

Chapter 2: How did I get here?

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Bankruptcy is a very serious step which can have major consequences for clients. People often approach financial counsellors in a very emotional state and see the issue as requiring urgent assistance and resolution. Sometimes the first role of the financial counsellor is to slow the client down and determine whether the urgency is real or imagined. Bankruptcy is a serious decision requiring detailed consideration.

Bankruptcy can happen in two ways – initiated by the debtor by lodging a Debtor's Petition, or by a creditor or creditors using a Creditor's Petition. The latter way (initiated by creditors) usually occurs at the end of a whole series of processes to recover the debt and although creditors often threaten their clients/customers with bankruptcy during the early stages of negotiation, they cannot force the client into bankruptcy without going through a number of steps.

Occasionally clients consider bankruptcy prior to any enforcement action being taken at all. This may be appropriate in some circumstances (a permanent change of circumstances making it impossible to pay outstanding debts or a large debt from a single event such as a car accident or court case). In practice, however, clients usually opt for bankruptcy after at least one creditor has or is taking enforcement action against them.

In an ideal world clients would approach us in the early stages of their financial stress, but the reality is that often we do not get contacted until the situation has become more difficult and recovery action has commenced.

Sometimes the clients have been advised by other services, family and friends, creditors or professional advisers to go bankrupt. Financial counsellors are in unique position due to their professional practice to be able to inform their clients of a range of alternatives, the consequences, both long-term and short-term, and give them time to reflect.

Clients in financial stress have a range of options available to address their financial issues (although these reduce significantly as enforcement processes progress). As financial counsellors we encourage our clients to pursue these options but, in some circumstances, they feel so disempowered, stressed or pressured by their debt situation that the only option they wish to pursue is bankruptcy.

Before legal action has commenced there are a number of options available to clients, these

include:

1. Keep paying as per contract (if possible).
2. Pay out the debt in full (by selling property or getting assistance from family members, for example).
3. Refinance (noting the dangers of going to lenders of last resort who charge high interest and fees).
4. Seek hardship assistance from the creditor, and if declined consider applying to the Australian Financial Complaints Authority (AFCA) an independent external dispute resolution scheme if available for the debt.
5. Offer a lump sum to settle – a reduced full and final settlement offer.
6. Seek a release (a waiver) from the creditor on compassionate grounds.
7. Ignore the debt and let the creditor take enforcement action (this may be an attractive option if the client receives Centrelink payments only and has no property except personal property that would be protected from the Sheriff (depending on which State and whether what is protected from the Sheriff is better or worse than bankruptcy)).
The client will need to be armed with information about dealing with debtor harassment.

Where legal action has commenced the options include:

1. Negotiate with creditor.
2. Pay out in full.
3. Refinance (noting again the dangers of lenders of last resort).
4. Defend the debt if the client doesn't believe he or she owes all or part of the debt (including where the debt may be statute barred).
5. Go to AFCA if available and no judgment entered.
6. Make a repayment arrangement directly with the creditor prior to judgment.
7. Apply to pay by instalments through the Court (warning – this may create a judgment debt in some states and should only be done once all else has failed).
8. Let the creditor enforce (see point 7 above).

A financial counsellor needs to be aware of timelines for debt recovery. Even if legal action has commenced there will often be time to consider a range of options including bankruptcy.

A person's circumstances need to be carefully considered before advising that bankruptcy is a viable (or palatable) option. **Chapter 4** discusses this decision-making process in more detail. **Chapter 5** goes through the other formal options under the Bankruptcy Act. **Chapter 6** considers the consequences of bankruptcy in greater detail.

To force someone into bankruptcy the creditor usually has to have obtained judgment for a debt of \$10,000 or more (or two or more judgment debts totalling this amount) and the person has to have committed an 'act of bankruptcy' (see **Chapter 10**). Usually there will

also be a Bankruptcy Notice (this is the most common way to establish an act of bankruptcy on which to base a Creditor's Petition). This means that there will have been a lengthy legal process before the Creditor's Petition has been served.

Where clients have ignored all these warning signs their options are very limited. **Chapter 10** covers what can and can't be done at every stage of the process.

A creditor can rely on where a debtor has formerly lodged a *Debt Agreement Proposal* in relation to a debt to force bankruptcy, although this is unusual – see **Chapters 5 and 11** for more information in relation to the consequences of proposing a *Debt Agreement*.