Determination

Case number: 602718

5 September 2019

1 Determination overview

1.1 Complaint

The complainant entered into a consumer loan agreement (loan) with the financial firm to purchase a vehicle. As the loan repayments were in arrears, the financial firm repossessed and sold the vehicle at an auction. The financial firm says the complainant is liable for the shortfall from the sale of the vehicle.

The complainant says:

- she is the sole borrower under the loan and her ex-partner is a guarantor
- she separated from her partner and he took possession of the vehicle, denied her access to it and defaulted on the loan repayments
- the financial firm did not consider her financial position and personal circumstances as a victim of family violence perpetrated by her ex-partner, when it repossessed and sold the vehicle
- due to some errors by the financial firm, she should not be liable for the shortfall
- she wants the financial firm to waive the entire shortfall debt and remove any adverse information it put on her credit file.

The AFCA case analyst gave the parties a recommendation on the issues in the complaint on 25 March 2019. The recommendation was partly in favour of the financial firm. The financial firm accepted the recommendation, but it was rejected by the complainant. A copy of the recommendation is attached to this determination.

1.2 Issues and key findings

Were the findings in the recommendation correct?

The findings in the recommendation were correct and are adopted in this determination. Whilst the financial firm's offer that was endorsed in the recommendation is no longer available to the complainant, as a matter of fairness in the circumstances, I consider the offer made was the most appropriate outcome on the shortfall debt.

I have considered submissions made after the recommendation.

Do the complainant's submissions change the outcome?

The complainant has not provided any new information that would change the outcome. The recommendation was fair in all the circumstances, having regard to AFCA's approach and considering the information provided by both parties.

1.3 Determination

This determination is partly in favour of the complainant.

I agree with the reasons for the recommendation. If the complainant accepts this determination, then:

- the financial firm must revise the total shortfall from $37,930.54 to $34,565.50
- the complainant is liable to repay only $17,282.75 in full repayment of her share of the debt under the loan contract
- the financial firm should pay the complainant $4,000 non-financial loss which should be applied to reduce the complainant's debt under the loan contract to $13,282.75
- within 14 days of the complainant accepting this determination, she should provide details to the financial firm of her current financial position, together with a reasonable repayment proposal that would see the debt repaid
- the financial firm must consider the complainant's proposal and let her know if it requires any further information to assess it. It is not obliged to accept it if it does not consider it to be reasonable
- the complainant should cooperate with the financial firm's reasonable requests for information
- if the parties fail to agree on a repayment arrangement within 14 days of the complainant providing a proposal or if she does not provide one, the financial firm may continue with collections activity once our file is closed.

2 Reasons for determination

2.1 Were the findings in the recommendation correct?

The recommendation was correct

I have decided this complaint on its merits, having regard to the relevant laws, good industry practice, codes of practice and previous AFCA decisions. I have considered all the information and documentation submitted by the parties, both before and after the recommendation. I am satisfied the information and documents I have relied on have been provided to both parties.

I am satisfied that the case analyst's recommendation contains an accurate summary of the complaint, the issues to be determined, any relevant law and AFCA's approach.

I agree with the reasoning and findings set out in the attached recommendation and it is substantially adopted into this decision.

The complainant rejected the recommendation

In rejecting the recommendation, the complainant says:

- she is the sole borrower of the loan because the original receipt of the vehicle, the second direct debit payment form and the current vehicle insurance policy are all in her name
- repayments for the loan were made from her business account and the co-borrower has no interest in or connection with that business
- the financial firm did not comply with the notice requirements under the National Credit Code (NCC) because it sent the default notices to her old address despite the list of assets and liabilities she provided in support of the loan application containing her new address
- the financial firm declined several requests she made for extensions to the time to redeem the loan and vehicle, but granted the co-borrower several extensions
- the financial firm should reduce her liability for the shortfall to zero and remove any adverse entries it has made on her credit file.

2.2 Do the complainant's submissions change the outcome?

The complainant's ex-partner is a co-borrower under the loan contract

The complainant says she is the sole borrower of the loan because the following documents were issued just in her name:

- the original receipt of the vehicle. However, she has not provided a copy
- the second direct debit payment form dated 14 June 2017
- the 2018-2019 vehicle insurance policy.

The vehicle invoice provided by the financial firm was issued in the names of both the complainant and her ex-partner.

The first direct debit form dated 31 January 2017 required the monthly repayments to be made from a joint business account ending * 4753 which is in the names of the complainant and her ex-partner. I note on her court order to vary the intervention order she has against her ex-partner, she stated she needed to liaise with him because they had a business together.

The second direct debit instruction dated 14 June 2017 required weekly repayments to be made from the complainant's business account ending * 3418. The complainant says her ex-partner has no connection to or interest in that business.

The second direct debit instruction was issued about six months into the loan and does not establish that the complainant is the sole borrower. This is because all the loan documents and the direct debit instructions at the start of the loan were signed by both the complainant and her ex-partner as co-borrowers. Repayments were made for the first six months from a joint business account.

The complainant is jointly and severally liable under the loan contract and it is her obligation as a co-borrower to make repayments. The complainant's choice to make the repayments from her business account does not establish that she is the sole borrower under the loan contract. I note the co-borrower has also made repayments to the loan that were not from jointly held accounts.

The complainant and her ex-partner are both listed as the "insured" in the comprehensive insurance declaration dated 31 January 2017. The fact that the 2018 - 2019 insurance policy was issued solely in the complainant's name, is immaterial and does not support the complainant's claim that she is the sole borrower.

In any event, if the complainant was the sole borrower, she would be responsible for the entire debt owing under the loan. Therefore, even if she succeeded in showing she was the sole borrower (which she has not), she would still not get to the outcome she wants – i.e. the entire shortfall debt waived. Rather, she would be in a worse position now because the financial firm would not have a joint borrower who it could also pursue for amounts owing under the loan contract.

The financial firm sent the notice to the complainant's last known address

The complainant says the financial firm did not comply with the notice requirements under the National Credit Code (NCC) because it sent the default notice to her old address. The complainant says the financial firm knew about her new address because she had included it in the schedule of assets and liabilities she provided in support of the loan application.

I am satisfied that the financial firm complied with the notice requirements for the following reasons:

- the loan documents the complainant signed contain her old address, hence it is the address on record for the complainant with the financial firm
- if the schedule of assets was provided to the financial firm in support of the loan application, the fact that it contains the new address does not constitute a notice of change of address or make it the address on record for the complainant with the financial firm, when the loan application specifies a different address for notices
- it is the complainant's obligation under the loan contract to inform the financial firm of any change of address
- early on in this dispute, the complainant said she told her ex her change of address and thought he had told the financial firm
- the financial firm sent the default notice dated 21 July 2017 to the complainant's last known address on record in line with its obligations under the NCC and the terms of the loan contract
- the complainant only notified the financial firm about her change of address on 31 August 2017.

The financial firm extended the redemption period by 73 days

The complainant says the financial firm declined her multiple requests for extensions of time to exercise her right of redemption but granted her ex-partner multiple extensions. The complainant's claim that the financial firm declined her multiple requests for extensions is unfounded. This is because the available information shows:

- the default notice was sent to the complainant and her ex-partner on 21 July 2017
- the demand notice was sent to the complainant and her ex-partner on 10 November 2017
- on 22 January 2018, the vehicle was repossessed with the complainant's assistance
- on 30 January 2018, the financial firm sent a 'notice after taking possession' to the complainant and her ex-partner giving them 21 days to exercise their right of redemption
- following multiple requests from the complainant (as well as her ex-partner), the financial firm kept extending the redemption period. It was extended by 73 days in total
- on 11 October 2018, the financial firm released the vehicle for sale and it was sold at an auction on 24 October 2018.

The financial firm has not made a default listing on the complainant's credit file

The complainant wants the financial firm to remove any adverse information it has put on her credit file.

The financial firm has confirmed that it has not made a listing on the complainant's credit file.

The complainant is entitled to non- financial loss compensation

The financial firm is required to pay $4,000 non- financial loss compensation for the inconvenience, stress and anxiety caused to the complainant by the financial firm's:

- failure to consider the complainant's personal circumstances as a victim of family violence perpetrated by the co-borrower and failure to offer her hardship assistance despite being on notice. Although the financial firm is not a member of the Australian Bankers' Association, we consider its industry guidelines on financial family and domestic violence policies, to represent good industry practice for non-members too
- failure to genuinely consider the complainant's financial circumstances when she applied for hardship assistance
- delay in notifying the complainant about its hardship assistance decision by 76 days contrary to section 177B (5) of the NCC which requires it respond within 21 days of the application
- failure to provide the complainant with the payout figure on the loan despite her request.

The $4,000 non- financial loss should be applied to the loan account to reduce the complainant's liability under the loan contract.

The revised shortfall debt remains unpaid

After deducting the selling expenses of $365.04 (GST inclusive) from the sales proceeds of $37,000, the shortfall due is $37,930.54.

The financial firm's delay in releasing the vehicle for sale for over eight months impacted on the condition and value of the vehicle at the date of the auction. On 1 May 2018 when the vehicle was parked at the auction yard, it was valued at $40,000, but only at $34,000 on 9 October 2018, shortly before the sale.

It is appropriate to reduce the shortfall by $3,365.04 being the difference between the actual proceeds of sale and the valuation as at 1 May 2018 when the vehicle was parked at the auction yard. I agree that the shortfall be reduced to $34,565.50 as the total debt owing under the loan contract.

On 27 February 2019, the financial firm offered to accept $17,282.75 (being half the revised shortfall of $34,565.50,) from the complainant in full and final settlement of her liability under the loan contract. That offer was endorsed in the case analyst's recommendation, but the complainant rejected the offer.

On 13 May 2019, the financial firm informed AFCA that while that offer had expired, it was willing to further reduce the complainant's liability to $10,000. The complainant rejected this offer too.

I appreciate that the financial firm has tried to resolve this complaint on a fair and reasonable basis. I agree with the financial firm's comments made with its initial offer that, whilst under the loan contract:

> *both borrowers are jointly and severally liable and are therefore both responsible for the full debt, however due to the situation, and to minimize any contact between the borrowers regarding this matter, we believe it appropriate to pursue each borrower for half of the revised shortfall only.*

Given the complainant's distressing family violence situation and that the financial firm can still pursue the co-borrower for the other half of the shortfall, it is fair in the circumstances for the complainant to be responsible for only half the revised shortfall.

In view of the above:

- the financial firm must revise the total shortfall from $37,930.54 to $34,565.50
- the complainant is liable to repay only $17,282.75 in full repayment of her share of the debt under the loan contract
- the financial firm should pay the complainant $4,000 non-financial loss which should be applied to reduce the complainant's debt under the loan contract to $13,282.75
- within 14 days of the complainant accepting this determination, she should provide details to the financial firm of her current financial position, together with a reasonable repayment proposal that would see the debt repaid
- the financial firm must consider the complainant's proposal and let her know if it requires any further information to assess it. It is not obliged to accept it if it does not consider it to be reasonable
- the complainant should cooperate with the financial firm's reasonable requests for information
- if the parties fail to agree on a repayment arrangement within 14 days of the complainant providing a proposal or if she does not provide one, the financial firm may continue with collections activity once our file is closed.

Recommendation

Case number: 602718 25 March 2019

1 Overview

1.1 Complaint

The complainant entered into a consumer loan agreement (loan) with the financial firm to purchase a vehicle. Because the loan repayments were in arrears, the financial firm repossessed and sold the vehicle at an auction. The financial firm says the complainant is liable for the shortfall from the sale of the vehicle.

The complainant says:

- she is the sole borrower and her partner at the time the loan was approved, is a guarantor
- after their split, her ex-partner took possession of the vehicle, denied her access to it and defaulted in the loan repayments
- the financial firm did not consider her financial position and personal circumstance as a victim of family violence perpetrated by her ex-partner, when it repossessed and sold the vehicle
- due to some errors by the financial firm, she should not be liable for the shortfall.

1.2 Issues and key findings

Did the financial firm mislead the complainant that she is the borrower?

The weight of information available shows the financial firm did not mislead the complainant to believe her ex-partner is a guarantor under the loan contract. The complainant ought to have known that her ex-partner is a co-borrower.

Did the financial firm repossess the vehicle correctly and lawfully?

Available information shows the financial firm exercised its right of possession lawfully and correctly.

Did the financial firm exercise its right of sale appropriately?

The financial firm was entitled to sell the vehicle because the default was not remedied.

Did the financial firm breach any obligation it owes to the complainant?

The financial firm does not have in place, a policy on family violence. Available information supports a finding that the financial firm did not comply with the industry guidelines on family violence.

The financial firm did not meet its hardship obligations towards the complainant.

1.3 Recommendation

This recommendation is partly in favour of the financial firm. If both parties accept this recommendation:

- the total shortfall should be revised from $37,930.54 to $34,565.50
- the complainant should be liable to repay only $17,282.75 in full repayment of her share of the debt under the loan contract
- the financial firm should pay the complainant $4,000 non-financial loss.
- the $ 4,000 non-financial loss should be applied to reduce the complainant's total debt of $17,282.75
- within 14 days of accepting this recommendation, the complainant and the financial firm should agree on a repayment plan for the remaining debt of $13,282.75
- while agreeing on a repayment plan, the complainant must provide a current statement of her financial position to the financial firm. The financial firm must consider the complainant's current financial position
- if the parties fail to agree on a repayment plan, the financial firm may commence recovery action against the complainant.

2 Reasons for recommendation

2.1 Did the financial firm mislead the complainant that she is the borrower?

AFCA can consider a claim that a financial firm engaged in misleading conduct

AFCA can investigate a claim that a financial firm misled a customer and caused the customer to suffer loss. If we find that the customer was misled, we will assess how much worse off the customer is as a result of relying on the representation made by the financial firm. Representation may be oral, written, conduct or silence. The remedy for misleading conduct is not to make the promise come true.

AFCA accepts that people often hold genuine, but at times differing beliefs about the same events which may have occurred some time ago. In this case, the parties' recollections go back to an event that occurred three years ago. If possible, AFCA will decide what is most likely to have occurred based on the information provided to us. If there is conflicting information and it is evenly weighted, we may find that a claim cannot be established.

The complainant has not shown that she was misled

The complainant says the financial firm made her believe she is the sole borrower under the loan contract and her ex-partner is a guarantor.

The complainant has failed to provide information or document to show she was misled by the financial firm that her ex-partner would be a guarantor and not a borrower.

The complainant says she attended the car dealer's office in January 2017 where she applied for the loan to purchase the vehicle. The complainant says at that meeting, the business manager advised that the loan application should be in her name because of her financial circumstance while her ex-partner should be the guarantor. The financial firm says the business manager was well-trained but is no longer employed by the car dealer.

The complainant and the financial firm did not provide any information or statements about what transpired at that meeting.

The complainant says because she is the sole borrower, she paid the deposit for the purchase of the vehicle to the car dealer and the car dealer issued the invoice in her name. However, the vehicle invoice provided shows it was issued in the names of both the complainant and her ex-partner.

The loan documentation shows the complainant's ex-partner is a co-borrower

The complainant says her ex-partner is not a co-borrower of loan.

If a person signs a document that they know contains contractual terms, then the person is legally bound by those terms. It is irrelevant whether the person read the document before signing it. The only exception to this is if there are extenuating circumstances, for example if the person was misled into signing the document.

The loan documentation shows the complainant's ex-partner is a co-borrower on the loan. The loan documents show the names (in print or hand written) and signatures of the complainant and her ex-partner as either "applicant 1" and "applicant 2" or "borrower 1" and "borrower 2". The loan documentation consists of:

- privacy disclosure statement and consent
- loan application
- consumer loan contract
- equity plus insurance certificate
- loan protection insurance certificate
- comprehensive insurance declaration.

Each of these documents have sections immediately below or beside each borrower or applicant's name and signature, for the name and signature of guarantor(s). Accordingly, the complainant would have noticed that her ex-partner's name was printed or written as "borrower" or "applicant".

The loan contract contained an express and clear warning immediately before the signature section for the borrower(s) to read the document before signing it to know exactly what contract they are entering. The loan contract contained a specific warning not to sign the document if there is anything the person signing does not understand." The complainant and her ex-partner's names and details were printed in the borrowers' section. Yet, the complainant signed the loan contract without raising any concerns.

The complainant ought to have known that her ex-partner is a co-borrower

The complainant says she was not aware that her ex-partner is a co-borrower. The complainant says she only became aware of this when AFCA drew her attention to the loan documents.

Based on the information available, it is reasonable to conclude that the complainant ought to have known at the time of the loan application and approval, that her ex-partner is a co-borrower.

The complainant confirmed that she personally filled and completed the application and documents, but inadvertently wrote her name and her ex-partner's name in the sections for the borrowers and/or applicants. Further, the complainant scanned and sent these documents to the business manager by email, yet, she did not notice the error. This argument does not establish the complainant's claim of misrepresentation

by the financial firm, considering the complainant's experience and knowledge as an accountant and registered tax agent.

The complainant confirmed that the original plan was to take out the loan in the name of the business jointly operated by her and her ex-partner. The loan application was supported by the joint business account held in the name of the complainant and her ex-partner. The loan application was also supported by payslips and tax returns from the complainant and her ex-partner.

At the inception of the loan, the direct debit instruction allowed weekly repayments from the joint business account and repayments were made from that account for the first few months.

2.2 Did the financial firm repossess correctly and lawfully?

The financial firm complied with the default notice requirements

The complainant says she did not receive any default notices from the financial firm about the repayment arrears. The complainant says she became aware that the financial firm had issued default notices when her ex-partner sent her a copy of the default notice dated 30 January 2018 he received from the financial firm.

Under the National Credit Code (NCC), a financial firm is required to issue notices to a customer's last known residential address. Available information shows the financial firm sent out a default notice dated 21 July 2017 to the complainant's last known address on record.

The complainant says she did not receive the default notice as her address had changed as at 21 July 2017. The complainant says the financial firm should have known that her address had changed because when she applied for the loan, she provided a contract of sale and informed the sales manager that she had bought a property and settlement was within two weeks.

However, AFCA accepts:

- the financial firm only needs to show it sent a default notice to the complainant's last known address before it repossessed the vehicle. The financial firm does not have to show that the complainant actually received the notice
- it is the complainant's obligation to notify the financial firm about any change of address or other contact details. Furthermore, clause 8.1(c) of the loan contract requires the complainant to notify the financial firm of any change of address.

The loan documentation contains the complainant's previous address which is the address on record. The financial firm's contact notes show the complainant notified it of her change of address on 31 August 2017. It is the complainant's obligation to notify the financial firm when her address changed.

The default notice dated 21 July 2017 complies with the default notice requirements under sections 88, 178(1) and 179 D (1) & (2) of the NCC. The default notice stated the default, gave the complainant 39 days to remedy the default and $424.48 as the amount due. The default notice stated that the whole unpaid loan amount will become immediately due and payable if the default is not remedied by the rectification date and the financial firm will commence recovery action including repossession.

The information available shows the financial firm complied with the notice requirements, sent out the default notice to the complainant's last known address and the period of notice to remedy the default was reasonable.

The default was not remedied

Neither the complainant nor her ex-partner made any repayments to remedy the default within 39 days from the date of the notice, 21 July 2017. Rather, on 8 November 2017, the complainant sent an email to the financial firm asking it to contact her ex-partner for the repayments because they are no longer together, and the vehicle was in his possession.

Because the repayments were not made, the financial firm's solicitor sent a letter of demand dated 10 November 2017 to the complainant demanding the payment of the arrears of $4,464.95 within seven days. Failing which, the financial firm would commence recovery action and court proceedings.

The complainant informed AFCA that she was not willing to make the repayments because the vehicle was not in her possession and she could not access or use it. The financial firm's contact notes show the financial firm contacted the complainant and her ex-partner via email and telephone on multiple occasions about the arrears, but the default was not remedied.

Accordingly, the financial firm was entitled to terminate the loan contract and repossess the vehicle.

The financial firm did not make any error

As enumerated above, the financial firm:

- sent the default notices to the complainant's last known address on record
- complied with the NCC requirements
- acted in accordance with the loan contract and its terms and conditions
- allowed reasonable time for the complainant and her ex-partner to remedy the default, and
- attempted to contact the complainant and her ex-partner several times before repossessing the vehicle.

2.3 Did the financial firm exercise its right of sale appropriately?

The financial firm was entitled to sell the vehicle

The vehicle was repossessed on 22 January 2018 and the financial firm sent a notice after taking possession of mortgaged goods dated 30 January 2018 to the complainant. The notice allowed for 21 days for the complainant or her ex-partner to exercise their right of redemption. The notice also stated that if the complainant or her ex-partner did nothing, they would lose the vehicle and it would be sold.

The financial firm's contact notes show that between 30 January 2018, the date of the notice, and 30 April 2018, there were email exchanges between the financial firm and the complainant about the arrears. However, the complainant did not make any repayments despite several promises.

On 6 March 2018, the complainant's ex-partner made a repayment of $2,800 leaving a balance of $9,704.83 as total repayment arrears and no further repayment was made. The 21 days redemption period was reasonable and was in fact extended by 73 days by the financial firm on the complainant's requests.

The financial firm released the vehicle for sale on 11 October 2018. The vehicle was sold at a public auction on 24 October 2018 for $37,000 leaving a shortfall of $37, 930.54 after deducting the selling expenses. The financial firm sent out notice of demand dated 1 November 2018 requesting the repayment of the shortfall from the complainant and her ex-partner.

The financial firm failed to provide the complainant with the payout figure

The complainant says on 7 May 2018 she sent an email to the financial firm requesting it to provide her with a payout figure on the loan, but the financial firm failed to do this.

Section 83(3) of the NCC compels the financial firm to provide the complainant with a statement of the payout figure within seven days after the day the request is given to the financial firm.

Contrary to section 83(3) of the NCC the financial firm failed to provide the complainant with the payout figure but responded by email on 8 May 2018 saying the vehicle was going through the sale process and once sold, the borrowers will be contacted regarding any shortfall. It is important to note that at that time, the financial firm had not released the vehicle for sale as alleged in its response to the complainant. The vehicle was released for sale on 11 October 2018, six months later.

The financial firm in its email of 27 February 2019 to AFCA, agreed that its staff member made an error by failing to provide the payout figure to the complainant. The financial firm's justification for its action will not hold. This is because the

complainant's failure on several occasions to keep her promise to make repayments, is not sufficient reason to fail to provide the payout figure as required by the NCC.

The financial firm's failure to provide the complainant with the payout figure on the loan resulted in the complainant not having the information that would have guided or assisted in seeking refinance for the loan or possibly, paying out the loan. The financial firm did not genuinely consider the complainant's request and subsequent emails, despite being on notice that she is experiencing family violence. The financial firm should be required to pay $1,000 non- financial loss to the complainant.

The financial firm delayed the sale of the vehicle

Although the vehicle was repossessed on 22 January 2018, its physical possession was passed to the auction company on 1 May 2018 and was released for sale on 11 October 2018.

The complainant says between 22 January 2018, when the vehicle was repossessed and 11 October 2018, when it was released for sale, the vehicle was damaged, and the quantum of the damage is worth $11,000. However, the complainant failed to provide information to support this claim.

Available information shows the vehicle battery was replaced before the sale. However, the auction company's email of 9 October 2018 shows:

- the valuation of the vehicle as at 1 May 2018 when the vehicle was parked at the auction yard, was $40,000
- due to impacts from environmental factors, marks on the car and poor condition of the tyres, the valuation of the vehicle had depreciated to $34,000 as at 9 October 2018
- a difference of $6,000 in the initial valuation of the car as at 1 May 2018 when it was packed at the premises of the auction company and when it was released for sale.

In view of the above, it is fair to conclude that the market price of the vehicle was impacted by the condition of the car as at the date of the auction. This was caused by the financial firm's delay in releasing the car for sale for over eight months. The financial firm has failed to provide any justification for the delay.

The co-borrowers are jointly and severally liable for the shortfall

After deducting the selling expenses of $365.04 (GST inclusive) from the sales proceed of $37,000, the shortfall due is $37,930.54.

In view of the delay described above and its implication on the market value of the vehicle, it is appropriate to reduce the shortfall by $3,365.04 being the difference between the actual proceed of the sale and the vehicle valuation as at 1 May 2018

when the car was parked at auction yard. Thereby leaving a revised shortfall of $34,565.50 as total debt owing under the loan contract.

The complainant says she is not liable for the shortfall because the financial firm made a number errors through its dealings with her.

As co- borrowers, the complainant and her ex-partner are jointly and severally liable for the debt under the loan contract. The default notice dated 21 July 2017 states that the repossession and sale of the vehicle will not extinguish the borrowers' liability under the loan. This is in line with s179(2)(f) of the NCC.

However, this is not the end of the matter.

2.4 Did the financial firm breach any obligation it owes to the complainant?

The financial firm was put on notice about family violence

The complainant says she is a victim of family violence perpetrated by her ex-partner and an Intervention Order is in place for her protection. The complainant notified the financial firm about this on 1 May 2018 and there were no prior signs for the financial firm to have suspected that she was experiencing family violence at the time it approved the loan.

As such, AFCA will be considering whether the financial firm from 1 May 2018, when it was put on notice about the family violence, complied with industry guidelines on financial abuse, family and domestic violence.

The financial firm did not comply with the guidelines on family violence

Financial firms are required to have in place policies and procedures for handling customers who are victims of financial abuse, family and domestic violence.

The financial firm confirmed it does not have a family violence policy. Accordingly, AFCA will assess whether the financial firm complied with the industry guideline on financial abuse, family and domestic violence policies as provided by the Australian Bankers' Association Incorporation. The relevant section of the guidelines is set out in section 3.1 of this recommendation.

Industry guidelines require financial firms when conducting transactions with their customers, to consider the circumstance of a customer experiencing family violence or a customer who was a victim of family violence. A higher standard of consideration and caution is particularly required where the victim and the perpetrator are joint borrowers as it is in this instance.

Available information shows that despite being on notice, the financial firm failed to consider the complainant's personal circumstance as a victim of family violence perpetrated by the co-borrower. The financial firm did not offer the complainant

hardship assistance. These failures caused the complainant to suffer some inconvenience, stress and anxiety for which the financial firm should compensate. The financial firm should pay the complainant non- financial loss of $2,000.

The complainant and her ex-partner are both jointly and severally liable for the repayment of the revised shortfall of $34,565.50. However, at the conciliation conference, the financial firm indicated its willingness to accept 50 percent of the revised shortfall from the complainant in full and final payment of her liability under the loan contract. Subsequently, the financial firm made a settlement offer via its email of 27 February 2019. Because the complainant is a victim of family violence perpetrated by the co-borrower, it is appropriate to endorse the financial firm's offer in this recommendation as it is a reasonable outcome.

Consequently, liability for the repayment of the revised shortfall should be split equally between the borrowers. The complainant should be required to repay only $17,282.75 being 50 percent of the total revised shortfall.

The complainant requested for financial difficulty assistance

Financial firms have an obligation to help their customers overcome their financial difficulties with any credit facility its customers may have with it.

AFCA is able to review a financial firm's decision about whether to agree to a complainant's request for a variation to a contract including repayments under deposit bond. We will consider the complainant's financial circumstances and their ability to meet a variation to the contract.

Available information shows the financial firm did not give genuine consideration to the complainant's hardship circumstance in line with s 72 (2) & (3) of the NCC. This is because of the following cumulative factors:

- when the complainant's ex-partner requested hardship assistance on 21 February 2018, the complainant refused to sign the financial difficulty application form. The complainant then sent an email to the financial firm threatening legal action, if it granted the ex-partner's application for hardship assistance
- the financial firm did not offer the complainant any hardship assistance when it was put on notice on 1 May 2018 that she is a victim of family violence and was experiencing financial difficulty
- the complainant requested for hardship assistance via telephone on 1 June 2018, but the financial firm only responded to her application on 17 August 2018
- the financial firm, offered the complainant a hardship arrangement to pay monthly instalments of $1,512.22 for three months and a quote to restructure the loan. But the financial firm did not ask the complainant to provide information about her financial position at that time

- the financial firm did not genuinely consider the complainant's financial circumstances and family violence experience when making the hardship assistance offer. Hence, the offer was not realistic in the circumstance.

Section 177B(5) of the NCC requires the financial firm to provide its notice of decision on the hardship application, within 21 days. The financial firm delayed in notifying the complainant about its hardship assistance decision by 76 days. The financial firm should be required to pay $1,000 non-financial compensation for the delay.

The financial firm did not meet its financial difficulty obligations

The principles for handling financial difficulty requests made by one borrower to a joint loan also apply in situations where family violence is involved are outlined in section 3.2 of this recommendation.

In view of the above, if the parties accept this recommendation:

- the total shortfall should be revised from $37,930.54 to $34,565.50
- the complainant should be required to repay only $17,282.75 in full repayment of her share of the debt under the loan contract
- the financial firm should pay the complainant $4,000 non-financial loss.
- the $ 4,000 non-financial loss should be applied to reduce the complainant's total debt of $17,282.75
- within 14 days of accepting this recommendation, the complainant and the financial firm should agree on a repayment plan for the remaining outstanding debt of $13,282.75
- while agreeing on a repayment plan, the complainant must provide a current statement of her financial position to the financial firm. The financial firm must consider the complainant's current financial position
- if the parties fail to agree on a repayment plan, the financial firm may commence recovery action against the complainant.

3 Supporting information

3.1 Family violence

Industry guidelines on financial family and domestic violence policies by the Australian Bankers' Association:

Financial firms are required to:

- Minimise the information that a customer is required to provide and the number of times a customer has to disclose the same information to the bank. Note: a customer may not have access to bank records and documentation.
- Where possible, customers should have consistency in speaking to one staff member.
- Provide copies of customer account documents without charge to assist in resolving matters or for legal purposes.
- Provide a specially trained team to work with customers impacted by family and domestic violence, for example, additional training for the bank's financial hardship and collections teams (or equivalent). Managers and supervisors should be provided with more detailed information, support and training (refer training section on page six).
- Refer a customer to a professional financial counsellor to assist with managing their financial situation, noting that support will likely be required for non-financial matters (see below).
- Work with a customer's agent or representative, such as a professional financial counsellor, lawyer, community services worker, legal aid officer or family and domestic violence specialist, and make it as simple as possible to appoint such an agent or representative while recognising the bank's privacy obligations under the law.
- If required refer a customer to a qualified, independent interpreter to assist with communication with the bank.
- Provide a direct toll-free telephone number for customer representatives similar to the dedicated financial hardship phone line provided for financial counsellors.\
- Banks will not require an intervention order as evidence of family and domestic violence as part of assessing a financial hardship application. Disclosure by a customer should trigger banks' financial abuse policies and referral to the appropriate team within the bank.

AFCA's approach on family violence policy

AFCA expects financial firms to have an operational policy on family violence and procedures in handling different types of transactions where family violence is a factor or concern.

AFCA's approach on financial difficulty in the context of family violence

The principles outlined above for handling financial difficulty requests made by one borrower to a joint loan also apply in situations where family violence is involved. This includes the expectation that a financial firm will work with an individual borrower who is requesting assistance, without requiring the consent of the other borrower.

Additional considerations where a borrower is or may be experiencing family violence include:

- Where a customer discloses family violence then the financial firm should take this on face value and not require the customer to provide evidence, for example, in the form of an intervention order.
- As it may be difficult for a customer experiencing family violence to gather supporting documents such as payslips or account statements, a financial firm should be willing to consider providing assistance without these documents.
- Waiving a debt may be an appropriate solution, if this will assist the customer to move on from an abusive relationship and achieve economic independence.
- As safety considerations will be particularly important, a financial firm should ensure that any discussions or correspondence it has with the other borrower, or with third parties such as collection agencies, protects the confidentiality and safety of their customer.

The financial firm should not default list the borrower experiencing family violence. Instead it should place enforcement action on hold while it works with the borrower to overcome his or her financial difficulty with the loan. This does not prevent the financial firm from making arrangements to enter a default listing against the other borrower, if appropriate.

3.2 AFCA's approach on Financial difficulty and joint debts

Requests for assistance from individual borrowers who are co-borrowers

AFCA expects financial firms to work with an individual borrower who is requesting assistance with a joint loan and discuss options for resolving their financial difficulty. If there is a suitable variation that would assist an individual borrower, then AFCA expects the financial firm to implement this. It is not necessary for the financial firm to first obtain the other borrower's consent

The National Credit Code, the Code of Banking Practice and the Customer Owned Banking Code of Practice all refer to an individual debtor being able to request assistance, including contract changes, where they are experiencing financial difficulty. There is no requirement for a request to come jointly from all borrowers to a loan. As each borrower is both jointly and severally liable to repay the full amount of the loan, it is our view that each borrower is also individually entitled to ask for assistance if they are having difficulty meeting their obligations.

Agreeing to settle a debt where there is joint and several liabilities

As mentioned earlier, each borrower on a joint loan is jointly and severally liable to repay the full amount of the debt. In our view, this does not prevent a financial firm from agreeing to settle or waive a debt with one borrower only, while retaining its right to pursue the other borrower(s) for the remaining balance. Alternatively, a financial firm may agree to separate settlements with each borrower individually or waive debt for all borrowers on the loan.

Examples of cases we have seen where customers are experiencing financial difficulty and financial firms have agreed to waive either part or all of a debt, for both secured and unsecured loans, include:

- Where a customer is experiencing, or has in the past experienced, family violence (and there were no warning signs at the time of lending).
- Where a customer is otherwise particularly vulnerable, for example due to mental health issues or physical disability.
- Where the debt is unsecured, the customer has no assets, and their circumstances are unlikely to improve in the foreseeable future.

3.3 Shortfall

Calculation of revised shortfall

Description	Amount
Total payout Proceed of sale Net sale proceeds (less sales expenses) Shortfall	• $78,802.00 • $37,000.00 • $36,634.96 • $37,930.54
Difference in vehicle valuation Total revised shortfall **50% of revised shortfall** Non- financial loss **Complainant's total debt**	• $ 3,365.04 • $34,565.50 • **$17,282.75** • $ 4,500.00 • **$12,782.75**