period is shorter and there is a facility for early discharge in some cases, but it has also been tightened

²³ For an explanation of the Enterprise Act 2002 individual insolvency provisions visit <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/legislation/reform.htm>

²⁴ Information on Debt Relief Orders can be found at <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/DebtRelief.htm>

in that there is a wider variety of enforcement measures available to tackle the culpable debtor.

273. The main driver for change was to enable the prompt rehabilitation of debtors to allow a fresh start and help lift the stigma of bankruptcy, whilst at the same time protecting the public from those bankrupts who have contributed to their insolvency through misconduct.

Safeguards Against Potential Abuse

274. Although the discharge period has been reduced, the range of enforcement remedies has been extended to include bankruptcy restrictions orders and undertakings (BRO/U). The effect of BRO/Us is to extend the restrictions that apply to undischarged bankrupts beyond discharge for a period of between 2-15 years. BRO/Us are aimed at tackling those debtors who are culpable but not necessarily criminal. The Insolvency Service secured 1,867 BRO/Us in 2006 with 86% being obtained by way of undertaking. This is an increase of 121% on the previous year when 843 BRO/Us were obtained.

275. There is also the facility to prosecute in cases where there is criminality.

276. In addition, more effective procedures have been put in place to ensure that bankrupts make reasonable payments out of income for three years by the introduction of income payment agreements (IPA).

277. The Following table shows the numbers of Income Payment Orders and Agreements over a number of years:

<u>Year</u>	Income Payment Orders	Income Payment Agreements	Total
2002	1,893	-	1,893
2003	2,265	92	2,357
2004	1,254	5,000	6,254
2005	69	9,033	9,102
2006	86	11,904	11,990
2007	74	12,982	13,056

278. Creditors are entitled to object where the official receiver proposes to file a certificate for early discharge. In addition, in cases where there is a lack of cooperation from the debtor then application can be made to suspend the discharge of the debtor.

Practical Effects of Any recent Changes

279. The Insolvency Service is in the process of evaluating the effect of the changes brought about by the Enterprise Act 2002. The Final Evaluation report on the effects of the individual insolvency provisions of the Enterprise Act 2002 are available on the Insolvency Service website.²⁵

280. Earlier evaluation work suggests that just over 25% of debtors have opened a bank account since being discharged.

Debtors' Views on Any Recent Changes

281. Debtor's views have been sought on various aspects of the bankruptcy process. Of particular relevance are the Discharge from Bankruptcy report (published 2006)²⁶ and Bankruptcy Courts Survey 2005 – A Pilot Study (published January 2006)²⁷.

282. Only 16% of debtors were aware of and influenced by the reduction in automatic discharge period, and only 8% were aware of an influenced by the early discharge provisions. However, around 40% thought that the reduction in period and the early discharge provisions had reduced the stigma. 80% agreed with the early discharge provisions.

Do Debtors Learn From Their Experiences?

²⁵ The Evaluation report can be found at <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/legislation/evaluation/finalreport/home.htm>

²⁶ The Discharge from Bankruptcy Report can be found at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/policychange/Discharge%20from%20bankruptcy.doc>

²⁷ The Bankruptcy Courts Survey can be found at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/persdocs.htm>

283. Prior to the changes, the incidence of second time bankrupts was around 4%. Following the changes it has fallen to around 2.5%.²⁸ It is possible that the new BRO regime has had an impact in deterring second time bankruptcy.

284. Interim evaluation research found that 85% of bankrupts felt that automatic discharge after 1 year gave, if necessary, sufficient time to learn from the bankruptcy.

Creditors' views on Any Recent Changes

285. Creditors views have been sought on various aspects of bankruptcy and their views on the changes have been sought as part of the evaluation exercise mentioned above. Results are expected later this year.

286. Interim evaluation material suggests that creditors did not support the reduction in discharge period because of fears it may encourage more people to enter bankruptcy. They also did not feel that second time bankrupts should be discharged as quickly as first time bankrupts.

Creditor Involvement in the Insolvency Process

287. Creditors may requisition a meeting of creditors, they may decide who should act as trustee, determine the trustee's remuneration, sit on a creditors committee and may ask the court to review the proceedings. Creditors frequently nominate an insolvency practitioner to act as trustee. Less frequently, they ask the official receiver to convene a meeting. They may also object to early discharge of the debtor, and also to the release of the trustee.

Alternatives to Bankruptcy

288. The principal statutory alternative to bankruptcy is the individual voluntary arrangement, which is an insolvency proceeding under the Insolvency Act 1986 and came in to force in 1986. IVAs are administered by an insolvency practitioner and allow for distribution of the debtor's assets and income in accordance with a proposal agreed by the creditors. Typically such arrangements last for about 5 years and allow for a partial write off of the debts

289. Outside of the statutory insolvency regime, there are also County Court Administration Orders (c1888), a procedure contained in the County Courts Act 1984, aimed at very low level debtors (owing less than £5000) who are able to repay part of their debt. This regime is underused (3,948 in total in 2004) and shortly to be reformed.

290. There are also a large number of unregulated debt management plans, where the debtor, often with the assistance of a company specialising in this area, comes to an arrangement to pay his creditors on a regular basis. Such plans are not subject to statutory regulation. Many last for very long periods of time (in excess of ten years) and, unlike the statutory procedures do not offer partial write off of the debts.

²⁸ See Interim Evaluation Report at:
<http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/legislation/evaluation/Discharge/Discharge2.pdf>

291. Legislation in the form of the Tribunals Courts and Enforcement Act 2007²⁹ introduces DROs, a debt relief procedure for low income/asset debtors who owe relatively little but have no way to pay their debts and need relief from enforcement. The Act also amends the current County Court Administration Order regime with the intention of opening it to a wider pool of people.³⁰

292. Additionally, it is proposed to amend the legislation relating to less complex individual voluntary arrangements to streamline the process and remove some of the administrative burdens in smaller cases, thus making such cases cheaper to administer.³¹

293. Debtors may choose which procedure is best for them, but clearly to some extent the choice will be dependent on the debtor's financial circumstances.

294. It is open to creditors owed more than £750 to present a bankruptcy petition and thus, subject to the views of the court, enforce bankruptcy even if the debtor is unwilling. The debtor may seek an annulment of the order if he is able to pay his creditors or subsequently enter an IVA.

295. Using an alternative to bankruptcy will mean that the debtor retains some control over his assets and is not restricted by legislation in the same way as bankruptcy in relation to certain activities –for example, obtaining credit (although realistically his credit rating will suffer whatever route is chosen), or acting as a company director.

296. At present debtors often pay a fee for the work done by the insolvency practitioner prior to the IVA being agreed, and then further funds for the supervision of the arrangement. Such fees vary depending on the complexity of the case, but supervisor's fees are often in the region of £4-5,000.

297. In the few cases where the debtor enters an administration order, the court takes a fee of 10% of the monies collected.

298. There is no formal activity to measure the success of IVAs, but consideration is being given to how management information in this area could be used. This work is being taken forward by a group of stakeholders chaired by The Insolvency Service known as the IVA Stakeholder Group.

299. Administration Orders are known to be ineffective, and as indicated earlier, and in the process of being reformed.

²⁹ The text of the Tribunals, Courts and Enforcement Act 2007 can be found at:
<http://www.opsi.gov.uk/acts/acts2007/20070015.htm>

³⁰ See “Relief for the Indebted – An Alternative to Bankruptcy” Summary of Responses and Government Reply www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/relieffortheindebtedanalternativetobankruptcyresponse.pdf

³¹ See “Improving Voluntary Arrangements” Summary of responses and Government Reply” www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/improvingIVAsgovtresponse.pdf

300. IVAs are administered by private sector insolvency practitioners. In recent years there has been a big increase in the promotion and advertising of IVAs, primarily through a number of bulk providers who advertise on daytime television and so on. However, this activity tailed off in 2007. There was a degree of adverse public criticism about this and the Office of Fair Trading has been looking into some of the advertising practices and issued a warning to 17 of the largest providers about the wording used in their advertisements.

Measures Aimed at Preventing Debt Problems

301. There is a cross government strategy to deal with over-indebtedness, its two objectives being to reduce the number of people getting into debt and improve the support and processes for those who do. The strategy has been in place since July 2004, and encompasses a wide range of initiatives from a variety of government departments, including improving financial literacy, better access to affordable credit, helping people on lower incomes to save, tackling illegal lending and provision of additional funding for face-to-face debt advice. The Insolvency Service's parent department (The Department for Business, Enterprise and Regulatory Reform) produces an annual report on over-indebtedness.³²

Statistics³³

302. Bankruptcy is a court-based procedure that grants relief from enforcement. Such assets and surplus income as the debtor has or acquires whilst undischarged are distributed to the creditors by a trustee and the debts are discharged after a period normally within one year. Whilst undischarged the debtor is subject to certain restrictions –for example he cannot obtain credit beyond the prescribed amount without disclosing his status, or act as a company director without leave of the court.

303. IVAs are an alternative to bankruptcy aimed at individuals who have assets or income (or both) to repay at least some of their debt. 75% by value of the creditors must agree to a proposal made by the debtor as to how he will repay his debts, and the arrangement is administered within the private sector by authorised insolvency practitioners, although there is a facility for the court to intervene if necessary.

³² The 2007 Over-indebtedness Report can be found at <http://www.berr.gov.uk/files/file42700.pdf>

³³ Further statistics can be found at:

<http://www.insolvency.gov.uk/otherinformation/statistics/statisticsmenu.htm>

304. The following table gives details of recent individual insolvency numbers:

Year	Bankruptcy	IVA
2000	21,550	7,978
2001	23,477	6,298
2002	24,292	6,295
2003	28,021	7,583
2004	35,898	10,752
2005	47,291	20,293
2006	62,956	44,332
2007	64,480	42,165

**UNITED KINGDOM
(NORTHERN IRELAND)**

The Availability of Statutory
Insolvency Procedures to
Non-trading Debtors

305. Insolvency legislation in Northern Ireland does allow an individual to become bankrupt, and has done for some time. The legislation includes provision for both trading and non-trading individual debtors (“consumer debtors”) relief from their debts.

306. As is the case in the rest of the United Kingdom, the individual insolvency regime in Northern Ireland seeks to ensure that debtors who are unable to pay their debts can seek protection from their creditors, whilst their assets should be collected and distributed fairly amongst their creditors. The system allows for the individual’s affairs to be subject to examination and provides relief from their debts.

The Law as it Relates to Non-trading Debtors

307. The principal legislation that deals with non-trading debtors in Northern Ireland is the Insolvency (NI) Order 1989 [S.I. 1989/2405(N. I.19)] as amended by the Insolvency (NI) Order 2005 [S.I. 2005/1455(N.I. 10)]. There are also various pieces of subordinate legislation including the Insolvency Rules (NI) 1991.

308. The Insolvency (NI) Order 2005 introduced changes to the personal insolvency regime that are broadly similar to those introduced in England & Wales by the Enterprise Act 2002.

309. Policy work has begun on a Northern Ireland Assembly Act to bring in Debt Relief Orders which will allow indebted individuals with little or no assets or income to obtain an Order for relief from the Official Receiver as an alternative to having to petition the court for a bankruptcy order. It is also planned to bring in legislation to simplify the law applying to individual voluntary arrangements.

The Policy Behind Recent Law Changes

310. The changes brought in by the 2005 Order are intended to allow bankrupts who are not culpable to be financially rehabilitated but also to provide that, where there was an intent to defraud, then the public would be protected.

Safeguards Against Potential Abuse

311. Bankrupts found to be culpable can be placed under continuing restrictions following discharge. Those provisions are identical to the Bankruptcy Restriction Order regime introduced in England & Wales in 2004.

Practical Effects of Any recent Changes

312. The changes made would not directly affect obtaining a bank account or employment. However being discharged after one year instead of three would obviously restore the right to engage in professions or occupations where bankruptcy was an obstacle.

Debtors' Views on Any Recent Changes

313. Debtors' views have not been sought on recent changes.

Creditors' views on Any Recent Changes

314. Creditors' views have not been sought on recent changes.

Creditor Involvement in the Insolvency Process

315. Creditors have the right to appoint a trustee in all bankruptcies but only do so in cases where there are significant assets. They also have a right to appoint a creditors committee to assist with an administration but this is seldom exercised.

Alternatives to Bankruptcy

316. The main alternative to bankruptcy in Northern Ireland is Individual Voluntary Arrangements (IVA), the law on which is contained in Part 8 of the Insolvency (Northern Ireland) Order 1989.

317. The Insolvency (NI) Order 2002 removed the need for a debtor seeking to enter an IVA to apply to the Court for a moratorium from creditor action.

318. The legislation does not impose the option on the debtor. Essentially, the choice is the debtor's although acceptance depends upon the creditors attitude.

319. The main incentives for the debtor to use an alternative to bankruptcy in Northern Ireland are that the debtor retains more control over assets and less publicity than in bankruptcy.

320. The cost to the debtor of an IVA will be the Nominee's fee (which typically will be between £1,500-£2,500) and the Supervisor's fee for administering the IVA. However, the supervisor's fee is borne by the creditors out of realisations.

321. IVAs are mainly administered by private sector insolvency practitioners and there is a degree of aggressive marketing. The Insolvency (NI) Order 2005 brought in provisions to allow the OR to administer post-bankruptcy IVA cases.

Measures Aimed at Preventing Debt Problems

322. The Department's Consumer Affairs Branch funds additional debt advisors employed by Citizens Advice.

Statistics

Year	Bankruptcies	IVAs	Total
2001	292	176	468
2002	334	207	541
2003	517	318	835
2004	666	449	1,115
2005	821	663	1,454
2006	1,036	774	1,810
2007	897	440	1,337

Miscellaneous

323. The law in Northern Ireland does not distinguish consumer bankrupts from other types of bankrupts such as those involved in trading activities

UNITED KINGDOM (SCOTLAND)

The Availability of Statutory Insolvency Procedures to Non-trading Debtors

324. Scottish Law allows a debtor who owes at least £1500 to petition for their own bankruptcy on grounds of “apparent insolvency”, i.e. evidence of action for recovery of debt through the Courts where time to pay has expired. This was introduced from 1 April 1993 by Section 3 of the Bankruptcy (Scotland) Act 1993. Prior to this, a debtor could petition for their own bankruptcy only with the consent of a creditor or if their creditors had refused a Protected Trust Deed³⁴.

325. There is no distinction in Scottish bankruptcy law between consumer and trading debtors. Section 6 of the Bankruptcy (Scotland) Act 1985 allows a “debtors” petition to be made by a trust, a partnership, a limited partnership, a body corporate or an unincorporated body

326. Bankruptcy Law in Scotland does not distinguish between fraudulent and innocent debtors. All debtors are discharged after 3 years unless a deferment is required in order to administer the case, which may happen e.g. if a debtor is uncooperative. Discharge is not deferred for public protection or as a punishment.

The Law as it Relates to Non-trading Debtors

327. The principal legislation in Scotland is the Bankruptcy (Scotland) Act 1985, as amended. This legislation, largely reflected the bankruptcy law in England & Wales in terms of its duration and effects.

³⁴ A voluntary trust deed is a less formal way of dealing with debt problems. It is a legally binding agreement by which the debtor's estate is transferred to the trustee to administer and realise for the benefit of the creditors. There are no court processes involved and less restrictions on the debtor. If the trust deed meets certain basic requirements, it can be registered as protected and this then becomes binding on all the creditors.

328. The Debt Arrangement Scheme was introduced from 30 November 2004 as an alternative form of debt relief for debtors who have multiple debts and require time to pay.

329. The Bankruptcy and Diligence etc. (Scotland) Act 2007³⁵ received royal Assent on 17 January 2007. The bankruptcy Part was commenced from 1 April 2008 and introduced 1 year discharge for all bankrupts, whether traders or non-traders, and also introduced Bankruptcy Restrictions Orders. Details of the new law can be found on the Accountant in Bankruptcy Website.³⁶

The Policy Behind Recent Law Changes

330. The changes that were introduced on 1 April 2008 were intended to encourage restart for business bankruptcies and to distinguish innocent from culpable bankruptcies. Bankruptcy Restrictions Orders and Undertakings (BRO/Us) will provide public protection against misconduct.

Safeguards Against Potential Abuse

331. BRO/Us for the fraudulent majority are intended to balance shorter discharge for the majority of debtors.

Practical Effects of Any recent Changes

332. Since 1 April 2008, a debtor who wishes to make themselves bankrupt no longer has to go to court. All debtor applications must be sent to and decided by the Accountant in Bankruptcy. A debtor must owe a minimum of £1,500 before they can apply for their own bankruptcy. If a creditor wishes to make a debtor bankrupt they must show to the court that the debtor owes a minimum of £3,000.

333. The Court of Session no longer awards or recalls bankruptcies. All creditor petitions and recalls must be submitted to sheriff courts. A sheriff will be allowed to delay their decision on a creditor's petition for bankruptcy to give a debtor time to agree a payment plan that will remove the need for them to be made bankrupt.

334. A new route into bankruptcy has been introduced for people on low income who do not own property and have very little in savings or other assets. This is known as Low Income Low Assets (LILA).

Debtors' Views on Any Recent Changes

335. Debtors' views have not been sought.

Creditors' views on Any Recent Changes

336. Creditors' views have not been sought.

³⁵ <http://www.opsi.gov.uk/legislation/scotland/acts2007/20070003.htm>

³⁶ <http://www.aib.gov.uk/guidance/Legislation/legislationpostapril08>

Creditor Involvement in the Insolvency Process

337. Creditors have the right to petition for bankruptcy, to nominate a private insolvency practitioner to act as Trustee, to nominate commissioners to oversee the administration of bankruptcy and the right to challenge the acts or omissions of a Trustee in the Courts.

Alternatives to Bankruptcy

338. The principal alternatives to bankruptcy in Scotland are firstly, the Debt Arrangement Scheme³⁷ which was introduced by the Debt Arrangement and Attachment (Scotland) Act 2002 (underpinned by the Debt Arrangement Scheme (Scotland) Regulations 2004) and secondly, Protected Trust Deeds which were introduced by the Bankruptcy (Scotland) Act 1985, Schedule 5.

339. Recent changes made to the law relating to alternatives to bankruptcy for consumer debtors are the freezing of interest and the protection for pending applications which were introduced in the Debt Arrangement Scheme from 30 June 2007 by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2007³⁸ (SSI 2007/262) and the Debt Arrangement Scheme (Scotland) Amendment (No. 2) Regulations 2007³⁹ (SSI 2007/187)

340. Debtors have the choice about which option to choose, but the rules on “apparent insolvency” disallow some debtors from choosing bankruptcy. There are no statutory incentives for a debtor to choose an alternative to bankruptcy.

341. Protected Trust Deeds cost around £3-4000 to administer and this is taken out of the debtor’s estate, effectively reducing dividends. The Debt Arrangement Scheme allows a fee to a payment distributor but the debt is effectively reduced by the amount of the fee.

342. There is aggressive marketing of Protected Trust Deeds despite the fact that this cannot legally be done direct by Trustees.

Measures Aimed at Preventing Debt Problems

343. There are no such measures within the Accountant in Bankruptcy but the Scottish Executive funds money advice.

Statistics⁴⁰

Year	Sequestration	Protected Trust Deeds	Total
2001	3,048	3,779	6,827

³⁷ For more information on the Debt Arrangement scheme visit www.moneyscotland.gov.uk

³⁸ <http://www.opsi.gov.uk/legislation/scotland/ssi2007/20070262.htm>

³⁹ <http://www.opsi.gov.uk/legislation/scotland/ssi2007/20070187.htm>

⁴⁰ See http://www.aib.gov.uk/Statutory%20Documents/Annual%20Report_2005-06.pdf for further statistics

2002	3,215	5,174	8,369
2003	3,328	5,452	8,780
2004	3,297	6,024	9,321
2005	4,965	6,881	11,846
2006	5,430	8,208	13,638
2007	6,219	7,595	13,814

Miscellaneous

344. The distinction between consumer and trading debt is not always clear cut. For example, a self-employed debtor who is sequestered on the petition of the Inland Revenue may be unable to pay a tax debt because of overall consumer debt.

UNITED STATES

The Availability of Statutory Insolvency Procedures to Non-trading Debtors

345. Title 11 of the United States Code⁴¹ (the “Bankruptcy Code”) allows individuals to become debtors (bankrupt). This concept originally came into force in 1841, with passage of the Bankruptcy Act of 1841

346. The Bankruptcy Code allows consumer debtors to discharge certain debts. This concept originally came into force in 1841, with passage of the Bankruptcy Act of 1841.

347. The individual insolvency regime in the United States seeks to ensure that debtors who are unable to pay their debts can seek protection from their creditors, whilst their assets should be collected and distributed fairly amongst their creditors. The system allows for the individual’s affairs to be subject to examination and provides relief from their debts.

The Law as it Relates to Non-trading Debtors

348. In the United States, consumer debtors usually file under Chapter 7 or Chapter 13 of the Bankruptcy Code (11 U.S.C.).

349. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005⁴² made substantial changes to the consumer and business provisions of the Bankruptcy Code. The amendments made by the 2005 Act came into force on October 17, 2005.

350. The 2005 Act was a comprehensive package of reform measures pertaining to both consumer and business bankruptcy cases. According to the legislative history, the purpose of the 2005 Act was “to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors.” The heart of the Act’s consumer

⁴¹ For further information on the US Bankruptcy Code see:
<http://www.uscourts.gov/bankruptcycourts/bankruptcybasics.html>

⁴² For further information go to [pcpa/index.htm](http://www.uscourts.gov/bankruptcycourts/bankruptcybasics.html)

bankruptcy reforms consists of the implementation of an income/expense screening mechanism (“needs-based bankruptcy relief” or “means testing”), which was intended to ensure that debtors repay creditors the maximum amount they can afford.

351. There are no current policy initiatives or any proposed changes to the law dealing with “consumer bankrupts” in the United States.

The Policy Behind Recent Law Changes

352. The 2005 amendments to the Bankruptcy Code were intended, in part, to help prevent abuse of the bankruptcy system, and to ensure that debtors repay creditors the maximum amount they can afford.

Safeguards Against Potential Abuse

353. Not applicable. The regime for consumer bankruptcies has not been relaxed in the United States.

Practical Effects of Any recent Changes

354. The changes made by the 2005 Act had several practical effects for individual debtors. For example, individual debtors must now receive credit counselling before filing a bankruptcy petition. Furthermore, the court may deny an individual debtor’s discharge if the debtor does not complete an instructional course concerning financial management.

355. The 2005 Act was intended, in part, to force more consumer debtors into Chapter 13 instead of Chapter 7. It is too soon to determine if this objective was accomplished.

Debtors’ Views on Any Recent Changes

356. No such survey of debtors has been undertaken

Creditors’ views on Any Recent Changes

357. No such survey of creditors has been undertaken.

Creditor Involvement in the Insolvency Process

358. Creditors are “interested parties” in bankruptcy cases and have certain rights and powers. For example, creditors may attend the first meeting of creditors and question the debtor under oath regarding the debtor’s financial affairs. Creditors may also:

- (i) File a complaint to obtain a determination of the dischargeability of any debt;
- (ii) File a motion seeking relief from the automatic stay; and
- (iii) Object to confirmation of a debtor’s Chapter 13 plan. Creditors frequently exercise these rights.

Alternatives to Bankruptcy

359. In the United States, Chapter 13 is part of the Bankruptcy Code. Debtors who file under Chapter 13 are subject to the jurisdiction of the bankruptcy court, and are subject to the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.

360. Under Chapter 13, individuals with regular income develop a plan to repay all or part of their debts. The general concepts contained in Chapter 13 originally came into force in 1841, with passage of the Bankruptcy Act of 1841.

361. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 made substantial changes to Chapter 13 of the Bankruptcy Code. The amendments made by the 2005 Act came into force on October 17, 2005.

362. Chapter 13 debtors must now receive credit counselling before filing a bankruptcy petition. Also, the court may deny an individual debtor's discharge if the debtor does not complete an instructional course concerning financial management.

363. In general, if a debtor's current monthly income is greater than the state median income, the debtor will not be eligible for relief under Chapter 7 of the Bankruptcy Code. Such debtors must file under Chapter 13.

364. There are incentives for the debtor to use an alternative to bankruptcy in the United States. Unlike Chapter 7, Chapter 13 debtors are generally permitted to retain their property. Chapter 13 also gives debtors the opportunity to cure arrearages on secured debts over a specified period of time. Additionally, the discharge under Chapter 13 is slightly broader than the discharge under Chapter 7.

365. The Chapter 13 filing fee is currently \$274.00 (\$235.00 statutory filing fee + \$39.00 administrative fee).

366. The Administrative Office of the US Courts tracks the completion rate of Chapter 13 plans. If the debtor completes the plan, and therefore makes all payments required by the plan, the case was a "success."

367. Chapter 13 is not "provided" by the private sector. Debtors who file under Chapter 13 are subject to the jurisdiction of the bankruptcy court.

Measures Aimed at Preventing Debt Problems

368. From time to time, court personnel conduct public outreach programs to educate high school and college students about wise financial management. There are also a wide variety of courses offered by the non-profit and for-profit sectors.

Statistics⁴³

369. The Administrative Office of the US Courts maintains detailed statistics regarding the number of bankruptcy filings, including Chapter 13 filings.

⁴³ For further statistics go to <http://www.uscourts.gov/bnkrpctystats/bankruptcystats.htm>

Non-Business Bankruptcy Filings

Year	Chapter 7	Chapter 11	Chapter 13	Total
2002	1,087,602	984	450,516	1,539,111
2003	1,156,274	930	467,999	1,625,208
2004	1,117,766	946	444,428	1,568,145
2005	1,631,011	877	407,322	2,039,214
2006	349,012	520	248,430	597,965

370. For a good description of each of the procedures included in the statistics, please see the publication entitled *Bankruptcy Basics*⁴⁴.

⁴⁴ <http://www.uscourts.gov/bankruptcycourts/bankruptcybasics.html>.

APPENDIX A – SUMMARY QUESTIONS RESPONDED TO - BY COUNTRY

	AUS	BVI	CAN	CZE	FIN	HK	IRE	JER	RUS	UK (EW)	UK (NI)	UK (S)	USA
A1	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
A2	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
A3	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
A4	N/A	N/A	Y	Y	N	Y	N/A	N/A	Y	N/A	N/A	N/A	Y
B1	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
B2	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
B3	Y	Y	Y	N/A	Y	Y	Y	Y	Y	Y	Y	Y	Y
C1	N/A	Y	Y	N/A	N	Y	N/A	Y	Y	Y	Y	Y	Y
C2	Y	Y	Y	N/A	N	Y	N/A	N/A	N	Y	Y	Y	Y
D1	N/A	N/A	Y	Y	N	N/A	N/A	Y	Y	Y	Y	Y	Y
E1	Y	Y	Y	Y	N	N/A	N/A	Y	N	Y	Y	N/A	Y
F1	Y	Y	Y	N/A	N	N/A	N/A	Y	Y	Y	Y	N/A	Y
F2	Y	N/A	Y	N/A	N	N/A	N/A	N/A	N	Y	N/A	N/A	N/A
F3	Y	N/A	Y	N/A	N	N/A	Y	Y	N	Y	N/A	N/A	N/A
G1	Y	Y	Y	N/A	N	Y	N/A	Y	Y	Y	Y	N/A	Y
G2	Y	N/A	Y	N/A	N	N/A	N/A	Y	N	Y	N/A	N/A	N/A
G3	Y	Y	Y	Y	Y	N/A	Y	Y	N	Y	Y	Y	Y
H1	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
H2	Y	Y	Y	Y	Y	Y	Y	N/A	N	Y	Y	Y	Y
H3	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
H4	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
H5	Y	Y	Y	N/A	Y	Y	Y	Y	Y	Y	Y	Y	Y
H6	Y	N/A	Y	N/A	Y	Y	Y	Y	Y	Y	Y	Y	Y
H7	Y	Y	Y	N/A	Y	Y	Y	Y	Y	Y	Y	Y	Y
I1	Y	Y	Y	N/A	Y	Y	Y	Y	Y	Y	Y	Y	Y
J1	Y	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y
K1	Y	N/A	N	N	N	Y	Y	Y	N	N	Y	Y	Y

APPENDIX B – SURVEY FORM SENT TO MEMBERS

IAIR Member/Country Details

Country	
Agency name	
Contact person	
Contact email address	

Part A – General propositions

The origins of bankruptcy law were for the benefit of creditors and to achieve repayment of the debt owing to them. However, over time, “social policy” has become more and more influential in determining the aims of bankruptcy law e.g. the relief from debt and its effects. This has been achieved, amongst other things, by allowing self-petitioning, exempt assets and discharge outside of creditor control.

Over the years, insolvency systems have been designed by legislators and judges to meet the needs of their own days. The problem is that those needs have often been conflicting depending on who the stakeholder is. It is difficult for policy-makers to get a balance and to take account of those diverse, often conflicting, interests.

As early as 1900, the aims of bankruptcy law were described by Brown in The Journal of Comparative legislation as:

- Punishment of the fraudulent debtor;
- Rehabilitation of the unlucky but innocent debtor; and,
- Equitable distribution of the assets.

The propositions have not changed that much over time, those propositions being that debtors who are unable to pay their debts can seek protection from their creditors, their assets should be collected and distributed fairly amongst their creditors, their affairs should be subject to examination and they should obtain relief from their debts if the situation warrants it.

Subject to that analysis being correct, the first area of this study is whether those propositions continue to underpin bankruptcy regimes or the extent to which they have been modified in at least some jurisdictions which have moved away from a “one size fits all” approach.

A1. Does your jurisdiction allow an individual to become bankrupt, and if so, when did this come into force?

Answer:

A2. Does your jurisdiction have statutory systems that allow non-trading individual debtors (“consumer debtors”) relief from their debts, and if so, when did this come into force?

Answer:

A3. Do the essential propositions that underlie most bankruptcy regimes, and that are outlined above, apply in your jurisdiction? If not then please explain the underlying propositions that apply in your jurisdiction for non-trading personal insolvencies.

Answer:

A4.If your jurisdiction has no such provisions for “consumer debtors”, has it been, or is it currently being considered?

Answer:

Part B – The law

B1. Please briefly set out the current law in your jurisdiction that deals with “consumer bankrupts” (in the USA this might be termed Chapter 7), including the title of the relevant statutes?

Answer:

B2. Please describe any changes in the last 5 years that have been made to the law relating to consumer bankrupts, the purpose of those changes and the dates on which those changes came into force?

Answer:

B3. Are there any current policy initiatives or any proposed changes to the law dealing with “consumer bankrupts” in your jurisdiction? If so, please describe them and their purpose.

Answer:

Part C – Drivers

C1.Where regimes have been relaxed, what were the changes trying to achieve?

Answer:

C2.Where regimes have been tightened, what were the changes trying to achieve?

Answer:

Part D – Safeguards

D1.Where your jurisdiction has relaxed the regime for consumer bankrupts, what safeguards have been put in place to guard against abuse?

Answer:

Part E – Practical Effects

E1. Where changes took place what have the practical effects of any changes been for the individual debtor? For example, has it been easier or harder to get a bank account or employment?

Answer:

Part F – Debtors’ Views

There is a related issue to the “practical effects” question above, of how more relaxed or more stringent regimes are viewed by debtors. Along with that, have debtors learnt anything from their experience.

F1. If changes to regimes have been made, have debtors been asked for their views on those changes? If so, please give details of when that survey was undertaken.

Answer:

The following two questions are only applicable if debtors have been asked for their views.

F2. How do debtors view the relaxation/tightening of the regimes?

Answers:

F3. What is the incidence of second/third time bankrupts and does this give any indication of the debtors' ability to learn from the experience?

Answers:

Part G - Creditors’ views

G1. If changes to regimes have been made, have creditors been asked for their views on those changes? If so, please give details of when that survey was undertaken.

Answer:

The following question is only applicable if creditors have been asked for their views.

G2. What are creditors' attitudes towards changes in personal insolvency regimes?

Answer: Further material should be available later this year.

G3. In your jurisdiction, to what extent do creditors have rights/powers to be involved in the bankruptcy process and do they exercise those rights?

Answer:

Part H – Alternatives to bankruptcy

A number of jurisdictions have introduced alternatives to bankruptcy where the debtor is able to put forward a proposal for payment, in whole or in part, to his/her creditors; and some jurisdictions are currently reviewing and revising their alternatives. This section of the survey seeks information about, and access to, alternatives to bankruptcy, including the costs and the benefits for debtors and creditors and how straightforward the procedures are; and on the basis of the recent USA amendments, who initiates an alternative.

In addition to provisions to deal with consumer debtors with assets and/or income, more recently proposals have emerged to deal with consumer debtors with relatively low levels of debt and who have few, if any, assets and no, or little, surplus income, where there is no evidence of misconduct on their part; where it would seem unnecessary and inappropriate to apply the formal, and costly, mechanisms of bankruptcy; and where there are recognised as being adverse socio-economic consequences of being in debt and being too poor to pay.

H1. What is the law in your jurisdiction relating to alternatives to bankruptcy for consumer debtors (in the USA this might be termed Chapter 13) and, if applicable, when did it come into force?

Answer:

H2. Please describe any recent changes that have been made to the law relating to alternatives to bankruptcy for consumer debtors and the dates upon which those changes came into force?

Answer:

H3. Do debtors have a choice between bankruptcy and any alternatives or does the legislation impose the option?

Answer:

H4. Are there any incentives for the debtor to use an alternatives to bankruptcy available in your jurisdiction?

Answer:

H5. Please outline the cost to the debtor of any alternatives to bankruptcy available in your jurisdiction?

Answer:

H6. Do you seek to measure the success of any alternatives to bankruptcy in your jurisdiction, if so, how do you define and measure “success”?

Answer:

H7. Where you have introduced an alternative to bankruptcy, has that alternative been provided by the private sector, and if so have you seen aggressive marketing campaigns in favour of alternatives to bankruptcy in your jurisdiction?

Answer:

Part I – Preventative Measures

I1. What measures have been taken in your jurisdiction (or by your office), if any, to reduce the likelihood of consumers getting into debt problems in the first place, e.g. financial counselling or education and, if applicable, when did those measures take effect?

Answer:

Part J – Statistics

J1. It would be helpful if, for comparative purposes, you could provide statistics on the numbers of bankruptcies and alternatives to bankruptcy. Whatever statistics that can be provided will be helpful, but figures going back to the year 2000 would be ideal? In addition could you please provide a very brief description of each procedure included in the statistics.

Answer:

Part K – Miscellaneous

K1. Are there any other points that you would like to make about the treatment of consumer debtors in your jurisdiction, or more generally?

Answer:

MANY THANKS FOR TAKING THE TIME TO COMPLETE THIS SURVEY



The IAIR is a world-wide organisation of government departments, ministries, agencies and public authorities with responsibility for insolvency policy and legislation, regulation and/or practice and administration