

HOW TO COPE

WHEN THE SKY IS FALLING

An insider's guide to recover from debt,
avoid bankruptcy and achieve financial freedom.



DOMINIQUE GRUBISA

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HOW TO COPE WHEN THE SKY IS FALLING

An insider's guide to recover from debt,
avoid bankruptcy and achieve financial freedom.

by Dominique Grubisa

www.DGInstitute.com.au

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ABOUT DOMINIQUE GRUBISA

Dominique Grubisa is a practicing legal practitioner with over 22 years of legal and commercial experience. She is a property investor and developer, an entrepreneur with businesses in Australia and Southeast Asia, a speaker, educator, writer and published author.

Dominique has successfully built the business from start-up to turning over tens of millions of dollars in Australia and internationally. She writes and speaks internationally on law, business, wealth and property. Her passion is making the legal system fairer and more accessible for everyone, and empowering people by sharing knowledge.

Dominique knows how to build wealth and succeed in business and property, and she educates, coaches and advises thousands of clients on how to grow and protect their wealth.

INTRODUCTION

It was without doubt one of the worst times in my entire life. After being blindsided by an unexpected series of events, my husband Kevin and I found ourselves *literally* homeless – camped out in the living room of my mother-in-law’s house with our young family!

Just months earlier, we had been riding high and were both successful and financially independent. We had a portfolio of properties and were working steadily towards building our wealth dream. Now, we barely had two ten-cent pieces to rub together. Most days I found it a struggle to get out of bed in the morning, and when I did I spent my time in my pyjamas, crying and wondering how it all could have gone so wrong.

If you’re reading this book, then there’s a good chance you’re going through one of the worst times in your life, too. Maybe you too made a regrettable business decision and you now risk losing your home. Or life has blindsided you with a job loss or the illness of a family member and you can’t meet your mortgage repayments. Maybe you bought property in a market that has crashed dramatically and your home is worth less than you paid for it. Or maybe, like so many people, you simply signed up for a mortgage that turned out to be beyond your means.

Whatever the reason, you’re now looking at the very real prospect of losing your house to the banks. In a few short months, you could have the asset that you worked so hard to buy unceremoniously stripped away from, your credit record ruined. How did it come to this?

If you are in this situation, I have a very simple message for you. There’s hope. It may feel like the sky is falling and that nothing will

ever be right again, but that's just not the case. The fact that you even managed to acquire a property in the first place shows that you are a strong person, and strong people survive.

I should know. Once I got through crying on the floor of my mother-in-law's house, I decided to fight and set about rebuilding my life. Thanks to hard work and knowledge, my husband and I were able to limit the damage to our finances and start acquiring assets and wealth again. Today, we run a highly successful business and are again in an extremely strong financial position. And this time our assets are protected against a similar disaster.

While there are no guarantees, if you follow the advice in this book there's every chance you will be able to achieve your own personal miracle. You may be able to take charge of the personal disaster you're now facing and limit the damage. Maybe you can win yourself some extra time to get your affairs in order. Maybe you can save your credit rating. Maybe you can negotiate to stop your house being sold and hold onto your much-loved home. And maybe, just maybe, this event is just what you need to reinvent yourself and set course for building wealth and realising your dreams.

Read on!

Dominique

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CHAPTER 1

THE FIRST STEPS

Change your mindset

Does any of this sound like you? You have absolutely no idea where next month's mortgage payment is coming from. The phone's running hot, not with calls from your friends but with demands to pay your outstanding debts. There's not enough money in your bank account to cover your bills and there doesn't seem to be more on the way. You have multiple credit cards, but each and everyone is maxed out and not worth the plastic it's made from.

With the mortgage hanging over your head like axe, you've begun hating the very same house you once fell in love with. All those dreams of the carefree times you'd spend there with friends and family have slipped through your fingers and, quite frankly, your life feels like a living nightmare. Maybe you've even spoken to a bankruptcy expert or financial counsellor who has just confirmed your fears; your situation is hopeless.

Well, think again.

First of all, stop thinking of yourself a fool. You didn't go out and spend all your money on something extravagant like a Porsche. You did what generations of Australians have done before you and chased the great Australian dream of property ownership. You purchased a valuable asset and climbed onto the property ladder with hopes of building your wealth and having a small corner of the world to call your own.

Things didn't go as planned and, for one reason or another, you are now looking down the barrel at losing your home. Maybe you

miscalculated how much you could repay. Maybe you lost a job, or a family member became ill, or an expected source of income vanished. Maybe you or a family member suffer from an addiction. Maybe you bought into a market, such as in a mining town where there was an unexpected fall in value. Or maybe spiralling property prices in the eastern states forced you to spend more than you should have. All of these are understandable and human actions.

Don't waste time beating yourself up over what has happened. In other circumstances, things might have turned out fine. It could have been you reading about some other poor soul facing foreclosure on their home. What you really need now is to change your way of thinking. And I believe I have just the medicine you need.

10 steps to change your thinking

Please don't skip ahead. I know you're probably thinking that a bunch of psychobabble is the last thing you need right now and that you'd much prefer to get your hands on some answers to your problems. Don't worry. There are plenty of facts and figures on the way in the coming chapters and I hope you will be able to use these to work your way out of your current problems. But if you approach the coming information with the wrong mindset, if you don't retrain your brain, there's a good chance you'll dismiss it as either too hard or not what you want to hear.

The very fact that you are reading this book suggests to me that somewhere, deep inside, you have a ray of hope that you can solve your current woes. The fat lady hasn't started singing just yet – although maybe you can hear her tuning up! Work with me and

try to focus on and amplify that sense of hope and maybe, just maybe, things will turn out better than you ever imagined.

Here are my 10 steps to change your thinking, before we move onto the strategies.

1. Be gentle with yourself. You may be in a better position than you realise.

Chances are you didn't go to Las Vegas and put your life savings on the red (although problem gambling can be a reason people get into mortgage trouble!). You simply purchased a home or invested in property. Maybe given a second chance, you wouldn't have bought the property that you did when you did, but each and everyone of us does the best we can at the time. Our judgement is fallible and that's what makes us human. We can't foresee every possible turn of events. And just like every human being, including the leaders of the most powerful countries and the CEOs of the top companies, you have the occasional slip in your judgement. In your case, you qualified for a loan which you thought you could pay off and now you have a few challenges to face. You could be struggling to meet the monthly repayments. Or maybe you bought in a market you were sure was going to soar and now you're stuck with a seemingly dud asset that is actually worth less than you paid – and is returning a pittance in rent.

Here's the thing, though. Real estate is very forgiving, especially given time. If your problem is that your property is worth less than what you paid for it because of market changes, there's every chance that this will change in the coming years. There were people 30 or 40 years ago who bought homes for \$65,000 and were thought fools by others for paying more than \$50,000. Those

homes have today become significantly more valuable. Would you still say they paid too much?

I would suggest that in many (but not all) cases, finding a way to hold onto your home is the best way forward. That may not ring true with you right now, but allow yourself the little luxury of not making up your mind just yet. If you see something in this book that you disagree with, try to just say “that’s interesting” rather than ruling it out. Some of the ideas are challenging and getting through this will require you changing your outlook.

It’s a bit like a five-year-old learning to ride a bike. As long as she says “I can’t do it” she won’t do it. But once she believes that she can, she will. As Napoleon Hill wrote in his bestselling book *Think and Grow Rich*: “Whatever man can conceive and believe, he can achieve.”

As human beings, we tend to respond strongly to pleasure and pain, and these two sensations are different for everyone. Right now, it might seem that you’re causing yourself pain by struggling on when you could get relief by giving up and starting over. That may or may not be a commercial reality, but there’s also a good chance that it’s your perception causing you problems. Maybe you heard about someone who fell behind on their mortgage and lost everything, and you think that’s the way the process always works. But if you can find a reason ‘why’ you should hold on, there’s a good chance you’ll find a ‘how’.

As much as you might be itching to be free of it, I would argue there are lots of good reasons why holding onto your house may be a good idea. It’s not just emotion you have invested in the property, it’s money and economic power.

What do I mean? Firstly, you qualified for a loan. That was an achievement in itself. If you bail out now, it's possible you may not qualify again. The credit market is a lot tighter now and finance is not flowing as easily. Even if your credit rating is still intact and you found a cheaper house now, chances are that you might find it hard raising the finance to buy.

Secondly, you very probably better off paying off an asset than paying dead rent. There's a good chance you will be able to right this situation. And if your situation relates to market trends, there's a good chance they will change in your favour eventually, too. A loan is a valuable thing and you were lucky to get it. Hang on to it.

Thirdly, you may have used a first homebuyer's grant or concessions to buy your house. They added value to your purchase and won't get them again. Depending on the value of your house and which state you live in, you may have paid stamp duty. If you sell or walk away now, that is money you will never get back and which you will have to pay again next time you buy.

You've also paid legal fees on the purchase of the property and exiting the property attracts more legal fees which you'll have to pay. These are levied whether you sell the home yourself or the bank sells you up, and either way you'll be charged. If the sale doesn't realise enough to cover these costs, the lender may chase you for them. And when you buy in again, you'll be met with more legal fees.

If you do have to buy again, you'll also pay agent's commission. This comes out of the proceeds of sale of your property and usually starts at about 2.2 percent of the sale price. That's money coming out of your pocket. And finally, you will lose your deposit. You worked hard to put that down. If you give up and walk away

from this property now, you won't be able to buy again until you've accumulated another deposit, presuming you qualify for a loan again.

So, don't be hard on yourself. Instead, be open to shifting your mindset – there's more enticing you to stay than there is telling you to go. And remember: It's not the strongest or even the smartest creatures who survive, it's those who adapt best to change.

2. Be aware of the facts. You're not the only one.

You are far from the only person (or couple, as the case may be) in Australia wondering if they can hold on to their home and feeling scared they might not be able to. About one percent of Australians who have a mortgage are behind on it, so with more than 3.1 million households paying off a mortgage that means more than 31,000 households are in danger of defaulting. Think about that for a moment – that's three times as many people as a full crowd in Melbourne's Federation Square or Sydney's Martin Place. It's a football stadium full of people in the same position you are.

And there are many, many others close behind you. A Salvation Army survey done at the start of 2018 found one in three people believed they would struggle to meet repayments if interest rates rise as expected (a rate rise is accepted as very likely by the end of 2018). Around the same time, property research firm Digital Finance Analytics estimated 924,000 Australian households were in 'mortgage stress', with 51,500 in danger of a 30-day default in 2018. Households are considered 'stressed' if net income does not cover costs.

The researchers also claimed that because of recent tightening around lending "there are many households currently holding loans which would not now be approved." According to the Salvos, nearly 10 million Australians believed the great Australian dream of owning a home was over.

Acceptance of your problem won't solve your problem – being in a financial position where you could lose your home *is* scary, even terrifying. But it's important to know you are not the only person to ever face this, some of your worst fears may be unfounded. Acceptance is the first step to change, and rarely is any situation ever completely hopeless.

Where there are problems there are always solutions. As Tony Robbins says: "Identify your problems but give your power and energy to solutions." This book could be part of your solution if you work to stay as positive as possible.

3. Be forward-thinking. Adversity forges strength and success.

I have built a wonderful career in the wake of going spectacularly broke during the Global Financial Crisis and, in retrospect, I wouldn't be the success I am today without that experience. Bear in mind I wasn't just out of money, I was multi-million-dollars-broke. If I can rebound, then so can you. It wasn't easy by any means and it involved a lot of acceptance followed by even more action. For a while I would lie in bed at night trying to convince myself that I just had a 'temporary cash flow' problem, but it was much worse than that. My road back started with finding a way to quarantine my good debt from my bad debt, excise the good stuff and protect it – which I will come to later. But this involved running everything I had done, all my business, in effect through

a sieve to examine it all. In the end, I only changed because I *had* to. That is the nature of change: you need to have arrived at a point where staying still is no longer an option.

Many people we hold up today as benchmarks for success acknowledge their mistakes were part of their journey to achievement and wealth.

Bill Gates and Paul Allen formed a company (called Traf-o-data) and with it a computer system to analyse local government traffic data in 1970s, but when a Seattle county representative came to inspect their work their computer famously failed. Then the business model collapsed when someone else offered to do the traffic data analysis for free. But Gates and Allen looked back on that experience as the point where they developed the skills and resilience they later used to form Microsoft. Gates has said: “It’s fine to celebrate success but more important to heed the lessons of failure.”

Plenty have blossomed from being even lower: Abraham Lincoln lost everything he owned after a general store he bought failed and he was left repaying debts for nearly 20 years – before becoming the American President in 1861. Henry Ford, Walt Disney, Lady Gaga and Larry King are among dozens of iconic names that all went bankrupt before going on to huge success. They simply would not give in to the idea of ‘failure’ or let it define them. Their stories were only just beginning.

When it comes to comeback stories it is hard to go past the 45th American President. Love him or hate him, Donald Trump was pretty much the punchline of many jokes in the mid-1990s in the US, but he made survival his strategy. He hung in there despite seeing his companies go broke *six* times; his self-belief was so great that he backed himself until others believed in him as much

as he did. There is no doubt that self-belief took him to one of the world's top jobs today, the leader off the free world.

Trump would never admit to failure – it's against his nature. But Henry Ford, who went bankrupt twice when trying to establish himself as a car manufacturer, did and he made it clear his many difficult experiences led to his ultimate success – which resulted in him becoming one of the richest men who ever lived, with an estimated net worth of nearly \$200 billion: "Failure is simply the opportunity to begin again, this time more intelligently," Ford said.

The life stories of these exceptional people prove – much as it hurts to admit it – that adversity is an important lesson on the road to success. Your own adversity hurts like hell right now, but what will you do with the potential lessons of the tough times you are going through?

The choice is in front of you – right now.

4. Be open-minded. Your new life can start now.

We can see from the examples above – and there are countless more like those – that your lowest point could actually end up being a gift. It sure doesn't feel like it, but you are going to have to let go and trust that this just might be true.

So, what now?

Acknowledge your failures. Business coaches advise unpacking a failure, so you don't make the same mistakes again, before moving on to the next venture – and you should, too. If you are struggling to relate to having had 'a business failure' and have 'but I just

bought a house and can't pay the mortgage' thinking, stop right there. How do you think the lender sees their loan to you? The answer is that they see it as 'new business'. Any two parties engaged in a deal where monies change hands and contracts are signed are in business together. You were in business with your lender and if you are on the verge of defaulting on your mortgage then you are on the verge of a business failure – though it's not too late to turn things around. Even if you sell up and move on, you can avoid this kind of pain next time.

A key to unlocking a new life is awareness of reality. Not only will burying your head in the sand not help, it could cost you hundreds of thousands of dollars, because your lender will potentially act in a predatory way towards you if it can prove you are failing to keep your end of the deal.

What you need to do is look at all aspects of the contract you had an obligation to meet or had control over. Where exactly did you fail? Were you naïve in signing a loan agreement that over-committed you financially? Has your income dropped or stagnated since you signed the mortgage?

Has your main failing been burying your head in the sand when your costs went up? This is likely to do with not opening mail or being in contact with your lender when things got tough. Or do you have other problems that you are not acknowledging? Whatever the result of your due diligence and whatever your decision – whether to sell-up, make a deal with the bank, or take them on over a breach of their conduct – from here on you need to act with much more savvy.

Once you have got real about your flaws and failures, then what? Wait for the lightning bolt of good fortune? You wish! Don't underestimate the importance of open-mindedness, or you won't be

able to recognise opportunity when it knocks. You have to be open-minded enough to accept new ways of thinking.

In the 1800s, a very clever man calculated the rate of population growth of New York City, predicting that the city would be uninhabitable by 1920. He used all sorts of calculations and projections to work out population growth. His maths was right and his figure for population growth proved to be spot on, but the city was not uninhabitable as predicted. You see he used his knowledge of the past and the present to predict the future, but he could not account for the randomness of the universe and the fact that nothing is set in stone. He calculated the amount of horses that would be required to service the increased population and found that the faeces from so many horses could not be easily disposed of and would form a pile as high as 20-storey building, thus rendering the city uninhabitable. What he did not know and therefore could not factor in was that while the population would continue to grow the motor vehicle would be invented thus rendering horses obsolete.

The point of this story? Just hang in there because things are about to turn your way. Just because based on past and present experience something seems impossible does not mean that things will not be different in the future – especially in these changing times. We need to work off *possibility* not *predictability*!

5. Be humble. Explore all options.

If you are truly struggling to pay the rent but are desperate to keep your house, you need to think laterally – which means being able to create new opportunities and options. Sometimes that just means recognising then seizing opportunities that are already out there.

Sometimes the options you don't want to consider involve humbling yourself, taking a step back so you can take two steps forward later. That might mean taking a second job in the evenings for a while, with all the earnings going to make up the shortfall in your repayments.

Moving out of your home so someone else can pay you rent is another option, even though it's probably not what you had in mind when you moved in. Asking family or friends if you and your partner (and children, if you have them) can move in for a while would be a tough pill to swallow. But it's an option worth seriously considering because the extra income might give you the cash you need to meet your mortgage repayments – keeping the wolf from your door.

You can do this in a few ways, but the most obvious are Airbnb or traditional rental.

The traditional method is listing your house as a private rental, via an agency, perhaps with a three- or six-month lease. Securing a tenant for a lease will give you the opportunity to plan ahead knowing you will earn a certain amount of income for the period of the lease. The downside is you may have costs associated with maintenance and repairs and an agency property manager, if you do not want to manage the process yourself.

It's not the best rental market we have seen in recent times – there is concern of oversupply and low yields in some cities, but landlords that take care of tenants can bank on a stable rental income.

Traditional home rental is seen as a market ripe for 'disruption' – people finding new ways of doing business in this area to get a slice of the action by doing things differently.

Airbnb has exploded in recent times – entire houses now make up 70 percent of all Airbnb listings. The number of houses on the service in Australia more than doubled in the year to December 2017, from 43,610 to 89,863. There’s a lot of competition, but it’s sure to keep growing so it makes sense to list here if you want to make your most important asset do some of the work. Where there are sellers there are buyers – Airbnb is obviously a go-to online destination for rental listings.

There are also rental websites such as rent.com.au which allow you to list a property for free and track the entire process online.

6. Be creative. Think outside the Box.

Remember you’re writing your own rules now because the old rulebook is obsolete in this brave new world. There will always be a way – no situation is hopeless. Your problem is obviously one where you can’t meet your mortgage repayments in the foreseeable future.

So, the solution could come from two fronts. One is reducing your mortgage repayments, and we will look at solutions below. The second is increasing your cash flow. As we’ve touched on above, this could come from rental income but also from other sources which we’ll look at below.

7. Be brave. Don’t be an ostrich.

Face your problems, deal with them and cross them off your list. If you don’t take control, then someone else will be forced to and you might not like the way they run your ship.

Unfortunately, it's part of our human makeup to want to run and hide from things that we perceive as troublesome or negative. We feel that if we don't acknowledge a problem then it's not there or it will go away. However, if you don't take action when your ship is sinking, there's a good chance that you'll end up going down with it.

Chances are that you don't fall in to this category. You're reading this book, so you've already made a stand and are being proactive. We will discuss meeting your problem head-on below.

8. Be grateful. Australia is still the Lucky Country.

Debates over an Australian property bubble – and fears it's about to dramatically burst, sending prices crashing and lives into ruin – have been going on for two decades now. After a long period of strong growth, Sydney and Melbourne have stalled recently, while other parts of the country have begun bouncing back. It's a complex market to read and it's unclear exactly when rates will rise from their current record low levels and what effect this will have on the market. But one thing is certain: housing has proven itself a reliable long-term investment for generation after generation of Australian.

While no-one can predict the future, decades of historical data suggest the property market will not crash into double-digit freefall in Australia as it has previously in other countries in the past. Local conditions, such as tight housing supply, high levels of urbanisation and secured home loans (which means unlike the US market, lenders can go after customers' assets if they default on their mortgages) serve to keep plenty of interest and activity in Australian property from locals and foreigners, resulting in strong medium- to long-term price growth.

The broader Australian economy, too, is strong and should remain strong – meaning Australia will continue to attract immigration and investment. In other words, plenty of factors make Australian property worth fighting to keep, as both an investment and as a primary residence. A downturn may happen, but the moral of the story is that despite ups and downs, property is a long-term investment.

Let's look a little more closely at the Australia versus US comparison. Ten years after the GFC, many people still fear that Australia could experience the same kind of property market problems as the US and the ensuing recession that went with them. Could the same thing happen here? I would say 'no it won't' – at least not in the same way. Here's why:

Firstly, the American housing loans in question during the GFC were 'non-recourse loans'. This meant the loan was tied to the house securing it and only the house, not the borrower. When things started to sour in the US market, many owners simply posted the keys to their properties back to the bank and walked away, with a bad credit rating their only worry. In Australia, the amount you've borrowed is your own liability, so we're far more likely to stick things out in tough times.

Secondly, prior to the GFC, the US had a high proportion of sub-prime lenders who could not obtain finance through traditional lending avenues. These were people who really should not have been given finance and their inability to repay their loans helped create a domino effect that devastated the market. In Australia, our finance industry has stricter regulations and we have only a fraction of the sub-prime loans that the US is exposed to. In the USA, 15 percent of loans were sub-prime. In Australia, only one percent of our loans are to sub-prime borrowers. Plus, lending is only becoming tighter and tighter here.

So, it's difficult to see how the same crash that devastated the US market could happen here.

9. Be methodical. Set short-term goals.

Winston Churchill once said: "When I look back on all these worries, I remember the story of the old man who said on his deathbed that he had had a lot of trouble in his life, most of which had never happened."

While Winston had a point about the uselessness of worrying, considering the potential pitfalls and perils ahead is an indication that you're moving on, both emotionally and intellectually. Somewhere inside, you've made the decision to take action and correct your course. Remember that this needs to be a gradual thing. If you try to change course by 180 degrees in one hit, you stand a good chance of capsizing in a storm, to use a sailing analogy.

The problem is sometimes people become so overwhelmed by the enormity of what lies ahead that they feel it's too hard to even start to correct things. They have thoughts like: "I can't do this. I'll never earn enough to pay down this debt" and in this way they are defeated before they even start.

You don't need to wait for a perfect plan to start. You just start where you are, with what you have and work towards perfection. Don't try and tackle the whole problem in one manoeuvre; no-one is capable of that. All you need to do for now is resolve that you will fix this and then take baby steps towards this goal. Just roll with it!

There are actually no problems in life, only situations which we can deal with as and when they arise. When you run into a problem and start actively dealing with it, you'll find you don't have time to feel stressed or depressed because you're actively doing something. Problems are only problems when we worry about what might happen in the future and when we feel powerless to do anything but stare at the collision course we're on. If you take action, there's no time to worry. So, fight fear with action and if it's not a problem yet then forget about it.

10. Be resolute. Never give up.

The only time you lose is when you stop trying. I find that a very empowering concept, knowing that I'll never be beaten if the game never ends.

As you go about solving the challenging situation you find yourself in now, remember that with the right resolve nothing will get in your way. You can accomplish anything. You may lose some battles along the way, but you won't lose the war.

So hopefully now you have a clearer mindset about your situation. You know that you have inner strength to get you through this and that there are good reasons to fight. Now all you need to know is how to do it. Read on!

CHAPTER 2

TAKING STOCK

WHERE ARE YOU NOW?

So, around about now you're probably thinking, "Thanks for the little pep talk, but you don't know my situation – it's totally unsalvageable."

But here's the thing. Changing your situation isn't your main problem. The bigger challenge lies in changing the way you think and how you view the challenges ahead. To work your way out of the mess you've found yourself in, your attitude and actions need to be positive and synched.

As Henry Ford once put it, "Whether you think you'll succeed or whether you think you'll fail, either way you'll be right."

The reality is you stand almost no chance of changing your situation if you go into it thinking, "Well I'll try, but I know it won't work". Instead, your line of thought needs to be, "I will get through this. This is worth fighting for, and I know I will succeed." Remember, your thoughts become your words, which become your actions, which then manifest in your reality. This means that by adjusting your thoughts and beliefs, you can literally change your destiny.

Of course, sometimes the smartest thing to do is cut your losses, and I'll deal with how to do this later on. But if you go down that path, it be your own decision and let it be a considered and rational, commercial decision not a desperate, panicked surrender. There is a difference.

Maybe, the house you bought is in a dreadful location and you now realise you paid \$200,000 too much for it. Or you bought in a regional area or a mining town where prices have tanked. Even with the mining sector slowly recovering, the value of your property could be a fraction of what you paid. Everyone around you from family and friends to acquaintances to the media are telling you that you've made a big mistake, blown your dough, and that the situation is hopeless.

But just remember this. Trust yourself above everyone else. You have the power to create your own reality and the herd is not always right – although very often it can feel safer to run with them. If the herd was always right, the whole world would be financially independent – not just the super rich top one percent of the population.

Whatever your course of action, know your facts, consider all your options, decide on the best outcome for you and then formulate a plan and start moving towards it. Step away from the herd and align yourself with the financially independent one percent. Your reality is what you make it. Or as Albert Einstein quipped, “Reality is merely an illusion, albeit a very persistent one!”.

YOU ARE MORE POWERFUL THAN THE BANK

One of the first things you need to know going forward is that you are more powerful than your bank. No, I'm not crazy. The reality here is that you are holding all the cards here and the bank is in trouble. The way they behave now depends largely upon you.

By now, everyone on the planet knows who Donald Trump is. As a US President he's been divisive, with people tending to either love him or loathe him. But whatever your views of Donald Trump

as a person and as a President, there's simply no doubting his savvy and acumen as a businessman. At the time of his inauguration, Forbes magazine put his value at a hefty US \$4 billion making him one of the richest men in America. Trump naturally argued that his wealth was much more than the estimates at US \$10 million! Who knows who's right. Either way he is a multi-billionaire.

In the early 1990s, Donald Trump owed his creditors US \$900 million. All of his assets went down in value overnight, wiping out all of his equity and then some. He was in the same situation as you. The story goes that one night during the hard times, Trump was walking down the street with then girlfriend Marla Maples and pointed to a homeless man and said, "That guy is worth \$900 million more than me... I'm worth minus \$900 million."

While a lot of Trump's friends were filing for bankruptcy, he said: "If they want me they can take me down, but I'm not going to make it easy for them." Instead, he negotiated with the banks and they held off and let him trade through it. His motto at that time was 'Stay alive till '95' – and he did. He paid everyone back and began paving his way to the White House. He didn't get a bad credit rating and the banks are still tripping over themselves to do business with him.

Trump played hardball with the banks and pointed out that he would fight them all the way if they tried to foreclose, costing them time and money in legal expenses and, further, he highlighted the huge losses they'd face trying to sell his assets in the market as it then was.

You are more like Donald Trump than you realise. You are the owner of assets and you can take the bank on and bog them down in a protracted legal battle where they'll ultimately be clocking up

a loss. Or they can talk to you and renegotiate your loan – and be paid in full within two years.

NEGOTIATE LIKE TRUMP

So why would the bank want to deal with you? They have billions and you're just a blip. Your debt is not \$900 million, so what bargaining power do you have? A lot more than you think.

Remember this: banks are *not* in the business of selling houses. Banks are in the business of lending money. The bank does not want your house. The bank wants you to keep your house and just keep paying the interest. It's a bit like a pimp with hookers working the street, if you'll pardon the crude analogy. The bank needs you to keep working and keep paying them. They don't want to call up the loan and they sure as hell don't want to mess around with kicking you out of your home and selling it up. This is a losing exercise for them both in time, money and resources.

Banks want to work *with* you. You just have to have a plan. Imagine if you loaned your neighbours \$100,000 and intended to live off interest repayments from them on that money of \$2,000 per month. You're happy for your \$100,000 to be invested with your neighbours because you have their house as security, your money is safe almost as if it's sitting in a term deposit account with the bank, but with a much higher return. What you're interested in is the regular interest repayments.

What if your neighbours stopped paying? Well, you'd be annoyed because you were expecting payment that month, but not worried about your \$100,000 deposit, you'd just want the cash flow. So, you ring your neighbour and write a reminder letter. But you hear nothing. When they finally answer the phone your neighbour tells

you that the cheque is in the mail. You wait but there's no cheque and your neighbour just keeps ignoring you. What option do you have? You just wanted your \$2,000 per month, but now you have to go to court and spend money on lawyers to get your neighbour out of the house. You need to send the sheriff round to change the locks, you'll have to find an agent to sell the home and put it up for auction. Plus, you'll have the added worry that there might not be a buyer willing to pay enough. And what if, after paying the agent and the water board and the council and the lawyers and back interest repayments and other charges that you have to clear on the property, you make a loss? Well, if the neighbour won't play ball you have no choice.

Let's look at another scenario though. What would you do if your neighbour came to you, before he'd missed a payment and said, "I lost my job and am doing whatever work I can find and I've moved in with my sister and am renting the place out. I will direct that all rents be paid to you and as soon as I get a new job I'll make up the difference. I've got lots of interviews lined up and I know I'll be on my feet and able to fix up the arrears in six months' time." If the rent was \$1,500 per month and he gave you an extra \$200 per month from his part-time work pay-packet, would you agree to accept \$1700 per month for six months and then receive \$2,300 per month for the next six months thereafter and then return to normal payments. Of course, you would! This is a win-win outcome isn't it? Why would you go through the trouble and uncertainty of repossessing the house when you could still get paid something and there was a definite plan in place to help him trade through the tough times. It would take you longer than six months to get possession of the property and sell it anyway. Plan B certainly looks more attractive than plan A.

It's the same with banks and their mortgage customers. It's just that most people do not know that everything is negotiable with

the bank. They think that it's all or nothing and if they can't pay all that's due, when it's due, they will just ignore it and then roll over when the bank repossesses the house.

HOW TO NEGOTIATE WITH THE BANK

If you've fallen behind on your mortgage payments, it's likely the first thing that happens is you'll receive a letter from the bank saying that you've missed a payment and asking for you to make it up. It will usually say words to the effect that if you are experiencing problems to contact them.

If you haven't defaulted yet but fear you will in the foreseeable future, then act now. Go to the bank *before* you actually default.

YOUR 12 OPTIONS

At this stage you have at least 12 options. Read through the following list, think about your circumstances and decide on the course of action you want to take.

1. Look At Refinancing.

It may be possible for you to get a more favourable interest rate that puts less financial pressure on you. Banks often offer considerable incentives to win your business from their competitors. And your own bank or lender might be prepared to fight to keep you. As well as a better rate, you might be win concessions over things like application fees and ongoing fees. Every cent counts when you're fighting to stay afloat.

Start by comparing your rate with those of other banks and other operators. As well as your favourite mortgage broker, there are a host of online tools that will let you quickly and easily compare rates. Depending on the amount you are borrowing you may also be eligible for a discounted rate for a honeymoon period.

It's important that you don't take the first 'no' you get as a final answer. Be prepared to do the legwork. I have been told 'no' several times only to get a 'yes' on my fifth attempt. Different lenders have different criteria and sometimes one finance broker can say that you don't qualify while another one will get the same deal across the line with the same institution.

Make sure though that you get an indication before you actually put in a formal application. This is because you have a credit record which lenders search when you apply for a loan on which appears any other applications you've made. You don't want a potential lender to see that three other banks have already knocked you back for the same loan. If you fall way outside the criteria, then be prepared to move on to the next lender.

Also, be sure to find out about any 'break' costs involved in changing lenders. It won't be worth it if you have to pay more to get out of your existing loan than you will be saving in your new loan. There are lenders out there now offering excellent introductory rates. If you were to refinance with such lenders you would probably find that your property will become cash flow positive once rented out and then your problem won't be debt it will be too much income!

If you're not already on an interest-only mortgage, you should also investigate this option as a way of significantly reducing your repayments. (See point number 6). While most home loans are principal and interest loans, meaning your repayments reduce the

principal and interest, with an interest-only loan you just pay down the interest.

These loans are usually for a set period of five years after which the loan changes to a principal and interest loan. The interest rates are typically higher than for standard loans. This type of loan has become increasingly popular in recent years, although there are indications the market is tightening with the government wanting people to pay off their principal and cool the housing market

2. Rent Out Your Home.

Now, I know that this was not part of your grand plan, but, it could be a very useful long-term survival strategy. You own a valuable asset that's in demand at the moment, so don't lose sight of that. There is the traditional way of renting plus the more recent method of going through Airbnb and renting your whole home for shorter periods. The rent you could receive for your property may just surprise you.

It's important that you don't just take the first agent's opinion on the likely rental yield. We not too long ago rented out a property where the rental estimates varied wildly from \$650 per week to \$1,000 per week. We went with the agent who gave the highest estimate and the first person to see the place paid the full asking rent.

Another example is a house we bought in Sydney's North West just before the GFC. Obviously, it was bad timing in hindsight, but we thought that prices had bottomed out there and that the fundamentals were good for the area.

Anyway, the tenants in the property were paying \$490 per week when we bought it, but we thought we could get more and it would be a good investment. We were right. As soon as we bought it, we put the rent up and got tenants for \$600 per week for six months. We thought we were lucky to get that and were a little worried when the tenants notified us that they were moving out on Christmas Eve. The house would surely be vacant for one month or so over the holidays. Who would want to move in to our house over Christmas? Who indeed? As it turned out, we actually had three applications and a bidding war ensued. We had someone move in on Christmas Eve for \$650 per week.

Later on, that lease then came up for renewal and, being a little greedy, we asked the agent what were the chances of raising the rent? We were told that rental inquiries had dried up and that we were getting good rent and had good tenants paying top dollar who wouldn't pay any more, so we should just leave it at that. Well, I practise what I preach, so I got other agents in and we ended up with a rent of \$750 per week. This is the same house that was renting for \$490 per week 18 months prior. The rent from the house went on to cover the mortgage! Not bad for a mistake is it? Your 'mistake' could be your cash cow!

Of course, you will need somewhere to live, but once you open up your mind anything is possible. Can you move in with family for six to 12 months until you sort yourself out? Once again, I know this is not ideal, but it is a question of priorities. Do you have any family nearby? Would you consider moving somewhere else then? Maybe closer to where you could find employment (interstate if there's nothing to keep you where you are like family ties? Preferably somewhere where rent is a lot cheaper if that's what you propose to do.) Imagine if you could rent your house out for \$800 a week and find somewhere for you for \$450 per week.

Human nature is such that we fear change – the better-the-devil-you-know mentality. It can, however, be liberating to embrace change. It has been said that every apparent setback is really an opportunity in disguise. Establish your goal as one of keeping your home and then let everything else fall into place around that.

3. Rent Out A Room/Rooms In Your House.

There are quiet students who will pay you for board. Ask a local agent what the going rate would be for a room. This could bring in a couple of extra hundred dollars per week.

Indeed, depending on the location of your house, there could be a niche market you could cater to. If it's near a university or hospital you could look at renting it out room by room to students or nurses/hospital staff, to generate more rent. If you're near a beach, look at holiday rentals over summer which could be quite lucrative.

Again, the arrival of Airbnb presents you with another option here. If your house is in any sort of desirable location (hopefully that's one of the reasons you bought it), you may be able to rent out your spare room for the weekend or a night or a week at a time to travellers or others in need of short-term accommodation.

4. Draw Down On Your Equity.

Have you had your house valued or appraised lately? It may be that it is worth more than you think. Alternatively, what about your income, has that changed, or is there something you didn't disclose to your lender before, maybe some extra income? Banks will look at this to boost your serviceability (your ability to meet monthly repayments on a loan). For example, do you do overtime

or work an extra job for cash? This extra income may allow you to borrow more if you refinance.

Of course, you may eventually want to sell the property to get out of debt. But refinancing lets you do this in your time and on your terms, not on your knees with a gun to your head. If refinancing can redress the imbalance of power and give you choice, then it is something you should consider. As I've said before, you're not borrowing to spend on a holiday or a home cinema. You are investing in an asset that will appreciate in time and that can bring you in an income in the short term.

Remember, you haven't made a loss until you sell! Do your sums. Work out what your property could sell for now, realistically. Then project what it could sell for in five years' time. Could it be worth more? Finally, work out what your repayments would be less rental income over five years and you will see the advantages of borrowing to hang on.

For example, say your home is in a regional area or a mining town. You originally paid \$550,000 and your home is now worth \$480,000. If you sold now, you would realise a loss of \$70,000 (\$550,000 - \$480,000, ignoring for the moment agent's commission and other 'invisibles')

If your loan is \$440,000 (80% x purchase price (\$550K), then with a mortgage interest rate of five percent your loan repayments are about \$2,150/month, assuming you're not paying interest only. If you are able to rent the property out at \$450/week, you are achieving a rental income of \$1800/month which leaves a shortfall to be met by you of about \$350/month (ignoring managing agent's fees and other expenses for the moment). This amounts to \$4,200 per annum (which is a lot less than the \$70,000 you stand to lose if you sell now). In five years' time. if your

property goes up in value by 15% (which is still possible) then it will be worth \$552,000.

So, you can see that for a relatively small price your problems disappear with the passage of time. The trick is to hold on. Don't take the present as set in stone. Remember that property will *always* increase in value in the long run. Also, the loss or shortfall over five years will be a tax deduction when you factor in negative gearing, so it's swings and roundabouts.

5. Negotiate With The Bank.

Banks expect and even anticipate your circumstances changing. Some even offer packages you can switch to if your circumstances alter. For example, Westpac offers a parental-leave option applicable to several of its home loan products. If you have a baby and take maternity leave, they will accept half your normal mortgage repayments for up to six months to allow for lower income following the child's birth.

The point is that banks are not averse to some sort of plan to help you through a difficult time. As I said before, it's not because they like you or they're nice, but because they want you to keep paying. They don't want to foreclose – that's only a measure of last resort. Your lender is obliged to grant you hardship relief to help you save your home, under the National Consumer Credit Code. (More on this later.) You just have to face it head on and strike a deal with them before you start defaulting. For some reason people think if they can't pay the full amount owing, that's the end of it. So how do you strike a deal?

You will find 20 tips on how to negotiate with your lender in Chapter 4 of this book. But here in the meantime is a short guide for some things to remember.

i) Appear in control

Don't let them chase you. It's all about appearances. There will be one person in the credit team who will be assigned your file and the deal you strike will be up to them. They will no doubt have guidelines as to what deals are appropriate and what circumstances to consider. But, basically, it all comes down to common sense. Are they going to feel comfortable if you hide and make excuses like 'the cheque's in the mail'? Of course not.

Remember my earlier hypothetical situation where you were dealing with a neighbour who owed you money? The bank doesn't want to know that you're in over your head, that you have a string of credit card debts and hire-purchase commitments and that you're drowning. They want you to come to them calmly and rationally. They can smell fear, so don't show any. Don't appear beaten and downtrodden; no one wants to have their money riding on a loser.

That's why the mindset chapter above is so important. Talk about "an unexpected change in income" which you're now addressing, not a full-scale panic that's left you in a tailspin. It's a bit like talking to a child and not wanting to spook them. "Everything will be alright, this is just a temporary glitch which I've almost fixed if you'll bear with me."

ii) Give reasons

Don't just shrug your shoulders and say, "I can't afford my repayments". Set out your situation in a controlled way. I'm assuming that something has happened to put you in this situation: you've lost your job or had your hours cut back, your

bills have risen because of something unexpected. Maybe medical issues have come up or you've lost a source of income from a spouse. Unexpected changed circumstances are not cause for alarm for a lender. Knowledge actually puts the lender at ease. If you've been upfront and given a viable reason, the lender feels less apprehensive about their money than if you just start missing payments out of the blue.

iii) Specify a monthly figure you will pay

This is the old bird-in-the-hand tactic. Your lender will have a figure they can accept in such circumstances. Provide proof that you'll meet the figure, providing documentary evidence if required. For example, you might say, "I propose to pay \$1800 per month. I'm confident I can afford this in the interim. Here's payslips from my part-time work. I average 18 hours per week. Here's an appraisal from a local real estate agent as to the expected rental return."

iv) Set out your long-term plan to get back on track

This will put the lender's mind further at ease. Say, for example, "I am looking for work in this industry where I can take home \$900 per week." Bring all documentary evidence you can to support your proposal. "Here's the ad/job description I applied for. I have a second interview next week."

v) Bring supporting documents

You are basically renegotiating your loan. Think of it as a new loan application. Everything you gave the bank when you applied for the loan has changed, so bring any new supporting documentation. Anything to do with the value of the house (like a market appraisal – only if it's favourable, of course), or income, pay slips of a spouse if they've increased or they've just started working, rental appraisals. Any document which will lend weight to your proposal.

vi) Point out the benefit of the deal to the lender

If you meet resistance, be ready with documents that point out the folly of foreclosure. It may be that the property has fallen in value below the loan amount. It may be that you owe land tax, council rates or levies on the property that the bank would have to clear if they wanted to sell it. Point this out to them with supporting documents such as market appraisals.

Obviously, this is a last resort. If they are not going for your proposal, then it's likely they'll foreclose anyway. Just be careful with this approach. Check that they won't meet you half way and that there's absolutely no middle ground. This last tactic could well backfire and spook them into selling you up if you use it as an opening tactic.

In real life, your strategy could work something like this.

You paid \$550,000 for your flat and borrowed \$440,000. You find a real estate agent who will appraise it at \$400,000. Call a few agents. You are looking for the one who will give you the lowest appraisal. You could even say to them "Can I get \$375,000 for this house?" A lazy agent will jump on this because the lower your expectations, the easier their job. So, you go to the bank with a written proposal in hand (with supporting documents including the agent's letter of appraisal of the property) which reads as follows:

CURRENT SITUATION

| | |
|--|-----------------|
| Loan Amount: | \$440,000 |
| Current Value: | \$400,000 |
| Sale price on sale: | \$400,000 |
| Less Agent's Commission (2%): | \$8,000 |
| Less Advertising: | \$5,000 |
| Less Council and Water Rates: | \$1,800 |
| Lost interest during sale and repossession period (say 6 months @ \$2,200/mth): | \$13,200 |
| Less legals for possession (contested proceedings): | \$15,000 |
| Less legals for Conveyance: | \$1,500 |
| Less Storage Costs: (For 3 months) | \$1,500 |
| Total: | \$354,000 |
| Shortfall | \$86,000 |

OFFER

| | |
|--|----------------|
| Current Loan Repayments | \$2,200/mth |
| Rent: | \$1,500/mth |
| Top-up | \$150/mth |
| Total: | \$1650/mth |
| Shortfall | \$550/mth |
| Total shortfall over six months (\$500 x 6): | \$3,300 |

After which time the loan will revert to the standard variable rate and interest payments will be paid in full each month with the shortfall of \$3,300 to be repaid within 12 months thereafter or upon sale or refinance of the property whichever is the earlier.”

So, you are getting a reduction of \$550 per month for six months to give you some breathing space. After this time, you will make full repayments at whatever variable rate applies in six months.

You will additionally make up any shortfall as and when you can over the following 12 months. Or you could ask for the shortfall to be capitalised or added to the loan amount. So, the bank is still getting everything they're owed, there's just an 18-month window for you to bring everything up to date.

What you are really doing is renegotiating the terms of your loan to buy you time to trade your way out of the tight situation you're in.

It's really a win-win outcome. You get to keep your home and the bank avoids a \$85,000-plus loss to them as a result of a repossession of your home. Note that if you do oppose the lender's repossession of your home it will cost the bank time and money. No one ever takes on the bank in court so they won't expect it or factor it in. Donald Trump threatened it to his advantage in the late 1980s and you can too. You may not choose to actually do it, but the bank will know that if you do, it will cost them time and money which will affect their bottom line. We discuss how to challenge a repossession later on.

vii) Keep an ace up sleeve for leverage

As we've said, the bank thinks they're invincible in court and 9 times out of 10 they are. Few people ever dare challenge them. Even if you want to you'll probably find that most lawyers are scared of the bank too. You'll most likely be asked if you owe the money and when you reply that you do you'll be advised to cough up or give up.

This really angers me. You have every right to challenge the bank and to have your day in court. Whether you really want to or decide to is, of course, another thing, but you should not be told to give up just because they're big and have lots of money and you don't. As we've said above, the bank doesn't want to sell your

home – it’s a nuisance to them. In order to do it they have to go through various legal steps, including applying to the court for an order for possession. They can do this in their sleep and the court will usually just rubber stamp their application because it’s never defended, and they are the bank, perceived to be above reproach. However, if you do decide to defend their claim against you, it gets even messier for them. Not only do they have the headache of trying to sell you up, but you’re actually obstructing them and costing them time and money.

Now, I’m not advocating this approach as I don’t know the facts and circumstances of your case. But you do have the right to defend yourself in these court proceedings by filing a defence. You can even file a cross claim if you allege that the bank owes you money or you have some sort of claim against your lender.

This is a risky strategy and will only pay off in some circumstances. Obviously, once the bank is successful in selling you up it will want its legal costs and back interest and the like and it will take this out of your equity if there’s anything left over after the house is sold or, alternatively it may come after you for it, garnisheeing your wages or bankrupting you. But, by the same token this can motivate the bank to cut a deal with you in the interests of commerciality. We’ll discuss this approach of defending the bank’s action further below.

6. Change To Interest Only.

If your loan is a standard home loan, then chances are you’re paying principal and interest off your loan each month. That is, your monthly loan repayments are higher because, not only are you paying the monthly amount of interest due, you are paying an amount off the actual loan amount (or principal) each month.

These types of loans mean a lot more money out of your pocket each month for the early years of the loan (becoming lesser and lesser towards the end of the loan).

You're probably still be in the early stages of the loan now, so you could considerably reduce your monthly repayments by switching to interest only. For example, a \$500,000 loan could see you paying over \$2,500 per month on principal and interest whereas interest-only equates to only \$2080 per month. Over time, interest-only loans are much cheaper anyway and it is really the only way to go with property. It is not the intention of this book to advise on loans and what is best for your circumstances in general, but rather, to set out options for you to survive. Survival in the short term requires lower loan repayments which are offered by interest-only loans. So, switch to interest-only and if you later decide that you want to ultimately own your own home then change to a principal-and-interest loan. Interest-only is definitely advisable if you intend to rent out your home as it will then become an investment property.

7. Apply For Tax Breaks Now.

If your home becomes an investment property because you are renting it out you can have your accountant (or personally) apply to the Australian Taxation Office to have your negative gearing factored in now so that your pay-packet (if you are a salary earner) will be more each week.

This means if there is a shortfall on your rental income and your mortgage repayments and other incidental expenses relating to your property, you can claim this loss now and your tax amount for PAYG tax, which comes out of your pay packet, will be less each week. This means more money in your hand to help pay your

mortgage! If you don't have an accountant to ask about this, contact the ATO or go to their website at www.ato.gov.au and you can download the variation of PAYG instalments form.

8. Sell

You may have personal reasons for wanting (or needing) to sell.

You should always be careful you don't end up owing a shortfall. Get appraisals from several agents and, if the price seems right and it's what you want, arrange the sale. Agents typically charge 2.2 percent commission, so it's well worth considering the many budget alternative now disrupting the market. Through Property Now, for example, you pay just \$700 for listings on the major property websites until your house sells. You, effectively serve as the agent, showing people around at the viewings you arrange. Purplebricks, meanwhile, offers more traditional agent services but at a cut-price rate of around \$5000.

Remember, selling a house takes time. If you go with a traditional agent, it will take at least two weeks after you decide to sell and appoint an agent, for the house to actually come on the market. Even if you find a buyer straight away it can take a further week for that buyer to do their due diligence, such as pest and building inspections and then exchange contracts.

Once contracts are exchanged, the usual settlement period is six weeks. So, make sure you factor in at least another 10 weeks of mortgage repayments if you're selling. And that's only if the place sells in the first week – obviously the longer the house is on the market, the longer you will be liable to pay your mortgage. To bring about a quick sale, it's best to set a competitive price. If you start high, be prepared to wait and to ultimately lower your price, although by then the property may be 'stale'. People tend to say,

“Oh that house, they’ve been trying to sell that for ages and they keep lowering the price”. If during the sale period you can’t pay your mortgage, it’s best to keep the bank in the loop. Tell the bank you’re selling and give them proof (agency agreement, contract, ads etc) to keep them off your back.

9. Don’t Listen To Armchair Experts.

Too many people are told by others that they are the bad guy and made to feel ashamed of their situation. They are accused of being greedy and borrowing money they couldn’t afford and now they can’t pay the piper. They are urged to just go quietly and learn their lesson, live within their means, take their medicine, get sold up, put the whole ugly thing behind them and start over.

The problem I have with this is that it is simply not the case. Circumstances change and people can get caught up through no fault of their own. Chances are you’re a victim of unforeseeable circumstances, not a criminal who stole money from the bank. Yet, often when people go to financial advisors or lawyers, the focus is on how to just fold up and surrender. I read three articles today about the foreclosure rate in Australia. The journalists were harping on the fact that people had gotten in over their heads and were now paying the price. A spokesperson from Legal Aid in Queensland said that people who resisted foreclosure could be adding another \$20,000 to the bill and that you would get 28 days to pay out the loan in full and after that, seven days’ notice to move out of the property. A financial advisor was promoting voluntary bankruptcy and grocery budgets!

You’re reading this book, so you obviously have a desire to get out of your current situation and not just lay down and die. With the greatest of respect, if these ‘experts’ were really any good in their

chosen area, that is financial and legal gurus, they wouldn't be doing the jobs they're doing! If you want to be successful, make sure you take advice from successful people.

Decide what you want and set about getting it and just ignore anyone who tries to tell you otherwise. It will take a strong will and you may even have to limit contact with those friends and family who tend to have a negative influence. As we've said before, if you believe you can do something then you'll find a way to do it. If you take advice from people who aren't providing the 'way' you're looking for but rather attacking your 'belief', then you may start to doubt yourself which can only divert energy from your goal and may even lead to failure. Don't let others decide your fate. If you want it and believe it is possible then it will be possible. Seek out positive influences that enforce your belief, rather than paying heed to nay-sayers!

I'm not advocating stubbornness or pride – merely access to information and informed decision making on your part. It may be that everyone else is right, but you should come to that conclusion based on your own research and the facts and figures involved, not because others seem to think it's the only way.

10. Get An Additional Source Of Income.

Get more income. Sounds obvious doesn't it? You may be thinking, "Well if I could get more money I would". The funny thing is, as they say, necessity is the mother of invention. Sometimes, when we are comfortable we won't push the boundaries and our comfort zone becomes our wealth zone. You don't need more money, so you don't get more money. If circumstances cause you to raise the bar, you will push beyond your comfort zone to achieve more and this will expand your wealth zone.

In other words, think outside the box. Be creative, is there some other way you can earn more money? Plenty of websites allow you to advertise your skills and even bid for jobs. It may be something as simple as a part time job or selling something on eBay.

11. Borrow From Someone Else And Offer To Pay More.

Just because you're in a dire situation doesn't mean that no-one else has any money, and equally, it doesn't mean that you will be like this forever. Does a family member or some close friend have money to lend you? They might be willing to capitalise the interest so that you can pay them back at the end of the loan. For example, you could borrow \$50,000 now upon the basis that you will pay back \$52,500 in 12 months' time. That's five percent interest, which is way more than what a bank would give them in a term deposit account. Plus, you could offer to pay the interest in cash. We are really interested in time at the moment. You are trying to buy time to trade through this.

12. Consider An Out-Of-The-Box Solution.

As we will discuss later, people are forced to think differently and to 'do deals' differently in times of crisis. There are options which involve you doing something new and abandoning the old way of doing business. What if I told you that there was a way to sell your house within two weeks and to get the full asking price? Impossible? Remember to think – “Hmm that's interesting ...” and read on.

CHAPTER 3

WHAT TO DO WHEN YOU OWE MORE THAN YOUR HOUSE IS WORTH

They say every cloud has a silver lining. And the good news when you're 'underwater' – or owe more money than your house is worth – is that your bank is going to be extremely motivated to work through the situation with you. Your lender knows that it may not find someone willing to pay it what it's owed for your house. At the same time, they have you, eager to hold onto the house for the money the bank is owed and ready to cut a deal with them. They'd be crazy not talk turkey. In you, the bank has someone who wants to pay them back all they are owed with no complicated legal manoeuvres. Their other option is to spend lots of money and time kicking you out, only to realise a loss on the loan and having to then chase you for the difference. They will want to work with you. It's in their interests!

Let's return to something I said earlier about walking away or hiding from your problems being the worst thing you could do. You want help and guess what? Your lender wants to help you! Yes, it's tempting to avoid creditors if you can't pay them what they're owed, but most lenders will agree that something is better than nothing. Banks want you to tell them if you're in trouble and will generally try to work with you. On the other hand, if you don't communicate with them, they'll have no choice but to foreclose. The key is in keeping the lines of communication open. They will not foreclose on you as long as you are still talking to them trying to work something out.

So, what is acceptable to them? Basically, they need to see some sort of light at the end of the tunnel – some sort of plan. If you say,

“I can’t pay, but I’m crossing my fingers and wishing really hard that something changes”, they will want to cut their losses there. They will figure the only way to get any of the money they are owed is to sell your house. After all, the longer they wait, the longer their money is tied up not earning anything for them. They’d rather sell your house for a loss, get some money back and lend it out to someone who will make repayments on it.

However, if you present your current situation as being temporary or indicate things are likely to change and given time, you will be able to eventually bring your loan repayments back on track, they will most likely allow you some latitude.

Your options

Don’t feel you don’t have options. You have plenty. Here are some of the courses of action you can take:

Seek forbearance

Forbearance is where the lender agrees to forego loan repayments for a while in circumstances where a borrower is expecting a lump sum of money that will then bring the loan back on track. The aim is for normal loan repayments to then resume. Forbearance can be sought in circumstances where you are expecting some sort of payout, be it an insurance claim that’s due to be settled, a redundancy package, or perhaps the sale of another property.

If you are seeking forbearance, gather together all the documentation and other evidence you can to support your hardship application. If you have capital tied up in another property that’s for sale, give your lender proof that you have that property on the market and include a letter or appraisal from the agent. You may want to show the lender the formal agency

agreement with the agent's estimate of the sale price of the property. You are aiming to give the lender the impression that something understandable and explicable has stopped you being able to meet your repayment obligations and that the situation will be remedied. They will want to know that the lump sum is real and is imminent and that this is just a temporary cash flow problem that will be fixed once the money comes through.

Propose a repayment plan

A repayment plan is used in situations where you have met with hardship and can't keep making loan repayments at the current level, but want keep paying something until your temporary hardship eases. The goal is that after this period you will resume your normal repayments again along with plus extra amounts to cover the period where you paid less. Once again, you must have a definite plan. So, if you lost your job and only have one salary for a period while you look for work, stress that once you find work two salaries will be ample to fix up all arrears. Or if your spouse has become ill or had a child but will eventually return to paid work, you will be able to make good the arrears at that time.

Ask for a mortgage modification

If your situation is permanent and you don't expect to be earning more money or coming into a lump sum of money in the foreseeable future, it may still be possible to modify your mortgage so that you are required to pay less each month. One example of modifying your mortgage in this way is extending the term of the loan. This means you are paying down the loan over a longer period of time so that each monthly repayment is less. You may even switch to an interest-only loan. This means you only pay interest on the mortgage at the lender's current variable – or if you prefer, fixed – rate. You are not paying off any principal, so your

monthly payments are lower. This may not be your ideal plan, but we are just in damage-control mode at the moment and you can always change back to principal and interest or arrange to make repayments over and above the monthly minimum when you are able to.

Another thing banks will do and indeed have done for others is to lower your interest rate for a time. Banks will do this rather than foreclose on your property. If you are really desperate this could indeed work for you. You should be able to negotiate a lower interest rate whereby you get a tenant paying enough in rent to keep the bank at bay (that is, the rent should cover the mortgage or come close). Consider using an agent to let the property and paying them a letting fee of one week's rent (or whatever you can negotiate) and then managing the property yourself so as to maximize your rental income and your ability to meet your mortgage repayments. There are also no-frills agents who will charge only a nominal fee to manage your property (about 2.2% of the rent).

Ask for a short sale

If you really can't keep your head above water, then the bank would still prefer not to repossess. Remember they just want their money back without having to go to court and all the other red tape.

Your lender may not agree to this option as readily as the other measures, but they have been known to agree to short sales in certain circumstances. What happens in such a situation is that the lender agrees to allow you to sell the property yourself (without them repossessing it) and they will accept the amount you receive in full and final settlement of your outstanding debt. So, they won't pursue you for any shortfall. Bear in mind, though, that is not a

standard sale where you are in control. You will have to present all offers to your lender and they will decide whether to accept or reject the offers.

Lenders may ask for some sort of affidavit (a formal legal document) or other form to be filled out whereby you are required to list all your assets and liabilities. Now, while I don't advocate any form of dishonesty, just be wary of your lender's requirements when co-operating with them. The information they want from you, which may be presented innocently as a formality when negotiating a 'workout' package, may be part of a fishing expedition. So, the moral is to both act in the spirit of co-operation and keep your friends close and your enemies closer. At the end of the day, they are out for themselves and they are being commercially minded. The lender will only be motivated to cut its losses with you and come to some arrangement if chasing you for their full pound of flesh would prove useless. That's why they want this additional information from you. If they can see you earn a good income or have other assets, then they may decide it's in their interests to repossess your property and then chase you for the shortfall.

Alternatively, if they see your situation is absolutely futile, they may abandon any work-out plan with you. The document you produce should ideally show that you are solvent, but not abundantly wealthy. You don't want the lender calling the shots and saying, "Well you earn enough per week to pay us back \$3,000 per month. You could always sell your investment property if you're having trouble".

By the same token, you don't want them to say, "Look you are so short each month, you'll never get out of this and we have no faith you'll ever be able to repay this loan."

It's probably unlikely that you have the ability to cover the shortfall, either in earnings or in other assets because you obviously would have pulled out all the stops you could before getting to this point. Just beware of the lender and what you do and say during the negotiation process. It's obviously in your interest to be open and honest but just know that you have rights and that just because they're a big financial institution and you're on your knees doesn't give them the right to make you jump through hoops and call all the shots! There are some very powerful consumer protection laws on your side.

I have seen one case where someone agreed to swear an affidavit disclosing all of his assets and liabilities and exaggerated some of the values of assets and his share of ownership (e.g., that he had 100 percent ownership of a \$100,000 boat when he actually had 10 percent ownership of a \$38,000 boat). He later said the reason for this was because he was embarrassed by his impoverished circumstances and also because he had already put these details on his original loan application when he first borrowed the money to buy the house and he did not want to admit that he hadn't been truthful before. The bank decided that this man had enough net worth for them to be able to get all their money back and so did not agree to a short sale.

In another case, a bank asked someone to declare all other sources of income, one of which was rent paid in respect of the mortgaged property. The borrower complied, thinking that this would boost his credibility with the bank to the end of securing a work-out package, giving the bank a copy of the lease. The bank then issued a notice of demand upon the managing agent directing that all rent be paid to them. They actually had no legal right to do this and can only intercept rent if someone is bankrupt or with that person's consent, but this did not stop them being bullies and scaring the agent into redirecting the rent to them!

The lesson here is just that you should work with the bank when it suits you, but don't just give up and do whatever they say because you think they're trying to help you or they're bigger than you. They are helping themselves first and will do whatever suits them and whatever will net them the highest return of their monies. You should think the same way!

Co-operate with repossession

This is where you can agree to consent to the lender repossessing the property. Instead of you doing nothing and waiting for the death knell of the bank repossessing, you can approach them and co-operate with the bank sale. It saves the bank the time and expense of repossessing on your home and it may help your credit rating to have it recorded that you assisted the bank with the foreclosure. You will, in effect, sign the property over to the bank and they will then sell it. Obviously, this is a last resort if all other workout options fail.

Negotiate settlement following repossession

You can still work out something with the bank even after they've been to court and got orders for possession of your home and a judgment against you for the value of your loan plus all of their legal costs. Settlement is always possible if there are motivating factors on both sides. If your circumstances change, you may be able to approach the bank and buy the property back. I have seen this done successfully on one occasion when the parties concerned had not paid their mortgage for 2.5 years and following possession proceedings, once the dust had settled, they successfully negotiated to refinance out of the debt. The final figure agreed upon was less than the original loan amount (let alone the interest for 2.5 years). The facts of this case were

complex, but the outcome shows that everything is negotiable. It is never hopeless!

Buy back the property at auction

This is similar to the above situation and I have seen it succeed before where a property was repossessed and ultimately sold at auction. The successful bidder was actually the trustee of a bare trust set up by the owner of the property for the purpose of buying back his own house at a much lower price than the amount he owed to the bank.

Sell the property on lease option or a 'wrap'

We discuss this method below. It is just an elastic solution which is becoming more and more mainstream and represents a potential win/win solution for all involved.

Seek hardship relief

Lenders are obliged by law and their own Codes of Practice to help you in times of hardship and if they do not there are measures you can adopt to force them to. This is explained in later chapters.

CHAPTER 4

20 TIPS FOR NEGOTIATING WITH YOUR LENDER

So, you've decided you want to come to an arrangement with your lender that will allow you to hold onto your property. Good for you! The first step is to contact the department within the bank or institution that holds your loan and establish: a) who is handling your matter, and b) how you can set up a meeting with them. Try to arrange a face-to-face meeting, rather than just exchanging letters or emails. Meeting someone in the flesh helps to establish bonds of trust, makes the person think of you as more than just a number, and allows you to have more control of the situation.

When you attend the meeting, it can be a good idea to take along an accountant or other financial or legal professional, who can help negotiate on your behalf. If this isn't possible, take along a trusted family friend. As well as providing moral support, they will be able to play the role of mediator (think: good cop/bad cop) and act as an objective buffer between you and the lender.

At the time you are arranging the meeting, politely ask if the person you are meeting with has the authority to negotiate a work-out plan for your mortgage. Sometimes credit or recovery officers with lenders are solely focused on simply clawing back money because they receive bonuses based on how much of the loan they recover. Ensure that the person you are meeting is authorised to vary your loan, otherwise the meeting is likely to be a waste of time. Insist upon the correct person being there.

Once you're in the try using the following 20 tips:

1. Invite the lender to set out what they want. Allow your opponent to move first. When you do this, you force them to create a baseline around which you can work. Obviously, you will need to tell them that you can't meet the current arrangements, say why, and explain what you have in mind to get out of the situation. You might, for example, open by saying, "I've lost my job and I'm looking for work. I'll have something shored up in the next month or so, but I'm finding it tough to meet the repayments on a limited income." Then ask if they would be willing to renegotiate or vary the loan and try to work out how this might work. You might suggest that paying them less for a period of time. Is this something they would consider? If so, what can they offer you?

You'll obviously know your bottom line ahead of the meeting, but why tell them straight away? It's wise to see what they will allow you to do. It may just be that they are offering a better deal than you would have thought to offer them!

2. Listen to the lender and understand their motivation. This is where most people foul up when negotiating. They are so focused on their own situation and what they want that they fail to listen to the other side. Have you heard the old proverb about keeping your enemies close? Study your opponent and try to figure out why they want what they want. Chances are that the bank doesn't want to foreclose. Instead, they want you to keep paying and they want to feel comfortable that you have a plan in place to do this in the long term.

The bank isn't likely to be emotional or vindictive about your situation. It just wants to protect its position and its bottom line. The credit manager or person assigned to handle your matter is essentially a pen-pusher. They will have bank guidelines as to how

far they can go in renegotiating the terms of your loan with you. Don't push the boundaries if you don't need to – it may be that there's no room for movement and the bank can, for example only offer a six-month moratorium on your loan.

Listen to what the opponent is telling you. If the bank wants more per month or a shorter moratorium period, then see how you can do this by adjusting other areas of your proposal. If the bank will only look at a four-month leniency period, then offer lower payments in that period to give yourself a buffer. Don't just write the leniency period off because it doesn't meet your bottom line of \$1,800 per month for six months. Look at offering \$1,400 per month for four months.

As Steven Covey writes in his best-selling book, *The 7 Habits of Highly Effective People*: “If two people hold the same opinion, then one of them is unnecessary.” You can get what you want more effectively if you can give the other person what they want at the same time. Covey advises that you diffuse conflict by listening, and suggests using the following phrase: “Good, you see it differently, help me to understand ...”

3. Think about what would be really attractive to your opponent. What could you bring to the table that they would really want to say 'yes' to? Remember, everything is negotiable. There is nothing you can't put in a deal to suit the two of you. Once again *listen* to your opponent and *understand* what they want.

For example, if the bank is hell bent on getting rid of you as a customer, then it probably don't trust you and sees you as a credit risk it doesn't want to do business with. So, offer a deal which will ultimately give the bank what it wants this but on terms that suit you. “Look, if I hear you correctly, you just want the whole loan paid out. Now, it will cost a lot of time and money to foreclose and it will take at least six months from go to whoa. What if I

refinanced? I'll need six months to do this and I'll pay \$1,700 per month whilst I'm arranging this. You can capitalise the balance of the interest repayments for that period. You'll get it all paid out on the refinance."

In this way, you are not going against the tide. The bank is still getting paid something and within six months it will be rid of you without the legal battle.

If there is still resistance, again *listen* to what it is. For example, if the bank is worried that you won't be able to refinance, you can propose handing over your possession to the bank voluntarily at the expiration of six months if you have not refinanced.

4. Clarify their offer and their position. If they have already put it in writing before the meeting, then bring it with you read the offer aloud. Then summarise it, saying words to the effect of: "So, if I understand correctly, you will accept lower repayments for six months, but they must be at least \$1,900 per month and if I default under this timetable you've set, then you can foreclose without further notice to me."

5. Bring up your own baseline in a slow and calculated way. Never just blurt out your terms. You need to establish a sense of how they will react to your baseline before you bring it up. Reveal things slowly in a conversational manner – perhaps even questioning.

6. Try to appear like a meeting point is imminent or progress is being made. Create a positive vibe that you are there today to reach a settlement. After they put their offer and you clarify it, you may introduce your position slowly and in a conciliatory way, saying words to the effect of: "I was considering your terms and I was wondering how you came to the figure of \$2,200 per month

as a bottom line? I don't want that to be a deal breaker, but I was trying to understand how you got to that figure. Would there be any room for movement there?"

It's a bit like hostage negotiation. The main aim is to keep your opponent feeling comfortable and keep the lines of communication open. You need to look like you're willing to trade and like you're all making progress.

7. Justify yourself. When you state your baseline, back up your position with information and facts. Give the bank practical reasons to want to accommodate your demands. (However, be careful you don't look like you're making excuses for yourself. That's a sign of low confidence). You might say, "I don't want to be irresponsible and set up a deal that I can't comfortably service. I may earn more some months than others and if so I'm happy to pay extra in offsetting the shortfall. But I don't want to commit to something that may be beyond me in the short term, as this will only cause you to mistrust me. Any extra money I keep by paying you less each month will go to you in the long run, but the aim of the breathing space I'm asking for is to help me get on top of things and not to stretch me to my limits. Now that this property is an investment or rental property I am claiming a tax deduction each week which gives me more money in my hand, but that will take at least three months to come through. Here is a letter from my accountant and you can see that I will be taking home \$700 per week and not \$600 once this is processed which will enable me to catch up quicker."

8. Work out what you can bargain with before you go in. Put some things in your baseline which you would be willing to abandon – but don't give them away all at once. Make your opponent feel like they're working hard and getting something for their efforts. Make it look like you are giving away a lot. The reason for this is that 10

small concessions extracted throughout the course of the negotiations will seem like more, psychologically than one big one.

9. Encourage your opponent to lower their baseline. Try to get a feeling for what your opponent values and what they are prepared to give in on. Test the waters with your own baseline, giving reasons. For example, you might say, “I won’t be able to pay \$2,200 per month in the immediate short term, because I am only earning on average \$400/week plus \$2,000 per month rent. So, I can only pay up to \$1950 per month, allowing me only \$1650 per month to live off. I could try and pay \$1900 per month if you gave me eight months at that figure though instead of six.”

10. Move away from your baseline in a slow and methodical way. Don’t seem too eager to give into anything your opponent has to say, but don’t seem stand-offish either. When you make concessions, do so slowly and avoid giving up huge benefits all at once, even if you wrote them into your baseline for the sole purpose of giving them away later. You want your opponent to feel like they’re extracting the most out of you and driving a good deal. If they think they’ve got themselves a hard-won deal thus far, they’ll be less likely to walk away from negotiations if you reach a stalemate.

11. Recap the ground you’ve already made so as to note any progress. Give praise for how far you’ve come. The idea is to get to a point where both parties are so happy with the points that they’ve negotiated for themselves that they are reluctant to let it all go. This is a point where it’s easier to go on and close a deal than to abandon everything and go back to the starting point. If the deal-breaker points are already in the bag, then all the rest is just fine tuning. For example, if one party wanted a six-month reprieve and they had got that concession, they are less likely to

walk away from the negotiating table because the other party wants the monthly repayments \$100 higher. The deal is unlikely to go south over \$100 – that should be easy enough for someone to come up with when they've got the six-month reprieve they wanted.

12. Never use ultimatums. These can lead to stalemates and they engender ill will in both parties. If your opponent offers an ultimatum, diffuse it by turning it into a question, use it to explore your opponent's baseline. Try to work out if they are bluffing, or do they mean what they say? Why are they adamant in wanting what they want? For example, someone might tell you, "If you're not prepared to pay \$2,200 per month then let's not waste our time with this anymore." You could counter this with, "Why is the figure of \$2,200 set in stone? We are quibbling over \$200 per month here which is only \$1,200 over the six months I'm asking for. I don't want that to be a deal breaker. I could stretch myself to \$2,050 per month which is a \$900 shortfall over the six months and I'll undertake to pay that \$900 in full in the seventh month."

13. Insist on the importance of completing the deal. Talk about the cost and futility involved in long negotiations. Stress how it's in everyone's interest to end discussions and reach a consensus as soon as possible

14. Make package deals. Even though you are negotiating things line by line, you need to create an overall 'package deal' that must be accepted in whole or not at all. That is, every point or concession builds upon the other. If you get to the end and then allow previous items to be renegotiated then it's one step forward, two steps back.

15. Fair trade. If you give something up, always ask for something

in return, even if it's not particularly important to you. Keeping the deal two sided at all times is important.

16. Focus on the interests that are shared by the two of you and find areas where you both agree. Don't take positions that will block you off from further negotiations. Instead, find the areas where the two of you agree and then capitalise upon them to mutual benefit. For example, if you both agree that you are going to pay the loan out in full you could focus on that part of the deal. "I'm going to pay you out in full of course but I'll need four months to arrange my finance."

17. Be fair and objective. Don't be deceptive or try to con the other side. Don't let them con you either. Set a tone of openness, fairness and integrity and ensure that both sides are following it at all times.

18. Brainstorm. Brainstorming is usually seen as something reserved for your own team. However, if you display the willingness to brainstorm with your opponent, he or she will really feel as if you desire the win/win scenario and he or she will be more inclined to help you both get there. For example, instead of saying "I can't possibly pay \$2,200 per month" you could say "I want to pay your minimum requisite amount but that's just too tight for me right now. What if we switched the loan to interest only now that the house is a rental property, would that change your minimum monthly amount? Is there any other way to lower that figure?"

19. Use time to your advantage. If you go too fast, you'll make a mistake. Mistakes may be difficult to correct and can result in a breakdown in negotiations (if you can correct it at all). Therefore, it pays to slow down and make sure every step is the right step. Furthermore, never be rushed into changing your position on a

matter. If you need to, say you're thinking about it and will put that point on hold and come back to it once you've made some enquiries.

20. If things turn sour, write down everything you've agreed on and take some time out. Don't slam your papers closed and storm out. Know that you can close this deal and perhaps you just need to sleep on it. Say you'll have to work on it and find a way through. Stay positive. There's always a way! Find it. You may be too tired after long negotiations to see something and the answer may come to you the next day. If you feel animosity growing or things slipping away, recap how far you've come and minimise the sticking point "We've sorted out the length of the reprieve and the monthly amount, the only thing left to finalise is how and when I will make up the shortfall after the six months." Then leave it all still open with the ball in your court to get back to them with something that works.

Some Things to Remember

The person you're negotiating with has no real interest in the outcome. That is, it's not their money. They don't stand to win or lose anything through their negotiations with you – they'll still get their salary no matter what. This means that negotiations may need to be tailored with this in mind. The representative of the lender no doubt has set criteria for negotiations and probably has no authority to go beyond that. Try to gauge their bottom line in the circumstances. They may say, "We never allow monthly repayments in a reprieve period to fall below 50 percent of what normal repayments would be." If there is some sticking point as a result of your lender's strict 'policies', you may need to politely ask to speak with someone higher up. Everything is always negotiable and if someone tells you otherwise it is because they are too junior within the organisation to know any better.

It may be that the person you are negotiating with does not care about commercial reality because they are just a cog in a wheel of the organisation and it's too much trouble. If you are met with obstinate resistance, then clarify and recap everything before politely adjourning the meeting. For example, "So if I understand correctly, what you are saying is that:

1. You never allow any leeway with renegotiating loans;
2. My only option is to pay the full amount on the due date each month;
3. If I don't pay all arrears by tomorrow you'll be commencing foreclosure proceedings.

Have I understood all of that correctly? It seems futile then in the circumstances to continue discussions with you however I am surprised that a meeting was arranged at all in light of the situation as you've described it. Can you tell me what department you are from? Can you tell me who is the head of your department? Who does your department report to (or who is in charge of that section)?"

Then write to the appropriate person. If you have no joy establishing the relevant department head, simply write to the CEO.

CHAPTER 5

HOW TO FIGHT THEM

What if it's war and you choose to fight?

If your lender won't negotiate, at some point you have to decide whether to fight them or simply give up.

Your decision will depend upon your goals and what it is you hope to achieve. Bear in mind that the bank has a right to recover from you the money that it has spent on the repossession process. If you decide to fight and make the bank run up huge legal fees, these can be clawed back from you either by bankrupting you or garnisheeing your wages. And if there is money left over after the sale of your property, this sum will be diverted to cover the bank's costs rather than going to you, as it otherwise would.

Resisting repossession is a tactic to be used with caution. But while it's a rarely used option and one many people advise against it, there can be circumstances in which you might consider it. Maybe the repossession process has already started and you are still in negotiations with the bank. In this case, you may want to defend the proceedings to keep the playing field as level as possible and to give you some ammunition or leverage when it comes to negotiations. If you've already cost the bank significant time and money, they may agree to your terms because the process has become so hard and costly for them. And just because a bank has legally won the right to sell a property for a certain amount, doesn't necessarily mean this is what they will do. I have seen cases where the banks make a commercial decision to settle for considerably less than the judgment amount just to be rid of the matter.

If you are paralysed by fear at this point, take a deep breath and read on. I am simply playing devil's advocate, helping you to see the worst-case scenario. Understanding and recognising our fears

is often the key to overcoming and neutralising them. There is an old German proverb which goes something like this: Fear makes the wolf bigger than he is.

The best way to deal with your fear as you travel through the unknown waters of potential repossession is to arm yourself with knowledge and information and to act. If you know what can happen and understand the law and the rights of lenders, then you are educating yourself about the full scope of the problem you are facing. This greatly reduces the fear factor, as you're now dealing with a known quantity rather than a shadow. Remember: there are no problems, only challenges to be dealt with. With this in mind, let's explore the worst-case scenario of what your lender can do and then look at what you can do to address this.

Below is an outline of how the process of repossession will typically unfold along with a range of options for you to consider at each stage.

What to expect

Letters of Demand. About two weeks after you miss a mortgage payment, you'll receive a letter or electronic notification from your lender advising you that you are in arrears with your loan repayments and asking you to bring the account up to date.

If you haven't contacted your lender to make an alternative repayment arrangement to suit your changed circumstances, now is the time to do it. Don't ignore this letter!

As time goes on, you are likely to receive one or two more warning letters or perhaps phone calls asking you to bring your payments up to date or contact the lender to discuss your situation if you are having difficulties.

There will then probably be one last letter of a more threatening nature stating that if you don't contact your lender or bring your account up to date they will take legal action without further notice.

A Statutory Notice.

If you ignore all this communication from the lender (which I don't advise), you will receive a Statutory Notice in the mail. This is the first legal step towards the lender taking possession of the property. The notice is likely to say that you have to pay them the missed payments within a month of receiving the notice. Depending on the small print in your mortgage or loan contract, the lender can, in addition, demand payment from you of the whole of the balance of the loan account.

What to do if you receive a Statutory Notice and you cannot negotiate or pay?

(a) Dig out your copy of the mortgage or loan contract that you should have received when you signed up for the loan. If you don't have a copy you can ask the lender for one, which you are entitled to do under the National Consumer Credit Protection Act *without* an explanation of why you want the documents. Make sure you also ask for copies of any additional documents setting out conditions of the loan. They do not have to provide copies if a court judgement has already been made but usually will, although a fee will likely be payable. If they refuse to provide copies, you may be able to dispute this by citing the Privacy Act and/or the fact the lender is contravening a code of conduct it has agreed to (see page 55). If there has not yet been a court decision, you are supposed to receive the documents within 30 days. An online information broker may perform this service for you too, but a fee will apply. You can also go to the land titles office – a.k.a. Land

Registry Services - or equivalent in your state, and buy a copy. You'll notice from the bank's statutory notice that they identify their mortgage as being registered as a number, like M1234567. You buy a search ticket at the counter in the Land Registry Services and fill it out with your name, the date and a copy of the document you want. Give it to the clerk and in 10 minutes your copy appears in a pigeon hole and you collect it.

(b) Read the copy of the mortgage:

(i) Your signature will be there and the witness to your signature may be a name you don't recognize. Sometimes, when people sign mortgage documents with a broker or at the bank branch with a loans officer their signature is not witnessed and the documents go to head office and a bank clerk witnesses everyone's signature. Is that *illegal*? Yes. Make a note of this, you may be able to use it later.

(ii) Before you leave the land titles office, take another look at the mortgage and it probably refers to some conditions of the loan contained in another document that's separately registered under a different number, for example A89101112. This is particularly relevant if someone sells a house (for example) and they think that their mortgage is for \$500K but the bank says they will only discharge the mortgage if they get a cheque for \$550K because they want another mortgage paid down or else they want a credit card paid off or whatever. The owner will wonder whether they have the right to do this and the terms of their mortgage will state this e.g. Is there an "all monies" clause or is the loan cross-collateralised with another loan.

(iii) You can pay another small fee and get a copy of this document and while you're there you should also buy a copy of your certificate of title to the property. The reference to title is on the

front of the mortgage as a lot number in your plan, Chances are that you'll already know that your home is something like Lot 21, and you'll remember that from your council rate notice. So, your title will be something like 21/7654, and you'll pay for an up to date copy of your certificate of title.

(iv) Having got your documents, you need to take your time and read every line in the papers. Don't scribble on these documents, just make notes separately. You're looking for all the headings, sentences and paragraphs that relate to 'what we will do', that is, the bank is telling you up front what all their obligations to you are.

Write out the parts that say what the bank will do that you know they haven't done. For example, they say they will give you statements on your loan account each month or quarter. Did they do that? If they did, it doesn't matter, if they didn't it's another weapon in your arsenal.

Now, look for a reference in the mortgage, or loan contract, for the National Credit Code. The document will tell you whether or not the National Credit Code (an Act of Parliament) applies to your loan. Lenders have onerous requirements under these credit laws which is more ammunition for you if they have not complied with them. (Read chapter 8 for more details on the Code and your rights under it.)

You should also go through the Statutory Notice with a fine tooth comb. The requirements for this document are very strict under statute, for example the Conveyancing Act, The Real Property Act and the National Credit Code. They have to state how much is owed, the total payout figure and how long you have to pay it and this cannot be less than 30 days. If there is a component for legal costs charged, this has to be specified and the notice has to be clear

and unambiguous as to the security property they are referring to. A separate notice has to be sent to each borrower.

So, what you've achieved so far is *knowledge*. You've excelled yourself by getting the search documents on your property. You've read the documents and have seen what the lender's rights and obligations are. You have identified any weak points in their case.

Remember, taking someone's property off them is a serious thing so the onus upon the lender is quite high. They have to dot their 'i's' and cross their 't's' and if they fall short in any respect (even a minor one) it can be fatal to their application to the court for an order for possession of your property.

What you should do at this stage is to write to your lender and tell them you're very sorry about the state of your account and the missed payment(s) and it was brought about because of changed circumstances which you then go on to briefly explain. You can't presently pay the full amount, but in view of your *hardship* circumstances you request a variation to the contract by extending the term of the loan by 12 months and suspending payments for three months. Explain that thereafter you will be able to pay \$ X a month or whatever proposal you have – this should be the absolute best deal you can put. There's no time now to leave room for negotiation – cut straight to your bottom line. Make sure you put everything in writing because if you do it over the phone and have a conversation with someone, it will be your word against theirs if there's any dispute over facts. If you have it in writing and you have kept copies there can be no room for confusion.

The important part in this plan is that you act *quickly* and with certainty before the Statutory Demand notice expires.

If the lender writes back and appoints a time for meeting, makes a counter offer or invites a further offer then you can follow the negotiation tips above. If, however, you receive a letter of refusal of your hardship application you can expect them to ask you for an up-dated statement of your assets, liabilities, income and expenditure. If they don't want to play ball, then just ignore this or query whether they are asking to consider a deal. They may just want to find out as much as possible about you to see if they will be able to cover any shortfall once they've sold the property. You are not obliged to give them this information, however it may be in your interests to co-operate if they want the information to consider whether they will come to some arrangement with you.

The Next Step

If you are unable to cut a deal with your lender, the next step is that a process server is likely to confront you in person either at home, at work or in the street and present you a Supreme Court 'Statement of Claim' for possession of your house together with a Notice to Occupier.

Service of the statement of claim has to be done in person under the court rules. You are in the proceedings as the *defendant*. If the process server doesn't find you at home, he or she has to keep trying to catch you and physically present you with the papers.

The 'Notice to Occupier' is different. It is left at the premises and directed to 'The Occupier'. If the property is rented, a notice is given to the tenant or occupier of the premises. Serving the documents to the tenant in person is not required, as he/she has no contract with the lender and is not a party to the proceedings. The papers can be shoved in the letter box, given to anyone who answers the door, or even pinned to the door!

The tenant may choose to get involved in the proceedings and has the right to advise the court of their lease. All they need to do is file two documents in the Supreme Court. The first is a 'Notice of Motion' and the other an affidavit sworn by the relevant person saying that they are a tenant. A copy of the lease should also be attached. There may be court filing fees of a few hundred dollars (depending on your state) for the notice of motion.

As all of this fall-out on the tenant is really your responsibility and not their doing, the decent thing to do is for you to draw up the notice of motion and affidavit yourself and pay the required fee. The paper work is so easy straight forward that in most cases that won't need a solicitor. The court has duty registrars who sit each day at a certain time and you can make an appointment to see them for help in relation to these documents. Otherwise, you can just turn up, take a number, and wait. The result will be that you will have a safe and secure tenant who will respect you and be understanding of your dispute with the lender. The up side for you is that your relationship with the tenant is strengthened, increasing the likelihood of the rent flowing in.

Your statement of claim from the lender now needs to be dealt with. It's likely to say that if you don't file a defence to the claim for possession of your property within 28 days of being personally served the document, the lender can, without a court hearing, file various papers and the registrar of the court MUST then make an order directing you to give up possession to the lender. This means the sheriff will come and change your locks.

What you can do is file a defence to the statement of claim. By this stage, you may have identified parts of the loan conditions that the lender hasn't complied with. Perhaps they failed to send you statements, breached the National Credit Code, didn't ensuring your signature on the mortgage was witnessed in your presence,

or there is a deficiency in the statutory notice of demand that the lender is relying upon. If you can argue that there's an invalid security document or a flawed statutory notice then you can successfully defend the lender's application for possession.

The strongest weapon you have in your defence is likely to statutory breaches by the lender. If you wrote to the lender seeking relief on the grounds of hardship and they refused your application, that may qualify as unreasonable, harsh, oppressive and unconscionable conduct under the Competition and Consumer Act and the Australian Securities and Investments Commission Act, both pieces of consumer-friendly legislation enacted by the Commonwealth Parliament. It may even be that you qualify for a hardship variation of your loan under the Credit Code (see following chapters for more information.)

When you file your defence, you may also file a cross claim against your lender. Under court rules both applications must be filed simultaneously. In basic terms, a cross claim is a claim you make against the lender. In the cross claim, you'll make allegations about the conduct of the lender, such as that you've suffered loss and damage as a result of your lender breaching the loan contract, relying upon an invalid security document and committing breaches of the Competition and Consumer Act, the Australian Securities and Investment Commission Act or the National Credit Code. You claim damages, interest on the damages and costs. You don't need to specify any amount at this stage.

There will be a filing fee on the cross claim which will vary from state to state. Once you file the papers you can go around to your lender's solicitor's office (which should appear on the statement of claim) and hand the receptionist a stamped copy of the defence and cross claim. This is good service of those documents upon your lender.

If you're a pensioner or otherwise can't afford the filing fee, help is available. The courts will waive or postpone fees to try and help you. The rationale is that the payment of fees should not be a bar to accessing justice.

In a couple of weeks, you're likely to receive a letter from the court telling you that the case will be listed before the registrar on a particular date and time. You will need to be there as all your hard work will be destroyed if you're not. If you fail to attend, the registrar is likely to dismiss your defence and cross claim and order you to pay the lender's legal costs.

Your cross claim is likely to upset the lender immeasurably as this is far from typical behaviour. Most borrowers, even if they have an excellent case, simply can't afford the legal fees to challenge their lenders. If they had the money, they would not have defaulted on their mortgage in the first place. It is possible that the lender might file a motion in court to have your defence and cross claim dismissed alleging that they show no justifiable case against the lender.

Eventually your case will have to be heard. You may have bought some time and you may have valid points, but it will cost a lot of money to engage lawyers to act for you and at the end of the day it seems you do owe the money. It may be possible to apply for legal aid, depending on your personal circumstances or you may be able to get assistance from a pro bono (free) lawyer through the law society or bar association in your state or perhaps some consumer advocacy group. But really, what you set out to achieve was to avoid simply rolling over and to instead force the bank to settle with you. Now is the time to make a last-ditch effort to do this. Otherwise, you will run up legal costs that you will be responsible for paying.

If it turns out that you cannot resolve the matter and the lender succeeds in gaining possession or if you settle with the lender and agree to drop your case and give them possession a number of things will happen. You will probably have a judgment entered against you for the total mortgage debt in favour of the lender plus your lender's legal costs. This would happen anyway whether you defended the matter or did nothing.

It is not the purpose of this book to walk you through defending possession proceedings. If you do have a good case, then it will succeed or fail on its merits which will obviously need individual attention and is beyond the scope of this text.

What Next?

One day, maybe in a couple of months, the sheriff will come to your home with a 'Notice to Vacate'. If the property is tenanted, the tenant may have to vacate. If they are permitted to stay, they may have to pay rent to the lender. However, ultimately the lender will exercise its power of sale and sell the property.

So, the property is to be sold. How well it sells at a mortgagee sale is another thing. It may be worth your while to buy it back if you can get the finance. You have the right to turn up at the auction or have someone do it for you and purchase back your own property. By this time, the loan balance will have blown out (plus legal costs, plus invisibles) thereby probably making the debt near to, or greater than, the value of the property. What that means is that no matter what, the end-result will be a loss for the lender. If you then present them with a list of unpaid rate notices, this makes the lender's financial situation even worse. To sell the property at auction, the lender would have to pay the rate arrears on your behalf to give a clean title to the buyer.

Lenders can be slow to recognize the full implications and costs as they usually take into account their needs and wants to the exclusion of all else. They do not contemplate that defaulting borrowers might fight back because things aren't usually done that way.

If you still want the property, you can:

- (a) buy the property at auction in the name of a company or someone else; or
- (b) negotiate a payout deal with the lender before auction and transfer title to a company or individual.

Conclusion

It doesn't matter if you win or lose. What matters is that you stood up and threw punches. Maybe some landed and some didn't. The important thing is you had a go and what you achieved, if nothing else, is that you bought *time*. You used the *system* legitimately, to cover your position and your interests. You did not just lay down and you kept some leverage over the lender to level the playing field and help you at the negotiation table.

What can the creditor do to get the judgment amount from you? If there is a shortfall after your home is sold, the lender may wish to pursue you for that amount. If you have managed to get a settlement for a lesser amount then that's the end of it. The lender has agreed to accept the lesser amount as full and final satisfaction of all your debts to them and they undertake not to pursue you further. However, if you don't settle and the property is sold on the open market to a third party, the lender has the right to chase you personally for all of their losses.

There are a variety of options that the creditor has available, the choice is theirs and all or any can be taken up in no set order or pattern.

They are:

Examination

The creditor can get the court to issue an 'Examination Summons' against you directing you to be at a court house on a particular day and time. You'll be told in the papers to bring with you a whole list of documents so the creditor can find out from you all they need to know (and more) to calculate their next move against you. Some creditors or their lawyers will give you a form to fill out showing your assets, liabilities, income and expenditure. If you get one of these, fill it out, tell the truth, but don't say too much. Remember that your creditor is using the system to their advantage against you to get as much information out of you as possible. This is take make it easier for them to get money out of you.

If you don't get a questionnaire from the creditor before the nominated day, then you have to go to court with your documents. It may be that outside court the creditor's solicitor will simply ask you questions without paper verification. One thing is certain: the courts are too busy to devote time to have you in the witness box being questioned by a creditor on how much you spend each week on peas and potatoes.

If you ignore the examination summons, it may be that a warrant is issued for your arrest and a sheriff's officer can come and arrest you and bring you before the court.

Garnishee

A creditor can garnishee money held by others that you own or that is due to you by others. It is commonly understood that a garnishee applies to wages, but its scope is much wider. There are two types of garnishees: for a fixed amount and for a continuing

amount. A fixed amount garnishee is good only for the day on which it is served. If the creditor serves a garnishee order on your bank for \$500 and there's only \$400 in the account, the garnishee fails and bounces off. A continuing-amount garnishee continues week to week, for example against a periodic payment you receive such as rent or wages.

If you have money due to you, a creditor can intercept it with a garnishee order. This could take the form of money owed to you by your employer, funds in your bank, rental income owed by a tenant, or money owed to you by anyone else. If the person who owes you money (the bank, real estate agent, or employer for example) is served with a garnishee order, they are required by law to pay all monies to your creditor instead of you.

If a garnishee order is served on your employer, you may be told about it by the pay office. Or there might just be less pay than usual in your bank account each pay day. The garnishee order usually applies to wages over the minimum wage and the baseline amount is regularly adjusted. Don't rely on what the pay office tells you is correct: simply ring or visit a court registry for confirmation. This will ensure the creditor get their money from you while ensuring you have enough money for necessities.

If you are unfortunate enough to be in this situation, one solution may be to change jobs or direct people who owe you money to pay someone else on your behalf. You may need to change estate agents or banks, too.

Another option to consider is avoiding paying your creditors by cheque or direct debit, particularly if they have a judgment against you. Paying via either of these methods allows your creditors to see the location of your funds and to potentially put a garnishee on your bank account and clear out all your funds. The alternative

is to pay in cash (with a receipt) or by money order or give someone you trust the money and get them to pay from their account. You're acting within your rights and your creditors won't see the source of your funds.

Writ of possession

There are two types of writs: possession of land and possession of goods. At the request of the creditor, the sheriff can serve you with a writ of possession of your household goods, above your tools of trade, bedding, a reasonable amount of clothing and basic furniture. The sheriff cannot take what you don't own. If he or she wants your piano which is on finance from another lender, you don't own it, the other lender does and it cannot be seized to satisfy your debts. The sheriff really isn't interested in taking everything, he or she is doing a job. So, if you surrender they will itemise and take whatever they see. On the other hand, if you are obliging and answer all questions but specify those items that are not yours, there is nothing more the sheriff can do but return to your creditor and advise of the situation.

Application to pay by instalments

There is one remedy you have against the creditor in all of this. If you've got a judgement against you for any amount, you can at any time apply to a court nearby to pay off the judgment debt over time. There is no fee payable to make this kind of application. It's called an application to pay by instalments and it comes in a multi-sheet form for assets, liabilities, income and expenditure. You can ask for the application at the registry counter or find it online via Google. Fill it out and give it to the court staff and a couple of weeks later the court will write to you and advise whether or not your application has been successful and whether you can pay the debt by instalments.

If approved, it is critically important that you obey the time and place for payment. If it says you pay \$X a month to the creditor at an address on a day, you do so. If you get it wrong by missing a date or paying a lesser amount, then you lose the protection of the instalment order and the creditor can move to recover the whole debt. If the court determines that you are not to have the benefit of an instalment order, they will advise you of this in writing. In that letter, you'll be told how to apply for a review, so take up the invitation, juggle your figures, say you can pay a bit more and re-file the application.

In order to obtain an instalment order, you have to demonstrate that you can pay off the judgement debt and running interest at 10 percent per annum inside about two or three years maximum. The way the court assesses the application is to take the amount of the judgment, add on 20 percent of it (being two years' interest) and to divide by 104 weeks or 24 months. It then looks at what the amount comes to and considers what you can afford. If you're offering peanuts and can or can't offer more, your application will be refused. The solution is to be realistic.

Many people who apply for pay-by-instalment orders and get them think they've been harshly treated. "The court ordered me to pay this amount per week!" is the usual complaint. It should be put in reverse, "The court ordered the creditor to accept from me this amount each week". What wonderful protection. A pay-by-instalment order is a stay of proceedings, a stay of execution against the creditor taking any further steps to enforce the judgement by any means. So, the instalment order is your friend, a life boat. So long as you keep paying the instalment amounts, your creditor has to wait and cannot do anything to you.

If you've got the one judgement, get rid of it by paying and resolve to yourself there won't be a repeat performance of the

circumstances that led you into debt. If you have multiple judgements then the process is exactly the same, but you divide your disposable money between them all. It's more tedious and obviously harder but it can be done and you will get out of it if you adhere to the instalment order and keep paying it.

Remember to be sensible. Don't go out and borrow more while you have the instalment order in place. Don't upgrade your house or buy another car. Your creditor may find out and before you know it there'll be an application to the court by the creditor to vacate or discharge the instalment order because of your change of circumstances and if you lose the instalment order, that's it, you can't re-apply and the whole of the balance of the judgement becomes immediately due and payable. That entitles the creditor to go again with garnishees, writs of possession, examinations and so on.

Bankruptcy

We live in a country of varying degrees of social justice administered through a mixed social welfare system run in the name of Her Majesty. The civil courts try to balance fairness between creditors and debtors, but where there's no hope of a debtor (that's you) paying all your creditors in a reasonable time the system dictates a time-out in the form of bankruptcy.

Bankruptcy is a legal device, a remedy where you can declare yourself bankrupt or your creditors can declare you bankrupt. The effect of it is that all is forgiven and your debts are written off and you don't have to pay any of your creditors anything, ever.

This may sound good at first blush, but stop and think very carefully as bankruptcy is not to be taken lightly. How old are you now? There is a stigma attached to bankrupts, even when they do

their time and are discharged. Unlike the old practice of doing time in jail for non-payment of fines and compensation, you do time on the outside. You are not in jail, you have your freedom, but you can't leave the country without permission. Assets worth more than a certain value get transferred to your court-appointed trustee who converts them to cash, pays himself or herself and if there's anything left, it's divided amongst the creditors. If you earn over a certain salary, you will lose some of that. You are accountable to your trustee in bankruptcy for the term of your bankruptcy (until you become a discharged bankrupt) – this is usually three years.

Any joint assets with your partner would be affected too – including joint bank accounts and investments. So, your partner would be affected.

You can declare yourself bankrupt by going to the Australian Financial Security Authority (AFSA) website and obtaining a 'Debtor's Petition', which is a form on which you detail your assets, liabilities, income and expenditure. You fill it in and sign it and then you become a bankrupt. That's the end for all interactions between you and your creditors. If the sheriff arrives with a writ of possession to snatch your furniture, you give him your bankruptcy number, he thanks you, bids you good day and goes away. You will get the phone calls from India from the credit card agencies but they'll leave you alone when you tell them you're bankrupt.

The fall-out of this – the downside – is that creditors won't be willing to lend to you or do business with you again for at least five years and your bankruptcy will be on your permanent credit report. It may affect you professionally, too, depending on your employment. Lawyers, for example, have to jump through hoops to obtain a practising certificate if they've ever been bankrupt.

You are legally required to have a meeting with your appointed trustee and make a full and truthful disclosure of your finances. The many and varied facets of bankruptcy are prescribed in commonwealth legislation known as the Bankruptcy Act and I do not propose to cover them in detail here. However, it might be of use to note a couple of important things:

(a) You have to co-operate with your trustee, and if they find out that you've got money or are being deceptive, they can penalize you by objecting to your discharge from bankruptcy. Bankruptcy is a healing and cleansing process. If you have no hope of paying out your creditors then it's unfair on them not to be paid and unfair on you to be persistently pestered.

(b) If you elect to pay someone money before going bankrupt then that can be clawed back by the trustee in bankruptcy if you were technically insolvent at the time you made that payment. It is seen by the trustee as a 'priority payment' and if it is within the 'relation-back' period then the recipient may have to pay it back and it becomes part of your asset pool to be divided up amongst all your creditors. The relation-back period varies depending on the transaction. So, be aware that if, for example, you decide to pay back your mother money you owe her and then go bankrupt. This may be a futile exercise.

(c) The time you remain in bankruptcy is three years from the date on which you complete your statement of affairs. If you are not frank about your finances and are found out by your trustee in bankruptcy, your bankruptcy may be extended.

(d) You can't roll out of bankruptcy, borrow again, clock up debt, go bankrupt for another three years. There are penalties for serial bankrupts.

The system is designed to draw the line between creditors and debtors so that everyone can move forward.

One or more creditors can apply to force you into bankruptcy if you owe at least \$5000. There is no minimum debt to apply for bankruptcy, although you must argue you are unable to pay a debt and must be a resident living in Australia.

The question for creditors to decide is whether or not it's worth pushing you into bankruptcy. What are they going to get? If a creditor files for your bankruptcy it's what's called a 'creditor's petition'. A petition has to be filed in the Federal Magistrate's Court, and the fees involved for the exercise are about \$5,000, so if you are really worth nothing some creditors may feel that bankrupting you is just throwing good money after bad.

Petitioning creditors can, if they choose, appoint their own trustee to administer your bankruptcy and deal with you. Such individuals are court-vetted five-star accountants, who get paid out of your assets before the creditors share in what's left. The court hearing process is something you may or may not want to attend. You'll play no part in it as it's mainly paper driven and a formality. If something goes wrong, it's usually with a piece of paper so there'll be an adjournment to allow the creditor's solicitor to fix it up. At the fall of the hammer the court declares you bankrupt and that's it. You have to give the trustee a statement of affairs and your three years starts from the day you hand in the form. If you delay it, time gets extended.

Under the Bankruptcy Act, you can call a meeting of all your creditors to give them a scheme of arrangement, a payment plan, on your terms. They may accept your proposal or they may reject it. Again, the system tries to be fair to both sides. If you have to pay all you've got and they accept that as being something rather than

nothing, then there's peace and you avoid bankruptcy and keep your passport.

There are over 20 grounds in the Bankruptcy Act that creditors can avail themselves of to bankrupt you. The most common ground used day to day is non-compliance with a bankruptcy notice. The way it works is that there is a judgment against you, or a few, adding up to more than \$5,000. That allows the AFSA to issue what's called a Bankruptcy Notice, which is a form telling you that if you don't pay the judgment debt(s) in a specified time, you'll commit what they call "an act of bankruptcy". Failure to comply with the notice and pay, entitles the creditors to file a creditors petition against you. It will be heard in court, and as it's a formality, it's quick and painless but lethal.

Your trustee in bankruptcy will take all you have or are entitled to, except for some things you do get to keep such as your superannuation, damages or compensation for personal injury, basic necessary household furniture and tools of trade (worth up to \$3700) and clothing along with items of sentimental value. You can keep a car worth up to \$7,800 in value or if under finance you can continue to pay it off.

If you earn above \$55,837 you have to pay over the surplus to the trustee.

Don't despair, lots of people have gone under, become bankrupt, only to re-surface better and stronger than before. A bit like a bush fire which cleans everything out and then the re-growth is amazing!

There are half-way measures which are not quite full-blown bankruptcy but provide a solution. A Part-9 debt agreement under the Bankruptcy Act is where all your creditors can agree to an

instalment arrangement whereby you pay the lion's share of your income to them over a period of several years until an agreed amount is discharged. It usually works out that each creditor accepts 70 cents in the dollar (or thereabouts) and all fees and charges stop and that amount is paid down over the agreed period of years. There is a trustee who sets up the arrangement and accepts a regular amount from you and then distributes that to all the creditors (after paying themselves of course.) This is advantageous as it brings finalisation and closure without the sting of bankruptcy and yet provides for convenience as well as putting a lid on the spiralling debt and penalties, fees and charges being racked up. There will be no further interest or charges and all instalments paid will go to reducing the debt.

CHAPTER 6

CREDIT CARDS AND OTHER FORMS OF DEBT

Everything is negotiable

The knowledge that you acquired in the previous chapters about managing debt to keep your head above water doesn't just apply to your mortgage. It can be used to some degree with other debts, too.

There's no need to feel crippled by your debts and just throw your hands up in the air. You just need to deal with them methodically. Sort out all your bills and then confront them. Remember: confrontation is the only way to deal with fear. As Eckhart Tolle wrote, "There are no problems now, only situations, which can be dealt with."

Fear thrives on your failure to confront it. It grows like mushrooms in the dark if you try to bury it. As Franklin D. Roosevelt so eloquently put it, you have nothing to fear but fear itself". Your fear is actually more dangerous and destructive than the thing you are afraid of. When you ignore your bills and debts because you feel afraid and helpless, the fear grows and the problem compounds and snowballs.

The good news is that you can actually deal with your bills the same way you have dealt with your mortgage. You can negotiate with any creditor over any debt. Everything is negotiable.

Credit card debt

If you have credit card debt, your lender will again be bound by consumer-friendly legislation to assist you in your time of hardship (see chapter on the Code National Credit). The good thing with credit cards is that the lender is 'unsecured'. This means that, unlike with a mortgage on a property, the lender has no recourse to any asset. They can't move in and sell your house or anything. They just have to hope you'll pay or else take you to court and get a judgment against you and then enforce it through one of the methods discussed in the previous chapter.

Credit card debt is not usually of the magnitude of mortgage debt. It is normally only tens of thousands of dollars, whilst mortgage debt is typically hundreds of thousands of dollars or more. The legal costs involved in obtaining a judgment against you and then enforcing it can often exceed the amount that the creditor is trying to recover. It is uncommercial for them to spend \$20,000 in legal fees and enforcement costs in trying to recover \$10,000 from you.

The other factor for your unsecured creditors is that if you are in a situation where you can't meet your minimum monthly repayments on your credit card or you have fallen behind on your payments, it is usually not by choice. You don't just wake up one day and decide that you will keep the money and stop paying off your credit card. If you use a credit card in the first place and carry that debt (making minimum payments each month) then you obviously don't have the money to pay it all off. What's more, if you stop making repayments altogether, you may well have run out of money altogether. You would clearly pay them if you could.

Creditors know that they can't get blood out of a stone and that they are throwing good money after bad in pursuing you through the courts. If they were to succeed in bankrupting you, they know

that you are likely to have other creditors and that unsecured creditors come last in a bankruptcy. Secured creditors get first dibs and get paid out in full, while unsecured creditors get to divide up anything else left over after that, which is usually slim pickings.

This means that credit card companies will usually accept anything from you. Something is better than nothing is their philosophy, especially if it's done voluntarily and they don't have to spend a fortune in legal costs chasing you.

I have had clients pay as little as eighteen cents in the dollar to discharge a credit card debt in full. This can be done without affecting your credit rating or having any other adverse effects if you act quickly enough.

Please note that there will come a point below which your lender will not negotiate. This is because lenders do sell off books of credit card debts for a fraction of the amount owing just to get the debt off their books and write it off as a loss. So, they may sell your \$20,000 debt to a company like CreditCorp who may have paid say \$3,500 for that debt. CreditCorp will then start harassing you saying that the debt has been assigned to them and demanding payment – every cent they get out of you in excess of \$3,500 is a bonus for them.

If you stop paying, the lender (or assignee, if your debt has been sold off) will phone you for a while and write nasty letters and then hand it over to a debt collector. They will harass you some more and, ultimately, they will probably record it on your credit rating. You may then have a hard time getting a credit card ever again. That's usually the height of it.

They may allow you to pay a lump sum that is significantly less than what is owed and just call it quits without affecting your credit rating. I have seen people pay less than half of what is owing on the card. The card is then cancelled and the account is closed, all without a blemish on your credit rating.

The other thing you can do is pay some lesser amount each month for a while (as with your home loan) or you could even get a complete moratorium on repayments for a while. You just have to *ask*. Most people don't do this because:

- i. They don't know they can. They think it's all or nothing and if they can't afford all they opt for nothing by default;
- ii. They ignore the whole thing and don't answer the phone or open their mail in the hope that it will go away;
- iii. They keep paying late every month as they struggle to keep their head above water, incurring massive penalties each month.

The other avenue you may consider is obtaining a balance transfer on your credit card at no, or a very low interest rate. This means that if you have a card with one lender, you can apply to have the balance on that card transferred to another lender and that will have a very low interest rate, or no interest payable for a six- or 12-month period. You can then throw everything into paying down the principal on that card. Once the six- or 12-month period expires and the card reverts to normal credit card interest, you can repeat the same exercise until the card is paid out in full.

The only problem with balance transfers (if you can call it a problem) is that you have to qualify for the new card in the first place. If you go doing this every six months, it will show on your credit report and lenders may become reluctant to give you what

looks like another card when your record shows that you have applied for four over a short period.

You can achieve the same effect of freezing interest and charges by applying for hardship variation from your existing lender.

Either way, you will feel so much better if you face your fear. Next time they ring you up asking for a late or missed payment and they ask why you're late, tell them you're having problems of a financial nature and ask what you can do? Either that person, or someone else who they put you on to, will ask you to describe the problem, how much you can afford, and over what time frame – in other words, what's your plan. It's exactly the same process as with your property: start negotiating! Once you deal with the situation, you can kiss your fear goodbye and start moving towards the light at the end of the tunnel.

They will most likely arrange to send you a hardship variation application form. Yes, it's a hassle and sometimes more onerous than getting the loan or the credit in the first place, but try and take it seriously. Fill out the form to the best of your ability, attaching copies of all documents required. If you make a half-hearted attempt and leave out parts or can't find the relevant documents to attach or just can't be bothered doing it, they may have grounds to reject your hardship application and you don't want that.

The application form will say something like this (depending on the company concerned and the relevant applicable law):

“You are entitled to apply to us for hardship assistance under the National Credit Code. If you are not satisfied with our decision relating to your hardship application, you can apply directly to your State or Territory court or tribunal to change the terms of

this contract. Contact your Government consumer agency or get legal advice on how to do this. Financial counsellors may also be able to help you.”

What that means is that they *have* to give your hardship application a fair hearing, if they reject it out of hand then you can take the matter further under the National Credit Code or other alternative dispute resolution methods, which are covered in later chapters. If they have grounds for rejecting it, such as you didn't apply properly or give them enough information to properly consider it, then you may not have any recourse against them for their rejection of your application.

You may not want to charge out and sue them and it's not necessary for you to throw the first punch. If they sue you for the relevant debt, then you have a defence and cross claim against them upon the basis that they breached the National Credit Code and/or the Code of Banking Practice (as discussed in later chapters) in failing to give you hardship assistance in light of your circumstances which were made known to them at the time of your hardship application.

Courts also have registrars and chamber magistrates and other officers available to assist you in drafting court documents such as defences and cross claims – you just need to ask at the Court Registry. Try pro-bono legal centres like the Financial Rights Legal Centre or Justice Connect who may also assist free of charge if your case fits their criteria.

It is not practicable to walk you through the process of defending a statement of claim taken out by an unsecured creditor in this book. For now, though, just know that you have the right to defend yourself and counter claim against your creditor and that free legal help may be available if this situation becomes relevant to you.

Other forms of debt

If you have other forms of debt, in the form of say, bills, the same applies. Your creditors don't want to wipe you out or bankrupt you and may only do it if they have no choice. Don't put them in that position. They are unsecured and they'll take something rather than nothing!

If you are dealing with a secured creditor under a hire-purchase agreement or some other personal loan, for example for a car, the same also applies. They will take the car or whatever goods the loan was for and you may be able to negotiate with them to leave it at that or you pay some token amount to keep them at bay for a while.

Why bother? Because time changes everything and this too will pass. You can't see it when you're in over your head and it is instinct to just surrender because it seems too hard to fight everyone. There is also such a social stigma attached to debt and the situation you're in. You feel it's like a straitjacket – the more you struggle, the tighter it gets, it seems easier to go with the flow. But you can work your way out of debt if you allow yourself some breathing space – and you probably haven't considered that most creditors *will* allow you this. It's about keeping the lines of communication open at all times or 'keeping your enemies close'.

CHAPTER 7

SEEKING HELP

Levelling the playing field: How to gain leverage over your lender or credit provider

There are times when dealing with a bank feels a lot like banging your head against a brick wall.

It's so frustrating that eventually you're tempted to give up, believing you have no other choice. If you're like me, you have had the frustrating experience of being left on hold with an overseas call centre for an hour only to be told nothing can be done for you and if you don't pay up the matter will be passed to the legal department. The convoluted reason as to why they refuse to listen or understand is immaterial; the bottom line is that all the red tape is giving you ulcers and you're sick of dealing with it. The bank is just too big and powerful and there's no way of overcoming the wilful blindness or misunderstanding of the imbeciles they have put at the coal face to deal with you.

The good news is that since the global financial crisis, the entire lending sector is now better regulated and as a consumer you actually have a lot of rights. For one thing, in 2010 the Australian Securities and Investments Commission (ASIC) introduced credit licenses. After the GFC, they realised banks had been irresponsible and lent money to people who shouldn't have been given loans, with the result being a lot of pain and a lot of trouble. The end result is that institutions lending money must have a license via ASIC and, to be licensed, they need to participate in External Dispute Resolution Schemes or EDRs.

Meanwhile, banks and lenders have a voluntary code of conduct to make themselves look like good corporate citizens who want to help people and do the right thing. The Code of Banking Practice is a voluntary customer charter setting out commitments and obligations to customers on standards of practice and principles of conduct. Most major lenders have subscribed to the code and one of the things they promise to do there is to listen to your problems and work with you to solve them.

The Code of Banking Practice and what it means for you

There is a little-known section in the Code of Banking Practice which could be a lifeline for you if you are drowning in debt and your credit provider won't talk to you or is being difficult.

What is the code? It is a 'voluntary' standard set by lenders which they can choose to be bound by. Most lenders opt in to the code which means they must honour it.

One part of the code relates to 'credit facilities' and relevantly provides:

"With your agreement, we will try to help you overcome your financial difficulties with any credit facility you have with us. We could, for example, work with you to develop a repayment plan."

So, if your lender dismisses out of hand your request to enter into some sort of payment plan because of your financial hardship you can raise this part of the Code of Banking Practice and inform them that they are in breach of the code. But what if they just won't play ball? Under the code, lenders have agreed to offer their customers access to external dispute resolution mechanisms to solve problems.

What is an External Dispute Resolution Scheme ('EDR')?

There are currently two EDR schemes in Australia that deal with the disputes with credit providers or lenders. From November 2018 the system changes – and both will be superseded by the new Australian Financial Complaints Authority (AFCA). But until then the EDR scheme that applies to your situation or dispute will depend upon who your loan or credit contract is with.

EDR schemes are *free* and supposedly independent of their members. At the end of the day they are probably toothless tigers, but they are valuable tools for the purpose of buying time and gaining leverage.

What I'm saying is that you can't just lodge a complaint and sit back and relax and expect to win – there will be an individual third party with certain powers assigned to your complaint and they will encourage you to sort it out with your lender. If this is not possible, they will assist you to mediate with your lender, and, failing that, they will make a decision which is binding on your lender but not on you. Without wanting to be cynical, if a matter goes all the way nine times out of 10 the decision maker will pass the buck and say that they don't have the power to give you what you want or that the lender has done all they have to do under the Code of Practice, but hopefully you will have achieved three things before this happens:

1. Bought time in which your circumstances may have improved, and
2. By-passed the red-tape and the call centre – you got the lender to listen to you and send the right people (i.e. decision makers to deal with the matter).
3. Achieved a workable arrangement to resolve your problem.

The first thing to do is lodge your complaint or dispute with the appropriate body. Ignore what others tell you about sorting it out with the lender first because we are only using this as a tool – yes, you do have to reach the end of the line with the lender before they can step in – all that we are after is a complaint matter number which makes it official that you have a matter ‘pending’ with an EDR scheme. The reason we want this is that lenders have agreed not to proceed with legal or enforcement action whilst a complaint is still pending resolution. So, you have snookered them with their own loophole and now they have to wait for the scheme to go through all of its red tape, the shoe is on the other foot! Now you can take all the time in the world to talk to them and now they will want to talk to you. Someone from the appropriate department within your lender will now be calling you to try and sort something out.

How to get a complaint before an EDR system

You must identify which EDR scheme to use (if you intend to complain before November 2018, when the new AFCA will start accepting complaints). Until then the options are:

- Financial Ombudsman Service (FOS) or;
- Credit and Investments Ombudsman (CIO).

Now don’t despair if you are getting the run around about a bill which doesn’t relate to a lender – the second most common complaint relates to telephone or other communications bills. If you have a dispute with your telecommunications (phone, internet or mobile phone) provider, you need to contact the Telecommunications Industry Ombudsman (TIO): Phone: 1800 062 058 or visit www.tio.com.au.

If you have a dispute about insurance or financial planning, you can also complain to the Financial Ombudsman Service. From November 1, 2018, you would lodge a complaint with the new AFCA.

See the contacts section at the end of this fact sheet for contact details for the TIO and other useful contact details.

Which EDR Scheme should you use (if complaining prior to November 1, 2018)?

1. Financial Ombudsman Service (FOS)

You should contact FOS if you have a dispute with your retail bank, one of its affiliates, such as Esanda (an ANZ-owned business), or any member of FOS and you are unable to resolve the dispute. All retail banks in Australia are members of FOS. There are also a number of finance companies and mortgage brokers who are members of FOS (for example GE Money). You can check who is a member of FOS by ringing 1800367287 or by going to their website.

FOS will consider and investigate your dispute for free over a period of time. They may have mediations or conferences which they can conduct via conference call. They may ask for documents or submissions, explanations or comments from you. They will ultimately make a decision that is binding on the lender but not on you. Borrowers are NOT bound by the decision; you can either accept or reject the decision. It's no skin off your nose to ignore the decision if it's unfavourable to you – you have still bought time and had it out with the bank.

Now there are some limitations. To complain to FOS, you must be seeking to recover a loss, either financial or non-financial, that has arisen as a result of the actions of the member of FOS. The maximum amount of financial loss that can be recovered for most claims is \$323,500. If you believe your loss is more than this amount (but less than \$500,000) and you are prepared to have the compensation awarded capped at \$323,500 you can still go to FOS. This means that you will waive the right to recover anything in excess of \$323,500. This can be useful if you just want to stall things but don't come under FOS's jurisdiction as your loan exceeds \$323,500. You can apply to FOS and gain the protection of your lender being unable to commence legal action whilst you have a complaint pending.

It's extremely important to note that under the new EDR scheme, the Australian Financial Complaints Authority (AFCA), the limit and cap will be increased to \$1 million. AFCA will begin accepting complaints from November 1, 2018. AFCA updates – including details of differences between the existing and new schemes - will be posted on the FOS website.

There are also certain time limits involved with a FOS complaint. You have:

1. Six years from the date you reasonably became aware of the problem/complaint; or
2. Two years from the date that you received a final response from your lender to file a dispute about the matter with FOS.

The time limit that applies will be the time limit that expires first. If you file after the earliest of the time limits has expired, you may not be able to go to FOS unless you can show that there are exceptional circumstances in your case.

Even if your lender has commenced court proceedings you can still go to FOS if judgment has not been obtained, but not if any decision has been reached by a court or tribunal. It is important that you file in FOS as soon as legal proceedings have been commenced. If you have filed a defence, you may still be able to go to FOS, but you should get legal advice immediately.

A word of warning. Now, this all sounds good doesn't it, but just remember that it is only one of many weapons in your arsenal and should be used in conjunction with all of the others covered in this book. It is a tool to use to buy time and bring your lender to the table not a one-stop shopping solution. As I said earlier don't become complacent and think that you will win at FOS because doing that is just depending on someone else (the ombudsman/decision-maker) to help you, which we don't want to do – we want to be responsible for our own solutions here and not just surrender the problem to the laps of the gods and hope for the best!

Also remember that just because your lender can't pursue legal action whilst FOS is investigating the matter, does not mean that all interest, fees and other charges under your loan contract magically stop – these will continue to accrue – however you may be able to negotiate them away through FOS!

How do you contact FOS (and find details of AFCA)?

Telephone: 1800 367287, Monday to Friday 9am to 5pm

Facsimile: 03 9613 6399

Website: www.fos.org.au (you can lodge a complaint online)

Address: GPO Box 3 Melbourne Vic 3001

2. The Credit and Investments Ombudsman (CIO)

Basically, you should contact The CIO if you have a dispute with a lender or credit provider who is not a member of FOS. This is usually most second tier or non-bank lenders. The CIO is able to investigate disputes for free and make decisions that are binding on the lender but not on you. The advantages and features of a CIO complaint are similar to the FOS:

1. Any enforcement action will be stayed (or frozen);
2. You will first be asked to negotiate directly with the lender/credit provider;
3. There is a jurisdictional limit of \$309,000 (that is the most the CIO can consider);
4. You must lodge your dispute within 6 years of becoming aware of any loss.
5. It will be superseded by the new Australian Financial Complaints Authority (AFCA) in late 2018, with complaints accepted under that scheme from November 1, 2018.

CIO can only consider complaints about their member lenders. You should be aware that not all lenders are members of CIO. You should first check if your lender is a member of CIO by contacting them or checking their website.

How do you contact CIO?

Telephone: 1800 138 422

By Fax: 02 9273 8440

Web: cio.org.au

Address: Credit and Investments Ombudsman, Reply Paid 252,
South Sydney NSW 1234

Hints for completing dispute form for an EDR

There is not much room on the form for a detailed 'War and Peace' on the history of the matter and whilst you can attach pages to explain the best way at first instance is to keep it to a simple, factual outline.

Example:

Write a simple description of how your problem first arose. For example: On 3 August 2017, I contacted the lender and sought temporary assistance as I was experiencing financial hardship. The lender then issued a default notice on 20 August 2017 because I had applied for hardship.

On 21 August 2017, I contacted the lender and advised that I was experiencing hardship and had sought assistance and was told that they could not consider this as the file had now gone to their legal department.

Complaint:

The lender failed to assist or consider my hardship application as required under the Code of Banking Practice.

c. Keep a copy of the complaint you send to the EDR scheme.

What will happen after you send your complaint to an EDR scheme?

1. The EDR scheme will advise you of your complaint number and tell you to make contact with the lender, informing it of the dispute and your complaint and quote that reference number. The EDR will allow 45 days for the lender to try to sort the dispute out with you.

2. If you fail to sort the matter out directly with the lender you should advise the EDR of this. The EDR scheme will send you a letter of authority for you to sign to enable the lender to give the EDR scheme information about your matter. Make sure the signed authority is returned to the EDR scheme by the required date.

3. The EDR scheme will then send your complaint to the member for it to respond. The member is given a certain time to respond (as little as 21 days).

4. The lender will then send you a response to your complaint. Important: You don't have to settle with the lender. If you are not happy with the Lender's response say so!

For example, you can write to the EDR scheme and say, for example: "I refer to the letter from the lender dated xx/xx/xx. My dispute with the lender is still not resolved because... (provide your reasons). I request that the EDR scheme investigate this matter."

5. This 'lender responds then you reply' process may occur again. Do not give up! Make sure you respond by any date set by the EDR scheme or seek an extension of time. If an extension of time is given confirm this in writing with the EDR scheme. If you believe

the dispute has not been resolved, you must tell the EDR scheme why it is not resolved and that you want your dispute to be investigated. Provide as much documentation in support of your claim as possible including letters, statements, emails and anything which supports your position (especially documents from third parties e.g. doctors' reports)

6. Once your complaint has gone to investigation, the EDR scheme will investigate your matter and make a finding. You have the option of rejecting the decision, if you wish. Write to the EDR scheme with your reasons for rejecting the finding and the case will be referred to the Ombudsman to issue a Recommendation. If you reject the recommendation, legal action is usually your only other alternative.

Of course, you may not have a case and you may not want to take legal action, but you have at least bought time and levelled the playing field with the lender through this whole process without costing yourself a cent!

CHAPTER 8

THE NATIONAL CREDIT CODE

If you thought you were on your own when it comes to taking on the banks, that's not entirely true. In addition to the various legal centres and public defenders in place is a piece of legislation aimed at making things fairer for people in debt: the National Credit Code.

Put simply, the code is a set of laws and regulations that spell out the obligations of credit providers, such as banks, and the rights of consumers, like you, when it comes to providing credit. While the word 'code' makes it sound like something voluntary, it is actually backed by federal legislation that requires providers of certain types of credit to be licensed, outlines the obligations lenders have to consumers, and it can be enforced by the Australian Security and Investments Commission (ASIC). This is good news for you as a credit consumer.

The code relates to credit contracts entered into after July 1, 2010 and replaces the old Consumer Credit Code that was run by the different states and territories. Now, no matter where you are in Australia, the same rules apply. Among other things, the NCC makes it mandatory for lenders and brokers to be transparent about comparative terms for obtaining credit and to be a member of an External Dispute Resolution (EDR) scheme.

While the code covers loans made since 2010, in some cases it also applies to contracts entered into as early as 1996. If your contract is pre-2010, you will need to get expert legal advice.

What all this means is the code is there to provide consumers with a protective framework – to help make lenders accountable and fair to their customers. The code provides:

1. Rules for credit provider conduct;
2. A format for consumers to easily understand credit obligations and rights in any credit contract;
3. Avenues for consumer protection in the event of the borrowers entering into some form of trouble during the course of their contract;
4. Redress mechanisms if a credit provider does not comply with the legislation.

A whole book would be needed to be devoted to explaining it and I don't propose to cover it exhaustively here, save to point you to a few 'pearls' which you may want to keep up your sleeve when it comes to knowing your rights and enforcing them against your lender.

According to the then finance minister, Chris Bowen, the new national lending conduct laws of 2009 were designed to "ensure that consumers can be immediately protected from any predatory and irresponsible lending." They also aimed to "prohibit poor credit practices at an earlier stage [and] allow consumers to access remedies for irresponsible lending sooner."

The NCC applies to ALL providers of credit where the borrower uses that credit for a personal, domestic or household purpose and purchase of or upgrade to investment property, or for refinancing an investment property. This applies to credit cards, home loans and car loans (if it's for the family car), but not for business loans or loans for a company or business vehicle, or loans from your employer.

Although credit providers do not have to comply with the code for non-regulated loans (loans which do not come within the code as they are for business, investment or other purposes), it appears to be general lending practice to follow the practices of the code in order to be fair overall and avoid any misrepresentations in the future.

The code makes it clear that lenders must act responsibly, stating that they cannot engage in unfair or dishonest conduct or the consumer can seek remedies by applying to the court. Lenders must disclose the rights and obligations of the consumer in the credit contract in easy to understand terms.

So, who benefits most from the Code? At the time, the Government specifically mentioned the need to introduce protections for “mum and dad property investors”. By that they mean ordinary investors; chances are that is you

You should be particularly aware of Division 3 of the Code, which deals with hardship. It basically sets out the circumstances in which a borrower can approach a lender to vary their loan terms due to personal or financial hardship in meeting repayments and what a lender must do to accommodate a borrower in such a situation.

Hardship

Hardship is defined in the code as being where a debtor is reasonably unable to meet their obligations under the credit contract as a result of illness, unemployment or any other reasonable cause. The NCC increased the threshold applicable for a hardship application for a variation or stay of enforcement to \$500,000, which the government expected would “enable more consumers to apply for changes to the terms of their credit

contract when in financial hardship, for example because of illness or unemployment.” In a nutshell, the hardship sections of the Code determine the type of variations that can be made to a contract.

Hardship tools

There are several methods that can be applied to vary a contract under hardship conditions. These include:

1. Deferral of Payments

This method is an extension to the loan term with payments being added to the original loan term.

2. Capitalisation

This method hides the arrears in the overall loan balance and payments are recalculated for the remaining loan term.

3. Moratorium

This method allows arrears to accrue as a result of agreeing to miss payments. The account remains in arrears in this instance.

4. Reduced payments

This allows for normal payments to reduce to an amount that the borrowers can reasonably meet. Depending how the agreement is set up will determine whether the account remains in arrears. Payments may be deferred.

Financial information

In order to consider the hardship request, and enter into an arrangement for the variation, lenders typically request that the following documentation be provided:

- a statement of financial position;
- details of the reason behind the hardship;
- clarification of the conduct of the account prior to the hardship request;
- details of arrears, if applicable, and loan balance (theoretically hardship should be applied for before an account falls into arrears);
- details of any other arrangements made, if any;
- position in regard to accessing insurance or super funds;
- the time frame requested for hardship;
- your recommendation on the application.

Section 76 of the Code deals with “unjust” contracts. A court has the power to “reopen the transaction that gave rise to the contract, mortgage or guarantee or change”. That is, if the court feels that a contract is unjust for any reason it can rewrite it or make any orders to redress the balance and make it fairer. This includes changing the terms of the contract, changing the amounts owing, the amount borrowed or even setting aside the whole contract. In some cases, this has included waiving or writing off a whole mortgage.

What is unjust is decided upon a case by case basis and I do not propose to go into extensive analysis of case law, suffice to say it is a very broad power and a court can do almost anything it likes if a lender has tied you into an unjust contract.

Section 78 of the code deals with “unconscionable interest and other charges”. They must be reasonable and reflective of a lender’s own costs of doing business and cannot be arbitrary, random or unfair.

I believe sections in the NCC (and previous State codes) detailing hardship have often been overlooked by borrowers. It may be that

borrowers did not have the funds to mount legal challenges to their lenders or worse, it may be that the legal fraternity has looked upon them with disdain and said something pompous like “A loan is a loan, you signed a contract and are legally bound. You should pay your debts when they fall due otherwise you are insolvent and should declare bankruptcy.”

Many non-bank or second-tier lenders have changed the rules, breached their loan agreements with borrowers, and lent money on information which they knew was false or failed to properly verify. They have passed on exorbitant rates, fees, break costs, penalties and other charges to their customers. Use the code to fight this.

CHAPTER 9

DEALING WITH DEBT COLLECTORS

The ACCC and ASIC guidelines for debt collectors: what they can and can't do

The Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC) are responsible for policing the behaviour and conduct of debt collectors in Australia. This covers both in-house collectors, who work for the various organisation that debtors owe money to, and contractors, who are external agents paid to recoup money on other organisations' behalf. In both cases, the job of the debt collector is to make you pay up.

ASIC and the ACCC jointly published guidelines for debt collectors as to what is and is not acceptable practice when pursuing debtors for monies owed.

The guidelines are not legally enforceable, but they can be referred to in court cases. As a starting point, they make it clear that “debtors are legally responsible for paying the debts they legitimately owe.” Where they owe a debt, they should not avoid their obligation to pay, they should communicate with creditors when in financial difficulty and ask for variations in repayment conditions, and they should “be candid” about their finances.

Those are your obligations. But, what about the debt collectors, themselves? Here is my summary of what the ASIC/ACCC guidelines say:

1. A debt collector is not permitted to harass, intimidate, threaten, embarrass or attempt to tire out a debtor. Furthermore, they cannot swear at or abuse you, use demeaning language, physical force or any form of coercion. How much is too much when it comes to pursuing you? The guidelines suggest that polite, professional and necessary contact (written or verbal; phone calls, messages, emails, text messages and letters) of up to three times per week or 10 times per month is the limit. Several calls or other contacts made in rapid succession (where the call reaches you or a message is left) is likely to be considered “undue harassment”.

Contact should only be within normal office hours or between 9am and 9pm at the weekend unless multiple attempts to contact you have been ignored. The debt collector must respect the communications channel or option you approve, within reason.

If you feel that the language or conduct of a debt collector in his/her dealings with you offends this guideline you should tell the person this and advise that you will contact the ACCC and/or Fair Trading if they persist.

If the conduct is really menacing and out of hand, you can go to the police and seek an Apprehended Violence Order (or the equivalent in your state) which requires the person not to contact you or come within a certain distance of you. If the police won't pursue the matter for you, you can always go to your local courthouse and ask the registrar or court staff there to assist you in taking out your own order.

2. A debt collector may only make contact where it is reasonably necessary. There must be a purpose for the call or letter and it can't be just to 'strong arm' or intimidate you.

3. A debt collector is only permitted one face-to-face contact with you per month and this type of contact is considered “a last

resort”; confronting you at work is discouraged but if necessary must be done in a way that doesn’t make your debt known to others. They are only allowed to come to your home if it is reasonably necessary to do so (for example, to repossess something). However, should you ask them to leave your premises, they must do so immediately (to stay is trespass). The guidelines require them to leave the vicinity of your home. They can’t, for example, stand across the road and watch, giving you the impression that you’re under surveillance.

If they won’t leave or seem to be stalking you, report them to Fair Trading or call the police. Keep written notes of any incident noting time, place, date, names and what was said.

If you advise a debt collector that you have a representative handling the matter on your behalf and you give them that person’s details (e.g. a solicitor or financial counsellor etc), the debt collector must not contact you personally again and must only deal with your authorised representative. The exception to this is that you haven’t provided authorised consent about this arrangement, the representative doesn’t have instructions or doesn’t respond to the debt collector.

Debt collectors are only allowed to approach third parties (i.e. your family or friends) once every six months and only in an attempt to contact you. Any sensitive personal information about you must be respected in this instance.

4. A debt collector must always provide you with any documentary evidence in relation to the debt that you may require. For example, the breakdown of interest or the default charges.

If they will not provide further information about your account upon request, then it could be construed as misleading and deceptive conduct. Make sure you put your request in writing and

document the details of all conversations about the matter so that you have your facts right when you make a complaint.

5. Once enforcement proceedings have been commenced by a creditor, all approaches from debt collectors must cease. If your matter is before the courts and the debt collector is still making unnecessary contact, you should report the matter to Fair Trading.

6. A debt collector must not tell a debtor that they (the creditor) do not enter into hardship arrangements or negotiate repayment plans. This would be misleading and deceptive conduct. Most lenders/creditors will be obliged under the provisions of the National Credit Code or the Banking Code of Practice to entertain a variation of your loan contract in circumstances of hardship.

7. It is unacceptable for a debt collector to encourage a debtor to get into more debt to service their liability to that creditor. If a debt collector says to you words to the effect of: "Can you get another credit card and pay out this one?" or "Can you refinance your home to draw out some equity?" you should take notes and make a complaint to the ACCC or the Fair Trading body in your state.

If you have entered into a repayment plan with your lender, its debt collectors must stop contacting you whilst you are honouring your obligations under that arrangement.

Similarly, under the relevant guidelines, if you become bankrupt or enter into a formal arrangement with your creditors under Part IX of the Bankruptcy Act, all debt collectors are obliged to cease contacting you.

8. A debt collector must not misrepresent the situation to you. This includes:

- a. Advising you of your rights, or lack thereof incorrectly e.g. “Because this is an investment property you cannot vary your loan contract”;
- b. Representing to you a course of conduct the creditor can and will adopt when this is not the case, i.e. “We will be getting a judge to sign judgment against you tomorrow” or “don’t worry it will be at least two months before anything happens if at all” (this can represent deceptive conduct);
- c. Advising you that your creditor will do, or refrain from doing something when this is not the case e.g. “We will note a default on your credit file”;
- d. Misrepresenting the law to you e.g. “If you don’t pay by Friday we will take your house next week.”

Of course, this summary of the guidelines only relates to legitimate debts. If you dispute the debt or allege you don’t owe it at all, you should advise the debt collector of this and say that all actions, legal or otherwise will be rigorously defended. They are not allowed to contact or pursue you for a debt you have advised them you dispute, except to clarify an issue or advise you that they will be adopting a certain course (i.e. “We know you dispute this amount but here is a copy of your January statement and if you persist in denying that the debt is owed, we will be commencing Court proceedings without further notice to you.”)

If you genuinely dispute a debt you should pursue the matter via an EDR scheme (see chapter 7 – note that a single new EDR regime kicks in from November 1) and/or seek legal advice and pursue and action under the National Credit Code (see Chapter 8).

So, just because someone is insistent and inflexible and they act for a lender does not mean that they can steamroll you. They are bound by certain rules and guidelines and you have the power to report them which can carry onerous penalties for them.

CHAPTER 10

ASSET PROTECTION

How to make sure your creditors get nothing from you

If your creditors win a judgement against you, whether it be for credit card debt or shortfall or mortgage debt, they're going to want to enforce that.

If you have other property, the next thing they're going to want to do is take that judgement and register it on the title of other property, like your family home or any other real estate that you own. That's because real estate is the most valuable asset most people hold; it's where most people store the majority of their wealth and where lenders can get a bit of traction in shaking you down for some money. You'll either pay them out so you don't lose your home or they become like a second mortgagee once they've registered their judgment or order on your title. means that they can sell up that asset to take any equity.

This is why it's really, really important to quarantine your other wealth, so that this disease of bad debt doesn't spread there. Set up and protect yourself to stop that knock-on effect. You've got a much more powerful position and a bargaining tool if creditors cannot attack your other wealth. More on this shortly.

As discussed earlier, the debts you have can be of two kinds: secured and unsecured. Just to recap, secured debts are those secured by mortgage over the property you own, a mortgage over your real estate, a charge over your car or furniture if you have it on finance or a debenture charge over your company. If you borrowed money on a secured basis, then your lender will have taken these types of securities from you as security for the loan. Your failure to pay an instalment is a breach of the loan contract

entitling the lender to give you a notice to bring the arrears up to date or pay up the full amount of the loan account balance. Non-compliance by you entitles the lender to seize the goods and sell them and in the case of real estate, to get a court order for possession of the property and evict you (or your tenant) and then sell it.

Unsecured debts are those where the lender has provided you with a loan or supplied you with credit for which the lender has no security at all. In the case of credit cards, your obligation is to pay the lender the minimum amount each month that it stipulates, month after month. Your failure to pay an instalment is a breach of the loan contract entitling the lender to give you notice to bring the arrears up to date or to pay up the full amount of the loan account balance. Non-compliance by you entitles the lender to sue you by way of a statement of claim for recovery of the debt, plus interest, plus legal costs.

So, secured debt is more powerful for a creditor. Unsecured debt means they're going to panic a lot more and they're going to go a lot harder to try and get the money back because they realize that they're up the creek without a paddle. They've got nothing but your promise and that's why, with secured debt, you pay a lot less. It's less risk to the lender. So, the interest rates on a residential mortgage, for example, is in the five percent area, whereas for an unsecured debt, a credit card, you're paying more like 15 to 20 percent and that's the difference - the risk to them. So, if the debt is secured, they're going to be a lot less panicked because they've got an asset there. But they're still going to come after it and other assets. That's why asset protection is really important. Even if you're circling the drain, it's important to set that up now in advance.

WHAT CAN THE CREDITOR / LENDER DO?

Secured creditors

A. Real estate. If you default under your mortgage, the lender will post to you a statutory default notice under the property laws of the state where the property is located. The notice will give you 30 days to pay up the loan and non-compliance by you will entitle the lender to exercise its power of sale under the loan documentation. If you correct the arrears and things continue normally, should you default again, the lender does not have to issue another 30-day notice.

If you fail to bring the arrears on the loan up to date, the lender will then make a Supreme Court application for an order for possession of the property, meaning, an order that you be evicted. The court application has to be served personally on each borrower. Personal service means that the sheriff, court bailiff or a licensed commercial agent must physically hand a copy of the application to each borrower. The court papers will state a hearing date, usually a month ahead. Unless you have a defence to the claim, you don't have to appear at court, the matter will be dealt with in your absence and in the usual course of events the court will make an order for possession with costs against you – that is, you will pay the mortgagee's legal costs for this exercise.

The sheriff or the bailiff will in a few weeks come to the property and serve a writ or a warrant for possession. Service can be personal but if you're not present when he or she comes, execution of the writ is effected by the actual document being taped or stuck to your front gate or door. The writ will tell you the date by which you must leave otherwise he or she will return with a commercial agent to physically take possession for the lender and a locksmith to change all the locks to bar your re-entry.

Once you've gone, the lender will engage a real estate agent to list the property for sale by private treaty or by auction, whichever they choose – you have no input. Following the sale, the lender will pursue you for recovery of the balance of the loan account as an unsecured creditor if the property sells for less than the loan or mortgage. They'll also want all the extra costs, fees and charges, details of which are set out below.

B. Cars, furniture etc.

Your car, boat, motor cycle, furniture and so on that you have under finance can be seized by the lender if you default under the loan contract. The first thing the lender will do is issue you with a statutory default notice under applicable state legislation. You will be told to pay out the account in 30 days. In the case of non compliance, the lender will make an application in a Magistrate's Court for an 'Order for Possession' of the goods. This will entitle the lender and its commercial agent to come and take the goods and sell them. The order for possession usually goes further and authorises the lender to enter private property, using reasonable force, to seize the goods and remove them. If, for example, your car is parked in the street or another public place and the lender finds it, he/she can simply organise a tow truck to hook it up and take it away. Obviously, this is very distressing if you come out of the supermarket and find your car gone. If the vehicle is in your garage or on other private property, the lender cannot remove it without supervision which means that the local police will be in attendance. A common popular misconception is that the lender is obliged to get the retail value of the car or furniture in an auction sale. The reality is that the goods will be sold off by one of the auction houses listed online where they will go under the hammer for, or below, the current wholesale price. For example, the car that you cherish and believe to be worth \$50,000 could end up being sold under the hammer for \$10,000 and there is nothing you can do about it. After sale, the lender will become an unsecured

creditor and be entitled to sue you using the devices set out below to recover from you the balance of the money due.

Unsecured creditors

As stated above, the balance of account on a secured loan becomes an unsecured debt after the secured property has been sold off. Credit cards and personal loans entitle the lender to sue you for the balance of the loan account and as a general rule such claims are extremely difficult to defend because the courts take the simple view that the lender gave the borrower money to spend, the lender wants the money back and the borrower has not paid it therefore the borrower is guilty. Claims for unsecured debts are made through the courts, by the lender issuing a 'Statement of Claim' and unless you have a valid defence there will be no formal court hearing and it will be an administrative process in the court office where the registrar stamps the papers and enters a judgement against you for the debt, legal costs and interest.

With a court judgment the lender has five available remedies:

1. Public Examination to obtain information about your current assets, liabilities, income and expenditure. The lender can have you brought before the court to supply this information, so they can calculate their next move.

2. Writ of Possession of goods. The lender can have the court send the sheriff or bailiff to your home, place of business, your rental properties to seize your furniture and personal effects and remove them for auction.

3. Writ of Possession of land. With a judgement the lender can issue a writ or a warrant and register this on the title to your real estate. If the property is not subject to a mortgage, the sheriff or bailiff can sell it by auction. If the property is subject to a mortgage, then the writ or warrant will stay endorsed on the title

to your property accumulating annual interest and you will have to pay it out when you either sell the property or refinance it.

4. Garnishee. A lender with a judgement can garnishee or intercept money due to you from other people. The most common garnishee is on wages where your employer is ordered by the court to pay you a specified minimum amount out of your wages with the whole of the balance of your pay being remitted to the lender. Bank accounts that you have can also be garnisheed and you won't necessarily know about it until your cheques start bouncing, as the court will order the bank to drain your accounts and pay the lender. Perhaps the least obvious garnishee that can harm you is where the lender intercepts rent of your investment properties from your tenants or garnishees your real estate agent so that the lender gets paid and you don't. Without a cash flow from your investment properties you might be exposed to defaults under your other mortgages.

5. Bankruptcy. A lender with a judgment can go to the Australian Financial Security Authority (AFSA) and issue what is called a Bankruptcy Notice which is a procedure under commonwealth legislation directing you to pay the judgment within a specified period and in the case of non-compliance the lender can then make an application to the Federal Court of Australia for an Order for your Bankruptcy. Unless you get yourself into a position to pay out the debt in full, bankruptcy proceedings are final because the courts always grant the Bankruptcy Order sought by a lender. The court will appoint a trustee in bankruptcy to administer your affairs while you are a bankrupt and this will either be a government agency, the Insolvency and Trustee Service of Australia or a court-appointed private chartered accountant. You have to have a meeting with the trustee and make a truthful disclosure of all your assets and liabilities income and expenditures. The trustee will take title to all of your real estate

and your personal possessions except for basic household furniture and tools of trade. Everything else you have will go to the trustee who will then distribute it among all of your creditors. Being a bankrupt is like being out of jail on bail, you can remain in society but there is very little you can do financially. The minimum period of a bankruptcy is three years but this can be extended if the trustee believes that you are hiding assets. Upon being declared bankrupt you may not leave the country without permission.

There is only one way to beat a creditor using the above five tools against you. It's an instalment order. It works this way. You are served with a Statement of Claim for recovery of a debt and it says that you have 28 or 14 days to file a defence or the creditor will claim judgment against you. Presuming you have no defence, the document you have been served with does show a way forward: it says that at any time within that period you can admit the claim or confess or agree to judgement. Given that they're probably going to get a judgement on you eventually, you might consider jumping in and agreeing to judgement. The next step is to fill out an application to the court to pay the debt by instalments, then give it to the office staff. There is no fee payable. The application is considered by the Registrar who will allow it or refuse it. People used to say you could do this and pay \$1 a week. Not so. The court looks at the debt plus interest at nine percent on the basis that the debt must be paid off over two or three years. If you get it, it operates as a stay of enforcement and the creditor cannot take any steps against you while ever you pay strictly in accordance with the order. If you lose, you can appeal. What the process does is to buy you time.

Asset protection

So, that's the law – the cold hard truth! But where there are laws, there are also loopholes. Now there's nothing we can do about

secured creditors – the loan agreement has been signed and the money is owed and they have the right to possess the goods by law. We can negotiate with these creditors (see above chapters covering negotiation). Remember, they do not want the goods – they are in the business of lending money and they would prefer money from you than being lumbered with a car, a plasma television or an ugly Harvey Norman lounge suite. You can cut a deal with these creditors.

The unsecured creditors are the weakest of all creditors and rank lowest on the credit food chain. This is because they have nothing of substance to take from you. They are desperate. You may have noticed this in their persistent phone calls. This is because that is all they *can* do – persistently contact you (the previous chapter spells out that harassment is not allowed) and hope to God you'll pay them. They don't want to throw good money after bad chasing you. Remember they have to pay lawyers to sue you and if they can't get the money you owe them now out of you, how are they going to get their legal costs back from you?

Maybe they want you to see the whites of their eyes and they'll sue you and get a judgment against you. That sounds like scary stuff doesn't it? Not really, remember you can apply to pay a judgment debt by instalments or if you have no money let's look at what they can do – chase you further, nag you?

You see, you have to reverse it – we are taught that debt is bad and it somehow sounds illegal to owe people money and be sued. You have breached a contract – you have not stolen. These are civil cases not criminal. We are in the commercial world here – people go broke and default on deals every day of the week all around the world. This is a risk of doing business and one which your lender took when he or she lent you the money. You can't pay them now, probably because someone else or others did not pay you. No big

deal. You have the power not them. You have their money and they have to chase you for it - and that gets expensive.

When I first started practising as a solicitor I worked in debt recovery. I was in charge of suing people who did not pay their unsecured debts. Nine times out of 10 I would tell my client (the big nasty lender) to close the file, write off the loss and stop wasting money because the debtor was “a man of straw”. That is, he had nothing for us to take.

Put simply, a judgement is only a piece of paper from the court, stamped by a judge confirming that A owes money to B, that is, that you owe money to the lender. That’s it – it’s not a crime, the judge is just rubber stamping the lender’s allegation that you owe money and haven’t paid – no surprises, you already knew that. This is a civil case, one civilian against another, not a criminal case where the government prosecutes the accused. The onus will always be on the lender to pursue you. A lot of people think that the onus is on them to pay, and they panic because they can’t pay. Remember it is up to the *lender* to chase you and if you have nothing, if there is no pot of gold at the end of the rainbow, then it’s the lender’s problem not yours. Put simply; they can’t get blood out of a stone.

So, what you want to do is to turn yourself into a stone – or a man of straw. It is fine to get a judgement against you and it is fine for the lender to chase you but at the end of the day you have nothing of value, no assets and no income.

This is how many of the wealthiest people operate; through ‘structures’, such as companies and trusts. They own nothing themselves and are not exposed to any risk in that sense.

You can operate this way as well. The first thing for you to do is to create a trust whereby you mortgage everything you own, and the

equity in it, to a friend or a relative whom you can trust and who would be prepared to be your trustee.

All of your clothing, jewellery, motor cars and any personal property of value would be assigned and transferred to the trust. You do not transfer ownership of your real estate to the trust because you would have to pay stamp duty on the transfer and you would have to get the lender's consent which would mean a new loan application and approval. Lenders will not agree to this so by way of an equitable mortgage you transfer your equity in the property to your trustee and we register a caveat on the title to your real estate to protect the trustees interest in the property. By way of example, you own a property and have 100 percent interest in the equity of it. The moment you borrow against the property your share of the equity decreases and the lender's share increases. If the bank loaned you 80 percent of the market value of the property you would have a 20 percent equity left in the property. By mortgaging this 20 percent equity to the trust it means that you have no equity in the property at all because you owe 100 percent or more of what it is worth. It makes it very difficult for lenders with judgments to try and take your 20 percent because you have mortgaged it.

Similarly, with your furniture clothing and jewellery, whether under finance or not, you have some equity in it all and if you mortgage those items to the trust creditors cannot seize them. You will not have any bank accounts in your name as all of your banking will be done through the trust and your trustee will direct the bank to allow you to be a signatory to the cheque account and that you are given an EFTPOS card. This will enable you to cover your cost of living and your creditors cannot garnishee your bank account because it would have been closed.

Your tenants will be directed to pay their rent to the trust and if you have a managing agent you will cancel the existing managing contract and the trustee will enter into a new management agreement with the agent so that you no longer become the client and all future rent is paid to the trust. The creditors cannot get the rent because although you owe them money under the judgement you have no money – the trustee holds it. If you are self employed, your business will be mortgaged to the trust and all invoices will be issued in the name of the trust and payments made into the trust bank account.

If you are employed PAYG, then you will have the pay office pay your wages into the trust and not to you personally. You will continue to be on the books as an employee and receive superannuation (because creditors cannot seize superannuation) and the annual group certificate will be issued in your name.

We will prepare all of these documents for you and give you written instructions on what to do and how to set it up so that it will work and give you peace of mind. Game, set and match to you – this is how to level the playing field and beat the banks at their own game.

In life, we do often things a certain way only because that is the only way we know. This becomes entrenched and seems set in stone. We then accept this as reality and don't challenge or seek to change it as it is "just the way it is". In Australia, when we want money we go to a bank. We have no bargaining power, we beg for a loan or credit and are very grateful if we get it. If we want a house, we need a mortgage and a deposit and money to pay for stamp duty – there is no other way! Or is there?

As I said at the start of this book, times of change are times of great opportunity. One of Darwin's most famous ideas was that the

survival of a species comes down to its ability to adapt and adjust to change. We also need to adapt to change to survive, in a financial sense.

Our world has changed. Banks have tightened up their lending criteria and the old ways can no longer be relied upon.

This is a time of great opportunity – man is very adaptive and will not crumble just because his systems might. We can adapt and survive and find another way. After the GFC, bank lending declined dramatically and in recent times it has again slowed – after a long period of growth. The upcoming Royal Commission into financial services is targeting banks' lending practices, with some experts predicting banking revenues could fall as a result. Every year, restrictions on lending seem to tighten and the current Royal Commission will only make it harder to get a loan.

So how do we adjust? I read somewhere that immigrants, as a group, statistically are more affluent and successful per capita than those who were born and bred in any country. It is apparently because they come with no pre-conceptions as to how things should be done. They never say, “that’s just the way it is”. They have nothing but the shirts on their backs and a clean slate to start afresh and they adapt and survive and ultimately thrive doing whatever has to be done. They see opportunity where everybody else sees reasons for failure. They are hungrier to find a way than to accept that there is no way. A local may say “I can’t buy a house because no-one will lend me money”, while an immigrant will say “How can I buy a house?”

So out of default, because lending is getting tighter, we are all becoming like immigrants. We are out of our comfort zone and now must find new ways of doing business. This has had the effect of forcing us to live off our wits and use our innate skills of reasoning and communicating. Before we had money, we used

bartering as a way of getting what we wanted. Many believe more and more business is being done via clever deal making.

We have people who can't pay their loans and want to sell and we still have people who want to buy, it's just that the lines of credit are tightening and banks may not lend the buyers the money to buy out the sellers. The world of commerce – as we know it – is slowing.

So, how do the buyers and the sellers do the deal they want to do? Easy – they just by-pass the bank! The seller has the capital behind him (the loan) but wants out because he can't find the next loan repayment, the buyer can service the loan but cannot get the capital to pay out the seller. These two both want something the other has – one a cash flow, the other capital (or a lump sum loan) – they do not need a bank they can work together for a win-win solution.

These deals have always been around, but we did not need to use them while credit was easily obtained. We have now been forced to think outside the square and people are closing deals which actually suit both parties' needs, are quicker and easier than traditional finance and save a lot of invisible fees and charges.

It may make more sense if I use an example of a deal clients of mine recently did out of necessity, but which was a win-win for them as sellers and their buyer.

My clients had a business they had paid \$150,000 for a few years ago and which was losing \$100,000 per annum. They had no cash flow and needed a lump sum of cash – \$25,000 – to pay pressing creditors plus \$4,000 a month to cover expenses. They had a lease for their business premises due for renewal for six years. If they didn't renew it within four weeks they would lose the business (as they needed the lease to sell with the business), but they had no money to keep trading. So they could not afford to enter a six-year

lease. Their solution was to quickly find someone to buy the business for \$110,000. Your kneejerk reaction to these facts is probably the same as my initial reaction “Bad luck – you bought a dud business and can’t sell it – I’m not a magician and can’t fix that! How can we find someone to pay \$110K for a business that loses \$100K per annum within six weeks?”

They listed the property with a business broker (the old way of doing things: “that’s just what you do”) and there were a few nibbles but at the end of the day no-one was interested in saving or financing the business because of the losses.

For every seller, though, there is a buyer. In this case there was someone who wanted this business. He wanted the lifestyle that came with it and knew he could turn it around and make a great profit. He offered \$110,000 for the business which my clients accepted. However, no one would lend him the money to buy the business.

He owned his own home, had a good cash flow and was a perfect candidate for a loan but no-one would lend money for a business which was losing \$100,000 per annum. This buyer had \$37,000 cash in savings. The buyer saw great potential in the business and knew what they had to do to turn a profit quickly and easily. My clients would have taken the \$37,000 (better than nothing for a failing business) but the parties negotiated back and forth and the deal they shook on was this:

The buyer paid \$37,000 up front and then \$5,000 per month for 18 months (totalling a sale price of \$127,000 – \$17,000 above the asking price) plus the grant of a second mortgage over the buyer’s property. That way my clients became secured creditors and if the business failed or the buyer stopped paying the \$5,000 per month,

my clients would still get the full \$127,000 sale price of the business.

My clients got the cash they needed to pay off immediate creditors and got a \$1,500/month mortgage on their home and an income of \$5,000 a month to cover that for 18 months! The buyer bought the business of his dreams – which no bank would give him the money to acquire.

There is a solution for every apparent problem. Although I don't like the word 'problem'; here are no problems, only situations, which can be dealt with. We need to tweak our thinking and stop going back to the old way by default. Finding new ways can mean a better solution for all parties because it only needs to be win-win. When you introduce a lender as the inflexible middleman, it's a non-negotiable win to them with no middle ground or room for movement to accommodate the needs of the buyer and seller. You can almost hear the bankers saying: "that's the way we do it – take it or leave it!"

How can you get even? The loophole with the low doc/no doc loan

Prior to the GFC, so called low-doc and no-doc loans were prevalent in many parts of the world and they played a major role in the economic chaos that followed. Low-doc loans are mortgages that can be approved without normal income verification requirements. You might be asked to make a declaration about how much you are earning, but there is no requirement to produce tax returns or paystips as there is with other loans. Of course, the potential for someone to make a false declaration and end up in trouble is significant. No-doc loans require zero evidence of an income, although the interest rates are considerably higher than for normal loans. You are also likely to have a larger proportion of

the property value. If you want to borrow 80 percent of the value, as with a regular loan, the interest rate sky-rockets even further. Naturally enough, following the GFC, there was a crack-down on such loans. The major banks and many other lenders no longer provide no-doc loans and other lenders will only provide them to buy business or investment properties. Nonetheless, there are still a few mortgage holders around who have signed up to low- or no-doc loans, and they can run into trouble.

In December 2017, the Governor General announced a Royal Commission into misconduct in the banking, superannuation and financial services industry, which is due to file a final report in February 2019. Included in the terms of reference is scrutiny on anyone acting as “an intermediary between borrowers and lenders” (in other words, mortgage brokers, with their commissions especially under the microscope). Lending practices and products could be explored in part b) of the terms, which calls on Royal Commissioner Kenneth Hayne to examine “whether any conduct, practices, behaviour or business services entities fall below community standards and expectations”.

Hayne himself has asked banks to be prepared to answer questions on the home loan industry. He is considered an expert on issues facing consumers of banking products.

To understand how it all started and where it all went wrong, we first have to understand the nature of the product.

What is a low-doc loan?

A low-doc loan was officially said to have been designed for self-employed people who did not have tax returns to support their earnings.

What lenders required for this style of loan was:

- a. For the borrower to verify that they were self employed by providing an ABN;
- b. For the borrower to provide details of income (on the loan application);
- c. For the borrower to swear a statutory declaration that the amount stated is what they actually earn.

What is a no-doc Loan?

These loans were initially said to have been created for those who have adequate funds to service a loan but are unable to show any of this information or swear a statutory declaration as to earnings. What lenders required for this product was for the borrower to swear a statutory declaration saying that they can afford to make all loan repayments in respect of the loan.

How were these loans used prior to the GFC?

The cynic in me, who takes a 'glass half empty view' when it comes to banks, suspects that lenders weren't thinking "Let's help people who can't show income by relaxing our lending requirements" when they offered no and low-doc loans ahead of the GFC. They were thinking, "There's so many people out there we could sell loans to, if only they earned enough money to service the loans. There's no risk to us because house prices are going up and up and we will always end up with a valuable property if they can't pay the loan. We will insure against prices falling though by making borrowers pay for mortgage insurance which will cover any loss which may occur for us. Let's find a way to lend them money by not requiring them to show us earnings."

So, what was the problem with these loans?

In terms of the GFC, everything would have been just dandy had property prices continued to rise and banks had continued to lend. Debt is not a problem, so long as you can get more debt.

What the lenders had in mind was that they would keep revaluing properties and lend more money against them each year, which would be used as a buffer to help the borrower cover the repayments. In effect, people were being encouraged to use their house as one big ATM to live off.

The problem was that properties do not always go up in value. At the first sign of the GFC, the asset bubble burst and banks reigned in their lending in the so-called credit crunch. This left the poor homeowner patsies, who were sold this defective product, high and dry.

You see, the banks had been looking after their brokers. When they unveiled their new low/no doc product. They said, “go forth and multiply and you shall be rewarded”.

What happened next was that brokers were given privileges by their banks. A broker who signed up a lot of borrowers in loans to one particular bank, for example, might have been rewarded by becoming a ‘gold’ broker. This meant that where, for example, Westpac would normally only lend 90 percent LVR (loan to value ratio) on a low doc loan for anyone else, for this broker, they would lend 95 percent. This had nothing to do with the merits of the potential borrower or their ability to service the loan, but rather the standing of the broker they chose with the bank!

Where’s the loophole?

As if it’s not bad enough that the property bubble deflated during the GFC and the banks and brokers were caught skinny dipping as

the tide went out. The borrowers who, right from the outset, were never able to service these low/no doc loans, were often left holding the baby.

The 'loophole' is that the banks were like the three blind monkeys who saw, heard and spoke no evil; they gave their 'gold' member brokers calculators and told them the numbers they needed to fill in the blanks for borrowers' incomes on low/no-doc loan applications.

But what of the borrowers? Unfortunately, most of the time, they were none the wiser. The script played out something like this:

"Broker: No worries – I can get you a loan. It's a 10-page application form, I'll fill in all your details later – I just need an ABN number from you – if you don't have one, can you get one for me? Now you'll have to pay lender's mortgage insurance, but that's standard with these types of loans, just a cost of doing business, and I need your signature here."

Those borrowers who complied subsequently felt the pinch. Many requested their loan applications from their lenders only to find that they had signed a form stating that they were self employed with an income of \$250K per annum. Some of these people were on Centrelink benefits! They did not know what had been filled in on their loan application.

The bank's response to the hapless borrower was: "We have nothing to do with it – you, or your broker, lied to us. That's your signature on the application form swearing you earn that amount."

And what of the low-doc and no-doc loans that the lenders were handing out like candy to anyone who asked? "We don't offer that defective product anymore because the risk is too great for us."

So, who wore the loss when it all went pear shaped? The borrower of course, because the lender made sure that they had enough security to cover themselves in the event that the borrower stopped servicing the loan. This practice amounts to 'asset lending'

What is asset lending?

Asset lending is lending on the value of adequate security without regard to the ability of a borrower to repay the loan or meet the monthly repayments.

What is the law on asset lending?

Asset lending is perfectly legal so long as the borrower understands what s/he is doing. All too often with low/no doc loans, the broker wanted the fat commission, the lender wanted to write the loan and earn the interest (totally risk-free because they had their foot on the borrower's valuable asset in the event that loan repayments were not met and if there happened to be a shortfall, they had mortgage insurance). The borrower, who was none the wiser and risked everything, ended up carrying the burden of the mortgage stress, or worse, and lost their property.

On 20 March 2006, the NSW Court of Appeal delivered its judgment in *Perpetual Trustee Company Limited v Khoshaba* [2006] NSWCA 41. In that case, three judges held unanimously that this style of asset lending was harsh and unconscionable and the loan contract was set aside.

This decision was followed by the Supreme Court of NSW in 2009.

Permanent Trustee Company Limited v Gillian O'Donnell
Permanent Trustee Company Limited v Di Benedetto Tonto Home

Loans Australia Pty Ltd v Tavares [2009] NSWSC 902 (4 September 2009).

This involved three similar cases being heard together. The judge held that it was unfair and unconscionable for the lenders to loan money to borrowers who could not repay the loans and all three loan contracts were set aside.

The National Consumer Credit Protection Act

The Commonwealth has responsibility for the regulation of consumer credit, through the National Consumer Credit Protection Act (2009). That act included the following reforms:

- a comprehensive licensing regime for all providers of consumer credit and services;
- responsible lending conduct requirements on licensees – not to provide credit products and services that are unsuitable for the consumer's needs and that the consumer does not have the capacity to repay;
- improved sanctions and enhanced enforcement powers for the regulator, the Australian Securities and Investments Commission (ASIC);
- expanded consumer protection through court arrangements, remedies for consumers and penalties for misconduct; and
- an expanded scope for the National Credit Code to include credit provided to purchase, renovate, improve or refinance a residential investment property.

What requirements or obligations do brokers have now?

The National Consumer Credit Protection Act places onerous obligations on brokers obtaining loans for clients. They must act in the client's best interests at all times and must act fairly and not engage in misleading and deceptive or unconscionable conduct.

This was always the law (as the judgments in the above cases reveal), but in 2010 it was set out in a statute. In a nutshell, brokers and lenders needed to satisfy themselves that the loan they provided was right for the borrower and that the borrower could afford to take on the loan.

Part of the banking Royal Commission's work will no doubt be to examine whether lenders and brokers have been meeting their legal obligations under the NCCP.

What can you do?

All of this is good news for you if you have been sold one of these low- or no-doc loans and are struggling under mortgage stress as a result. The courts have shown willingness to set aside (or totally write off) these loans.

You are also encouraged to make a public submission to the Royal Commission via its website, or by calling 1800 909 826. The Royal Commission doesn't have the power to resolve disputes though.

The other problem people are facing with these loans is that they have hefty penalties for early discharge. If you have refinanced with a mainstream bank you may have also signed up for a prohibitive 'break' or 'exit' cost which make it extremely difficult to extricate yourself from the loan.

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