

Chapter 1: Introduction

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Introduction

In the last few years financial counsellors have increasingly found themselves working with clients who have a whole range of complex issues. At the same time the regulatory landscape has evolved rapidly, with new laws and amendments affecting the financial counsellor's work occurring with considerable frequency. The pressure on financial counsellors to keep abreast of all these new demands has led to the need for resources which give support to financial counsellors and allow them to develop the necessary skills required to meet these challenges.

After the success of the Credit Law Toolkit and the Mortgage Stress Handbook there was a clear need for the development of a Bankruptcy Toolkit. As a result of a chance conversation an opportunity arose to develop such a resource and thanks to the assistance of FAHCSIA (now the Department of Social Services) funds were made available to write this toolkit.

The help, knowledge and insights of a then recently retired deputy official receiver, Mr Bob Cruickshanks, were also drawn upon to produce a practical guide to bankruptcy. This toolkit is now updated as at 2024.

The purpose of this toolkit is to assist financial counsellors to be able to explain to their clients the consequences of bankruptcy, the alternatives, the process and the practical details of completing the forms. It also covers problems that may arise during bankruptcy and even beyond discharge.

Financial counsellors and bankruptcy

Bankruptcy is a major part of financial counselling. These clients deserve access to the information that will allow them to make educated and considered decisions.

The role of the financial counsellor in assisting clients with bankruptcy is to provide comprehensive support and information. Financial counsellors should not allow themselves to be limited to giving assistance to 'fill out the forms'. Financial counsellors should strongly resist pressure from clients to reduce their role to this as it raises major issues of duty of care and professional practice.

The financial counsellor's role is one of:

- Ensuring clients have considered all the available options.
- Making sure clients understand all the potential consequences.

- Supporting clients to enable them to cope more easily with the consequences of their decision (including the emotional impact and practical challenges).
- Assisting clients to understand the forms including why particular questions are being asked, what will be done with the information provided, and the consequences of omitting information or providing wrong or misleading information.
- Supporting clients through the lodgement process.
- Ensuring clients understand what is expected of them during bankruptcy and beyond (some financial counsellors may also respond to questions during the bankruptcy and advocate for the client to creditors and/or the trustee should that be appropriate).

It is almost impossible to do this properly in the course of one interview and it should therefore be a rare situation where bankruptcy forms are completed at a first interview. Even when the situation seems urgent, there may be other options to buy time.

Some services have a policy of not completing bankruptcy forms at the first interview and this position is clearly communicated to clients.

Clients who say they only want help with the forms and do not want to discuss the options and consequences not only miss an important opportunity to make sure they are taking the best course of action from their own perspective, but also put financial counsellors at risk of falling short of their professional obligations.

It is rare that the client will not listen if it is stated that the service requires the client to be informed of their other options as part of considering bankruptcy, and to be fully informed of the consequences of bankruptcy before proceeding with that option.

About this toolkit

This kit is designed for use by financial counsellors and other caseworkers (such as community lawyers) who assist clients with bankruptcy.

As the law of bankruptcy is very complex and no two clients are the same, it is important to work through both the decision-making process with the client – whether to go bankrupt – and the completion of the forms, thoroughly and systematically. Unfortunately, bankruptcy is also an area that leads to fairly frequent consumer complaints.

Some of these complaints may be justified, such as where a caseworker has failed to explain an important consequence to the client, but in other cases it may be that the client was simply not prepared to listen and with the benefit of hindsight is now disappointed. In the interests of both better client outcomes and to protect yourself professionally you need both:

- Systems which help you avoid mistakes and oversights, and
- Records that explain and justify what you have done.

Many financial counsellors and financial counselling services have already developed their

own forms and procedures for assisting clients with bankruptcy. In this kit we try to pool the benefit of this vast experience to develop a convenient source of information and tools to help achieve best practice in this area.

We encourage you to use this resource as a starting point, supplemented by other things that are useful, such as updates from the Australian Financial Security Authority ('AFSA') or handouts from further training.

While newer financial counsellors and community lawyers may wish to read some sections of this kit entirely, others may simply use it as a reference to look up in the event of unusual problems. If you are completely new to bankruptcy law you might want to start by reading **Chapter 3** and **Chapter 6**. Another possible way of using this kit is to refer to **Chapter 7** question by question as you complete a client's Statement of Affairs and use the cross references to other parts of the kit as particular issues come up relevant to the particular client.

The Structure of the toolkit

This resource is divided into 12 Chapters. **Chapters 2 – 9** roughly following the bankruptcy process and consequences from beginning to end.

Chapter 2 How did I get here?

Chapter 3 Bankruptcy in a nutshell – a very skeletal summary of the consequences of bankruptcy

Chapter 4 The A-Z of Bankruptcy, a format for working out if a client really should be considering bankruptcy

Chapter 5 Formal alternatives including a Declaration of Intention to Present a Debtor's Petition, Part IX Debt Agreements and Personal Insolvency Agreements

Chapter 6 The consequences of bankruptcy in detail (the real guts of the issue)

Chapter 7 Completing the forms (a practical guide with lots of cross references to the previous chapter)

Chapter 8 Life in Bankruptcy dealing with issues that commonly arise during bankruptcy

Chapter 9 Post Bankruptcy, the ongoing ramifications.

Chapter 10 covers entering involuntary bankruptcy via the Creditor's Petition process and what options clients have at each stage, from receiving a Bankruptcy Notice to finding out there has been a sequestration order made (an order making someone bankrupt).

Chapters 11 and 12 cover trouble-shooting for clients who are already in Part IX Debt Agreements and Personal Insolvency Agreements respectively. **Chapter 11** also covers the

situation where clients have signed up to complete a Debt Agreement proposal but have now changed their mind.