Financial counselling and the self-represented debtor in the Federal Circuit Court bankruptcy list: An analysis of a recent pilot service

Paul Ali, Lucinda O’Brien and Ian Ramsay

This article presents a detailed empirical analysis of an innovative financial counselling service offered to self-represented debtors in the Bankruptcy List, in the Melbourne Registry of the Federal Circuit Court, in 2014 and 2015. This pilot service offered on-site financial counselling to debtors who attended the court without legal representation, in response to a creditor’s petition. The article draws on the researchers’ surveys of debtors and creditors’ solicitors, interviews with financial counsellors and Registrars, and data compiled by staff at the court. It concludes that the service improved the efficiency of the List, while also offering significant benefits to debtors. The article outlines potential for further empirical research on the role of financial counselling in the context of contested creditors’ petitions, and in the bankruptcy system more generally. It also discusses the role of emotion in bankruptcy proceedings and identifies scope for further, interdisciplinary work in this area.

INTRODUCTION

When creditors are unable to recover debts they can apply to have the debtor made bankrupt.1 Though relatively rare,2 the “creditor’s petition” is an enduring feature of the Australian bankruptcy system.3

1 Bankruptcy Act 1966 (Cth) ss 43, 44.
2 Around 10% of bankruptcies are initiated by creditors, while the rest are initiated by debtors voluntarily. In the financial year ending on 30 June 2014, there were 2,058 involuntary bankruptcies, representing 11% of all bankruptcies. In the previous financial year, there were 1,863, representing 9% of all bankruptcies: Australian Financial Security Authority (AFSA), Table 2: Bankruptcies by Type – Debtors’ Petitions and Sequestration Orders, https://www.afsa.gov.au/resources/statistics/selected-statistics/personal-insolvency-activity/table-2-bankruptcies-by-type-debtors-petitions-and-sequestration-orders. In the 2011 calendar year, 10% of bankruptcies were involuntary: Insolvency and Trustee Service Australia (ITSA), Profile of Debtors 2011 (Report, 2012) p 19.
In response to a creditor’s petition, a debtor may appear before the court to explain why he or she should not be made bankrupt. Many debtors appear at such hearings without legal representation and without having obtained any legal advice. Some of these debtors have little understanding of the purpose of the hearing or the need to demonstrate solvency in order to avoid bankruptcy. Many debtors, overwhelmed by the stress of their debts and other problems, are highly emotional and cannot take decisive steps to address their financial problems. These factors often make it difficult for the courts to manage contested creditors’ petitions in a fair and efficient manner. In response to this problem, the Federal Circuit Court (FCC) in Melbourne has begun to offer on-site financial counselling to self-represented debtors in the Bankruptcy List. This service, initiated by the court, aims to promote the efficient operation of the List and to achieve the just resolution of contested creditors’ petitions. Specially trained financial counsellors attend each hearing of the List and 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. In so doing, they help debtors to make informed decisions regarding their financial problems, while also alleviating some of their distress. At the same time, they enable the court to resolve these matters more quickly and efficiently.

This article represents the first detailed empirical study of financial counselling in the Australian bankruptcy system, focussing specifically on its role in contested creditors’ petitions. It reports the results of an evaluation of the FCC service, conducted by researchers at the Melbourne Law School (MLS). This evaluation, carried out from October 2014 to May 2015, drew on the experiences of debtors, financial counsellors, creditors’ solicitors and Registrars of the FCC, as well as data collected by FCC staff. It concluded that access to financial counselling helped several debtors to demonstrate solvency and thus avoid bankruptcy. In other cases, where debtors had little prospect of avoiding bankruptcy, the counsellors played an equally important role. Explaining the consequences of bankruptcy, they sought to dispel some of its negative connotations, presenting it as a viable, constructive solution to unmanageable debt. The counsellors also provided important emotional support to debtors in distress, enabling them to focus on the relevant issues and engage meaningfully with the legal process. While the service might not have led to different outcomes in every case, it helped many debtors to take decisive action and resolve their matters more quickly, without the need for multiple adjournments. In this respect, the service reduced stress and anxiety for many debtors, while also reducing unnecessary delay and wastage of the court’s resources.

This article begins by outlining the operation of the service provided at the FCC, drawing on surveys of debtors and creditors’ solicitors, interviews with financial counsellors and Registrars of the court, and data collected by FCC staff. It proceeds to evaluate the service’s success in assisting debtors and enhancing the efficiency of the Bankruptcy List. It goes on to discuss the potential for further research in this area. Noting the achievements of the FCC service, it suggests that there may be scope to create a more formal role for financial counselling within the Australian bankruptcy system.

4 To the researchers’ knowledge, there is no publicly available data regarding the demographic profile of debtors who attend court in response to a creditor’s petition. AFSA publishes extensive data regarding Australian bankruptcies and the demographic profile of bankrupts, including the age, gender, income and family situation of bankrupts (AFSA, Profiles of Debtors, https://www.afsa.gov.au/resources/statistics/profiles-of-debtors), but this data does not distinguish between voluntary and involuntary bankruptcies. There is considerable scope for further empirical research regarding the ways in which debtors respond to creditors’ petitions. The current study suggests that some debtors may be underrepresented in hearings in the Bankruptcy List: for example, according to statistics published by AFSA, more than 40% of Australian bankrupts are women, however all 12 debtors who participated in this study were men. Further empirical study of contested creditors’ petitions could investigate whether or not court attendance rates vary according to income, gender, age, ethnic background, geographic location, literacy levels or other factors. It could explore the extent to which some types of debtors (eg men) are more likely to attend court, while others are more likely to allow their matters to proceed ex parte (eg women). It could explore social factors that might affect rates of court attendance (eg, access to legal advice, employment obligations and child care responsibilities). This research could also explore the extent to which attendance at court improves a debtor’s prospects of avoiding bankruptcy.

reviews existing commentary on debt counselling in the United States (US), Canada and other jurisdictions, and outlines the important ways in which these models differ from Australian financial counselling. The article concludes that it would be useful to carry out further empirical studies of financial counselling, in the specific context of contested creditors’ petitions and in relation to other aspects of Australian bankruptcy law. Drawing on interdisciplinary work in the emerging field of “law and emotion”, it also identifies scope for further analysis of the role of emotion in bankruptcy, and in particular, the ways in which financial counselling helps emotional debtors to obtain more favourable outcomes from their bankruptcy hearings. It concludes that further empirical research of this kind could make useful contributions to bankruptcy scholarship and to other, more expansive and interdisciplinary fields of research.

BACKGROUND

Involuntary bankruptcies are relatively rare in Australia, making up roughly 10% of bankruptcies each year. To bring about a debtor’s involuntary bankruptcy, a creditor must “petition” the court for a sequestration order. The creditor (or creditors collectively) must prove that the debtor owes at least $5,000, and that he or she has committed an “act of bankruptcy”. 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. Registrars presiding over hearings in the List state that debtors often have little understanding of their purpose; that these debtors often have a limited grasp of their true financial situation and their capacity to repay their debts; and that some do not understand the steps they can take to avert bankruptcy, for example, by selling assets such as a family home. The Registrars report that, even when debtors are relatively well informed about their options, they are often so overwhelmed by stress that they cannot act on this knowledge to resolve their situations. These factors often make it difficult for Registrars 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 will in most cases 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.

To address this problem, in September 2014, the Melbourne Registry of the FCC began to provide on-site financial counselling to debtors in the Bankruptcy List. Financial counsellors specialise in assisting people with financial problems, working within a community development framework. Financial counsellors seek to empower their clients by equipping them with information, skills and

7 See n 2.
6 Bankruptcy Act 1966 (Cth), ss 43, 44, 47; Symes CF and Duns J, Australian Insolvency Law (2nd ed, LexisNexis Butterworths, 2012) pp 69-71. “Acts of bankruptcy” are defined by s 40 of the Bankruptcy Act 1966 (Cth). They include failure to comply with a bankruptcy notice; fleeing the jurisdiction with the intention of defeating creditors; and breach of a debt agreement (as defined by Pt IX of the same Act).
9 This discussion of self-represented debtors draws on the researchers’ interview with Registrars of the Melbourne FCC. The Registrars preside over hearings in the Bankruptcy List. For a detailed account of this interview, see the section, “Interview with Registrars”, below. Many of the Registrars’ observations were corroborated by the financial counsellors who participated in the service. The researchers’ interview with the financial counsellors is discussed in the section, “Interview with Financial Counsellors”, below.
10 The court may dismiss the creditor’s petition, and refuse to make the sequestration order, if it is “satisfied by the debtor: (a) that he or she is able to pay his or her debts; or (b) that for other sufficient cause a sequestration order ought not to be made” (Bankruptcy Act 1966 (Cth), s 52(2)(b)). It may also stay proceedings under the order for up to 21 days (s 52(3)). See Nichols PW, Bankruptcy Act 1966 (5th ed, LexisNexis Butterworths, 2012) p 215.
insights into their financial behaviour. They offer budgeting assistance and guidance with money management, as well as information about government assistance and hardship programs (such as those offered by electricity, water and telecommunications providers). They assist their clients by negotiating with creditors, establishing payment plans and, in some cases, providing information about other options for dealing with debt, such as formal debt agreements and bankruptcy. They aim to help clients to address their immediate financial crises, while also adopting “longer-term … strategies” to prevent financial problems from recurring. Australian financial counsellors are entirely reliant on State and Federal Government funding. For this reason, counselling services often struggle to meet demand and experience frequent, sometimes dramatic fluctuations in revenue. At the same time, this government funding enables Australian financial counsellors to offer impartial and independent services at no cost to their clients.

The FCC service arose from collaboration between the FCC and the Consumer Action Law Centre (Consumer Action), a community legal centre with an in-house financial counselling service. The steering committee included representatives of the Federal Court of Australia (FCA), the FCC, the Victorian peak body for financial counsellors, Consumer Action and the MLS. The service received direct funding from the FCA, the FCC, 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). This funding enabled the service to operate on a trial basis for an initial period of 12 months.

**OUTLINE OF THE SERVICE**

The service’s two principal objectives were set out in a Memorandum of Understanding between the FCA, the FCC, Consumer Action and the MLS. They were “to assist [Self-Represented Litigants (SRLs)] 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 SRLs as promptly and...
inexpensively as possible”. To achieve these objectives, the FCC provided training to a group of financial counsellors employed by 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 service through its Bankruptcy Users’ Group and other channels. From 30 September 2014, when the service officially launched, financial counsellors attended hearings of the Bankruptcy List each Tuesday and Thursday morning. Working in conjunction with the counsellors, a Melbourne not-for-profit legal service offered assistance to debtors with potential legal grounds for resisting bankruptcy. Some self-represented debtors were referred to the legal service, while others were referred only to one of the two, at the discretion of the presiding Registrar.

Unlike conventional financial counselling services, the service sought to offer immediate, on-the-spot assistance to debtors, within the stringent time constraints imposed by the court. In most cases, after making a referral to a financial counsellor, the Registrar would pause or “stand down” the matter for approximately 30 minutes, to enable the debtor to confer with a counsellor. During this time, the counsellor would assess the debtor’s financial situation, explain the purpose of the court hearing and emphasise the need to demonstrate solvency. If the debtor had no realistic prospect of avoiding a sequestration order, the counsellor would outline the basic consequences of bankruptcy. If the debtor had some assets or alternative means of repaying his or her debts (eg by borrowing money), the counsellor might attempt to negotiate a repayment plan with the creditor or creditors. At the end of this consultation, the debtor would return to court. In some cases, the debtor would address the court, while in others, the counsellor would speak on the debtor’s behalf. At this point, the debtor might consent to bankruptcy, whereupon the court would issue a sequestration order. Alternatively he or she might request an adjournment. The Registrar would usually grant an adjournment, for as little as a week or as long as several months. Of these adjourned matters, most resolved at the second hearing, either because the matter resolved (due to payment of the debt or the creditor’s acceptance of a payment plan) or because the debtor failed to attend. Where debtors failed to attend the second hearing, the Registrar generally proceeded to make the debtor bankrupt in absentia.

**RESEARCH METHODOLOGY**

The research team carried out a multi-faceted empirical evaluation of the service. It devised its methodology in consultation with the steering committee and the ethics committees of the FCC and the MLS. The evaluation had five components: a written survey of debtors, completed at the court; an online survey of creditors’ solicitors, administered using the SurveyMonkey platform; separate group interviews with financial counsellors and Registrars, carried out by the MLS research team; and a review of data collected by FCC staff. The debtor survey asked respondents for basic demographic


22 The service ceased operating briefly over the Christmas and New Year period.

23 While the legal service did not offer legal representation, it provided many other forms of assistance to debtors, including legal advice, assistance in the preparation of documents, information about court procedure and advice on other ways of resolving their financial problems.

24 These grounds might include defects in the bankruptcy notice: Bankruptcy Act 1966 (Cth), s 41. See also Nichols, n 10, pp 149-179.

25 For a discussion of the criteria that Registrars adopted in deciding whether to refer debtors for financial counselling, legal advice or both, see the section, “Debtors with ‘Financial’ Issues”, below.

26 Most matters were adjourned for around one month. This information was derived from the spreadsheet compiled by the Registrars and their assistants, summarising the progress of each matter from first to final hearing. This data is discussed in more detail in the section, “Court Data” below.

27 The methodology was approved by the Chief Judge of the FCC and the Human Ethics Advisory Group in the MLS.

28 The surveys of debtors and creditors’ solicitors were anonymous. Debtors 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.
information (such as their age, gender and occupation) and then asked them to assess the service’s impact on their understanding of court procedure, the bankruptcy system and the issues in dispute. It also asked debtors to assess the service’s impact on their hearing and their financial situation more generally. It concluded with some open-ended questions regarding ways in which the service might be improved and the causes of the debtors’ financial problems. The survey of creditors’ solicitors followed a similar format, asking respondents for basic information about their legal practice and their clientele, then asking them to assess the service’s effectiveness in assisting debtors and promoting the efficient conduct of the Bankruptcy List. The interviews with financial counsellors and Registrars assumed the format of small focus groups, each with three participants (excluding the researcher). The researcher asked the interviewees a series of questions regarding the service’s operation, its impact and ways in which it could be improved. In both interviews, participants were encouraged to view the questions as starting points for a general discussion. The methodology sought to document the way in which the service operated, in a practical sense; to evaluate its success in meeting its stated objectives; and to understand why it had succeeded in meeting, or failed to meet, these objectives.

In adopting this flexible, multi-method or “triangulated” approach, combining quantitative and qualitative methods, the research team sought to obtain a more nuanced and multi-faceted understanding of the service than would have been possible by adopting a single technique.

**Challenges posed by the debtor survey**

The debtor survey proved to be the most complex and challenging aspect of the evaluation process, presenting a number of practical and conceptual problems. Some practical problems arose from the research team’s decision to administer the survey at the court, immediately after the debtor’s hearing. It was accepted that the debtors would find it difficult to focus on completing a survey at this time, due to the stress of impending bankruptcy and related issues. It was understood that many debtors might have little desire to complete the survey at court, in this context, when their immediate legal and financial problems demanded their full attention. The research team also anticipated that, as in previous empirical studies of bankruptcy, some debtors would be reluctant to participate, due to perceptions of stigma attaching to bankruptcy or a view that money and financial problems...
The research team also envisaged that some debtors might complete multiple surveys, over successive attendances at court, potentially distorting the results. Counterbalancing these risks, it seemed highly likely that any other method would result in an extremely low response rate. In the context of acute financial stress and imminent bankruptcy, it seemed probable that very few debtors would complete a written survey if asked to take it home and return it by post.

The design of the debtor survey encountered other methodological problems often associated with empirical studies of bankruptcy and financial counselling. The format of the survey required debtors to assess their own understanding of the bankruptcy proceedings and the way in which the counselling affected it. Self-reported data of this nature must be treated with some caution, as there is evidence that people “tend to overestimate their financial knowledge relative to their actual knowledge”. The proposed methodology also raised the prospect of selection bias, since there was a risk that only debtors who responded positively to the service, or to the financial counsellors, would agree to participate in the evaluation process. Again, this is a common concern among empirical researchers seeking to assess the impact of financial counselling programmes, since the most “motivated” consumers of such services (those most likely to benefit from counselling) are also the most likely to participate in studies and evaluations.

As in many empirical bankruptcy studies, there was no “control group”, for various reasons, it was not practicable to survey a group of debtors who attended the court, or a comparable court, without using the financial counselling service. Finally, there was a risk that, since debtors completed the surveys in the presence of the counsellor who had assisted them, some might feel a degree of pressure to report favourably on their experiences. To counteract this, debtors were invited to deposit their completed surveys into a secure box, located in the room in which they met with the financial counsellors. The debtors were also asked to sign a consent form, in which they acknowledged that their responses would be kept confidential and published anonymously.

Despite the challenges associated with the debtor survey, the research team believed that it was very important to seek debtors’ views on the impact of the service. While it was acknowledged that the debtor surveys could not yield reliable quantitative data, it was hoped that the surveys would offer a qualitative insight into the experiences of debtors, and in this way, provide an important counterpoint to the views of financial counsellors, Registrars and creditors’ solicitors.

Sample size and relevance of results

All five components of the evaluation were based on small samples. This was unavoidable, due to the small scale of the service, in its initial pilot phase; time constraints affecting the collection of data; and the relative rarity of contested creditors’ petitions in the Bankruptcy List. Reflecting its status as a pilot, with limited funding, the service was initially confined to the Melbourne Registry of the FCC. The modest scale of the service necessarily restricted the amount of data available for analysis. Time constraints on the collection of data also affected the sample size. The FCC initially planned to conduct the service for 12 months, from September 2014 to September 2015. In order to complete the

37 Ryan, “Interviewing”, n 35, p 68.
38 In practice, the financial counsellors were able to state with confidence that each debtor only completed one survey.
41 Collins and O’Rourke, n 39, p 492.
42 The absence of a suitable control group is a common feature of empirical studies of insolvency, both personal and corporate: see Lawless and Warren, n 39, p 211; LoPucki LM, “Reorganization Realities, Methodological Realities, and the Paradigm Dominance Game” (1994) 72 Interdisciplinary Conference on Bankruptcy and Insolvency Theory 1307 at 1311-1313.
43 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 research participant consents to the use of his or her information for the purposes of research.
evaluation before the end of the pilot, the research team elected to collect data for an eight-month period from early October 2014 to late May 2015. This eight-month period included a number of public holidays and the summer vacation period, during which very few matters were heard. The small sample size also reflects the relative rarity of contested creditors’ petitions in the List. While there is no publicly available data regarding debtors’ rates of attendance at these hearings, the Registrars participating in this evaluation indicated that most matters are determined ex parte.

Despite the small sample size, and the uniqueness of the service at the FCC, the results of this evaluation are relevant to wider discussions regarding the role of financial counselling in the Australian bankruptcy system. It is possible that the service may expand to other Registries of the FCC in due course. Even if the on-site service does not expand beyond the Melbourne FCC, it offers a useful insight into the ways in which financial counsellors can assist debtors facing a creditor’s petition, in other settings. To the extent that it is an exercise in qualitative research, the present evaluation does not claim that its findings are directly “generalizable” to these settings. The experiences and circumstances of debtors in the Melbourne FCC may not correlate with those of debtors in other Registries of the FCC, or debtors who seek help from financial counsellors in other locations, such as a suburban community legal centre. Still, the present evaluation provides an insight into the range of emotions that such debtors might experience when confronted with a creditor’s petition and required to navigate a complex and inflexible legal process. It also illustrates some types of assistance that financial counsellors might offer to help debtors navigate a hearing in the Bankruptcy List successfully.

RESULTS
In the eight months from October 2014 to May 2015, 31 debtors were referred to a financial counsellor. One additional debtor received advice from a counsellor without being formally referred by the court, bringing the overall number of participants to 32.

Survey of debtors
In practice, as anticipated, the survey of debtors encountered some problems in its execution. The counsellors were highly effective in encouraging debtors to complete the survey. Unfortunately, however, the research team received several completed surveys without an accompanying a consent form, or attaching an unsigned consent form. It is possible that some debtors found it difficult to concentrate on the survey, meaning that they forgot to sign the consent form. Some others may have signed a consent form that subsequently became detached from the survey. As the survey was anonymous, it was not possible to contact these debtors to seek their consent retrospectively. The timing of the surveys also presented difficulties. While it was expected that the counsellors would ask the debtors to complete their surveys after the conclusion of their hearing, they in fact provided the surveys to debtors at the end of their consultation, while the debtor’s hearing was still underway. This made it difficult for debtors to assess the impact of the counsellor’s advice, since at the time of completing the survey, they did not yet know the outcome of their hearings. Administering the surveys mid-hearing also reduced the time available for counsellors to spend assisting debtors.

44 See n 4 above.
45 Financial counsellors currently operate through approximately 100 community organisations across Australia: Brackertz, n 12, p 5; Financial Counselling Australia, Pre Budget Submission, n 16, p 3. For more information regarding the location of these financial counselling services, see Australian Securities and Investments Commission (ASIC), Find a Financial Counsellor (25 July 2014) ASIC’s MoneySmart, https://www.moneysmart.gov.au/managing-your-money/managing-debts/financial-counselling/find-a-financial-counsellor.
47 Webley, n 46, pp 934-35.
48 As the debtor surveys were completely anonymous, it was not possible to exclude this individual from the evaluation process.
49 At the conclusion of the evaluation period, 18 debtors out of 32 had completed a survey.
50 Six completed surveys either did not attach a consent form or attached an unsigned consent form.
Despite these difficulties, the survey of debtors provided a useful insight into the impact of the service. Eighteen of the 32 debtors completed surveys, representing a response rate of 56%. 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%. Of the 12 debtors who returned completed surveys and consent forms, seven (58%) 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 service 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%) 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%) either strongly agreed or agreed that the counsellor had helped them to avoid bankruptcy. By contrast, only three (25%) 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 service. 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”.

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%). 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%) had been appearing in the List for between one and five years, while some had more than 20 years’ experience. The vast majority (68%) 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 service.

The creditors’ solicitors were generally positive about the service. Most (68%) agreed that the counsellors “help [Self-Represented Litigants] to understand the purpose of the Court hearing”. Around the same number (63%) 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% agreed that the counsellors “help SRLs to assess their capacity to repay their debts”. In other respects, the solicitors were more equivocal. Most (53%) 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. Fifty percent (50%) said that the service caused their matters “to resolve more quickly, with fewer hearings”, but 39% found it difficult to say whether or not this was the case. Thirty-nine percent (39%) said that the service helped them to “understand the debtor’s grounds for resisting bankruptcy”, while 56% said that it did not. Twenty-two percent (22%) said that the service helped them to determine whether or not the debtor was solvent, but 67% said that it did not. Fifty percent (50%) said that the service resulted in a “more efficient, cost-effective process” for their clients, with another 11% saying that it may have helped in this regard.

Several solicitors acknowledged the practical benefits of providing counselling at court, rather than referring debtors for assistance elsewhere, at a later date. “Having the counsellor … at court …
One solicitor wrote that the service is “essential for debtors in court, as they are often overwhelmed by the process and need assistance to understand their options.” Another noted that the court has “a duty to ensure that debtors have access to appropriate support.”

Interview with financial counsellors

The interview with the financial counsellors revealed that they are dedicated to helping debtors navigate the complexities of bankruptcy. They described the ways in which they assist debtors, the challenges they face in working on-site at the court, and the ways in which the service could be improved if it is to continue.

Understanding the nature of the hearing

The counsellors believe that most debtors need assistance to understand the process of bankruptcy. They explained that they begin each consultation by assessing the debtor’s situation, taking into account income, assets, and debts, and evaluating any viable options for avoiding bankruptcy, such as taking out a loan or selling a car. In some cases, they have to explain 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 explained, they aim to help debtors “maintain some control” over the process of selling their assets, avoiding bankruptcy and saving substantial legal and administrative fees.

**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 … [I]t 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.

**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.

**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 presiding Registrar in order to offer assistance to debtors. “[O]ften 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]an 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 admitted that it is often very difficult to assist clients in 15 or 20 minutes, midway through a court hearing. “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 service; still, they admitted that they preferred the cases in which Registrars granted a four week adjournment straight away, “because the pressure is off”. As noted above, all three counsellors said that they 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 service. 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 programme is valuable too and it’s working.”
Interview with Registrars

The three Registrars who have made referrals to the service were interviewed in a focus group format. They described the ways in which the service has benefitted debtors, creditors and the court.

Debtors with “financial” issues

The Registrars considered that the service is useful to debtors with predominantly “financial”, rather than “legal”, issues; in other words, debtors who may be able to avoid bankruptcy by paying their creditors, rather than by challenging the creditor’s petition on legal grounds. One explained:

if the unrepresented person is just talking about trying to repay the debt, I’ll refer them just to the financial counsellor…. But if they start talking about things like, “Well, I wasn’t served with a document, and he owes me money,” or something like that, to the extent that they might be raising some sort of counterclaim … I will refer them to [the court-based pro bono legal service].

The Registrars conceded that in some cases, it is difficult to draw neat distinctions between “financial” and “legal” issues. One said:

Often the counsellor will say, “Look, I think there’s a legal issue here.” It may be financially related… they may have a case for solvency, which is both a factual and a legal … issue.

In these circumstances, the Registrars explained, they might refer the debtor to financial counselling first, and then subsequently make a referral for legal advice, or allow the financial counsellor to assist the debtor in accessing legal advice.

Understanding the nature of the hearing

Like the counsellors, the Registrars thought that the service 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 … [T]hey 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.

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.
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] [a]re 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 they can.” The Registrars also attached great value to the counsellors’ capacity to speak on debtors’ behalf in open court.

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.

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.

A faster and more efficient process

The Registrars felt that the service made the 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 service also helps the 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.

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Access to justice

One Registrar noted that the service helps debtors to participate meaningfully in their court hearings, promoting access to justice in a procedural sense. While the service 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.

Suggestion 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”.

Court data

Since the commencement of service, the FCC has maintained a detailed spreadsheet outlining the progress of matters referred to the financial counsellors. This data reveals that, of the matters in which referrals were made, 27 proceedings were finalised during the evaluation period. Of the 27 finalised matters, 21 (78%) were resolved by consent between the parties, with 14 consent dismissals and seven (7) consent sequestration orders. Of these 27 matters, 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. Considered in conjunction with the Registrars’ comments, this data suggests that the service enabled some matters to resolve more quickly that would otherwise have been the case, enabling the FCC to use its resources more efficiently.

Common themes emerging from the data

Several common themes emerged from the surveys, interviews and court data. Debtors, creditors’ solicitors, financial counsellors and Registrars all reported that the service conferred benefits on debtors, helping them to understand the purpose of the hearing and the importance of demonstrating solvency. All four groups also reported that the service conferred an emotional or psychological benefit upon debtors, reducing their distress and enabling them to take a calmer, more dispassionate approach to the proceedings. These two themes emerged as the strongest points of consensus among the four groups that participated in the evaluation. The four groups were also broadly consistent in reporting that the service improved the efficiency of the List, though some creditors’ solicitors expressed uncertainty in this regard, and debtors and counsellors were not asked to comment directly on questions of efficiency. Data supplied by the court complemented, and to some extent endorsed, the Registrars’ strong view that the service improved court efficiency. Identifying points of convergence between data sources is an important aspect of multi-method or “triangulated” research. A high degree of consistency between sources tends to reinforce the validity of findings gathered by multiple methods. In this evaluation, the common themes emerging from the surveys, interviews and data suggest that the findings are reliable, despite the small sample on which they are based.

Evaluation

Assessed against its objectives, the service appears to have been broadly successful.

51 The remainder stood adjourned at the conclusion of the evaluation period.

52 Nielsen, n 33, p 955.
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 service 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 service helped some debtors to establish solvency, when they may otherwise have been made bankrupt. It also enabled other debtors to identify bankruptcy as a positive step for them, in their circumstances. Irrespective of the outcome, access to the service enabled debtors to understand the nature of the bankruptcy proceedings and to participate meaningfully in the process.

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 service also increased the efficiency of the Bankruptcy List. By referring debtors for personalised assistance, it relieved Registrars of the need to explain the proceedings and to question debtors about their solvency in open court. By encouraging the prompt resolution of matters, it reduced the need for adjournments, saving the court time and allowing it to use its resources more efficiently.

Additional benefits for debtors

The evaluation found that the service 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 an immediate 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 quickly, they avoided the more prolonged and debilitating stress of a process lasting several months.

Limitations and scope for improvement

This evaluation suggests that there is some scope to improve the service if it is to continue at the Melbourne FCC or to be replicated in other Australian courts. The financial counsellors 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. The Registrars suggested that it may be beneficial to provide financial counsellors with further training, particularly on the issue of liability for costs. More generally, it must be conceded that with 31 formal referrals from the court to the financial counsellors, the service directly assisted relatively few debtors in its first eight months. Allowing for one month’s break over December and January, due to the summer vacation, this figure of 31 referrals represents an average of 4.4 referrals per month, or approximately one per week. This low referral rate is unsurprising, given that the service was exploratory and experimental in nature. As noted above, several debtors and creditors’ solicitors said they thought the service should be advertised more widely, and it is possible that such publicity would encourage more debtors to attend court, to make use of the service. A detailed discussion of these proposals is beyond the scope of this article. A further, more wide-ranging empirical study of debtors in the Bankruptcy List would provide a useful evidence base for improvements to the service.

FURTHER ANALYSIS AND SCOPE FOR ADDITIONAL RESEARCH

The service is significant not only because of its potential benefits to individual debtors, but because of its broader implications for Australia’s bankruptcy system. Based on the experience of the FCC service, there may be scope to accord financial counselling a more formal role within the system. International scholars have published several studies of debt counselling and its role in the bankruptcy process, but this work has limited relevance to the Australian context. It would be useful to conduct more detailed research on the Australian model of financial counselling, to facilitate further

53 See the section, “Sample Size and Relevance of Results”, above.
consideration of this issue. There is also scope for more empirical research on the role of emotion in bankruptcy proceedings, drawing on recent developments in the interdisciplinary field of “law and emotion”.\textsuperscript{54} This work could consider the way in which financial counselling helps debtors to overcome their emotional distress in order to participate more effectively in the legal process.

Scope for greater use of financial counselling in the bankruptcy system

This evaluation suggests that in the context of a creditor’s petition, financial counselling offers considerable value, potentially leading to better outcomes for debtors while also promoting the more efficient operation of the courts. In Australia, most people facing bankruptcy do not have access to legal representation.\textsuperscript{55} In this respect, Australia’s regime differs dramatically from that of the US, in which legal representation is the norm.\textsuperscript{56} The experience of the FCC service to date suggests that some bankrupts, and people at risk of bankruptcy, can achieve better outcomes if they have access to personalised assistance and advice from a financial counsellor than if they participate in a bankruptcy hearing on their own. This finding is consistent with existing research in Australia and elsewhere,\textsuperscript{57} which indicates that SRLs are disadvantaged in many areas of the civil justice system. The literature suggests various solutions to this problem, including better access to pro bono assistance,\textsuperscript{58} “unbundling” of paid legal services,\textsuperscript{59} simpler court procedures,\textsuperscript{60} greater provision of legal information and education,\textsuperscript{61} and even a move away from adversarial trials towards more inquisitorial forms of adjudication.\textsuperscript{62} This evaluation of the FCC service suggests that free financial counselling can also help to mitigate the problems created by self-representation in bankruptcy. It suggests that while some debtors require legal assistance, others derive significant benefits from financial counselling. These benefits include an enhanced ability to participate in the court process, a greater understanding of the advantages and disadvantages of bankruptcy and greatly reduced emotional distress. It also suggests that financial counsellors help courts to deal with self-represented parties efficiently and fairly.

\textsuperscript{54} See Maroney, n 6.

\textsuperscript{55} AFSA does not publish statistics regarding rates of legal representation in bankruptcy, however it does collect and publish data regarding debtors’ “primary source of information” about bankruptcy. Its most recent \textit{Profile of Debtors} reports that in 2011, only 44\% of bankrupts had access to a “professional source” of information about bankruptcy (a category that includes financial counsellors, solicitors, accountants, debt agreement administrators and registered trustees). In 2011, only 5\% of bankrupts nominated a solicitor as their primary source of information about bankruptcy. By contrast, 20\% nominated a financial counsellor as their primary source of information and 34\% named AFSA itself (then known as ITSA). Twenty-three percent (23\%) of bankrupts said that they did not obtain advice either from AFSA or from any other professional source. ITSA, n 2, p 14.


\textsuperscript{58} See, eg, Gustafson, Gluek and Bourne, n 57.


\textsuperscript{60} See, eg, Genn, n 57, p 439.

\textsuperscript{61} See, eg, Littwin, n 56, pp 172-173.

\textsuperscript{62} See, eg, Stewart, n 57 at 165.
It would be useful to conduct more detailed empirical research on the role of financial counselling in Australia’s bankruptcy system, particularly in the context of contested creditors’ petitions. Such research might identify ways in which financial counselling could play a more formal role within the system, both to improve efficiency and to assist self-represented debtors. This research would need to consider the unique features of Australian financial counselling, while also drawing on studies of debt counselling in other jurisdictions. International bankruptcy scholars have produced a significant body of research on debt counselling services for bankrupts, including several empirical studies. While this literature offers a useful point of comparison, it has little direct application to Australian conditions, because the services in question differ markedly from those available to debtors in Australia. With some exceptions, the US and Canadian scholarship examines compulsory rather than voluntary counselling. In Canada, compulsory credit counselling has been part of the bankruptcy system since 1992. In the US, a similar form of debt counselling became a pre-requisite for debt discharge in 2005, with the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act. These compulsory schemes have attracted criticism from some bankruptcy scholars, on the grounds that they are ineffective, unnecessary and paternalistic. In both the Canadian and US literature, debtors often describe their counselling sessions as a perfunctory exercise and “a hurdle to jump through”, rather than a genuine source of instruction or assistance. The debt counselling schemes of Continental Europe represent an alternative model. These schemes reflect the European preference for long-term payment plans, rather than the total extinguishment of debts through bankruptcy. While they are generally voluntary, these schemes play a role in identifying debtors...
suitable for debt discharge, creating an incentive for debtors to participate. The debtor’s genuine efforts to arrive at an acceptable payment plan (with the assistance of a debt counsellor) will often be taken into account in any subsequent application for debt discharge: see Kilborn, n 63 at 273-274). The debtor’s genuine efforts to arrive at an acceptable payment plan (with the assistance of a debt counsellor) will often be taken into account in any subsequent application for debt discharge: see Kilborn, n 63 at 273-274).

Australian bankruptcy researchers could build on the present study, and future empirical work, by considering ways in which financial counselling might be more formally integrated into Australia’s bankruptcy system. Such research could consider the scope for elective, independent financial counselling to play a greater role in the process leading to involuntary bankruptcy, both in order to improve the efficiency of the courts and to offer meaningful support and assistance to debtors. It could also explore opportunities for counselling to play a greater role in the context of voluntary bankruptcy. This research would need to acknowledge the criticisms that have been levelled at mandatory programmes in other jurisdictions and to take into account the unique features of Australian financial counselling services.

The role of emotion in bankruptcy proceedings

This evaluation also illustrates the critical role of emotion in the bankruptcy process. While the financial counsellors offered many forms of valuable assistance to debtors (including providing information about the bankruptcy process, helping them to assess their finances and create budgets, and speaking on their behalf in court), participants in the study repeatedly emphasised the counsellors’ role in providing emotional support to debtors. This theme emerged strongly from the survey of debtors, many of whom expressed fervent gratitude for the counsellors’ “understanding” attitude. It also emerged as a prominent feature of the interview with Registrars. The Registrars noted that debtors often appear in court in states of great distress, but appear “calmer” and better equipped to deal with their situations after a consultation with a counsellor. The counsellors were even more explicit in discussing this aspect of their role. They observed that debtors were often in a state of “crisis” when attending court, and that simply having the chance to tell their story was, for many debtors, a source of immense psychological relief. Some creditors’ solicitors also recognised this as an important function of the counselling service. One wrote that it is an “essential service” in that it offers “emotional support to SRLs”, improving their chances of getting a “fair go” in the hearing. The consistent theme of these comments is that, by listening to debtors’ stories, demonstrating empathy and offering reassurance, the financial counsellors greatly reduce the stress associated with a hearing. In this way, they can significantly alter a debtor’s demeanour and mood in the court room. This in turn can have a material impact on the outcome of a hearing, potentially averting bankruptcy for some debtors. Even when bankruptcy is inevitable, the counsellors’ intervention can reduce the psychological harm associated with it, by allaying debtors’ anxiety and encouraging them to view bankruptcy in a more positive light.

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71 The debtor’s genuine efforts to arrive at an acceptable payment plan (with the assistance of a debt counsellor) will often be taken into account in any subsequent application for debt discharge: see Kilborn, n 63 at 273-274).

72 Niemi-Keisiläinen, n 63 at 412.

73 Brackertz, n 12, p 5.

Financial counselling and the self-represented debtor in the Federal Circuit Court bankruptcy list

This finding points to the scope for further empirical research on the role of emotion in bankruptcy proceedings. The study of law and emotion is a relatively recent development, with considerable potential for further expansion.75 This interdisciplinary field challenges the view that law is, or should be, divorced from emotional considerations.76 Instead, it points out that emotion plays a central role in the practical operation of legal systems and in many branches of jurisprudence. To date, much work in this area has focused on the criminal law, with scholars examining the role of emotion in judging, sentencing, jury deliberations and victim impact statements, among other topics.77 Still, there have been some attempts to identify and analyse the role of emotion in bankruptcy law,78 including several empirical studies.79 These studies have not been directly concerned with the bankruptcy hearing, focussing instead on the behaviour and experiences of debtors before and after bankruptcy. Nevertheless, they offer a starting point for further, more systematic enquiry into the way emotion influences debtors’ participation in the bankruptcy process, both in the context of contested creditors’ petitions, and more generally. This work could intersect with, or complement, the research on financial counselling outlined above, by exploring the way in which financial counselling helps debtors to manage their emotions, and thus achieve better outcomes from the legal process.

CONCLUSION

This analysis suggests that the FCC’s financial counselling service has been successful in providing innovative, targeted assistance to self-represented debtors and in enhancing the efficiency of the Bankruptcy List. By providing free and timely access to financial counselling, the service has helped several debtors to demonstrate solvency and avoid bankruptcy. It has also helped others to recognise bankruptcy as a viable option, in their particular circumstances. By providing knowledge, advocacy and psychological support, the service has enabled debtors in both categories to take a more dispassionate approach to their financial problems and to take decisive action, avoiding the need for

75 Maroney, n 6 at 130, 135.
76 As Maroney writes, “[a] core presumption underlying modern legality is that reason and emotion are different beast entirely: they belong to separate spheres of human existence; the sphere of law admits only of reason; and vigilant policing is required to keep emotion from creeping in where it does not belong”: Maroney, n 6 at 120.
78 Many bankruptcy scholars acknowledge the role of emotion in bankruptcy law. This acknowledgement often forms part of a larger critique of the “neoclassical economic model” that casts all debtors as “rational wealth maximizer[s]”: Efrat R., “The Moral Appeal of Personal Bankruptcy” (1998-1999) 20 Whittier Law Review 141 at 146-147. Teresa Sullivan, Elizabeth Warren and Jay Lawrence Westbrook typify this approach when they observe that “[d]ebtors may fail to follow the economic model of the bankruptcy debates because the circumstances of their decisions inhibit the economic rationality model … Debtors on the verge of a bankruptcy filing are under enormous pressure from their creditors. They are often filled with anxiety and self-loathing. There may be terrific tension in their homes, and they know very little about bankruptcy … Most of those intimately associated with the bankruptcy process – the judges and the lawyers – explain that the debtors’ emotions and their lack of information do not leave them in a position to ‘calculate’ much of anything, except that the next paycheck will not stretch around even the most pressing payment demands”: Sullivan TA, Warren E and Westbrook JL, As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America (BeardBooks, 1999) pp 243-244; cited in Efrat, n 78 at 147, fn 26.
79 One of the most useful accounts of the role of emotion in bankruptcy discusses the different emotional experiences of male and female debtors: Sullivan T, “Gender Differences in Accounts of Bankruptcy” (2005) Saint Louis University Public Law Review 433. Analysing transcripts of interviews with a large sample of male and female debtors, Sullivan concludes that in comparison with male debtors, female debtors are “far more likely to express regret, embarrassment, shame and a sense of humiliation” in relation to their bankruptcies. They are “less likely to distance themselves from the bankruptcy; instead, they report that the bankruptcy was an intense personal experience, and one that they do not wish to repeat” (at 443). Studies of the role of stigma and shame in bankruptcy law can also be regarded as “law and emotion” research, even if they are not “self-identified” as such: Maroney, n 6 at 124. See, eg, Thorne D and Anderson L, “Managing the Stigma of Personal Bankruptcy” (2006) 39 Sociological Focus 77. For other discussions of emotion in the context of bankruptcy law, see also Wiener RL., Block-Lieb S, Gross K and Baron-Donovan C, “Unwrapping Assumptions: Applying Social Analytic Jurisprudence to Consumer Bankruptcy Education Requirements and Policy” (2005) 79 American Bankruptcy Law Journal 454; and Wiener RL., Holtje M, Winter RJ, Cantone JA, Block-Lieb S and Gross K, “Psychology and BAPCPA: Enhanced Disclosure and Emotion” (2006) 71 Missouri Law Review 1003; cited in Bornstein BH and Wiener RL (eds), Emotion and the Law: Psychological Perspectives (Springer, 2010) p 3.

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multiple adjournments. In this way, it has reduced the stress and anxiety suffered by debtors, while also promoting the more efficient use of court resources. This evaluation has found that although there is scope for improving the service, there is also reason to expect that it will benefit debtors and the FCC if it continues in its current form. There may be value in expanding the service in Melbourne and establishing similar services in other Registries of the FCC. There is also scope for further empirical and comparative research, to consider the ways in which financial counselling could be more effectively integrated into the Australian bankruptcy system. The experience of the FCC suggests that such a reform, if carefully implemented, could improve the efficiency of the system, while also providing fairer, less stressful and more positive experiences for self-represented debtors. Finally, this evaluation illustrates the considerable potential to explore the role of emotion in bankruptcy proceedings, by conducting further empirical studies and drawing on interdisciplinary work in the field of law and emotion. Such research could consider the way in which financial counselling helps debtors to manage their emotions in the court room, and in turn, promotes the more just and effective resolution of bankruptcy matters.