

Determination

Case number: 531302

30 July 2019

1 Determination overview

1.1 Complaint

In December 2014, the financial firm (the bank) advanced two home loans to the complainant to purchase a property. Before it advanced the loans, the bank provided the complainant with quotes for home and contents insurance (home insurance) and mortgage protection insurance (MPI).

The complainant says:

- she told the bank to set up “all the insurances” and believed it had done so as she subsequently saw two monthly deductions of approximately \$43 appear on her statements
- on 1 September 2017, a fire caused extensive damage to the property
- when she called it to make a claim for the damage to her property, the bank told her she held MPI only and did not have home insurance.

She requests the bank cover the cost of repairs to the property, replace her contents and waive any exit fees in the event she refinances with another lender.

The bank says the complainant was responsible for establishing home insurance. Since she did not set up or make any payment towards such a policy and cannot reasonably have believed premium payments were being made, she is solely responsible for financing the repairs to the property and replacing the contents.

1.2 Issues and key findings

Was the bank required to ensure the property was insured?

Yes. The bank’s policy required it to ensure that the complainant had adequate insurance over the security property. In failing to ensure she had such insurance, the bank contributed to the complainant’s loss.

Is the complainant entitled to compensation?

Both parties have contributed equally to the complainant’s loss. The complainant failed to take reasonable care to protect her own interests. The bank failed to ensure she had home insurance in place to protect its security. As a matter of fairness, the bank should assess the complainant’s claim for loss as if she had held the quoted-for

home insurance from December 2014. The assessed loss including any cash settlement is to be reduced by 50% to reflect the complainant's contribution to her loss. The bank is to compensate the complainant for her non-financial loss arising from its conduct by paying her \$1,500.

1.3 Determination

This determination is substantially in favour of the complainant. If the complainant accepts this determination within 30 days of its issue, the bank is to

- assess within two months of her acceptance of this determination the complainant's claim for loss in accordance with the home insurance policy (as renewed) for which it provided a quote in 2014. If the parties cannot agree on the assessment by the end of this period or any further period agreed between them, the complainant can lodge a new complaint at AFCA limited to the assessment of the claim for loss. The assessed loss including any cash settlement is to
 - > be reduced by 50% to reflect the complainant's contribution to her loss
 - > have deducted from any amount paid to or assessed for the complainant the amount of the premiums for the policies (renewed on the same terms as the policy the subject of the original quote) that she would have paid in the ordinary course from December 2014 to October 2017
- within 14 days, pay to an account she nominates \$1,500 to compensate the complainant for her non-financial loss.

2 Reasons for determination

2.1 Was the bank required to ensure the property was insured?

No home insurance policy was established

During the loan application process, the bank and the complainant discussed home insurance and MPI. In late November 2014, the bank provided the complainant with written quotation summaries for home insurance and for MPI (for which there were two quotes, one for the variable rate home loan and one for the fixed rate home loan) which included the following indicative monthly premiums:

- home insurance for \$47.43 per month
- MPI for \$41.46 per month for each loan.

The complainant has consistently stated she told the bank's lending officer with whom she had been dealing to "set up all insurances". The officer says she has no recollection of this alleged instruction. In the absence of any recollection by the officer, and since the complainant says she

- previously had home insurance on another property
- went through with the lending officer a list of her contents and settled upon coverage for \$30,000
- wanted both insurance policies at the premiums for which the bank had provided quotes
- has a clear recollection of telling the lending officer to proceed with both insurances during a face-to-face meeting after she had received the quotes,

I accept, on balance, the complainant instructed the lending officer to set up home insurance and MPI as per the quotes. In my view, a mortgagor such as the complainant who purchases MPI has a risk profile which suggests it is highly unlikely they would not also purchase home insurance.

In relation to the MPI, the complainant subsequently signed for each loan a Mortgage Protect Application Form (which included a direct debit authority) and a MPI policy was established for the variable rate home loan and the fixed rate home loan. From December 2014, MPI premiums of \$41.46 and \$43.86 per month were debited to the complainant's transaction account.

No home insurance policy was established.

The complainant was required to insure the property

The loan contracts the complainant entered into with the bank and the mortgage she gave the bank over her property required her to insure the property.

The mortgage required that the insurance policy

- be held with an insurer approved by the bank
- be to the bank's satisfaction,

and that if requested, the complainant provide the bank with evidence of insurance. If she failed to obtain appropriate insurance, the mortgage permitted the bank to take out home insurance on her behalf and to her account.

From December 2015, the six-monthly statements issued on the loan accounts contained a statement reminding the complainant that

"it's a condition of your loan that you maintain insurance on the mortgaged property at all times for at least the full replacement value of the property. Please confirm with your insurer that your policy adequately protects your property".

Relevant parts of the loan contracts and the mortgage are set out at 3.2 below.

The bank did not comply with its policy

The bank's policy in place when the complainant entered into the loan contracts stated that

...[w]hen assessing a credit application, bankers must make sure there is adequate insurance over assets held as security ... The bank's security documents require the security provider to make sure that the insurance policy is on terms, for an amount, and with an insurer approved by the bank.

The bank says its policy at the time did not require it to obtain evidence of insurance. I accept that the policy in place in December 2014 stated that for properties such as the complainant's with a market value of less than \$1 million, insurance verification was not required. The policy nonetheless required bankers to "complete related Loan Checklist items", and the bank has provided its Checklist Details completed by the lending officer on 25 November 2014 which contains the following entry:

Acknowledgment from cust that property/ies must be insured at all times for full replacement cost

The bank says that as a result of the complainant acknowledging this requirement, the lending officer provided to her the home loan and MPI quotations for her to act upon if she wanted to instigate the policies.

Irrespective of this acknowledgement, I am not satisfied that the bank met its policy which required it to "**make sure** there is adequate insurance over assets held as security" for its loans to the complainant. The giving of an acknowledgement does not

demonstrate that a security provider has in fact taken out insurance on terms, for an amount, and with an insurer approved by the bank.

I also accept AFCA's industry adviser's advice that in December 2014, it was good industry practice for a lender to ensure that prior to drawdown and as a condition of settlement, home loan borrowers had adequate insurance over the security property.

The bank contributed to the complainant's loss

In failing to ensure the complainant in fact held adequate home insurance for the security property, the bank failed to meet

- its policy and
- good banking practice

and thereby contributed to the complainant's loss.

I am satisfied, on balance, that had bank ensured there was adequate insurance over the property prior to settlement of the loans, the complainant would have received in the ordinary course correspondence including renewals of policy from her insurer and would have had home insurance in place in September 2017, when fire damaged her home and contents. In reaching this view, I have had regard to the fact that the complainant

- had previously held home insurance in respect of a mortgage provided by another lender
- within days of learning in September 2017 that she did not in fact have home insurance, took out a policy with another insurer and has since renewed that insurance
- had MPI in place, suggesting she had a risk profile which makes it highly unlikely she would not have had home insurance also in place.

2.2 Is the complainant entitled to compensation?

The complainant says she believed she had home insurance

The complainant says based on the following, she understood she had home insurance with the bank:

- prior to drawing down the loans, she instructed the lending officer to "set up all insurances" for which the bank had quoted, including home insurance. She gave this instruction during a face-to-face meeting with the lending officer after she had received the insurance quotes
- shortly after she gave the lending officer this instruction, she signed "myriad" loan and other documents in early December 2014 and believed they included

documents to incept the home insurance policy and to authorise a direct debit to her account for monthly premiums

- having regard to a previous mortgage she had with another lender which required home insurance as a condition of the loan advance, she believed the home loan could not be finalised unless the bank was satisfied the property had been insured for an amount and with an insurer it approved
- following settlement, she noticed two separate amounts for insurance being debited monthly from her account, and she attributed one debit to the home insurance premium, and the other to MPI. She did not expect that a separate MPI policy and premium would apply to the fixed, and variable, home loans and therefore attributed only one of the monthly debits to her account to MPI for both loans.

The complainant further says

- she didn't notice that she had not received annual renewals for home insurance. "I continued to see debits being drawn from my account and felt comfortable with the knowledge that I had not made changes [to the home insurance] and the only changes ... were a small increase in cost to be expected"
- since she believed she held home insurance with the bank, she did not take any action in response to the generic statements about the requirement for home insurance that appeared in the loan account statements issued from December 2015.

The complainant's actions in response to the fire are consistent with her stated belief she had home insurance. The available information shows she immediately contacted the bank to make a claim and was shocked to learn that no home insurance policy was in place.

The complainant did not take reasonable care

The onus was on the complainant to insure the property. While I accept that she believed she had home insurance, the complainant failed to take reasonable care to ensure this insurance was in place from December 2014.

The complainant took steps to implement the MPI which she did not take to implement the proposed home insurance. This should have been apparent to her. She signed an application form (which included a direct debit authority) for the MPI for each loan.

The bank sent the complainant correspondence in late 2014 and early 2015 confirming she had MPI for each loan, and further correspondence in early 2016 and 2017 advising her of renewal details. It should have been apparent to the complainant that she received no correspondence confirming she had home insurance, or renewals for home insurance; the policy in respect of which she had received an

annual quotation in late 2014 and which she instructed the bank to incept for her would have lapsed in late 2015.

The monthly debits to her account were for the MPI applying to *each* loan. Although the amounts of these monthly debits were similar to the 2014 monthly quote for home insurance, they were not the same.

The bank's home insurance quote was misleading

In support of its submission that the complainant could not reasonably have believed she had taken out home insurance with it, the bank says

- the quote dated 20 November 2014 which it gave the complainant was for bank insurance via A insurer. The quote states that it is only valid for 30 days and is a provisional quote only. If she wished to proceed, the complainant was required to provide further details about the property and her insurance history
- at the relevant time, it was not allowed to establish home and contents insurance with A insurer; it could however provide a quote to the complainant because of the bank's association with A insurer.

The complainant says the quote was on bank letterhead and invited her to contact it if she wanted to "acquire the product". After considering both the home insurance quote and the MIP quotes, and since she had been dealing in person with her, the complainant says told the lending officer during a meeting to "set up all insurances" and understood this had been attended to.

The bank's letter addressed to the complainant dated 20 November 2014 and sent on its letterhead states in part as follows:

"Thank you for the opportunity to provide you with an insurance quotation.

We would be pleased **to arrange** [bank] Home Insurance with an indicative annual premium of \$569.13... Our quotation is valid for 30 days.... **We can commence your policy over the phone at any time during this period.**

If you have any question about this quotation please call us

This insurance is provided by [A insurer]... In arranging this insurance [a related body corporate of the bank] acts as an agent for [A insurer] and not as your agent...

... To acquire the product you can contact your Banker or our Insurance Hotline on [number]" (emphasis added).

The attached Insurance Quotation stated a reference number, the complainant's name and "summary premium details" for her property. The Quotation stated in part as follows

Thank you for giving us the opportunity to quote on your insurance.

If any information is incorrect or incomplete, or you wish to obtain any more details, please contact [the bank] on [number].

Important Information

This is a provisional quotation only and has been prepared using the information you have provided to us. If you wish to proceed you will need to provide further details about the property to be insured and your insurance history. Subject to the details you provide, your application may be accepted or declined or insurance may be offered upon different terms by the insurer..." (emphasis added).

Although I accept the quotation stated it was provisional, when read as a whole, the bank's letter and quotation suggested the complainant could "acquire the product" by contacting the bank. I have highlighted parts of the communication that suggest the complainant could arrange home insurance by telling the bank she accepted the quote for the cover at the premium offered. Although I accept the bank's submission that it could not set up home insurance *on her behalf*, the bank's letter did not make clear what more the complainant would be required to do to obtain the proposed insurance, and there is no information to suggest the lending officer told her when she instructed the officer to "set up all insurances" what more the complainant was to do.

In all the circumstances, I am satisfied that

- following her receipt of the letter and quote, the complainant was misled to believe she could obtain home insurance by telling the bank's lending officer to set it up, and the officer did not correct this misapprehension or explain exactly what was required
- the complainant believed she signed the home insurance documents amongst the "myriad" documents she signed on 10 December 2014.

Opportunities to bring the absence of home insurance to the complainant's attention were missed

The bank was aware in September 2015 that the complainant did not have a home insurance policy with it, since it sent a generic letter to her promoting its home insurance as part of a marketing campaign for mortgage holders who did not hold bank-issued home insurance. The bank's records show it attempted to call the complainant in October 2015 to follow up on the letter but did not reach her. The complainant says, correctly, that the letter was general in nature and did not address

her particular circumstances, promoted an “add-on” to the bank’s home insurance, and did not state that she did not have home insurance with the bank.

In July 2017, the complainant met with the lending officer to discuss refinancing the loans, and although an application was commenced, it did not progress.

I accept that the parties did not discuss home insurance following the despatch of the 2015 marketing letter or at the time of the 2017 refinancing discussions. Had they done so and had the bank brought to her attention that she did not have home insurance with it, I am satisfied for the reasons touched on above that the complainant would likely have immediately obtained such insurance.

The bank should assess the complainant’s loss claim as if she had held home insurance from December 2014

In my view, both parties have contributed equally to the complainant’s loss. The bank failed to ensure the complainant had home insurance in place to protect its security. The complainant failed to take reasonable care to protect her own interests.

In relation to her claim for loss arising from the fire, the complainant has provided a summary of the

- repair work required for the property, the work performed and the outstanding work, and
- lost contents,

together with a preliminary report about the cause of the fire, photos of the damage, and quotes and invoices, all of which have been exchanged to the bank.

She has also explained overtures she has made to the manufacturer of the polishing machine which she said ignited and caused the fire, and the retailer from whom she purchased the polishing machine. The complainant says she has not received any compensation from either of these parties. This material has also been exchanged to the bank.

Since by reason of the bank’s and her failures, the complainant missed the opportunity to make a claim under the proposed home insurance policy, it is not appropriate in this complaint for AFCA to award a sum for her alleged financial loss.

Rather it is fair and appropriate to require the bank to assess her claim for loss as if she had held the home insurance for which it provided a quote in December 2014 (on the basis the policy was renewed on the same terms each year to October 2017). It is also fair and appropriate for the complainant to co-operate with the bank as required by the policy and as if she were the insured under the home insurance policy (renewed on the same terms from time to time). The bank is required – with

appropriate assistance from assessors and loss adjustors as needed – to assess the complainant’s claims for damage to the property, contents, temporary accommodation and other benefits associated with claims arising from fire in accordance with the policy (as renewed).

To give effect to this remedy, and

- to acknowledge the parties’ equal contribution to the complainant’s loss and
- having regard to the information the complainant has provided to AFCA which has been exchanged to the bank,

if she accepts this determination, I require the bank to assess the complainant’s claim for loss in accordance with the policy within two months of her acceptance of this determination. If the parties cannot agree on the assessment by the end of this period or any further period agreed between them, the complainant can lodge a new complaint at AFCA limited to the assessment of the claim for loss. The agreed assessed loss including any cash settlement is to

- be reduced by 50% to reflect the complainant’s contribution to her loss
- have deducted from any amount paid to or assessed for the complainant the amount of the premiums for the policies (renewed on the same terms as the original quote) that she would have paid in the ordinary course from December 2014 to October 2017. (Since the complainant took out an insurance policy with another insurer following the fire, she is not required to pay, twice, premiums for a home insurance policy from October 2017).

The bank is not required to pay for the complainant’s parents’ lost rental

The complainant has included in her claim for loss in this complaint \$10,800 in “rental loss” she says her parents incurred because they allowed her to live rent-free in their investment property while her property was being repaired.

On the face of it, this is not the complainant’s loss. The complainant’s temporary accommodation costs arising from the fire are however, a matter for the bank’s assessment under the terms of the policy (as renewed).

The bank should compensate the complainant for her non-financial loss

The complainant says that as a result of the bank’s failure to ensure she had home insurance, she has “endured financial and emotional hardship”. She says she feels let down by the bank and has experienced significant stress and inconvenience, including as a result of being required to apply for financial hardship assistance on her home loan as she undertook repairs to her home following the fire.

I accept that the fire and all that has flowed from it has caused the complainant very considerable stress and inconvenience. I do not require the bank to compensate the

complainant for her stress caused by the fire. I do, however, consider it fair and appropriate for

- the bank to compensate the complainant for her stress and inconvenience associated with being unable to make a claim in the ordinary course on the home insurance that would likely have been in place had it followed its internal policy and standard industry practice
- the amount of compensation for non-financial loss to which she would otherwise have been entitled to be halved having regard to her contribution to her loss
- the bank to pay the complainant \$1,500 to compensate her for her non-financial loss arising from its conduct.

3 Supporting information

3.1 The determination is made under FOS Terms of Reference

The Australian Financial Complaints Authority (AFCA) has commenced managing disputes previously lodged with Financial Ombudsman Service (FOS).

This determination is made under FOS Terms of Reference but has adopted the following terminology for consistency with AFCA. In this determination the AFCA terms have the same meaning as the FOS terms defined in paragraph 20.1 and Schedule 1, 2 & 3 of the FOS Terms of Reference.

FOS definitions	AFCA term
applicant	complainant
financial services provider	financial firm
dispute	complaint
claim	claim

This complaint has been determined based on what is fair in all the circumstances, having regard to the relevant law, good industry practice, codes of practice and previous FOS decisions (which are not binding).

There has been a full exchange of all material information relied on for the purposes of this determination and each party has had the opportunity to address any issues raised by the other. All material provided has been reviewed and considered.

In reaching my decision, I have had regard to the advice of AFCA's industry advisers. The industry advisers have extensive banking and financial services industry experience and regularly provide advice about what constitutes standard and good industry practice.

3.2 The provisions of the loan and security documents

The loan contract general terms state, relevantly, as follows:

Insurance

10. Do I have to take out insurance?

[The bank] can insist you take out or pay the cost of types of insurance specifically allowed by law. These are compulsory third party personal injury insurance, mortgage indemnity insurance or insurance over property covered by any mortgage. Otherwise, you can decide if you want to take out insurance or not.

If you take out insurance, [the bank] cannot insist that you use any particular insurance company.

The memorandum of common provisions to the mortgage state, relevantly, as follows:

Insurance

4.1 You must maintain for the duration of this mortgage, insurance:

(a) covering the land and any works against all usual risks which a person in your position would prudently take out, public liability insurance, and any other insurance required by law or which [the bank] reasonably requires, in connection with your ownership, occupation or use of the land;

(b) for the full insurable value of the land and any works on a full replacement and reinstatement basis, including any rents and profits, and the cost of demolition and removal of debris and consultants' fees unless the land is part of a shared scheme....

4.2 Each policy of insurance under clause 4.1, relating to the land, must:

(a) expressly note [the bank's] interest as mortgagee;

(b) if required by [the bank], identify [the bank] as sole loss payee;

(c) be to [the bank's] satisfaction and with an insurer approved by [the bank].

4.3 You must, in relation to each insurance policy under clause 4.1:

(a) whenever asked by [the bank], produce evidence of current cover...

(b) ensure the cover is not reduced or cancelled and notify [the bank] if it is or it could be;

(c) ensure nothing happens that could permit an insurer to decline a claim (and notify [the bank] if anything would permit an insurer to do this); and

(d) notify [the bank] if an event occurs which permits an insurance claim to be made or an insurance claim is made or refused.

4.4 if you do not comply with clauses 4.1 or 4.2, [the bank] may take out, renew or maintain any insurance required by clauses 4.1 or 4.2, and you must immediately pay [the bank] all costs incurred in doing so.....

3.3 Approach to assessing claims for non-financial loss

The FOS Terms of Reference enable AFCA to compensate a complainant for non-financial loss (capped at \$3,000 per claim). Compensation for non-financial loss is limited. AFCA may decide a financial firm should compensate a complainant for such loss only where there has been:

- an unusual amount of physical inconvenience;
- an unusual amount of time taken to resolve a situation;
- interference with the complainant's expectation of enjoyment or peace of mind.

AFCA takes a conservative approach to compensation and expects a complainant to be moderately robust and bear the usual degree of inconvenience associated with correcting an error. AFCA does not award compensation for loss that a complainant may incur as a result of pursuing a dispute or rectifying a financial firm's error.