Lead Ombudsman – Banking and Finance
Australian Financial Complaints Authority
mailto:consultation@afca.org.au

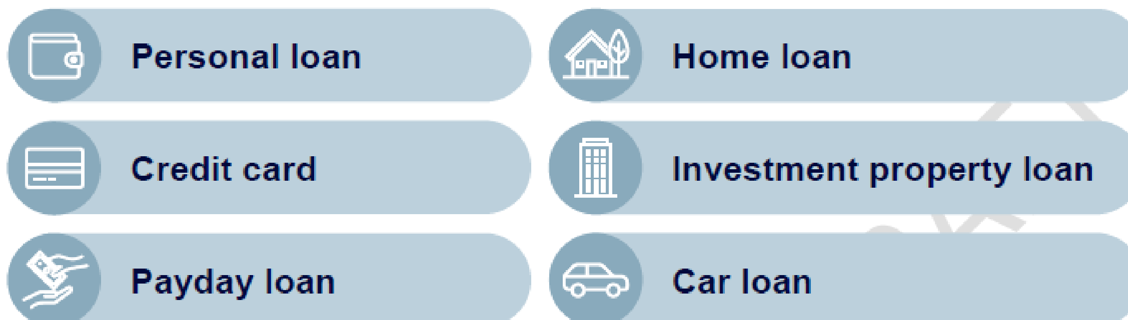
Response to Draft Responsible Lending Policy

IPF Digital Australia Pty Ltd trading as Credit24 ("IPFD"), welcomes the opportunity to contribute to the AFCA's approach to managing complaints alleging non-compliance with legislative responsible lending obligations.

In addition to the specific questions posed by the AFCA, IPFD also brings to draws AFCA's attention to significant bias issues in terminology which AFCA should remove if it is to fulfill its stated purpose and its legislative purpose as an unbiased independent dispute resolution organisation for consumer lending.

A. CATEGORIES OF LOAN IN THE AFCA DRAFT APPROACH

AFCA has included for consultation 6 categories of consumer loans:



IPFD takes issue with AFCA using the term "Payday loan" as a category of loan. There is no such loan category within the National Consumer Credit Protection Act. If AFCA is referring to Small Amount Credit Contracts as defined in the legislation, then it should use this term in its policy documents. Publishing "Payday loan" as a category of consumer loan displays ignorance in its understanding of consumer credit products and implies, by using a term often used by consumer advocates to impart a derogatory connotation, demonstrates a bias against credit providers servicing the sub-prime consumer market. To highlight the social role serviced by small loan credit providers, I refer the AFCA to the 2017 paper by prof Ashton de Silva (RMIT) "An Australian Householders Choice"[1] a copy of which is included for ease of reference.

RECOMMENDATION: the term "Payday loan" be removed from the draft policy and AFCA terminology generally.

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B. IPFD'S RESPONSES TO THE SPECIFIC QUESTIONS ASKED BY THE AFCA

Assessing reasonableness of inquiries and verification steps

- See section 3.2: *AFCA considers whether the inquiries and verification steps were reasonable*

1. Do you consider our approach to assessing the reasonableness of inquiries and verification steps aligns with the guidance in ASIC RG 209?

RG 209 recognises in accordance with the Federal Court and Full Federal Court decisions in *ASIC v Westpac [2019} FCA 1244] and* ASIC v Westpac [2020] FCFCA 111 and provides for the assessment to be future based rather than a hindsight regard to discretionary expenditures. Where the credit provider has followed RG209 in documenting the warning that the applicant will need to reduce past expenditures and the applicant has agreed to so do, the AFCA should accept that as sufficient and not reopen at a later time past expenditures as a basis for reviewing the assessment.

2. Do you have any other comments about our proposed approach to assessing the reasonableness of inquiries and verification steps?

(i) It is recommended that where AFCA has conducted a systemic inquiry of a credit providers of a credit providers inquiries and verifications and concluded there is no systemic issue, then the AFCA should adopt its policy of precedent decisions and rely on that finding to screen out further complaints on the same issue.

The AFCA should be mindful of the costs implications of not adequately screening complaints at the assessment stage. It is a basic business imperative, that all costs of a business be recovered in the prices charged. AFCA being loose with screening, including not relying on its previous decisions, only penalises consumers in higher than necessary pricing of credit products.

(ii) AFCA should be flexible in the extent of inquiries and verifications it considers adequate. The level should be commensurate with the size and term of the loan product.

Changes the financial firm could reasonably have foreseen

- See section 3.3, page 19: *Changes the financial firm could reasonably have foreseen*

3. Does our approach to considering a financial firm's assessment of reasonably foreseeable changes in a complainant's circumstances align with the guidance in ASIC RG 209?

IPFD Response 3

The AFCA draft approach does not include reference to the landmark decision of the Full Federal Court in ASIC v Westpac [2020] FCFCA 111 and the amendments subsequently made by ASIC in REG209.

The policy appears to take an hindsight approach to expenditure in its proposed approach to assessing unsuitability. In the majority of the Full Federal Court:

Justice Glesson said:

"*As his Honour (Justice Perram in ASIC v Westpac [2019} FCA 1244] explained, a consumer's total historical spending is not a necessary integer in an assessment of the consumer's likely future ability to comply with the consumer's financial obligations under the contract*."

And Justice Lee said:
"I respectfully agree with the primary judge (see J[71]) that it does not follow that the statutory purpose can only be achieved by taking into account all information collected, regardless of its relevance or materiality to the assessment of unsuitability. Simply labelling an expenditure as a Declared Living Expense, and the fact that the consumer incurs that expense on their current lifestyle, does not necessarily change its nature from being discretionary. It is plain that a consumer may choose to, and can be expected to, forgo particular living expenses in order to meet their financial obligations under a credit contract."

The historic expenditure and financial position immediately prior to the assessment of a loan is not the necessary criteria to be applied to the assessment of unsuitability. ASIC recognised this in amending RG209. AFCA must recognise it is the consumer's choice to forego past expenditure behaviour to meet the obligations under the loan contract.

RG 209 provides for the credit provider to indicate in the loan assessment that the applicant will need to reduce their historic expenditure to meet the loan obligations. If the applicant specifically acknowledges that they will reduce past expenditures to meet the loan obligations, AFCA must accept the consumer's choice.

4. *Do you think it is it reasonable for AFCA to consider that where a borrower will likely reach retirement age during the loan term, the lender should, as part of its reasonable inquiries and verification steps:*

(a) *assess how the borrower will repay the loan in retirement.*

(b) *if it appears likely the borrower will need to sell assets to repay the loan, make inquiries about whether the sale of those assets at that time meets the complainant's requirements and objectives?*

The AFCA, being a dispute resolution body, should not embark on fishing expeditions nor display bias in favour of consumers. The paper includes this concept without adequately explaining how practically this would arise in a loan application and the breadth of its application intended by the AFCA. IPFD recommends before including this item in its dispute resolution considerations, more detail is needed for consultation.

5. *Do you have any comments about our proposed approach to considering the reasonableness of applying interest rate buffers to loans*?

IPFD considers that AFCA needs to have a flexible approach to "buffers". IPFD considers that a loan affordability assessment should provide for a buffer. How that is done can vary with the term, the amount and the method by which the buffer is done.

IPFD provides for an income buffer in the affordability calculation by which 5% of income is withheld from the income used for affordability assessment purposes.

Determining if a loan was unsuitable

- See section 3.4: *AFCA determines whether the loan was unsuitable*

6*. Do you have any comments about how we propose to seek and consider further information when we find a financial firm has made an error in its assessment*?

(i) The AFCA policy incorrect includes the rebuttable presumption for small amount credit contract presumed unsuitability. IPFD recommends AFCA replace this old law with the current law.

(ii) AFCA must consider separately the two legislative issues:

a. Has the credit provider conducted the inquiries and verifications;
b. Has the credit provider assessed the loan as unsuitable

7. *Do you have any comments about how we propose to use further information to determine whether the loan was unsuitable for the borrower*?

(i) With respect to alleged domestic violence
IPFD has found instances of the following where "domestic violence" has been claimed to be the reason for not having to pay back a loan:
(a) Alleged domestic violence at a time prior to the consumer actually applying for the loan.
(b) Allegations that domestic violence caused the person to apply for the loan against their will.
IPFD recommends that AFCA uphold the rights of a credit provider, who has advanced funds to a consumer to be repaid. In most domestic violence complaints that IPFD has dealt with, rarely has the loan application and funds not been at the true discretion of the applicant. IPFD recommends the AFCA recognise the procedures for id verification, including direct communication with the person, prior to assessing a loan application in considering the worth of the allegation. Included is a police issued Apprehension of Violence Order as these are not proof of domestic violence and few complaints are supported by a contested ourt Order.

(ii) AFCA should avoid attempting to become a credit risk loan assessor. Different firms and different loan markets have their own risk appetite and assessment criteria. It can be a dangerous step for AFCA to embark on making its own inquiries (further information) and deciding for itself what risk appetite and assessment criteria it would like the world adopt.

(iii) Importantly, the legislation recognises, that Credit is Different to a Financial Product. In a financial product (managed investment scheme, shares in a company, insurance policy, superannuation account etc, it is the consumer who is at risk of losing their money which they give to the provider of the financial product. With Credit it is the credit provider who is at risk of losing the money they have given to a borrower. It is in

recognition of that difference, that the National Consumer Credit Protection Act places a high threshold for a loan to be unsuitable. The requirement for a loan to be unsuitable, as the AFCA draft policy states is that the borrower (S131(2)(a) “will be unable to comply with the consumer's financial obligations under the contract, or could only comply with substantial hardship”.

It is recommended that AFCA should recognise in its loan assessment policy that the risk of providing a loan is primarily a risk of loss to the credit provider and the high threshold for classifying a loan as unsuitable inherent in the legislation. In particular, the AFCA should not embark on a fishing expedition of its own making on behalf of a complainant but rather demand of complainants that they make their case.

Section 4:

How we determine fair outcomes and calculate complainant loss

- Section 4 of the Approach explains how we will determine a fair outcome, including how we calculate loss. We have sought to align with legal principles and regulatory guidance, including ASIC Regulatory Guide (RG) 277

8. *Do you have any comments about the way we propose to assess a complainant's loss and benefit*?
IPFD's experience is that loss assessments have not been excessive, however its' experience has been that AFCA does not consider the actual loss of capital and interest suffered by a credit provider outweighing the non-actual loss (for example “stress”, “inconvenience”) in determining the complainant should be compensated.

- See section 4.2 Calculating responsible lending remedies, and Guide One.

9. *Do you have any comments about how we propose to assess loss and benefit for different types of loans*?

- See section 4.2, page 34 *Assessing benefit from investment property loans* and Guide One.

10. *Do you have any comments about how we propose to consider capital loss from investment property loans*?

IPFD cannot comment as it does not currently issue property loans.

- See section 4.2 *Calculating responsible lending remedies*, and Guide One.

11. *We propose to determine how a complainant should repay any outstanding debt. This approach may allow a complainant to retain an asset and repay any outstanding debt over time if it is fair in the circumstances of the complaint. Do you have any comments about our flexible approach to determining fair outcomes when an unsuitable loan is secured by an asset*?

- See section 4.2, especially page 36 *Assessing how secured assets can be dealt with fairly* and Guide One

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IPFD cannot comment because it's current lending is unsecured.

Other feedback

12. *Do you have any comments about our tool which has been developed to assist financial firms provide detail to us about their unsuitability assessment*?

AFCA does not appear to have considered the template published by ASIC in RG 209. This firm has modelled its loan assessment template consistent with the template in ASIC RG209. AFCA should accept already published Regulatory Guide templates rather than generating additional and unnecessary work for credit providers.

All costs incurred by a credit provider need to be recovered in its pricing. Unnecessary tools and work adds to the price ultimately paid by borrowers. It is incumbent on AFCA to avoid templates of its own and accept the template that the regulator ASIC has published and considers sufficient, an assessment template.

The tool is referenced on page 13 of the Approach, and a copy is attached to this consultation paper, see Appendix 1.

13. *Do you have any feedback about the 'Quick reference guides' included in the Approach*?
[Response to be included]

14. *Do you have any other feedback about how the draft Approach meets our objectives*?

IPFD Response 14.1

IPFD repeats its opening submission in section A at the start of this submission to AFCA.

AFCA has included for consultation 6 categories of consumer loans:

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IPFD Response 14.2

The draft policy incorrectly impliedly states the current unsuitability criteria for small amount credit contracts. It is embarrassing to have to point out that in a major policy paper issued by the AFCA in August 2023, that AFCA quotes the wrong law. The rebuttable presumptions have been replaced by a quantitative assessment whereby repayments cannot exceed 10% of the applicant's income. It is recognised that for complaints relating to assessments made prior the change in law, the former rebuttable presumptions may be relevant. However as the term of a small amount credit contract is defined to be not more than 12 months, it is unlikely to be relevant to complaints received by APRA alleging non-compliance with responsible lending law.

IPFD Response 14.3

AFCA's draft policy states it will consider its "**Past decisions"** to ensure consistency in its decision making. However, the experience of PFD is that AFCA consistently ignores its previous determinations when deciding to accept a complaint.

IPFD is particularly concerned that AFCA must accept its own determinations where AFCA has conducted a systemic inquiry into the responsible lending procedures of a credit provider and determined there is no issue with that credit provider's responsible lending procedures.

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In that situation, AFCA should follow its systemic inquiry determination as having already determined that the credit providers procedures and criteria have already been determined by the AFCA as correct.

Concluding comments:

IPFD would welcome the opportunity to discuss with AFCA the comments and recommendations made in this submission.