



# Financial Rights

LEGAL CENTRE

E-FLYER



CALL THE  
CREDIT & DEBT  
HOTLINE ON  
1800 007 007

CALL THE  
INSURANCE  
LAW SERVICE  
ON  
1300 663 464

Financial Rights Legal Centre Inc.  
ABN 40 506 635 273

Fact sheets are information only and should not be relied upon as legal advice. Some of this information only applies to NSW.

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Welcome to the FINANCIAL RIGHTS LEGAL CENTRE E-flyer.

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### 1. What we do at the Financial Rights Legal Centre: *Credit & Debt issues we can NOT help you with*

We are a community organisation with limited resources and limited expertise. We can provide advice about dealing with personal banking products, such as credit cards, personal loans, mortgages, car loans and fringe lending. We can also give some advice and options about ATO debts, utility debts, Ombudsman services, debt collection activities, rules surrounding early release of superannuation, and some information regarding bankruptcy.

Areas where we are unable to help consumers include the following:

#### Rental arrears and tenancy issues

- Instead contact the tenancy advice service in your state, for example in NSW you can visit <http://www.tenants.org.au/>

#### Business Matters (including business loans and debt)

- Contact the business commissioner in your state, for example in NSW visit [www.smallbusiness.nsw.gov.au](http://www.smallbusiness.nsw.gov.au)

#### Financial and Investment Advice

- ASIC's Money Smart website has great information on financial advice and how to choose an adviser: <https://www.moneySMART.gov.au/investing/financial-advice>

[www.financialrights.org.au](http://www.financialrights.org.au)



## Recommending Loans

- You may decide to get a finance or mortgage broker to help you choose the right loan, but first you should read this factsheet: <http://financialrights.org.au/wp-content/uploads/2014/02/FRLC-Factsheet-Finance-Mortgage-Broker1.pdf>

## Disputes with Superannuation Companies

- The Superannuation Complaints Tribunal is an independent dispute resolution body which offers a free, 'user-friendly' alternative to the court system. You can find more information here: <https://www.sct.gov.au/>

If you call us with questions about the above issues we will not be able to help you, but we will endeavour to refer you to the appropriate company, government or community department where possible.

## 2. Debt Management Firms

Consumer advocates, including Consumer Action Law Centre and Financial Rights Legal Centre, have observed an explosion in recent years of firms that provide quasi-financial service "solutions" to consumers in financial distress.

Debt management firms can be categorised into four groups:

1. debt negotiation,
2. credit repair,
3. Part IX debt agreement brokers, and
4. personal budgeting services.

These businesses have a number of common elements, including:

- Targeting consumers experiencing financial stress, particularly low-income Australians;
- Failing to provide clear explanations of fees and charges during initial contact by consumers;
- Charging high up-front and ongoing fees for 'services';
- Suggesting high cost 'solutions' to debt problems that are not in the consumer's best interests, potentially leaving them in a worse financial position than before – even when there is a free dispute resolution service available to the consumer.

The lack of regulation in this sector is having a detrimental impact on people with debts or concerns about their creditworthiness.



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ASIC released a report into these businesses in January 2016 called *Paying to get out of debt or clear your record: The promise of debt management firms*. In this report ASIC found many of the same problems that consumer advocates have been worried about. For example, ASIC found that:

*“the promise of debt management firms is attractive to many consumers. However, where this promise does not or cannot meet expectations, the harms for consumers can range from the relatively minor to the very serious.”*

ASIC also found that:

*“Barriers to entry for firms providing debt management services are low. Firms are not required to satisfy threshold requirements (such as ‘fit or proper’ person tests), satisfy competence standards, meet conduct or disclosure obligations, manage conflicts of interest or belong to an EDR scheme to resolve consumer complaints.”*

Finally, some of ASIC’s most worrying findings were that:

- fees and costs were opaque, making it difficult for consumers, often in significant financial hardship, to assess the cost of the services relative to the purported value;
- fees were often high and heavily ‘front loaded’—that is, fees were payable before services were provided or promises met, which is likely to increase consumer commitment and exacerbate sunk cost bias;
- some sales techniques may create a high-pressure sales environment;
- little information was given about important risks;
- some firms had a poor understanding of the relevant law and the consequences of particular strategies, which may lead to unsuitable services for some consumers; and
- firms rarely referred consumers in financial hardship to free, alternative sources of help—such as financial counsellors, consumer law services or ombudsman schemes—or advised consumers they could resolve the problem themselves at no cost.

We believe that the most effective option for improving the standards of debt management firms and enhancing consumer outcomes is the introduction of a rule-based statutory regime combined with a licensing system. This would bring debt management firms into line with other businesses in the finance sector, which must obtain a licence from ASIC.

Along with Consumer Action we have recently co-hosted a Roundtable to discuss the regulatory challenge caused by debt management firms which provide quasi-financial service “solutions” to consumers in financial

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difficulty and cause significant cost to industry and government alike. The Roundtable was very successful at bringing together industry members, ombudsmen schemes, regulators and consumers who are all interested in engaging on these issues. In the coming weeks and months we intend to follow-up the outcomes of that Roundtable with advocacy to Government regarding regulatory reforms.

### 3. Debt Management Firm Case Study

A was a single mother with a daughter, with one personal loan and a debt to a family member. She was entirely reliant on Centrelink. She wanted to refinance the personal loan because she wanted to reduce repayments but the creditor declined because she had a default listing. The listing related to a telephone bill that the client disputed as being fraudulent, i.e. not her debt. This default (because it was incorrect) could be easily removed by an ombudsman or a financial counsellor for free. Unfortunately A called a Debt Management Firm (DMF) instead. She found the company by searching on the internet “free debt help”, and was attracted by being able to get her credit report for free and a free consultation.

After a 2 hour “session” with the company, A felt harangued by the operator telling her she was “insolvent” and her only option was a Debt Agreement. She was told to pay the telecommunication provider even though she said the phone debt did not belong to her and she disputed it. Regarding her debt to a family member, they told her to get her family member to agree to a lesser amount for the purposes of the Debt Agreement, but she could pay her family the rest “on the side.” A was signed up over the phone to pay for a Debt Agreement after they recorded her verbal consent. They then sent her out some forms and told her to stop paying her personal loan. A had doubts, and she rang Financial Rights. The DMF had already started to direct debit her account.

Financial Rights assisted her by:

- Disputing the DMF contract and seeking her release and a refund of the fees paid to date;
- Disputing the telco listing and removing it for free; and
- Reviewing the personal loan, and determining that the bank had not calculated her expenses correctly when they granted the loan. A lower amount was negotiated after a dispute was raised.

Had she followed through with entering into a Debt Agreement (being a form of insolvency) she would have ended up with a further listing on her credit file, been forced to pay a debt she disputed and would have lost the right to challenge the personal loan.



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We argued the entry into the contract was unjust and unconscionable within the meaning of the Australian Consumer Law (being Schedule 1 of the Competition and Consumer Act 2010).

Specifically, we argued:

1. The length of time of the interview was unconscionable. The client instructed us that she cried during most of the interview, felt powerless and that she was cajoled into thinking this was her only option. Her education, experience and personal circumstances were also relevant in arguing she was taken advantage of and was vulnerable;
2. The service was advertised as being a “free consultation”, when it was in fact a high pressure sales tactic;
3. Our client was on Centrelink, with one debt, a disputed debt and a debt to a family member. She was unsuitable for a Debt Agreement. Clients with only one debt or a debt to a single institution on Centrelink are not suitable for Debt Agreements; and
4. Our client was advised to pay for a debt she disputed owing.

Other potential issues to look for in these types of cases include:

- Whether any of the contract terms might be unfair within the meaning of the unfair contract terms in the ACL. If they are, those terms may not be able to be enforced.
- Whether there was any misleading or deceptive statements made by the advertising or the sales consultants.

In this instance the company was a member of external dispute resolution (EDR). You should always check, as some of these businesses are members (even though it is not compulsory). You can check by searching at [www.fos.org.au](http://www.fos.org.au) or [www.cio.org.au](http://www.cio.org.au)

A dispute was initially raised with the internal dispute resolution contact. If the matter is not resolved the next step is to lodge in the EDR scheme. EDR is free for consumers, and not binding on the individual only the financial service provider member.

It's best to terminate the contract and raise the dispute as quickly as possible. Any direct debit that you may have authorised should also be cancelled as soon as possible.

If the business is not in EDR, then you will need to consider what alternative forum might be appropriate. You should generally get some advice before lodging in a court or tribunal to make sure you have good prospects of winning. Unlike EDR, a court or tribunal decision will be binding on the consumer. There are also generally time limits from when the disputed contract was entered limiting when you can lodge in a Tribunal or Court and application fees. In some states there are Tribunals

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that have jurisdiction to determine matters under the ACL, including the NSW Civil and Administrative Tribunal, Queensland Civil and Administrative Tribunal or Victorian Civil and Administrative Tribunal. Some courts may award costs against you if you lose.

#### 4. Common Insurance Problem: *When a tree falls in a storm, who pays for its removal and damage?*

After recent storms across Australia, common inquiries on the Insurance Law Services advice line were:

1. Whether a consumer's insurer is liable for the removal of a fallen tree, or damage caused by the tree to the insured's property; and
2. When a tree has fallen on a neighbour's property, whether the tree owner or the tree owner's insurer is liable for any damage caused by the tree.

Insurance is a contract between an insurer and you, where the insurer on receipt of a premium agrees to compensate you for certain defined losses or liabilities that may occur during a specified period of coverage. Routinely, insurers will seek to minimise potential claims by including exclusion and condition clauses to limit the liability.

What you are covered for with your insurance policy will depend on the wording, and you should read your Product Disclosure Statement (PDS). Cover can vary significantly from insurer to insurer.

#### CASE STUDY

Jane lives on a block with lots of trees. One night there was a huge storm and four trees on her property came down.

First, a big old eucalypt fell in the backyard. Thankfully, it did not hit anything but she now has a massive fallen tree that is blocking her from getting to the back gate.

A second one crashed and damaged her shed.

A third one crashed and landed on her car that was parked on the street

A fourth landed on the house next door! It caused the boundary fence to come down, and damaged the neighbour's guttering.

Jane recently had a landscaper out; he told her all the trees on her property were in really good condition.



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Some insurance policies will only cover you for the removal of the tree if it causes damage to the insured home and contents. If there is no damage to the home or contents, then you may be up for your own removal costs.

When a tree falls and it is a tree on your own property it can be a straightforward application of the policy wording.

In the case of Jane, her policy covers her for storm, but excludes the cost of removing fallen trees where there is no damage to the insured property. As the first tree has fallen in the backyard but did not hit any of the property, her insurer will not pay for the cost of the removal.

With her second tree crashing into her shed, where she had building insurance that covered sheds and outbuildings, she is covered to remove the tree and fix the shed.

With the tree that fell on her car, as her car is not covered by her home and contents insurance, it is not covered! Luckily, she has comprehensive car insurance and so she can make a claim on the car insurance. Her car will be repaired, but the tree removal costs will be up to her.

Jane's neighbour has sent her an angry letter demanding she pay for the removal of the tree, and claiming money for the damage to the gutters! Jane's insurer says she is not liable and to ignore it! Jane's insurer says they will only pay for 50% of the fence, and tells her the neighbour has to pay for the rest!

Difficult situations often arise when the tree falls on your neighbours' property. The neighbour may think you are automatically liable, because it is after all your tree.

The law about neighbours rights and responsibilities is covered generally by the common law, being the tort of nuisance or negligence.

Just because the tree is on your property it does not mean you are automatically liable for the tree falling or dropping branches in a storm.

For you to be liable, generally you need to be aware the tree:

- is near the boundary and is in a dangerous condition, or
- belongs to a species which is known to 'drop' branches

If a strong, healthy tree blows down across the fence in a storm, this is considered to be an 'act of God' for which there is no liability.

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When you are the owner of property you are liable as the home owner for any claim of nuisance or negligence made out against you. It is generally advisable to have Home and Contents insurance which will cover you for your “Legal Liability”. An insurer generally sets a limit of \$20 million for “Legal Liability” to pay damages arising from a claim for an accident that results in death, bodily injury, or damage to property of a third party not living with you. This extends to damages if a tree on your property falls and damages another person’s property and you are liable.

If you are not liable, then your insurer is not either.

If you knew the tree was dangerous, for example, an arborist had recommended its removal or you had a Council order requiring its removal which you failed to act on then you may be exposed to some liability. If you think there may be an issue, notify your insurer immediately.

With boundary fences, generally each neighbour is responsible for 50% of the cost for repair or replacement of the fence. As you are only liable for 50%, then your insurer is only liable for 50%.

Jane’s tree is healthy. The severity of the storm meant lots of trees blew down, and there was nothing she could have done.

Jane writes back to her neighbour and explains that as the tree was healthy, her insurer says she is not liable and she suggests they claim on their own insurance. She forwards them the invoice for the 50% of the fence repair.

Jane’s neighbours (or their insurer) could still insist she is liable. They would need lots of evidence to show that it was an obvious and foreseeable risk that the trees would pose a danger. They should probably seek legal advice before they commence any proceedings against Jane as Jane has a report saying the trees were healthy and the storm was very severe.

## TIPS!

It is always a good idea to read your PDS to check the extent and conditions of your coverage.

Where trees cause damage and it is not a storm, for example your tree was dead, damaged or a species prone to having branches fall and you have a reasonable suspicion it might fall down you should take steps to address the danger. Contact an arborist or your local council about whether the tree can be removed. If the tree or branches cause damage, then you may be liable. Your insurer will not pay the cost for these preventative steps, but it might be in your interests to address the problem.

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It is a common exclusion in the “legal liability” that the insurer will not be liable for damages to third party property where you are cutting or lopping trees. This would be a risk you would bear yourself.

## 5. New Resources: *Bankruptcy Factsheets*

Financial Rights has added three new legal information Factsheets to its website that relate to Bankruptcy. Here is a quick overview of what they cover:

### 1. [Should I consider bankruptcy?](#)

Bankruptcy can provide vital relief for people with overwhelming debt, but it involves giving up most of your assets and some control over your finances. You do not have to have a minimum amount of debts or property to enter bankruptcy, but you need to be insolvent (unable to pay your debts when they fall due). You get to keep some basic personal property. Bankruptcy can give you relief from debt collection and a fresh start (release from your debts), but it also involves many drawbacks.

This legal factsheet provides a brief summary of the advantages and disadvantages of bankruptcy, what property of yours will be protected if you do go bankrupt, how long your bankruptcy will last, and how to apply for bankruptcy if you decide it is the right thing for you.

But remember, this factsheet is just a guide. If you are seriously considering going bankrupt you should get advice about your particular circumstances before you commit to anything. To speak to a financial counsellor for free call 1800 007 007.

### 2. [Help! I'm being made bankrupt!](#)

You can be forced into bankruptcy if you have committed an Act of Bankruptcy. Common Acts of Bankruptcy include failing to respond to a Bankruptcy Notice, presenting a debt agreement proposal, or having a writ of execution returned unexecuted.

If you receive paperwork, such as a Statement of Claim, Bankruptcy Notice, or Creditor's Petition you need to get advice urgently! The process is very difficult and expensive to undo if you leave it too late. Often it is impossible.

This legal factsheet will give you some useful information on the process a creditor has to go through to make you bankrupt, what different types of legal documents mean, and what you should do if you receive bankruptcy related legal documents in the mail. Remember, this Factsheet is just a guide, and we recommend you get advice IMMEDIATELY if you believe someone is trying to make you bankrupt. For free credit and debt advice call 1800 007 007!



### 3. [Debt Agreements](#)

Debt Agreements are a formal alternative to bankruptcy under the Bankruptcy Act for people who are insolvent (unable to pay their debts as they fall due). Under a Debt Agreement, your creditors agree to accept less than the full amount of the debts owing in return for a commitment by you to meet regular repayments for an agreed period of time.

If you make all the repayments under the agreement, you are then released from the remainder of the debts included in the agreement. If you fail to make it to the end of the agreement (you do not make all the repayments) then the deal is off and the creditors will go back to chasing the whole debt, plus any interest that has accrued in the meantime. Unlike going bankrupt, you may keep your assets, such as a home you are paying off, but there are many other consequences that are very similar to bankruptcy.

Remember, Debt Agreements are an act of bankruptcy and may seriously affect your ability to obtain credit in the future. Always get independent advice from a free financial counsellor before entering into a debt agreement by calling 1800 007 007. Debt agreements are only one option for consumers to consider when having trouble paying debts.