The Australian Financial Complaints Authority (AFCA) Approach to Irresponsible Lending Complaints – including providing compensation and redress to Consumers

Australian Financial Complaints Authority (AFCA)
By Email: consultation@afca.org.au

10 September 2023

Dear Sir / Madam,

My name is Anita Gibson Shannon. I am a consumer advocate, a strong supporter of responsible lending laws and qualified Financial Counsellor.

These submissions were originally written in July 2021 as a part of my Advocacy Assessment for the Diploma in Financial Counselling. I resubmit these submissions for AFCA's consideration regarding 'AFCA's new draft Responsible Lending Approach'.

On 25 September 2020, the Government announced proposed reforms to the responsible lending obligations contained in Ch 3 of the National Credit Act.[1]

Subsequently, AFCA removed its 'usual approach' document regarding irresponsible lending from its website citing it may lead to confusion as the Government attempted to repeal Responsible Lending from the NCCP Act.

The Bill was defeated in the Senate and therefore the Responsible Lending obligations remain in statute.

I have identified that AFCA's usual approach to Responsible Lending complaints are unfair, do not accord with the law and do not provide consumers with adequate compensation for a lenders breach of the law.

Accessing 'alternative' dispute mechanisms is vitally important to banking and insurance customers, as most do not have the money, nor resources and knowledge to take their complaints to the Courts.

As a part of financial counselling services, financial counsellors can (and often do) assist their clients in making complaints to AFCA.

There has been a long history in Australian law which has attempted to ensure lenders do not lend money to people who can not repay it under the terms of the contract or not without substantial hardship. (See various (now repealed) State Consumer Credit Codes S.70 (1996) (also known as the **UCCC**) (now contained in **National Credit Code** S.76) and the National Consumer Credit Protection Act (Cwth) (**NCCP Act**) – Responsible Lending obligations.

1 National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 (**The Bill**)

These laws also provide compensation provisions, equitable relief and amendments / changes to loan amounts and contract terms.

The NCCP Act was revolutionary as it was the first federal piece of legislation that made 'reasonable enquiries' into a borrowers ability to repay a loan an 'obligation' under law, with civil penalties for breaches and compensation provisions for borrowers who were placed into 'unaffordable' loans from the outset.

My concern is that AFCA are not currently making determinations based upon Parliaments intentions regarding compensation for loss and damage under the NCCP Act. While I understand AFCA are not a Court, they have a legal and contractual obligation to apply the law as it stands.

I write these submissions from the perspective of an AFCA determination that 'irresponsible lending' had occurred in home lending and AFCA's current approach to providing consumer compensation for 'loss or damage' and whether this approach is 'fair, efficient, timely and independent' and whether AFCA's approach meets community expectations.

The current approached by AFCA in dealing with irresponsible lending complaints:

1. Does not adhere to the approach in the examples contained within the Explanatory Memorandum to the National Consumer Credit Protection Bill (2009),
2. Results in poor outcomes for consumers,
3. Has the potential to leave a consumer in a vulnerable / homeless state,
4. Does not adhere to Community expectations,
5. Potentially is against the law.

AFCA's current approach:

1. Does not provide any debt reductions.
2. Adds inclusion of 'rent' payable to the lender by way of compensation as a 'benefit' obtained by the consumer.
3. Accelerates the loan (to 6 months)
4. Only provides 2 options for the consumer – refinance (highly unlikely when the loan was found unaffordable) or sell property.

AFCA advised me that "Financial Counsellors know that they will not get 'debt reductions' for clients through AFCA"

All which result in poor outcomes for consumers.

In order to fulfil its obligation to provide a fair and reasonable dispute resolution scheme, AFCA must consider and seek to directly address the consumer harm due to irresponsible lending. This includes both financial and non-financial harm and loss.

A breach of the responsible lending laws in the NCCP Act allows a borrower to seek compensation for any loss suffered by the borrower or resulting from the breach (s.178 and S.179).

National Consumer Credit Protection Bill - EXPLANATORY MEMORANDUM

https://www.legislation.gov.au/Details/C2009B00148/Explanatory%20Memorandum/Text

Referring to the Explanatory Memorandum to the National Consumer Credit Protection Bill (Cwth) (2009) the approach to 'Irresponsible Lending' and 'compensation for loss and damage' is stated as follows:

Compensation orders for loss or damage

4.79 Where a licensee has contravened a civil penalty or committed an offence, and a consumer has suffered loss or damage from that contravention, the consumer can seek compensation in two ways:

• through a specific order for a compensation amount for loss and damage [Part 4-2, Division 2, section 178]; or

• through a general order to compensate loss or damage or prevent or reduce the loss or damage suffered or is likely to suffer, through a broader range of remedies [Part 4-2, Division 2, section 179].

4.80 ASIC may make an application on behalf of the consumer with their consent for both types of orders.

4.81 The primary reason for the two separate orders is to enable access to streamlined court procedures in section 199 for straightforward compensation matters. It is recognised that more complex claims warrant a more formal assessment under the law. However, straightforward and small claims could be addressed in simpler court proceedings. Consequently, a separate remedy for only monetary compensation in provided in section 178.

4.82 If the amount of compensation sought under section 178 is less than $40,000, a consumer can 'opt-in' to a streamlined court procedure at their local court, Magistrate's Court, or the Federal Magistrates Court. This procedure permits more streamlined and informal proceedings, including not having to regard legal forms and technicalities and a presumption against legal representation (see below).

4.83 An order can be made under this provision; whether or not a declaration of contravention under section 166 has been made.

4.84 Both types of compensation orders are limited to offences or contraventions of the Credit Bill other than the Code. This is because the Code contains self-contained civil remedies that are currently known to industry and consumers. These provisions would likely be in conflict with provisions in the Code.

4.85 The compensation orders may only be made within six years of the day the cause of action (that is, the loss or damage to the consumer) that relates to the contravention or offence accrued. This is to capture the situation where the contravention (for example, putting a consumer into an unsuitable contract) does not result in loss or damage to the consumer until a later time.

4.86 Section 179 is modelled on section 1325 of the Corporation Act.

4.87 A court may make an order as it thinks appropriate to compensate a consumer or any other affected party (the plaintiff), or prevent or reduce that loss or damage suffered where the loss or damage is the result of a contravention of a civil penalty provision or a commission of an offence under the Credit Bill [Part 4-2, Division 2, subsection 179(1)]. The defendant is the person who committed the contravention or offence [Part 4-2, Division 2, paragraph 179(1)(b)].

4.88 The type of orders the court can make include:

- voiding or partially voiding the contract, deed or arrangement;
- varying the contract, deed or arrangement;
- refusing to enforce some or all of the terms of such a contract, deed or arrangement; and/or
- directing the contravener to pay an amount of compensation.

4.89 This remedy is particularly important where precise restitution or compensation is not possible. It enables the court to do what is practically or equitably just between the parties.

4.90 The flexibility given to the courts to rewrite the credit contract is due to the way in which credit contracts operate. The consumer may have utilised the credit in a way that does not allow the court to void the contract (for example, due to the purchase of a home or where the principal is used to purchase goods or services that cannot be sold, such as travel).

4.91 An award of money may not be the most effective way of providing compensation, compared with varying the terms of the contract. Cancelling the contract (rescission) may also give a consumer an unfair benefit in the use of the principal of the loan.

> **Example 4.2: Responsible lending**
>
> [redacted] was an electrician who earned $1,200 a week. He spent $600 a week on expenses. He went to a lender to get a home loan of $200,000. [redacted] needed a loan with an average interest rate that he could pay off over the medium term. Instead, he was offered a loan for $500,000 with a high fixed interest rate and therefore repayments that he could not readily afford.
>
> As he was experiencing hardship, [redacted] sought an injunction against the lender collecting his mortgage repayments. [redacted] then sought compensation for the loss and damage he had suffered for being put into an unsuitable loan. The court, under section 179, ordered the lender to **reduce the overall debt [redacted] owed to the lender commensurate with what he would have owed if he had been provided with a loan that was not unsuitable** minus:
>
> • the amount he had already paid to the lender; and
>
> • the amount in compensation for any loss and damages he suffered as a result of getting the unsuitable product.
>
> This recognised that [redacted] received a benefit from the initial credit provided, but that he experienced loss and damage from being put into the unsuitable loan.

4.92 Any compensation to a consumer or an order in relation to loss or damage can be mitigated (including limiting the amount of compensation) if the consumer has made a false or misleading

representations in order to obtain the credit. This is to take into account what is practically just in the circumstances.

> **Example 4.3 Consumer False and Misleading Representation**
>
> In order to obtain a credit card with a $3,000 limit, [redacted] claimed that she had an income of $50,000 and had one personal loan valued at $5,000. In fact, [redacted] only had an income of $18,000 and also had another personal loan of $3,000 plus a credit card with a credit limit of $4,000 from other credit providers.
>
> The credit provider offered her the credit card.
>
> The credit provider relied on the information provided by [redacted] and made some reasonable steps to verify her financial circumstances in order to provide the loan. However, the credit provider did not suitably verify her income. If the credit provider had known of her true financial circumstances, they would not have offered her the credit.
>
> When [redacted] could no longer meet the repayments, she sought compensation for being placed into an unsuitable credit contract.
>
> In this instance, the court considered that [redacted] was entitled to a lower amount compensation for loss and damage, even if the credit provider did not suitably verify her income. This is because she made false and misleading representations to the credit provider about her financial circumstances.

Preference for compensation

4.93 A person who contravenes the Credit Bill may be required to both pay a fine and compensate those who have suffered loss or damage as a result of the contravention. Where the person who has contravened the Credit Bill has insufficient financial resources for both, section 181 will require the court to give preference to making a compensation order to compensate those who have suffered loss or damage. [Part 4-2, Division 2, section 181]

4.94 This is not directed at allowing the court to waive or reduce the fine where it considers that the defendant does not have sufficient financial resources, thereby allowing the defendant to avoid punishment. The court may still impose a fine. The provision allows the court to order that a person who has suffered loss or damage will be compensated first, that is, before the fine is paid into consolidated revenue. Where a fine is not paid, proceedings for enforcement and recovery may be commenced.

Fair and Practical Outcomes for the Example in 4.2

So, with regard to the Electrician example (or [redacted] the Sparky as I like to call him) which comes straight out of the Explanatory Memorandum [redacted] would:

1. have had his principle loan amount reduced from $500,000 to $200,000 (debt reduction)
2. the $200,000 would have been reduced further by:

1. the amount of interest / principal payments [redacted] had already made to the lender, and,
2. the amount [redacted] paid for legal / disbursement / loan application fees / etc

This result would be a **fair** and **equitable** outcome for [redacted], and a suitable consequence for the lender for breaching the 'responsible lending' laws, which includes a loss of principal.

Under this outcome if would be more probable that based upon the reduced loan amount, [redacted]

1. would be able to make affordable repayments going forward, and,
2. would not lose his home.

AFCA's current approach to 'Irresponsible Lending'.

Currently, AFCA's approach to 'Irresponsible Lending' does not reflect the approach contained in the Explanatory Memorandum as stated above.

Once AFCA's identifies that the lender has engaged in 'irresponsible lending' (a breach of the law) AFCA's starting position is 'what amount did the person borrow?' (no debt reduction) and then works through calculations of loss and damage from that point, while also adding a rental amount the borrower must 'pay' to the lender for living in their own property.

Commissioner Hayne said in the Royal Commission Interim Report, in relation to Robert Regan's story (case study #2); Royal Commission, Interim Report (September 2018) Vol 2 p 51.

'that the position taken by ANZ (of requiring full repayment of the capital amount of the debt, reducing periodical payments and allowing a moratorium on those reduced payments) does not accord with what the community would expect. It is a position that assigns no responsibility to ANZ for the events which have happened. Further, and separately, if ANZ did breach its responsible lending obligations, the offer that it made was not adequate redress for that failure"

As a further example I downloaded this case from AFCA's own website using key search words such as 'home loan' + 'irresponsible lending' + '2019'

AFCA Case Number 604211 – Bank: St George
Publicly available at https://service02.afca.org.au/CaseFiles/FOSSIC/604211.pdf

In January 2018, the borrowers obtained from the financial firm (bank) a loan for $1,197,000 (loan) to purchase a property (property), which was taken as security.

The borrowers complained to AFCA that the bank breached their legal obligations under the NCCP Act and engaged in 'irresponsible lending'.

AFCA **agreed** with the borrowers that the Bank did indeed lend irresponsibly and therefore broke the law.

What is an appropriate outcome to this complaint?

In accordance with AFCA's approach to irresponsible lending, the bank has to reimburse interest and fees to the loan. If the complainants sell the property, the bank must reduce the loan further to reimburse the complainants for purchase and holding costs. The bank is responsible for sale costs. If the complainants refinance and retain the property, they are not entitled to reimbursement of stamp duty and holding costs. The complainant has to account for the benefit received from living in the property.

AFCA considers both loss and benefit incurred from investment lending.

Where we decide it was inappropriate for a financial firm to lend funds, it has to reimburse interest and fees on the irresponsibly lent amount. We also consider what loss the complainant suffered because of the lending being provided. To do this, we consider the purpose of the loan, any benefit the complainant gained from it, and any additional costs the complainant incurred.

Loss if the complainants have to sell the property.

If the complainants have to sell the property, their loss comprises:

- costs related to the purchase (for example, legal/conveyancing expenses)
- repayments made to the loan
- "holding costs" –i.e. costs of maintaining the asset (for example, council rates)
- costs of sale

Loss if the complainants refinance and retain the property

If the complainants refinance the loan and keep the property, their loss comprises repayments to the loan, solicitor"s fees and loan and registration fees; and solicitor"s fees only.

They are not entitled to reimbursement of stamp duty and holding costs. This is because if the loan had not been advanced, the complainants would not have the property.

The holding costs and stamp duty are costs the complainants would always have had to incur to own the property and live in it; and are not costs that they will be charged by any new lender on refinance. If these costs were reimbursed and the complainants kept the property, rather than compensating them for loss from the irresponsible lend, they would be unjustly enriched –i.e. they would get a windfall.

On the other hand, the complainants are entitled to reimbursement of loan and registration fees; and solicitor"s fees, since they may have to incur such costs again on refinance, so this is a loss to them. From either of these calculations of loss, we subtract the value of any use the complainant derived from the asset.

This includes rental income received from an investment property, and any tax benefits received. In this case, it includes the **benefit the complainants got from living in the property, rather than paying rent elsewhere** (this is appropriate and fair whether the complainants sell or retain the property, as they are getting the repayments to the loan reimbursed).

Where a complainant uses funds for investment purposes, such as to purchase an investment property, the complainant is liable for any shortfall after the sale of the property. This is because the bank is not liable to the complainant for the investment risk. The investment risk rests with the complainant (and also the investment reward if there is a surplus after sale).

The complainants received a benefit from living in the property The complainants‟ stated intention when they applied for the loan, was to rent out the property. The complainants say that due to unforeseen circumstances, they could not rent the property out and elected to live in it, so it would not sit vacant.

The complainants therefore had the benefit of living in the property, without paying rent to live in a comparable property. The bank has provided a valuation which states the property had an estimated rental value of about $820 per week. The complainants have provided two rental appraisals stating the rental value of the property is about $700 to $750 per week.

Generally, AFCA accepts the estimate of a licensed valuer over that of a rental appraisal, unless there is reason to vary from this approach. In the circumstances, it is appropriate to adopt the higher end of the complainants‟ rental appraisal (being $750 per week), because:

The complainants provided two rental appraisals from different real-estate agencies which provide a consistent estimate of the rental value of the property. This adds weight to the estimate in the rental appraisals.

The complainants‟ rental appraisal was obtained in July 2019 while they were living in the property. It is therefore a more accurate estimate of the rental benefit the complainants received whereas the bank's valuation was obtained about six months before settlement.

It is unlikely the property depreciated in rental value by 15% within one year (being the difference between $820 and $700). In the circumstances it is fairer to adopt the higher figure of $750, because it represents a conservative estimate which is between the bank's valuation and the lower figure in the rental appraisals.

The complainants therefore received a benefit from the property of about $68,250 from 12 January 2018 to 15 October 2019, **being the amount of rent they saved**. The complainants incurred a financial loss due to the irresponsibly lent loan.

The account statements show that as at 11 October 2019, the complainants owed $1,190,507 on the loan.

Considering the benefit the complainants received, AFCA has calculated a revised debt owing:

of $1,112,102 as at 11 October 2019 if the complainants sell the property.
of $1,177,053 as at 11 October 2019 if the complainants refinance and retain the property.

This means as at 11 October 2019, the complainants have incurred a loss due to the loan being provided:

of **$84,186** if they sell the property ($1,196,288 less $1,112,102)
of **$19,235** if they refinance and retain the property ($1,196,288 less $1,177,053)

Page 9 of AFCA determination.

The complainants must repay one of the alternative final revised debt amounts to the bank within 180 days of their acceptance of this determination (whether by sale of the property or refinance).

If the net amount received from the sale of the property is insufficient to repay the amount owed, the complainants will be liable for the shortfall.

So in breach of the Explanatory Memorandum, AFCA provided no debt reduction of the principal amount, added 'rental costs' to the borrowers debt for living in their own property and 180 days to finalise the debt in full (acceleration of loan), with the Bank.

I can not see in this determination an option that would allow the borrowers to make payments on an amount that was affordable, nor an option that instructs the Bank to continue in the contract at that affordable rate.

These borrowers were not even in 'default' under the terms of the contract when they made this complaint. (Page 3).

What this approach also does not consider is the possibility that borrowers may have had to borrow money from family members or obtain further credit from other sources in order to meet their repayments obligations under a 'irresponsible loan'.

What should have happened?

Inputting the financial details of these two borrowers (found on page 9 of the AFCA determination) into the St George Banks own calculator the results were these two borrowers had the capacity to borrow an amount of:

$280,033

St George Bank – How much can I borrow calculator.
https://www.stgeorge.com.au/personal/home-loans/home-loan-calculators/mortgage-calculator

However the loan amount approved by the Bank was $1,197,000

Using the Explanatory Memorandums example under **Example 4.2: Responsible lending** the consumers would have been required to repay **$280,033** (the affordable loan amount) less the repayments already made, less the costs of acquiring the loan.

I'm sure these borrowers would have been able to make arrangements with the Bank to make the reduced payments going forward without having to sell or refinance the home.

It is also highly unlikely that these borrowers would be able to refinance **$1,177,053** considering AFCA's determination that the original loan amount of $1,197,000 was unaffordable some 18 months before hand, without the next lender also engaging in 'irresponsible lending' unless there was a substantial increase in the borrowers income, which is highly unlikely.

The Bank would need to take the hit on principal (as per the law) as they engaged in irresponsible lending.

AFCA's Approach – Outcome for Customer

Loan amount owing to Lender …

$1,112,102 as at 11 October 2019 if the complainants sell the property.
$1,177,053 as at 11 October 2019 if the complainants refinance and retain the property.

Acceleration of loan contract - 6 months to sell or refinance.
Customer liable to lender for any 'shortfall' after sale of property.

VERSUS

Explanatory Memorandum – Outcome for Customer

Loan amount owing to Lender …
$280,033 (affordable amount)

Less

$90,323 – loan repayments
$1,463 – loan and registration fees
$1499 – solicitors' costs

Total amount owing to Lender …

$186,748

Based upon 28 year loan contract – variable interest at 2.49% (current St George interest rate) repayments for the borrower would be $369.00 per fortnight.

No acceleration of the loan contract.
Unlikely property would need to be sold therefore no 'shortfall'.

As you can see – these two approaches (AFCA v Explanatory Memorandum) to irresponsible lending / compensation and redress create very different outcomes for consumers.

As AFCA is required to 'put consumers first', a real review of the current AFCA approach to compensation calculations for customers who have experienced irresponsible lending must occur.

AFCA's approach to compensation is at best conservative and unfair and, at worst, wrong at law.

Acceleration of Loan

The practice that a debt must be paid out in full in a short amount of time is unhelpful to consumers and may cause more harm than if they never complained of irresponsible lending at all. The consumer must be given the opportunity to pay any outstanding amounts (including the reduced amount) across the original life of the loan, as allowing anything else is unfair to the consumer and rewards the financial firm for lending irresponsibly.

AFCA has no basis to effectively terminate the contract, accelerate payment of the balance of the loan, and require the sale of, in many cases, the borrower's home. This issue was directly addressed in the Royal Commission with respect to the case study of Jennifer Low (case study #4). FOS Lead Ombudsman, Mr Field, in his evidence, conceded that such an approach was wrong.
Royal Commission, Transcript of Proceedings – Mr Phillip Field, Day 25, (28 May 2018) p2553.

A consumer should also have access to the NCC hardship variation provisions on the revised debt amount, that is the consumer should be able to increase the loan term if the outcome would be for them to remain in their residential property.

Selling a primary residential property should always be the very last resort.

Using AFCA in a irresponsible lending compliant in effect inhibits consumers from obtaining fair outcomes and proper compensation. If the determination is in their favour they may lose their home without being fully compensated.

AFCA must be made to follow the intentions of Parliament when it passed the National Consumer Credit Protection Act (Cwth) regarding irresponsible lending, compensation provisions.

Added 'rental' component (benefit) to be paid to an irresponsible lender

AFCA's approach is that the consumer received the benefit of living in the house rent-free. Accordingly, the consumer's compensation is to be reduced by the rent that would have been payable on that property at that time.

This approach is wrong, does not accord with the Explanatory Memorandum nor does it accord with the common law.

The 'benefit' obtained from one transaction – a loan – is not relevant to the assessment of loss in a separate transaction – the purchase of a house.

The calculation of benefit as currently applied by AFCA conflates two separate transactions. In assessing loss, the law recognises that any benefit from the relevant contract, here the loan contract, may be considered when assessing loss.

The concept of benefit from a second transaction (what the loan is used for) does not have any relevance to the assessment of loss from an irresponsible loan. There are two reasons for this.

First, it is a separate contract and any benefit under that contract is not directly related to the irresponsible loan, including where the house that is purchased with the loan funds is secured by the loan. The complaint is about the loan, not the home purchased.

Second, the benefit of a loan is the money loaned, e.g. $500,000, not what that money is then separately used to purchase (the home).

The use to which the benefit of a contract is applied has never been relevant to the legal concept of assessing loss. This was recently affirmed by a joint judgement of the Full Court of the Federal Court of Australia in **Wyzenbeek v Australasian Marine Imports Pty Ltd [2019] FCAFC 167**. That case involved a misleading and deceptive conduct claim. The applicants purchased a yacht on the basis that it was an ocean-going vessel—this proved not to be the case. Nonetheless, the applicants did use the yacht. The respondents argued that damages needed to be reduced to give credit for the benefit the applicants had derived from use of the yacht.

The Court at [111] rejected this proposition in the context of a 'no transaction' case and at [114] – [115], noted that no such reduction is available as a matter of common law.

The Court noted further:

"Nor should any allowance or deduction be made for the uses to which Mr and Mrs Wyzenbeek have put Cadeau."

An irresponsible lending case is properly a 'no transaction' case as the loan would never have happened had the misconduct not occurred.

The remedy for an irresponsible lending case (as a 'no transaction' case) should put the borrower back into the position they were in before transaction. The consumer should not have to account for their use of an item purchased with an irresponsible loan. Further to this, the principle of fairness should operate to reduce the principal amount owed by the consumer in light of the harm caused to them by the irresponsible loan as per the Explanatory Memorandum example.

In **COMMONWEALTH BANK OF AUSTRALIA -v- DINH [No 2] [2019] WASC 456 (17 December 2019)** at [719] - [723]

http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/wa/WASC/2019/456.html

[719] The Bank submitted that, if the transaction documents were set aside, Ms Dinh should be required to repay the money she borrowed plus interest at a commercial rate. The Bank submitted, in effect, that the interest rate that should be applied is the Supreme Court interest rate.

[720] Counsel for Ms Dinh effectively conceded that, if the transaction documents were set aside, the money would have to be paid back. That said, he did not retreat from Ms Dinh's contention that she should be left in the position she was in before the Agreement Date.

[721] Where equitable relief in the shape of rescission of a contract is granted, equity does not require complete restitution of the position which existed before the contract. It allows its remedies 'to be utilised to achieve practical restitution and justice'. Equity also allows a court to not set aside the transaction in its entirety or to set it aside subject to conditions, so as to prevent one party obtaining an unwarranted benefit at the expense of the other. The 'concern of equity, in moulding relief between the parties is to prevent, nullify, or provide compensation for, wrongful injury'.

[722] Clearly, if the transaction documents were set aside, Ms Dinh would be left with an unwarranted benefit if no conditions were imposed. However, if she had succeeded in proving that the Bank had engaged in misleading or unconscionable conduct, it would not have been equitable to require her to repay the entire debt. This would have left her homeless and without any assets. She would have been far worse off than if she had never entered into the Loan Agreement. This would not have been just.

[723] In my view, if she had succeeded in proving that the Bank had engaged in misleading or unconscionable conduct, it would have been appropriate to make orders that would leave her in the same position she was in immediately prior to the Agreement Date, so far as that was possible.

See also: Vadasz v Pioneer Concrete (SA) Pty Ltd [1995] HCA 14; (1995) 130 ALR 570; (1995) 69 ALJR 678; (1995) 184 CLR 102 (16 August 1995)

http://classic.austlii.edu.au/au/cases/cth/HCA/1995/14.html

Why AFCA should be made to follow the 'Examples' contained within the National Consumer Credit Protection Explanatory Memorandum.

The National Consumer Credit Protection Act (NCCP Act) is current federal legislation. AFCA have a legal obligation to apply the law as it was passed by Parliament.

S. 178 – 179 of the National Consumer Credit Protection Act refers to compensation for breaches of the 'civil penalties' provisions of the Act. A breach of responsible lending is one such breach.

According to the ACTS INTERPRETATION ACT 1901 - SECT **15AB**

Use of extrinsic material in the interpretation of an Act

(1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act;

(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:

...

(e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;

(f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;

There is simply no excuse for AFCA to ignore the expressed intentions of Parliament when dealing with irresponsible lending.

AFCA's current approach is draconian and not in accord with the law, nor with community exceptions. It does not provide adequate compensation and redress for consumers nor does it provide appropriate consequences for Lenders who break the law.

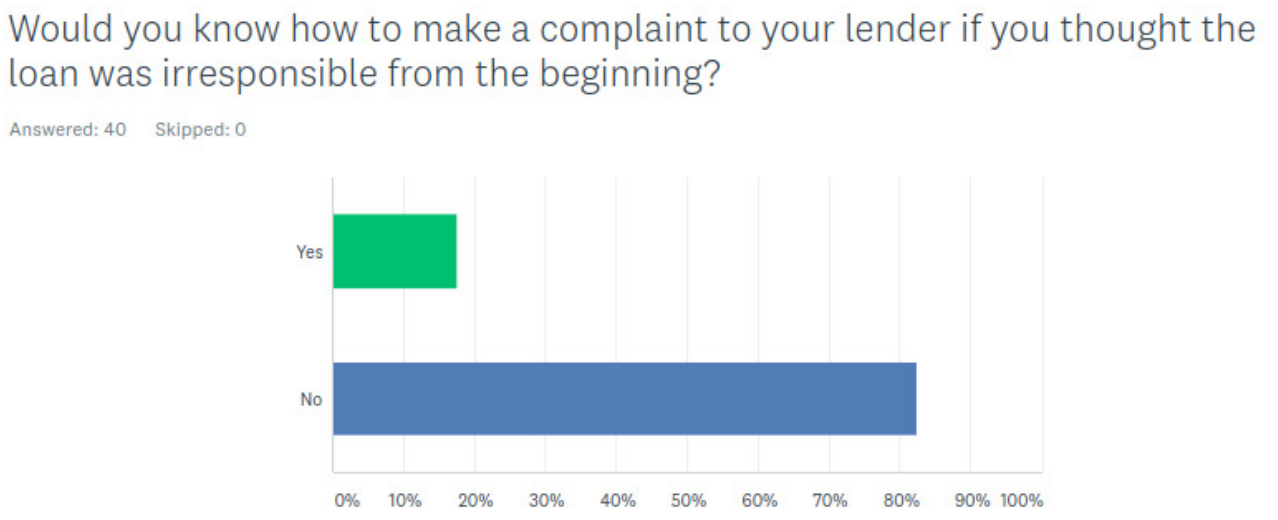
Survey – Responsible Lending

In May 2021 I conducted a survey regarding Responsible Lending. I had 40 responses to my survey.

In particular I asked the questions:

Would you know how to make a complaint to your lender if you thought the loan was irresponsible from the beginning?

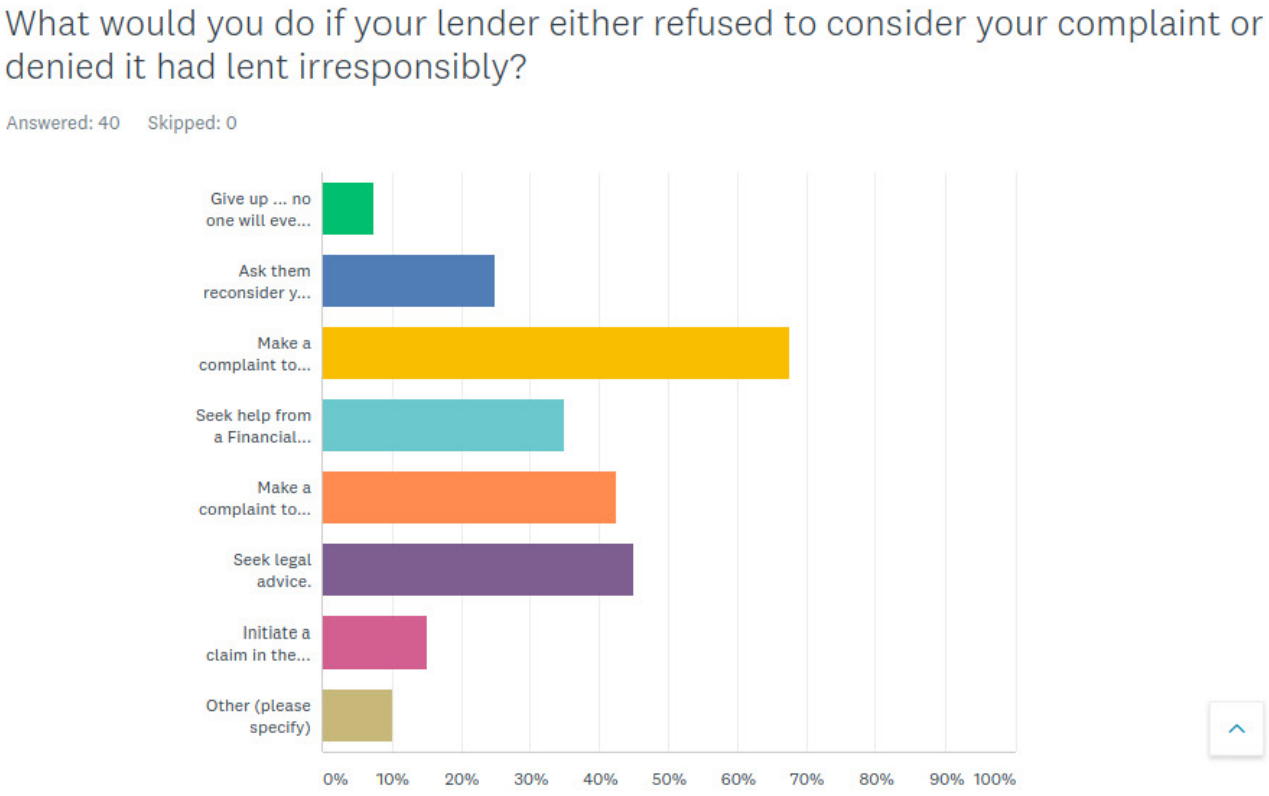
82.5% of participants indicated **No**.



ANSWER CHOICES	RESPONSES	
Yes	17.50%	7
No	82.50%	33
Total Respondents: 40		

When asked "What would you do if your lender either refused to consider your complaint or denied it had lent irresponsible"

67.5% said they would make a complaint to AFCA.



ANSWER CHOICES		RESPONSES	
Give up ... no one will ever beat a bank.		7.50%	3
Ask them reconsider your complaint.		25.00%	10
Make a complaint to the Australian Financial Complaints Authority (AFCA).		67.50%	27
Seek help from a Financial Counsellor.		35.00%	14
Make a complaint to ASIC.		42.50%	17
Seek legal advice.		45.00%	18
Initiate a claim in the Courts.		15.00%	6
Other (please specify)	Responses	10.00%	4
Total Respondents: 40			

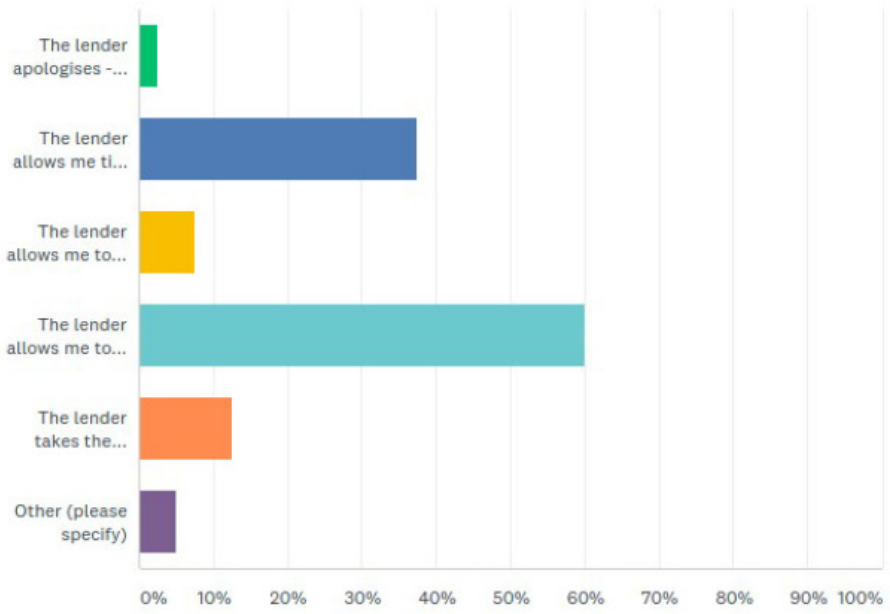
When asked "What do you think would be a fair resolution to your complaint for irresponsible lending"?

60% said "the lender allows me to keep the property, reduces the loan balance to an affordable amount and I agree to make those payments into the future"

This outcome is in line with the Explanatory Memorandum and as you can see from these results are in accord with Community expectations.

What do you think would be a fair resolution to your complaint for irresponsible lending?

Answered: 40 Skipped: 0



ANSWER CHOICES		RESPONSES	
The lender apologises - nothing more.		2.50%	1
The lender allows me time to sell the property and compensates me for the money I have paid towards the irresponsible loan (interest, fees, charges etc).		37.50%	15
The lender allows me to keep the property, waives all debt owing and discharges the mortgage.		7.50%	3
The lender allows me to keep the property, reduces the loan balance to an affordable amount and I agree to make those payments into the future.		60.00%	24
The lender takes the property and sells it and releases me from any further debt. No further compensation required.		12.50%	5
Other (please specify)	Responses	5.00%	2
Total Respondents: 40			

Recommendations

As AFCA was established under the 'Putting Consumers First' legislation:

Debt Reductions
1. Ensure that AFCA are applying the 'debt reduction' provisions under the NCCP Act as per the Explanatory Memorandum and using that amount as its base amount for calculating further loss or damage, not basing calculations upon the 'full amount loaned'.

Removal of added 'rent' component as a 'benefit' to consumer
2. Ensure that AFCA removes the current additional cost (as an implied benefit) of 'rent' in its consideration for compensation. This is not recognised under statute nor the common law. In fact it would appear to be against the law on a no-transaction case basis.

Focus on consumer remaining in their primary residential property
3. Ensure that under an AFCA determination it is **imperative** that consideration is given to options that would allow a consumer being able to remain in their home, and not be pressured into refinancing or selling if the reduced amount of the loan can be repaid under the terms of the contract (even if the loan term has to be extended).

> This is also in the Public Interest in so far as tax payers and not for profit charities should not be left to clean up this mess by having to assist now (potentially) homeless people access housing and other essential services such as mental health services and counselling.
>
> It would be much fairer to ensure that lenders and AFCA are doing everything they can to ensure Australians are not becoming homeless through irresponsible lending.

Removal of Acceleration of Loan
4. Ensure that AFCA does not issue recommendations or determinations that effectively reward irresponsible lenders by allowing them to accelerate payment on an irresponsible loan – this is unfair at best and punishes consumers. If any further payment is due, the consumer must be afforded the ability to pay this over the life of the original loan or extend the life of the loan under the NCC hardship provisions.

5. Question of AFCA:

> 1. How it's current approach to compensation provisions / calculations for irresponsible lending was established?
> 2. Who it consulted with when establishing this approach?
> 3. Whether or not it believes this approach is consistent with the intention of parliament when it passed the NCCP Act and therefore is consistent with the law?
> 4. Whether or not (and if so when) AFCA obtained legal advise regarding the current approach?
> 5. Whether or not AFCA provides complainants with an opportunity to argue a position against unjust enrichment? Ie … 'change in position'.

6. Ensure that ALL irresponsible lending breaches are reported to ASIC, as they have a responsibility under the Act to apply for civil penalties against lenders who breach the law.

Thank you for considering my submissions.

If you have any questions, please contact me at [redacted]

Anita Gibson Shannon