

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 AFCA,

Please accept this document as further submissions to my submissions emailed on 11 September 2023.

I include within this submission another example of AFCA's failed approach to irresponsible lending complaints and inadequate procedures to provide proper compensation and redress to consumers.

I refer to the following determination:

Determination - Case Number: 704543

<https://service02.afca.org.au/CaseFiles/FOSSIC/704543.pdf>

The complainant obtained a home loan of **\$369,800** (home loan) from the financial firm (bank) in September 2015 to purchase a property in C (C property).

AFCA determined that the loan was lent irresponsibly.

AFCA's final determination was:

If the complainant accepts this determination, the parties should do as follows This determination is a fair outcome because **the bank did not met obligations as required by law**, industry codes, or good industry practice to responsibly lend the loan.

Within 14 days of the complainants accepting this determination, the bank should revise the outstanding loan balance and the parties take the following steps:

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- the bank should reduce the loan balance to **\$387,477.53** (revised debt) and not charge interest and fees on this amount.
- the bank should pay \$4,000 non-financial loss compensation to an account nominated by the complainant
- take steps to remove any adverse credit reporting about the loan from the complainant's credit file

- the complainant should be given six months, from the date of acceptance, to repay the revised debt (this can be done by either selling the C property, refinancing or by other means available)
- if the complainant is unable repay the revised debt within the six month period of sale, she must surrender the C property to the bank for sale; the complainant may surrender the C property earlier than six months if she wishes to do so.
- the bank is liable for the payment of all property selling costs (if the complainant sells the C property, then the bank must reimburse the complainant for her sale costs). If the bank sells the C property, it must not pass those sale costs onto the complainant).

Imputing the complainants financial information into the St George calculator 'How much can I borrow' <https://www.stgeorge.com.au/personal/home-loans/home-loan-calculators/mortgage-calculator#content>

The amount the complainant could afford was **\$246,315**

The amount the complainant was provided was **\$369,800**

The revised debt (after AFCA added the rental benefit) was \$387,477.53 (that is \$17,677.53 more than the original debt and \$141,162.53 more than what was affordable at inception)

Therefore in AFCA's final determination the complainant was ordered that she pay more to the Bank than she borrowed and determined that the complainant must either sell the property, refinance (at the higher revised debt, which would be unaffordable) or provide vacant possession to the Bank.

What should have happened (using the example contained in the Explanatory Memorandum)?

The debt should have been reduced to the affordable amount, being \$246,315 (debt reduction). This amount should have been further reduced by:

\$12,302.50 - Government charges

\$1,644.35 - Legal costs

\$42,517.50 - Loan repayments

Therefore the revised debt should have been: **\$189,850.65** (with no further interest)

The complainant should have been offered the opportunity to consider whether or not the revised debt was affordable moving forward.

The loan agreement should NOT have been accelerated.

If the complainant chose not to continue in the loan agreement and to provide vacant possession to the Bank, the Bank should have been ordered to provide the complainant restitution in the following amounts.

\$12,302.50 - Government charges

\$1,644.35 - Legal costs

\$42,517.50 - Loan repayments

\$17,046.63 – Holding costs.

\$41,000 – Deposit paid (this was not included in the recommendation nor determination but was communicated to me by the complainant)

\$114, 510.98

The above calculations are considered following the reasoning in SHANNON -v- PERMANENT CUSTODIANS LTD [No 3] [2022] WASCA 112 (25 August 2022)

The complainant has advised me that she reluctantly accepted this determination based upon advice that as the Bank had obtained default judgement prior to her AFCA complaint the Bank could apply for a possession order through the Supreme Court and effectively she could be kicked out of her home in approx 4 weeks, so the 6 months would be a better outcome for her.

However, the AFCA determination was deficient in providing proper compensation and was arguably worse than if she had gone through the Court process.

On 22 November 2022 the Bank did in fact seek to have the default judgement set aside in the Supreme Court of Western Australia, citing that the complainant would have had a defence to their claim.

This however was done **AFTER** the complainant reluctantly accepted the determination.

Recommendations

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.

The only time a 'rental benefit' should be included in an irresponsible lending complaint is if the property purchased was an investment, AND the borrower obtained the rental monies from a tenant.

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.

AFCA to order that Default Judgements be set aside before complainant accepts / rejects determination / recommendation

5. If a FSP has obtained a default judgement against a complainant, and subsequently AFCA makes a finding that the FSP has engaged in irresponsible lending, AFCA should be able to order that the FSP set aside the default judgement before the complainant accepts or rejects the recommendation / determination.

This is because the complainant can make an application to the Court to have the default judgement set aside if they can demonstrate *inter alia* that they have a defence against the FSP's claim. An irresponsible lend would be such a defence.

AFCA should be able to finalise the complaint without the need for the complainant to make such an application.

Thank you for considering my submissions.

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

Anita Gibson Shannon