Friday 15th September 2023

Natalie Cameron
Lead Ombudsman – Banking and Finance
Australian Financial Complaints Authority
By email: consultation@afca.org.au

Dear Natalie

The NCPA is pleased to provide some comments in response to the AFCA Approach to Responsible Lending, however, makes the following comments as a preamble to our response to the AFCA questions.

The National Credit Providers Association (NCPA) is the national peak body which represents the Small Amount Consumer Lending Industry in Australia. The industry comprises small to medium businesses who provide small and medium amount credit loans to consumers and provide credit options for the 3 million financially excluded Australians who are unable or choose not to access credit from big bank lenders. The NCPA also represents some credit reporting agencies and other providers of services to the industry.

The NCPA has previously noted concerns with the number of financial counsellors, advocates and thus consumers that are able to game the system and use the AFCA dispute resolution scheme to evade responsibility for repaying small and medium loans, often when the consumer is in part or wholly responsible for the dispute.

NCPA members have provided examples of consumers making complaints to AFCA simply to avoid liability or worse, to seek compensation for their own behaviour.

Case 1

> *A customer had an outstanding balance with the lender of over $3,000. The customer was direct debited in accordance with the direct debit service agreement for 2 payments of $50 (total $100). The customer disputed the direct debits with his bank, to which the bank closed his dispute as unsuccessful due to there being an active direct debit agreement.*
>
> *The customer subsequently made a complaint to AFCA. All documents were then provided by the lender to AFCA, who recommended that the customer be refunded the $100, awarded the customer non-financial compensation of $500.*

The lender reluctantly agreed to this recommendation, as it was not economically viable for them to pursue the complaint further. It had already cost the lender $1,745 in the dispute resolution process to get to this stage and the next stage would come at a cost of $7,570.

AFCA provided no explanation to the lender about how the amount of compensation was determined or even why compensation was deemed appropriate for this case.

Since then, the customer has subsequently declined the AFCA recommendation and wants the entire debt now waived. Further, because of the automatic rejection from the customer the lender is now faced with a $7,570 cost for action taken by the lender the customer had agreed to in their contract.

Lenders are extremely concerned about getting involved in the dispute resolution process but are required to by law. The costs borne by the lender are disproportionate with no responsibility borne by the consumer. Under the AFCA rules, a consumer can appeal or not accept an AFCA decision, but a lender cannot and must accept the decision of the AFCA.

Case 2

Case study 2 provide in the AFCA approach documents is an example where a customer obtained a loan via fraudulent payslips. The customer was subsequently awarded compensation, that was reduced by 25% due to their own misconduct. How was the compensation calculated in this case and why was it awarded when the company was defrauded.

Example

Complainant conduct reduces compensation

A complainant provided fraudulent payslips to a financial firm during the credit application process. The fraud was not readily apparent to the financial firm, however the complainant was aware the payslips were fraudulent at the time they provided them.

AFCA found the financial firm nonetheless breached its responsible lending obligations because it held transaction statements that indicated the complainant's income was substantially lower than the amount shown in the payslips.

AFCA's revised assessment showed the credit contract was unaffordable and unsuitable for the complainant using the income shown on the bank statements. AFCA reduced the compensation payable to the complainant by 25% because their actions contributed to the financial firm's error.

One of the key components of government regulation is certainty for those who are obligated to comply with the rules. It appears the rules for determining fairness applied by AFCA are ambiguous or discretionary, not clear to lenders and disproportionately favour the consumer even in cases where the consumer is at fault.

Section 3: How we decide if a financial firm has met its responsible lending obligations.

The Australian Securities Investment Commission (ASIC) is Australia's integrated corporate, markets, financial services and consumer credit regulator. ASIC license and regulate people and businesses engaging in consumer credit activities (including banks, credit unions, finance companies, and mortgage and finance brokers), ensuring that licensees meet the standards – including their responsibilities to consumers – that are set out in the *National Consumer Credit Protection Act 2009*.

Lenders apply the responsible lending obligations required under the NCCP Act 2009 and considers that any changes or additional requirements when assessing a consumer for credit, that are proposed to be applied from an organisation that has as its charter to provide a dispute resolution scheme, as overreach, inappropriate and will simply result in more regulation and cost for the lender. If AFCA determines a lender has breached their responsible lending obligations, they should refer the lender to ASIC. It is important to note that the costs for dispute resolution are borne solely by the lender.

Section 4: How we determine fair outcomes and calculate complainant loss.

AFCA notes that it's decision making is based on the premise of what is "Fair in all the Circumstances" (under AFCA Rules). The case studies suggest that fair is considered only from a consumer-focused lens.

It is important to note that complaints are registered at a cost to the lender based on an allegation only. There seems little fairness applied to the lender as the examples demonstrate that even if a consumer has lied, deceived, or committed fraud during the application process, the lender can still be considered to have made an error and be subjected to compensation arrangements.

This is not good practice and is not a sustainable approach to independent dispute resolution to resolve complaints about financial products and services. Governments should apply the principles of model litigant rules (obligations), guidelines for how a government ought to behave before, during, and after litigation with another government body, a private company, or an individual.

Additional Comments

On page 5 AFCA references common types of consumer credit and uses the term 'Payday Loan'. The introduction by the federal government of the National Consumer Credit Protection Act 2009 saw the banning of payday loans and introduced Small Amount Credit Contracts (SACCs). It is inappropriate that a federal government agency such as the AFCA continue to refer to a SACC as a payday loan.

On page 6 the AFCA notes that it *may be able to consider a complaint if the borrower says the lender: unlawfully discriminated against them when deciding to decline a loan*. This infers the AFCA may be going to make judgements on when a lender declines a loan. Since the

introduction of the new SACC rules that commenced on 13th June 2023, many providers have declined thousands of loan applications because the consumer no longer qualifies under the new income assessment rules. How would AFCA determine if a lender has discriminated against a potential borrower? What is the AFCA's definition of discrimination?

The NCPA is concerned that this is straying a long way outside of the AFCA's charter. Lenders apply the rules according to the NCCP Act and their responsible lending obligations when assessing a loan application. Discrimination is not one of those criteria. If the AFCA was legitimately able to determine a loan was rejected that was blatantly unlawful discrimination, then the best course of action for the AFCA would be to refer the matter to an appropriate organisation that can make an assessment - https://humanrights.gov.au/complaints.

On page 10 the AFCA refers to the presumption of hardship, this is no longer part of SACC legislation.

Page 11, 27 and 57 refers to a range of credit products. It is important for the AFCA to acknowledge that different credit products need to be assessed differently. Credit should in all cases be assessed 'responsibly', but what should be deemed responsible for a 30-year mortgage is going to be different to a three-month SACC loan. For example, it would be responsible for a Mortgage Broker to ask a 60-year-old when they plan to retire and how they are going to cover the 30-year mortgage when they stop working, but it would be irresponsible for a SACC provider to ask the same question of a 60-year-old and may even be considered a breach of privacy.

It is also important the AFCA be aware that the average 30-year loan will yield a broker with $27,000 over the life of the loan in trail income. But a $300 SACC over a month would only yield $72. It is responsible for a Mortgage Broker to spend up to a week verifying income and expenses due to the large amount being loaned, but for a SACC Loans officer to spend a week when the lender yields $72 isn't realistic.

Good lending practice is to work out as accurately as possible the income and expenses over the life of the loan, which will tell the lender if the potential borrower can afford the loan. There is always risk since no one can be completely certain of the future, but assessing future income over a month is going to be less extensive and less risky than working out income over 30 years. The AFCA should allow for the scale, nature and complexity of the credit product being offered when deciding on how to define responsible lending.

Page 58 refers to six months Bank Statements. ASIC require three months bank statement for loan assessment. Is AFCA overriding ASIC requirements in how much income and expenses needs to be collected in the way of bank statements? The NCPA recommends that three months Bank Statements remain the regulatory and industry standard.