

Federal Circuit Court Financial Counselling Project Evaluation

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FEDERAL COURT OF AUSTRALIA



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Contents

Executive Summary	5
1 Introduction.....	7
2 Background	7
3 Outline of the project	8
a Participants	8
b Objectives	8
c Operation.....	9
d Evaluation methodology	10
4 Results.....	11
a Survey of debtors	11
b Survey of creditors’ solicitors.....	11
c Interviews with financial counsellors.....	13
i Understanding the nature of the hearing.....	13
ii Assessing solvency and explaining options.....	13
iii Negotiating with creditors’ solicitors	14
iv Emotional support.....	14
v Suggestions for improvement	14
d Interviews with Registrars	15
i Understanding the nature of the hearing.....	15
ii Explaining the impact of bankruptcy.....	16
iii Advocacy	16
iv Assessing solvency and explaining options.....	17
v Emotional support.....	17
vi A faster and more efficient process	17
vii Access to justice	18
viii Suggestions for improvement.....	18
e Court data.....	18
5 Evaluation	19
i Assisting self-represented debtors to understand the nature of bankruptcy proceedings, so they are better able to determine their rights, and to make effective decisions in presenting their cases	19

ii Increasing efficiency in the FCA and FCC in achieving the just resolution of bankruptcy matters involving self-represented debtors, as promptly and inexpensively as possible	19
iii Additional benefits for vulnerable debtors	20
6 Conclusion and Recommendations	20
Appendix 1: Client survey	22
Appendix 2: Creditors' solicitor survey.....	26
Appendix 3: Interview questions for financial counsellors	29
Appendix 4: Interview questions for Registrars	30

Executive Summary

Since September 2014, the Federal Circuit Court (FCC) in Melbourne has provided direct financial counselling services to self-represented debtors in the FCC's Bankruptcy Lists. This pilot service, implemented by the FCC in collaboration with the Federal Court of Australia (FCA), the Consumer Action Law Centre (Consumer Action) and the Melbourne Law School (MLS), attempts to assist vulnerable debtors and to promote the efficient operation of bankruptcy proceedings in the Court. A Memorandum of Understanding between the project's partners states the project's objectives as being:

- to assist self-represented debtors to understand the nature of bankruptcy proceedings, so they are better able to determine their rights, and to make effective decisions in presenting their cases; and
- to increase efficiency in the FCA and FCC in achieving the just resolution of bankruptcy matters involving self-represented debtors, as promptly and inexpensively as possible.

In order to achieve these objectives, the project provides on-site financial counselling every Tuesday and Thursday morning, in conjunction with hearings in the Bankruptcy List. The location of the service at the Court makes it possible for Registrars to refer debtors for immediate financial counselling assistance, without the need for an adjournment.

This report evaluates the project and concludes that it has been highly successful in meeting its objectives. In making this assessment, the report draws on statistical information recorded by FCC staff, on surveys of debtors and creditors' solicitors, and interviews with financial counsellors and Registrars.

At 26 May 2015, 31 self-represented debtors had been referred by a Registrar to financial counselling provided at the Court. These debtors were all responding to creditor's petitions.¹ Of the 31 referred matters, 27 have been finalised. The remainder stand adjourned to a future list. Of the 27 finalised matters, 21 (78%) were resolved by consent between the parties with 14 consent dismissals and 7 consent sequestration orders. This high proportion of resolutions by consent will inevitably reduce the numbers of reviews and appeals from Registrars' decisions, which in turn will reduce the workloads of both FCC and FCA judges.

The project has also increased the Court's efficiency by reducing the number of hearings taken to finalise matters involving self-represented debtors. This saves the Court time and allows it to use its resources more efficiently. Before the implementation of the project, matters involving self-represented debtors would often take three or more hearings. Of the 27 finalised matters involving a financial counsellor, 21 only took one or two hearings to resolve.

¹ As at 14 July 2015, there have been 36 referrals made from 74 bankruptcy lists. The number of referrals was slow at first, as different Registrars developed a sense of when and in what circumstances a referral would be appropriate. With more familiarity and wider publicity, it is reasonable to expect the number of referrals will increase significantly.

Significant efficiencies also result from giving debtors a better understanding of the nature of bankruptcy proceedings, and of the focus of the Court on issues of solvency. When debtors are able to appreciate the real issues before the Court, to put on relevant submissions and evidence and to enter into informed discussions with creditors, they can more properly participate in and engage with their proceedings, promoting access to justice, and leading to a more just resolution of proceedings.

The evaluation indicates that the project has helped several debtors to demonstrate solvency (thereby avoiding bankruptcy) and several others to accept bankruptcy as a positive option in their particular circumstances. The surveys and interviews found that all debtors, financial counsellors and Registrars, and the majority of creditors' solicitors, agreed that the project helps debtors to understand the purpose of a bankruptcy proceeding and the consequences of being made bankrupt. Several creditors' solicitors identified benefits in having the financial counsellors available at the Court, including less delay and a more streamlined process. Notably, 89% of creditors' solicitors agreed that debtors were better off as a result of the financial counsellors' assistance. The Registrars stated that the project made better use of Court resources, while also ensuring that debtors can participate meaningfully in the court process. The financial counsellors strongly believed that the service assists debtors, creditors and the Court, by enabling debtors to focus on the relevant issues and take realistic, practical steps to resolve their matters.

The project interacted effectively with JusticeConnect's pro bono Self Representation Service, so that financial counsellors were able to refer debtors to JusticeConnect for legal advice where appropriate. It is anticipated that more and better collaboration with JusticeConnect will confer even greater benefits on debtors in bankruptcy proceedings.

The report concludes that the project has been highly successful in assisting self-represented debtors in bankruptcy proceedings, and in increasing efficiency in the resolution of those proceedings. While there is scope to improve the service, there is also reason to expect that it will benefit debtors and the Court if it continues in its current form. The report includes several recommendations regarding the improvement of the service and its possible expansion to other Registries of the FCC.

1 Introduction

Since September 2014, the FCC in Melbourne has provided on-site financial counselling services to self-represented debtors in the Bankruptcy List. This service, initiated by the Court, aims to promote the efficient operation of bankruptcy proceedings and to achieve the just resolution of bankruptcy matters.

In many cases, vulnerable debtors do not understand legal language, the purpose of the hearing or the steps they can take to avoid bankruptcy. They are often highly stressed and have trouble explaining their circumstances to the Court. The Court will often offer an adjournment, to allow a self-represented debtor to seek legal and other advice.

Unfortunately, however, many debtors do not know where to go for help. In these cases, adjournments only serve to prolong the debtor's ordeal, while causing delay and expense to creditors and the Court. In seeking to address this problem, the Court has enlisted the skills of professional financial counsellors who specialise in assisting people in financial difficulty. Since the commencement of the project, these counsellors have attended Bankruptcy Lists each Tuesday and Thursday morning to provide immediate support to debtors, following a referral from the presiding Registrar. They help debtors to make an accurate assessment of their finances and their prospects of avoiding bankruptcy. They advocate on behalf of debtors in court, liaise with creditors' solicitors and refer debtors to sources of legal advice and ongoing financial counselling.

This report evaluates the project and concludes that it has been highly successful in meeting its aims. In making this assessment, the report draws on the experiences of clients, financial counsellors, creditors' solicitors and Registrars. It concludes that the counsellors have helped several debtors to demonstrate solvency and thus avoid bankruptcy, by drawing up detailed statements of their financial circumstances, negotiating payment arrangements and identifying assets that can be sold or offered as security. In other cases, where debtors have had little prospect of avoiding bankruptcy, the counsellors have played an equally important role. Explaining the consequences of a sequestration order, they have sought to dispel some of the negative stereotypes associated with bankruptcy and presented it as a viable, constructive solution to unmanageable debt. They have also provided much-needed emotional support to debtors in acute distress, enabling them to focus on the relevant issues and engage meaningfully with the court process. While this might not have led to a different outcome in every case, it has helped many debtors to take decisive action and resolve their matters more quickly, without the need for multiple adjournments. In this respect, the project has reduced stress and anxiety for many debtors, while also reducing unnecessary delay and wastage of Court resources.

2 Background

When creditors are unable to recover debts of \$5,000 or more, they may seek to have the debtor declared bankrupt. To do so, they must apply to the court for a sequestration order. In these circumstances, the debtor may appear before the court to explain why he or she should not be made bankrupt. In the Bankruptcy List at the Melbourne Registry of the

FCC, debtors frequently appear at such hearings without legal representation and without having obtained any legal advice. Generally, these debtors have little understanding of the purpose of the hearing. In many cases, they also have a limited grasp of their true financial situation and their capacity to repay their debts. Some debtors, overwhelmed by the stress of their debts and other problems, have been unable to take positive steps to resolve their financial difficulties until the day of the hearing itself. Some do not realise that they can avoid bankruptcy, for example by selling assets such as a family home. These factors often make it difficult for the Court to establish whether or not a debtor is solvent, and, by extension, whether or not to issue a sequestration order. Debtors' matters are frequently adjourned to enable them to seek legal and financial advice. In many instances, however, the debtor returns without having obtained any further advice. This situation can result in multiple adjournments, causing wastage of the Court's resources and considerable stress to the debtor. More importantly, it can result in significant adverse consequences for the debtor. In the absence of evidence to demonstrate solvency, the Court must ultimately issue a sequestration order. This means that debtors are sometimes made bankrupt when they may in fact be solvent, simply because they have failed to produce evidence of solvency to the Court.

3 Outline of the project

a Participants

This project has received direct funding from the FCA and the FCC. It also received indirect support from Consumer Affairs Victoria (in the form of funding to Consumer Action) and the Australian Research Council (in the form of a research grant to the MLS).² It is a collaborative project, with a steering committee that includes a Registrar of the FCC, representatives of the Financial & Consumer Rights Council (FCRC) and Consumer Action, and researchers from the MLS. The FCRC is the peak body for financial counsellors in Victoria. Consumer Action is a community legal centre, specialising in consumer law, with an in-house financial counselling service known as MoneyHelp.

b Objectives

The Memorandum of Understanding establishing the project identified two principal objectives, being:

- to assist self-represented debtors to understand the nature of bankruptcy proceedings, so they are better able to determine their rights, and to make effective decisions in presenting their cases; and
- to increase efficiency in the FCA and FCC in achieving the just resolution of bankruptcy matters involving self-represented debtors, as promptly and inexpensively as possible.

² The MLS research team is currently carrying out a three year research project on bankruptcy law, funded by an Australian Research Council Linkage Grant.

c Operation

To achieve these objectives, the FCC provided training to a group of financial counsellors employed by the MoneyHelp programme at Consumer Action, to familiarise them with the specific issues facing debtors in the Bankruptcy List. It provided the counsellors with administrative support and a designated office directly opposite the court room in which the Bankruptcy List is conducted. It briefed creditors' solicitors about the project, through the FCC Bankruptcy Users' Group and other channels. It then began referring self-represented debtors to the financial counsellors.³

The project launched on 30 September 2014 and will continue until September 2015. Financial counsellors currently attend all hearings of the Bankruptcy List on Tuesday and Thursday mornings. Debtors are referred to the counsellors at the discretion of the presiding Registrar, depending on their particular circumstances.⁴ When a debtor is referred for financial counselling assistance, the Registrar will generally stand the matter down for 30 minutes, to enable the debtor to confer with a counsellor immediately. In an office adjacent to the court room, the counsellor will meet with each referred debtor for approximately 20 minutes. During this time, the counsellor assesses the debtor's financial situation and other relevant circumstances, explains the nature of the proceedings and emphasises the need to demonstrate solvency in order to avoid bankruptcy. If the debtor has no realistic prospect of demonstrating solvency, the counsellor will provide basic information about bankruptcy. In some cases, the counsellor will refer the debtor to JusticeConnect for legal advice, or to MoneyHelp for ongoing financial counselling.

At the conclusion of the 20 minute consultation, the debtor will return to the court room. He or she will address the Court, though in some cases, the counsellor will speak on a debtor's behalf. At this point, the debtor may either consent to the making of a sequestration order or request an adjournment. The Registrar will usually grant an adjournment, for as little as a week or as long as several months, with most matters being adjourned for around one month.⁵ Most matters resolve at the second hearing, either because the matter has resolved (ie the creditor has withdrawn the petition for a sequestration order) or the debtor has failed to attend. If the debtor does not attend the second hearing, the Registrar will generally make a sequestration order.

By 26 May 2015, by which time the project had been running for eight months, 31 debtors had been referred to a financial counsellor. One additional debtor received advice

³ Some self-represented debtors are referred for pro bono legal advice, as well as or instead of financial counselling. This legal advice is provided by JusticeConnect (<http://www.justiceconnect.org.au/>) and is the subject of a separate evaluation process.

⁴ If the debtor seems to have legal grounds for resisting the sequestration order, the Registrar will generally refer him or her to JusticeConnect for legal advice.

⁵ This information was derived from a spreadsheet compiled by FCC staff, summarising the progress of each matter from first to final hearing. This data is discussed in part 4(e), below.

from a counsellor without being formally referred by the Court, bringing the overall number of participants to 32.⁶

d Evaluation methodology

The evaluation methodology was devised by the research team at the MLS, in consultation with the steering committee. It was approved by the Chief Judge of the FCC and the Human Ethics Advisory Group in the MLS. The evaluation had five components: a written survey of debtors, completed at court; an online survey of creditor's solicitors;⁷ separate group interviews with financial counsellors and Registrars, carried out by the MLS research team; and a detailed spreadsheet compiled by the Court, recording the progress of each referred matter. The survey instruments and interview questions are attached as appendices to this report.

The debtor survey proved to be the most complex and challenging aspect of the evaluation process. In consultation with the steering committee, the research team decided to administer the surveys on the day of the debtor's court hearing, whether it be his or her first, second or subsequent attendance at court. This method made it possible that some debtors might complete multiple surveys, over successive attendances at court.⁸ Counterbalancing this potential problem, it seemed highly likely that any other method would result in a very low response rate. In particular, it seemed probable that, given the stressful and difficult circumstances of most debtors, very few would remember to return the surveys if they were asked to complete them at home and return them by post.

In practice, administering the surveys at court raised a number of practical problems. The financial counsellors were asked to provide each debtor with a survey and to ensure that he or she placed the completed survey in a secure box, along with a signed consent form.⁹ The counsellors were highly effective in carrying out this task, achieving a response rate of 56 per cent.¹⁰ Unfortunately, many debtors found it difficult to complete the survey accurately, meaning that 19 per cent completed a survey but did not sign the consent form.¹¹ This result reflects the fact that most debtors were stressed and preoccupied by the hearing, and in this context, could not be expected to give the surveys their full attention. The timing of the surveys (at the end of an initial hearing, in many cases) also made it difficult for debtors to assess the impact of the counsellor's advice, since this would in many cases turn on the outcome of their subsequent or final hearing. Moreover, given that debtors completed the surveys in the presence of the counsellor, it is possible that some felt a degree of pressure to report favourably on their experiences. In their focus group, the counsellors drew attention

⁶ As the debtor surveys were completely anonymous, it is not possible to exclude this individual from the evaluation process.

⁷ Both surveys were anonymous. Clients were invited to provide their contact details if they wished to participate in one-on-one interviews, but this information was kept separate from the client surveys.

⁸ In practice, the financial counsellors were able to state with confidence that each debtor only completed one survey.

⁹ These consent forms are mandated by the University of Melbourne's ethics guidelines. They set out the way in which the research data will be used and stored. By signing the form, the participant consents to the use of his or her information for the purposes of the research.

¹⁰ At the time of writing, 18 debtors out of 32 had completed a survey.

¹¹ Six completed surveys either did not attach a consent form or attached an unsigned consent form.

to all these problems and suggested that a future project might evaluate the debtors' experiences by means of a telephone interview, several days after their final hearing.

4 Results

a Survey of debtors

Despite the challenges outlined above, the survey of debtors provided a useful insight into the impact of the project. As noted above, 18 of the 32 debtors completed surveys, representing a response rate of 56 per cent. Six of these surveys could not be included in the evaluation process, either because the debtor did not sign the consent form or because the consent form became detached from the survey. This left 12 surveys available for analysis, representing a response rate of 38 per cent.

Of the 12 debtors who returned completed surveys and consent forms, seven (58 per cent) were attending court for the first time. Six were employed, four were unemployed and two were self-employed. All 12 were male. While not all debtors provided details of their usual occupation, those who did included a dentist, a production manager, a builder, a building inspector, a 'service tech', a systems technician and a welder/fabricator. One debtor gave his occupation as 'sales and marketing'.

The debtors were extremely positive about the project and the assistance they had received from the financial counsellors. All 12 either strongly agreed or agreed that the financial counsellor had helped them to understand bankruptcy. Eleven (92 per cent) strongly agreed or agreed that the counsellor had helped them to understand the procedures of the Court; that the counsellor gave them good advice; that the counsellor 'gave [them] useful options for addressing [their] financial problems'; and that they were 'better off' as a result of the assistance they had received from the counsellor. Nine (75 per cent) either strongly agreed or agreed that the counsellor had helped them to avoid bankruptcy. By contrast, only three (25 per cent) strongly agreed that the counsellor 'helped [them] to realise that bankruptcy was a good option' for them.

While most debtors did not provide extended comments, those who did were very enthusiastic about the project. They described the counsellors as 'very helpful and understanding' and 'great people to deal with'. One wrote that the counsellor 'was absolutely great and understanding. I believe she went beyond the duty of her job to help me out and for this I am very appreciative.' Two suggested advertising the service more widely, in order to reach more people 'in real need'.

b Survey of creditors' solicitors

The survey of creditors' solicitors was administered online, using the SurveyMonkey platform, and circulated by the FCC's Bankruptcy Users' Group. The survey was sent to 54 unique email addresses, resulting in 19 completions (or a response rate of 35 per cent). Respondents acted for various creditors in the Bankruptcy List, including the Australian Taxation Office, banks, finance companies and various small businesses. They worked as

sole practitioners, in-house counsel and in small, mid-sized and large corporate firms. Most (53 per cent) had been appearing in the List for between one and five years, while some had more than 20 years' experience. The vast majority (68 per cent) had only had a handful of matters (between one and three) in which the debtor had been referred to a financial counsellor, since the commencement of the project.

The creditors' solicitors were generally positive about the project. Most (68 per cent) agreed that the counsellors 'help S[elf]R[epresented]L[itigant]s to understand the purpose of the Court hearing.' Around the same number (63 per cent) agreed that the counsellors 'help SRLs to understand the consequences of being made bankrupt' and 'help SRLs to explain their circumstances to the Court.' 52 per cent agreed that the counsellors 'help SRLs to assess their capacity to repay their debts.' In other respects, the solicitors were more equivocal. Most (53 per cent) were unsure whether or not the counsellors 'help SRLs to assess whether or not bankruptcy is the best option for them' or 'provide SRLs with realistic options for solving their financial problems.' This may reflect the fact that, as several pointed out, the solicitors were not privy to the discussions between counsellors and debtors and thus could not be sure exactly what assistance the debtors received. 50 per cent said that the project caused their matters 'to resolve more quickly, with fewer hearings', but 39 per cent found it difficult to say whether or not this was the case. 39 per cent said that the project helped them to 'understand the debtor's grounds for resisting bankruptcy', while 56 per cent said that it did not. 22 per cent said that the project helped them to determine whether or not the debtor was solvent, but 67 per cent said that it did not. Still, 50 per cent said that the project resulted in a 'more efficient, cost-effective process' for their clients, with another 11 per cent saying that it may have helped in this regard.

In their general comments, several solicitors acknowledged the practical benefits of having the counsellors attend court to provide immediate assistance to debtors. 'Having the counsellor... at court for this process helps streamline a more efficient process', one wrote. Another wrote that with the counsellors present in court, '[a]djourments for debtors to seek advice may be avoided, as they can access assistance on the day of the hearing.' One noted that 'some debtors have difficulty locating and taking the time to reach out to a financial counselling services externally', while another pointed out that 'having the advice at court forces [debtors] to focus on the appropriate timelines' rather than 'giving them an excuse to go away allegedly to obtain advice'.

On the overall impact of the project upon debtors, the solicitors were very positive, with 89 per cent agreeing or strongly agreeing that debtors were 'better off as a result of the assistance they receive[d] from the financial counsellors.' One solicitor wrote that even if the project did not ensure a quicker process or lower costs for creditors, 'it is an essential service that is required at court in the interest of giving people a fair go – even if at its minimum it provides some general information and emotional support to SRLs.' Several solicitors recommended that the service be advertised more widely, for example with flyers, cards, and information on creditors' petitions and bankruptcy notices.

c Interviews with financial counsellors

The three financial counsellors involved in the project were interviewed together in a focus group format. The counsellors described the ways in which they assist debtors, the challenges they faced in working on-site at the Court, and the ways in which the service could be improved if it is to continue.

i Understanding the nature of the hearing

The counsellors believed strongly that ‘the majority’ of debtors in the Bankruptcy List were not equipped to navigate the hearing without assistance. They pointed out that some debtors speak English as a second language, while most have little or no familiarity with court procedures. They also observed that most debtors are ‘distressed and overwhelmed’ when they attend their hearing, so that even those with professional qualifications or business experience are often unable to cope without support. They described their assistance as follows:

...What the financial counsellor can do for that client in the court is find out whether they’re solvent or not. Explain the process of what could happen today. Explain what the Registrar has just asked of them. Get some idea – do some financial assessment and also make that assessment of, is bankruptcy the best thing for this person or is it not. Do they have something to lose? Are they solvent?

The counsellors explained that part of their role is to focus debtors’ minds on the immediate issue of solvency, rather than the underlying causes of their financial problems. They observed that many debtors

are not clear on what the purpose of the bankruptcy hearing is and they arrive fired up to have the fight and argue about the principle of the thing and the justice and the unfairness and all of this. Obviously that’s not the role of the bankruptcy hearing... Sometimes... we do have to be very blunt...

ii Assessing solvency and explaining options

For the most part, the counsellors viewed their role as being to empower debtors by arming them with information. They explained that they begin each consultation by making an assessment of the debtor’s situation, taking account of income, assets and debts, and options for avoiding bankruptcy, for example by getting a loan or selling a car. In relation to home-owning debtors, the counsellors aim to ‘help to protect that property... to try to stop clients from losing their houses’ where possible. In some cases, they said, they have to provide the ‘bad news’ that a house must be sold in order to avoid a sequestration order. In these circumstances, they will

have conversations... such as, you need to get the house up for sale, ASAP, and on that basis we can get a short adjournment. But by the time you come back into court you’re going to have to have evidence to show that the house is on the market.

In these cases, the counsellors aim to help debtors ‘maintain some control’ over the process of selling their assets, avoiding bankruptcy and saving substantial legal and administrative fees.

iii Negotiating with creditors' solicitors

The counsellors felt they had developed a positive and constructive working relationship with several creditors' solicitors, enabling them to negotiate viable alternatives to bankruptcy for several debtors. One said that 'lately... a lot of the creditors' solicitors are more open to coming up with deeds for a repayment plan and... other options like putting caveats on...' debtors' houses. Another said that she had been 'pleasantly surprised by the majority of creditors' solicitors being quite open and quite receptive'. She said that there had been 'some fantastic outcomes', including a case in which 'the creditors' solicitor agreed to [a] payment plan and a lump sum payment and the client didn't lose their house'. The same counsellor said that

today in court a creditor's solicitor... actually stood up and it was he... that recommended to the Registrar that the client be referred to a financial counsellor... It was a telephone conference and it was the creditor himself that said he would like the client to have an opportunity to get linked in with a financial counsellor. So, I do feel that our presence in the room is beginning to change some of the way creditors' solicitors view bankruptcy procedures and their dealings with clients. They now have... another option available.

iv Emotional support

The counsellors also stressed the importance of providing emotional support to debtors. They described having to cope with a wide range of emotions, 'rang[ing] from apathy to anger, to distress, to sadness, to complete withdrawal emotionally and... suicidal ideation...' A hearing in the Bankruptcy List is, they pointed out, 'a crisis situation' for many people. Many debtors have

just been trying to struggle along and deal with this issue themselves and... the average member of the population doesn't even know what a financial counsellor is or that we exist. So for them to be in court and... [be] referred to a free service, somebody who's not linked to the court, who's not a lawyer, who's really there as an advocate for them... they are so grateful and people just break down in tears in the office because they are so happy that... somebody is actually there to, in a way, hold their hand and guide them through the process. It is a great sense of relief for a lot of those clients, that for many of them it is the first time that they've actually been able to tell their story about what's happened... It's just been a very positive process for the majority of clients...

v Suggestions for improvement

The counsellors identified some ways in which, in their view, the service at the Court could be improved. They expressed concern at having to wait for a referral from the Court in order to offer assistance to debtors. '...Often when we're at court,' one explained, 'we can see people outside, and we're aware... that there are people there that we could possibly approach...' The counsellor said that the previous week, a woman who was visibly distressed had attended court, and had 'r[u]n away' before her matter came up for hearing. 'I knew that I could have possibly spoken to that client and it could have made a bit of difference', she said. The counsellors also said that when they refer a debtor to JusticeConnect for legal advice, they would like to receive further information regarding the outcome. The counsellors did not ask their clients to consent to the release of this information, and due to

solicitors' duty of confidentiality, JusticeConnect was unable to disclose it. The counsellors suggested that either they or JusticeConnect could ask clients to sign a consent form, to try to address this issue. The counsellors also explained that on some occasions, clients had been referred for legal advice only to find that they were ineligible for assistance from JusticeConnect (for example, due to a conflict of interest). They thought that it would help if JusticeConnect could refer these clients back for financial counselling as soon as possible, to enable them to explore other referral options.

With regard to their own role in the project, the counsellors admitted that it is often very difficult to assist clients in 15 or 20 minutes, when a matter is stood down to allow for an immediate consultation. 'It's very quick', one said, 'and we really have to think on our feet and be quite thorough... and also, at the same time, being empathetic and looking out for the cues of the client... not being too dismissive of their distress or worries... it's not enough time'. The counsellors did not suggest that the practice of standing down matters should be abandoned, acknowledging that this is an important part of the project; still, they admitted that they preferred the cases in which Registrars granted a four week adjournment straight away, 'because the pressure is off'. The counsellors stated that on one occasion, they had felt unsafe being left alone with an angry and aggressive debtor; however they said that after raising this with Court staff, they had been provided with a duress button, which allayed their concerns. As noted above, all three counsellors said that they had struggled to administer the survey of debtors, particularly in the context of a 20 minute consultation. They suggested that a telephone survey might be a more effective way of obtaining feedback from debtors.

On the whole, however, the counsellors expressed high levels of satisfaction with the project. They particularly valued their interaction with the Registrars in regular 'debrief' sessions at the end of a hearing. 'When the Registrar calls you back to have a chat', one explained, 'it... makes you feel valuable and... gives us insight that the program is valuable too and it's working.'

d Interviews with Registrars

The three Registrars who have participated in the project were interviewed in a focus group format. They described the ways in which the project has benefitted debtors, creditors and the Court.

i Understanding the nature of the hearing

Like the counsellors, the Registrars thought that the project helps debtors to understand the purpose of a hearing in the Bankruptcy List. One Registrar observed that

...generally speaking... self-represented litigants... do have a lot of difficulty understanding a couple of critical points of principle that underpin bankruptcy... They often don't understand that... the focus of the matter is their solvency. I think they often think that they are, as it were, at the pointy end of a debt collection process and the best thing they can try and do is just to get out of it as cheaply as possible. I think sometimes they stand up and try and make submissions that are misguided. Sometimes too they think that they're still in a position to argue legal issues in relation to the debt, in circumstances where they can't do it, and the *Bankruptcy Act* is quite... technical about what issues you can raise and when and matters

that you should have raised in the proceeding where the original judgment was made... A number of self-represented litigants don't understand that, and they arrive thinking... I still don't think I owe them the money. Because the car didn't work or something like that... So I'm still not going to pay them and I want to have another opportunity to argue that point.

The Registrars considered that the counsellors play an important role, not only in focussing the debtors on the issue of solvency, but in familiarising them with the court process more generally. They recognised that some debtors

find it difficult to... understand some of the words that we use automatically, like *adjourn* and *evidence* and *affidavit*. So I think to navigate a hearing in the Bankruptcy List is difficult for them... Once you start talking about, well you've got to file an affidavit and you can't give evidence from where you're standing... then once you add some of the technicalities of bankruptcy to it, I think it becomes fairly difficult for them.

ii Explaining the impact of bankruptcy

The Registrars noted that talking with a financial counsellor often leaves a debtor with a better understanding of bankruptcy and its implications:

I think there's a general conception of bankruptcy as being a terrible thing and a shameful thing... Some people actually misunderstand how it's going to work, what the consequences are, that it might be the best thing for them under the circumstances. It might be beneficial. Rather, they just think that their things are going to be taken from them; they might be thrown out into the street.

Some debtors believe that 'they'll have to leave their job', and these 'misunderstandings... add to their stress levels.' By dispelling these misconceptions, counsellors alleviate some of the debtors' distress and allow them to take a more dispassionate, pragmatic view of their situation.

iii Advocacy

As the Registrars pointed out, financial counsellors offer a kind of assistance that goes far beyond anything the Court can provide to self-represented parties. They conceded that their own capacity to assist debtors is constrained by their need to remain impartial:

It's a balance... between making sure [debtors] are not at a disadvantage by reason of their lack of representation or understanding [and] not assisting them to the point of preferring them over the creditor[s] who... are represented, invariably.

The Registrars conceded that their attempts to help might intimidate some debtors, whereas

the same questions from a counsellor are going to be less threatening... than questions from the bench. I mean we ask them, are you employed, what do you earn, what do you own. It's a bit threatening coming from us and no doubt there's a bit of suspicion here as to why you're asking.

The confidential nature of the counsellor's assistance was crucial to its success, they felt, since debtors were often reluctant to reveal their financial problems in open court. 'There's a great freedom in being able to discuss something in confidence with someone who basically

is there to help’, one Registrar observed. ‘They’re on your side to help you as much as you can.’ The Registrars also attached great value to the counsellors’ capacity to speak on debtors’ behalf in open court.

iv Assessing solvency and explaining options

The Registrars confirmed that in some cases, the financial counsellors have helped debtors to establish solvency and to find ways of avoiding a sequestration order. ‘I’ve had one case where the debtor had been insisting to me that he didn’t have any means of paying the debt’, one Registrar said.

I’ve referred him to the financial counsellor, and the financial counsellor came back and said quite emphatically that he would be able to raise finance on his home. So he didn’t actually realise that he could use the equity in his home to borrow, at home loan rates, in order to pay – he was thinking in terms of I can’t afford a personal loan or whatever. So that was a classic example of the financial counsellor alerting him to a possible way of resolving the issue.

v Emotional support

The Registrars agreed that the counsellors provide debtors with vital emotional support. One stated that

there’s definitely support being provided by the financial counsellors, in terms of helping people deal with their circumstances...where the self-represented litigant arrives in an extremely emotional state. You know they may have been crying, they might be crying while they’re standing on their feet at the bar table or something like that...

After speaking with a counsellor, these debtors often seem ‘more at ease, because they understand that bankruptcy’s not the end of the world.’ They are

in a calmer state and a better state to make the decision. I’ve... had a couple of occasions where the litigant’s come back and said, well I came here and I didn’t want to be made bankrupt. It’s terrible, I’m very upset about it... but... I can see it’s the best thing so I’m prepared to accept it.

vi A faster and more efficient process

The Registrars felt that the project made the Bankruptcy List run more efficiently, saving resources for the Court and for creditors. Whereas, ordinarily, matters involving self-represented debtors would take three or more hearings to resolve, ‘[t]hey’re now taking one or two’ and are ‘generally resolved in half the time’. As a result of seeing a counsellor, debtors ‘start to think about what they have to think about immediately, rather than [in] two or three months’. The project also helps the Bankruptcy List to run more quickly, they said, since it reduces the need for the Registrar to spend time in open court questioning the debtor and explaining the purpose of the proceedings. ‘It’s much more efficient to refer a matter off,’ one Registrar explained,

than to have spent probably 10 minutes or more dealing with an unguided self-represented litigant who wants to... give you their entire life story... It’s assisting us in being able to more efficiently run the List, have somebody deal with them, while we continue the business of the court.

vii Access to justice

One Registrar noted that the project helps debtors to participate meaningfully in their court hearings, promoting access to justice in a procedural sense. While the project might not affect the substantive outcome of every matter, he said,

there's another more significant difference, which is that the matter's been determined... in a circumstance where all the parties understood what the proceeding was about, what the major issues were, and were able to put their position properly on the basis of some kind of tangible real understanding. That's a big difference... from the situation we had before, where we never really knew whether the person, the self-represented litigant, understood what was going on or not.

viii Suggestions for improvement

The Registrars suggested that there might be scope to provide the counsellors with additional training, particularly on the issue of creditors' legal costs. They said that debtors sometimes ask counsellors about their potential liability for costs, and that counsellors find it hard to answer such questions. Because the Court's discretion as to costs is so wide, it would be difficult to provide counsellors with a set of points or 'script' to guide them in these circumstances. Still, the Registrars thought it might be useful to provide the counsellors with further training, to help them to deal with debtors' questions regarding costs. With the proviso that the counsellors cannot give 'de facto' legal advice, the Registrars thought that 'general guidance... of a neutral nature... would be beneficial'.

The Registrars concurred with the counsellors' view that there is scope to improve coordination between the counselling project, the Court and JusticeConnect. 'In principle', one Registrar said, 'I like the fact that the two systems... support each other.' In practice, however, the two services did not always work seamlessly. The Registrars observed that referral to a counsellor has immediate benefits 'because it's an instantaneous referral where the answer comes back quickly'. By contrast, 'when you make a referral to JusticeConnect... [you] don't ever know what the process was' and what advice was given. Moreover, these referrals are 'time-consuming' and the legal advice 'sometimes... doesn't eventuate, because for example there may be a conflict'. One Registrar has had 'a number of matters in which JusticeConnect [wasn't] able to give advice.' In these circumstances, the Court only finds out 'anecdotally, if at all' whether or not the debtor has been accepted as a client, attended an appointment and received legal assistance. The Registrars acknowledged that JusticeConnect is limited in its capacity to provide this information since, apart from its duty of confidentiality to clients, its solicitors do not attend court. Still, these factors underscored the unique value of the counselling project: 'immediate, invariably effective' and specifically tailored to the needs of the debtor and the Bankruptcy List.

e Court data

Throughout the project, the Court maintained a detailed spreadsheet outlining the progress of matters referred to the financial counsellors. This data reveals that, of the 31 matters in which referrals were made by Registrars as at 26 May 2015, 27 proceedings have

been finalised.¹² The remainder stand adjourned to a future list. Of the 27 finalised matters, 21 (78%) were resolved by consent between the parties, with 14 consent dismissals and 7 consent sequestration orders. It is likely that this high proportion of resolutions by consent will reduce the numbers of reviews and appeals from Registrars' decisions. This in turn will reduce the workloads of both FCC and FCA judges.

The Court data also suggests that the Project has enabled several matters to resolve more quickly than would otherwise have been the case. Of the 27 finalised matters involving a financial counsellor, 21 took only one or two hearings to resolve. By way of comparison, the Registrars in their interviews stated that matters involving self-represented debtors often take three or more hearings to resolve. This reduction in the number of hearings per matter represents a significant saving of court time. It suggests that the Project has succeeded in enabling the Court to use its resources more efficiently.

5 Evaluation

Assessed against its objectives, the project has been highly successful.

i Assisting self-represented debtors to understand the nature of bankruptcy proceedings, so they are better able to determine their rights, and to make effective decisions in presenting their cases

The project has provided a unique and highly targeted service, reaching debtors who otherwise would not have had access to financial counselling. Feedback provided by debtors, creditors' solicitors, financial counsellors and Registrars strongly suggests that the project has helped some debtors to establish solvency, when they may otherwise have been made bankrupt. It has also enabled other debtors to identify bankruptcy as a positive step for them, in their circumstances. Irrespective of the outcome, access to the project has enabled debtors to understand the nature of the bankruptcy proceedings and to participate meaningfully in the process.

ii Increasing efficiency in the FCA and FCC in achieving the just resolution of bankruptcy matters involving self-represented debtors, as promptly and inexpensively as possible

The project has also increased the efficiency of the Bankruptcy List. By referring debtors for personalised assistance, it has relieved Registrars of the need to explain the proceedings and question debtors as to their solvency in open court. By encouraging the prompt resolution of matters, it has reduced the need for adjournments, saving the Court time and allowing it to use its resources more efficiently. By bringing most referred matters to a resolution by consent, the project has reduced the likelihood of these matters being appealed, representing a further reduction in the workloads of both FCC and FCA judges.

¹² As noted above, the evaluation of the project was undertaken in relation to 32 self-represented debtors because one additional debtor received advice from a counsellor without being formally referred by a Registrar. As at 14 July 2015, there have been 36 referrals made from 74 Bankruptcy Lists.

iii Additional benefits for vulnerable debtors

The evaluation found that the project has conferred important psychological benefits on many debtors. Several debtors indicated that, in the highly stressful context of a court hearing, the chance to talk to a counsellor gave them a great sense of satisfaction and relief. It is likely that some debtors also obtained a long-term psychological benefit, since by bringing their matters to conclusion more quickly, they avoided the more prolonged and debilitating stress of a process lasting several months.

6 Conclusion and Recommendations

On the basis of this evaluation process, the financial counselling pilot project has been highly successful in providing innovative, targeted assistance to self-represented debtors, in providing much-needed support to debtors and in enhancing the efficiency of the Bankruptcy List. There is reason to expect that the project will benefit debtors and the Court if it continues in its current form. There may be scope to expand the project further and to initiate similar projects in other Registries of the FCC.

There is some scope for improving the project, if it is to continue at the Melbourne Registry or to be replicated in other Australian courts. As noted above, several debtors said they thought the service should be advertised more widely, a suggestion with which several creditors' solicitors agreed. The counsellors raised problems with the written survey of debtors, suggesting that a telephone survey might be preferable. The counsellors also indicated that they feel a great deal of pressure in their 20 minute consultations with clients, and said that they would like to have more time if possible. While some time pressure is inevitable, it would be helpful if the Court could consider ways in which slightly longer consultations could be accommodated (for example, by standing each matter down for a longer interval). The Registrars suggested that it may be beneficial to provide financial counsellors with further training, particularly on the issue of liability for costs. Both the Registrars and the financial counsellors felt that there was scope to improve the flow of referrals between the counsellors and JusticeConnect.

Recommendation 1: That the project continue to operate in the Melbourne Registry of the FCC.

Recommendation 2: That the FCC investigate the possibility of expanding the project to other Registries.

Recommendation 3: That the service be advertised more widely.

Recommendation 4: That the FCC investigate options for providing the financial counsellors with more time to consult with individual debtors, for example by standing matters down for a slightly longer interval.

Recommendation 5: That the FCC provide financial counsellors with ongoing training, developed in consultation with the financial counsellors, including on the issue of debtors' liability for creditors' costs.

Recommendation 6: That the steering committee, or other appropriate body, liaise with JusticeConnect, to explore ways in which the projects could be better integrated. Steps could be taken to improve communication between Consumer Action and JusticeConnect, so that the financial counsellors receive basic information about the outcome of matters that have been referred to JusticeConnect, in circumstances where both organisations are effectively working for the same client. To address confidentiality concerns, debtors could perhaps be asked to sign a consent form, allowing JusticeConnect to provide this basic information to the financial counsellors where appropriate, and vice versa.

Recommendation 7: That in future the evaluation of debtors' experiences be carried out via a telephone interview, rather than via a written survey. Ideally, the interview should be conducted by an independent person and should take place after the debtor's matter has concluded.

Appendix 1: Client survey

**Federal Circuit Court Bankruptcy List
Financial counselling pilot project
Client survey**

DATE: _____

Have you completed this survey before?

Please tick:

- This is my first time at Court.**
- This is my second time at Court.**
- I've been to Court several times.**

What has happened since the last time you came to the Court?

Why have you come back?

You are welcome to complete the survey again, but you do NOT need to complete all the questions. Please feel free to answer those questions that are most relevant to you.

A. About you

1. What is your age? _____
2. What is your gender? _____
3. Please name your suburb (or town), or the postcode of where you live:

4. Do you speak any languages other than English at home? If so, which language(s)?

5. Are you currently employed? _____
6. If you are employed, what do you do? _____

B. Your views on the financial counselling service at Court

Please select one answer in response to each of the following statements. These questions relate to the assistance you received from a financial counsellor at Court, not at any other time.

1. The financial counsellor helped me to understand bankruptcy.

- Strongly agree
- Agree
- Not sure
- Disagree
- Strongly disagree

2. The financial counsellor helped me to understand Court procedures.

- Strongly agree
- Agree
- Not sure
- Disagree
- Strongly disagree

3. The financial counsellor helped me to avoid bankruptcy.

- Strongly agree
- Agree
- Not sure
- Disagree
- Strongly disagree

4. The financial counsellor helped me to realise that bankruptcy was a good option for me.

- Strongly agree
- Agree
- Not sure
- Disagree
- Strongly disagree

5. The financial counsellor gave me good advice.

- Strongly agree
- Agree
- Not sure
- Disagree
- Strongly disagree

6. The financial counsellor gave me useful options for addressing my financial problems.

- Strongly agree
- Agree
- Not sure
- Disagree
- Strongly disagree

7. I am better off as a result of the assistance I received from the financial counsellor.

- Strongly agree
- Agree
- Not sure
- Disagree
- Strongly disagree

8. Do you have any suggestions as to how the financial counselling programme at the Court might be improved?

9. Do you have any other comments on the assistance you received from the financial counsellor at Court today?

10. What are or were the main causes of your financial problems (eg unemployment, illness, business losses, relationship breakdown)?

11. Do you have any further comments?

THANK YOU VERY MUCH FOR COMPLETING THIS SURVEY.

PLEASE PLACE YOUR COMPLETED SURVEY IN THE SECURE BOX PROVIDED.

Please note that this survey is anonymous. If you would like to receive a copy of our research report, please contact the research team directly, using the telephone number or email address provided in the Plain Language Statement.

Appendix 2: Creditors' solicitor survey

**Federal Circuit Court Bankruptcy List
Financial counselling pilot project
Creditors' solicitor survey (administered online using SurveyMonkey)**

This survey asks for your views on the financial counselling service available to self-represented litigants (SRLs) in the Bankruptcy List. This service has been available to SRLs since October 2014, as part of a short term pilot project. Your feedback will help us to evaluate the impact of the service.

This survey contains 20 questions and should take 3 to 5 minutes to complete.

A. About you

1. What is the business of your main client in the Bankruptcy List (eg a bank, finance company)?
2. How long have you been practising in the Bankruptcy List at the Federal Circuit Court?
3. What is the nature of your legal practice (eg large corporate firm, small firm, sole practitioner, in-house counsel)?
4. How many of your matters have involved a financial counsellor (ie as part of this pilot project)?

B. Impact on SRLs

These questions ask about how the pilot project has affected SRLs in the Bankruptcy List. In answering these questions, please comment on the impact of financial counsellors located at the Court.

5. The financial counsellors help SRLs to understand the purpose of the Court hearing.

- Strongly agree
- Agree
- Not sure
- Disagree
- Strongly disagree

6. The financial counsellors help SRLs to understand the consequences of being made bankrupt.

- Strongly agree
- Agree
- Not sure
- Disagree
- Strongly disagree

7. The financial counsellors help SRLs to explain their circumstances to the Court.

- Strongly agree
- Agree
- Not sure
- Disagree
- Strongly disagree

8. The financial counsellors help SRLs to assess their capacity to repay their debts.

- Strongly agree
- Agree
- Not sure
- Disagree
- Strongly disagree

9. The financial counsellors help SRLs to assess whether or not bankruptcy is the best option for them.

- Strongly agree
- Agree
- Not sure
- Disagree
- Strongly disagree

10. The financial counsellors negotiate effectively with their clients' creditors.

- Strongly agree
- Agree
- Not sure
- Disagree
- Strongly disagree

11. The financial counsellors provide SRLs with realistic options for solving their financial problems.

- Strongly agree
- Agree
- Not sure
- Disagree
- Strongly disagree

12. SRLs are better off as a result of the assistance they receive from the financial counsellors.

- Strongly agree
- Agree
- Not sure
- Disagree
- Strongly disagree

C. Impact on your practice, your clients and the Court

These questions ask about the how the pilot project has affected your practice, your clients and the Court. Please feel free to answer simply 'Yes' or 'No', or to provide longer comments on specific matters or the service more generally.

- 13. Did this service cause your matters to resolve more quickly, with fewer hearings?
- 14. Did it help you to understand a debtor's grounds for resisting bankruptcy?
- 15. Did it help you to determine whether or not a debtor was solvent?
- 16. Did it result in a more efficient, cost-effective process for your client?
- 17. How could the service be improved?
- 18. What are the benefits (if any) of providing financial counselling services to SRLs at Court, rather than providing them externally?
- 19. What are the disadvantages (if any) of providing these services at Court, rather than providing them externally?
- 20. Do you have any further comments?

Thank you very much for completing this survey. Your responses will be reviewed by a research team at the Melbourne Law School. The research team is preparing a report on the impact of financial counselling services in the Federal Circuit Court. If you would like to receive a copy of the report, please contact Lucinda O'Brien on (03) 8344 7096 or at lucinda.obrien@unimelb.edu.au. These contact details are included in the Plain Language Statement (the PDF document you received by email, along with the link to this survey).

Appendix 3: Interview questions for financial counsellors

1. Can respondents to a bankruptcy petition successfully navigate a hearing in the Bankruptcy List of the Federal Circuit Court on their own?
2. What can a financial counsellor do to assist them?
3. When clients first come to you for assistance at the Court, how do they feel about the Court hearing?
4. How do they feel about financial counselling and the assistance you are able to provide?
5. How do they feel about their financial problems and their future prospects?
6. Do you think that they understand the nature of bankruptcy proceedings and, in particular, the focus of the Court on the issue of solvency?
7. How long do you typically spend with a client on the day of his or her Court hearing?
8. How often do you help a client to prepare an affidavit of financial circumstances, or any other financial summary? Have you found this difficult to do, in the context of a one-off, Court-based service?
9. How often do you refer a client to other financial counselling services for ongoing assistance? How many of them do you think will actually access these services?
10. Does the client's attitude towards the hearing, or his or her general financial situation, change as a result of your assistance and advice? If so, how?
11. What are the advantages and disadvantages associated with being located at the Court?
12. Do you think that financial counselling at the Court is more or less effective than counselling provided off-site? Why?
13. Do you think that access to financial counselling is more or less important than access to legal advice, for unrepresented respondents in the Bankruptcy List? Why?
14. Do you think that certain people are especially likely to benefit from access to a financial counsellor? If so, who are they?
15. Do respondents in the Bankruptcy List require any other kinds of assistance, either provided in the Court building or available via referrals?
16. How effective has this pilot programme been?
17. Have there been any problems with the operation of this pilot programme? If so, what were they?
18. Do you have any suggestions as to how the programme might be improved?
19. Do you have any other comments to make about this pilot programme?

Appendix 4: Interview questions for Registrars

1. Do you think that respondents to a bankruptcy petition can successfully navigate a hearing in the Bankruptcy List of the Federal Circuit Court without legal representation? If not, why not?
2. What can a Registrar do to assist respondents in this situation?
3. What can a financial counsellor do to assist respondents in this situation?
4. What can a solicitor do to assist respondents in this situation, short of representing them in Court?
5. How do you decide whether to refer a respondent to a financial counsellor, a solicitor or both?
6. How do respondents react when you suggest that they seek advice from a financial counsellor located in the Court?
7. How do creditors view the presence of financial counsellors at the Court?
8. Did you think debtors in bankruptcy matters before you had a significantly better understanding of the nature of the proceedings after receiving assistance from a financial counsellor, than they would have without that assistance?
9. If yes, was the debtor therefore better able to assess their options, to the extent you could perceive it?
10. Did the assistance of a financial counsellor assist the Court in understanding the position of the debtor including in relation to solvency and any legal issues?
11. Were the number of hearing dates reduced from what would have been expected without a financial counsellor?
12. Were the legal costs of the creditors likely to have been reduced?
13. Where the financial counsellor spoke in Court on behalf of the debtor, did that assist the Court?
14. In your experience, how successful have financial counsellors been in assisting debtors in bankruptcy proceedings before you?
15. How can the involvement of a financial counsellor affect the outcome of a hearing, or a bankruptcy petition more generally?
16. Do you think that access to financial counselling is more or less important than access to legal advice, for unrepresented respondents in the Bankruptcy List? Why?
17. Do you think that certain types of respondents are more likely than others to benefit from the assistance of a financial counsellor? If so, how would you characterise these respondents?
18. Do respondents in the Bankruptcy List require any other kinds of assistance, either provided in the Court complex or available via referrals?
19. How effective has this pilot programme been?
20. Have there been any problems with the operation of this pilot programme? If so, what were they?

21. Do you have any suggestions as to how the programme might be improved?

22. Do you have any other comments to make about this pilot programme?