



Australian Government



Australian
**Small Business and
Family Enterprise**
Ombudsman

15 April 2019

Mr Mike D'Argaville
Australian Financial Complaints Authority

By email: submissions@afca.org.au

Dear Mr D'Argaville

AFCA Scheme (Additional Condition) Amendment Authorisation

While we welcome the additional condition to the AFCA scheme to allow victims of poor bank conduct, in particular small business borrowers, to be investigated, we do not support the basis for excluding cases.

For complaints to be excluded where a decision or determination has been;

- made by a court or tribunal;
- based on the merits of the case, made by a predecessor of the AFCA scheme; or
- finally settled between the victim and the bank,

does not recognise that many court and tribunal decisions and determinations were based on understandings at the time by (commonly) self-represented small businesses. Nor does it recognise that many banking victims accepted settlements offered by their bank under duress. This is contrary to AFCA's approach which is to consider both legal principles and good industry practice:

When determining any other (non-superannuation) complaints, we decide what is fair in all the circumstances. This is not limited to considering what is legally permissible, although we do take legal principles into account.¹

To understand "duress" in this context, it is important to recognise that, leading up to and during a dispute, a bank will take control of a small business' accounts, continue to increase the debt by adding excessive penalty interest and administration charges, extend court processes by seeking adjournments and other delaying tactics, lodge appeals, and generally drag out the process until the small business owner will accept a settlement just to exit the process.

Without cash flow a business cannot operate. Without spare capital, a business cannot engage legal expertise. Without an operational business the owner, sells their home, their personal assets. Over time, the business owner and their family are left with no home, no assets and, often, develop mental health issues.

As a result it is crucial that all complaints back to 1 January 2008, including those where the victim considers the decision, determination or settlement fell below community standards be included in the additional condition for the AFCA scheme.

¹ Extract from <https://www.afca.org.au/what-to-expect/how-we-make-decisions/>, 10 April 2019

In seeking such an amendment we also recognise the need for a triage process to identify those complaints that AFCA determine are not appropriate to further consider. We attach the templates used during our *Inquiry into small business loans*, in December 2016, which we hope may be of assistance.

We would also be available to share our learnings from the inquiry and provide any other form of assistance. If you would like to discuss this matter further, please contact Jill Lawrence on [REDACTED] or at [REDACTED]

Yours sincerely

A handwritten signature in black ink, appearing to read 'Kate Carnell', followed by a period.

Kate Carnell AO

Australian Small Business and Family Enterprise Ombudsman

Appendix A : Review

Case Summary sheet	
Name	Josephine Public
Bank(s)	XXX Limited
Time period	2009-2013
Outcome/Court cases	Bank sold property as mortgagee in possession. Complaint to FOS.

Unilateral Changes to contract	N/A
Non-monetary default	N/A
Re-valuation	2002 Commercial property valued at \$500,000 2010 Valuation \$670,000 (after renovations) 2012 placed on market at \$500,000. Sold for \$460,000. Claim – very poor marketing.
Hardship provision	N/A
Access to justice	2012 complaint lodged with FOS. 2014 FOS determination – <i>maladministration in lending in advancing the Loans to the Applicant and is required to compensate.</i> Bank compensated the interest that had been charged but did not pardon the loans.
Unconscionable or unfair conduct	Claims that bank did not allow selling one of the mortgaged properties to pay back the loans.
Issues with regulators	N/A

Summary
<p>Reasons:</p> <p><i>The FSP engaged in maladministration in lending when it provided the loans to the Applicant because:</i></p> <p><i>“The FSP engaged in maladministration in lending when it provided the Loans to the Applicant because:</i></p> <ul style="list-style-type: none"> <i>• The living expenses accepted by the FSP in the loan Application were less than the acceptable standard for living expenses (based upon the Henderson Poverty Index or HPI)</i>

Appendix B : Timeline

Year	Month		Activity
2002			Loan taken to purchase commercial property using the family home as security.
2008			Mortgage \$300,000 to service renovations to commercial property. The commercial property was used as security.
2010	April	Bank assessment	<i>"xxxx, servicing position is accepted."</i> <i>"Fully secured position with a few Non sensitive assets held, which can be sold to reduce/clear debt if required".</i>
2010		Val	Bank required that all properties held be re-valued (residential, commercial and investment). Newly renovated commercial property valued at \$670,000
2010			Unable to maintain loan repayments. Proposed selling investment property.
2011			Default. Commercial property placed with 'residential' real estate agent, not 'commercial' real estate agent.
2012		FOS	Lodged complaint with FOS.
2013			Eventual sale price \$460,000.
2014		FOS	Two years later a determination. The FSP did engage in maladministration in lending in advancing the Loans to the Applicant, and is required to compensate them". (Reasons for determination given.)