

**“They still want to take our house”:  
A further investigation into house  
repossessions in the ACT Supreme Court**

**The Consumer Law Centre of the ACT  
and the Centre for Commercial Law,  
The Australian National University**

This report builds upon the 2006 report of the Consumer Law Centre of the ACT:  
*They Want to Take Our House: An Investigation into House Repossessions in the ACT  
Supreme Court.*



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## A. Executive Summary

Housing affordability and home ownership are regarded as key indicators of the economic health of a nation. Over the past 18 months, housing in Australia has become increasingly unaffordable. Many commentators argue Australian housing is now the least affordable it has ever been.

For many consumers credit makes purchasing a home possible. Evidence is mounting however that the number of house repossessions and mortgage sales has increased dramatically in the last three years. Consumer advocates and financial counsellors across the country have raised serious concerns about predatory lending practices in the home loan market. A lack of consumer protection, especially in relation to the activities of non-Authorised Deposit Taking Institutions, is causing many to lose the equity in their homes or to lose their homes altogether.

Research for this report has found that in those jurisdictions where statistics are available (NSW, Queensland, ACT and Victoria) the rate of court repossessions has increased by 79% between 2004 and 2006. These figures are:

|                     | NSW   | Qld  | Victoria | ACT   | Total |
|---------------------|-------|------|----------|-------|-------|
| 2004                | 3061  | 100  | 1773     | 55    | 4989  |
| 2006                | 5368  | 756  | 2765     | 83    | 8972  |
| Percentage increase | 75.3% | 756% | 55.9%    | 49.0% | 79.8% |

In September 2006, the Consumer Law Centre produced a report on house repossessions in the ACT Supreme Court.<sup>1</sup> That report looked at court records and data from 2002 to 2005. This report takes into account updated data from the ACT Supreme Court Records for the 2006 calendar year. It also examines refinancing activity prior to court repossessions (through title searches) and examines the growth in applications for early release of superannuation.

### **The main findings of this report are:**

1. The substantial jump in the numbers of actions for possession by lenders in the ACT during 2005 (up to 90 from 55 in 2004) has levelled, with 83 court orders for repossessions in 2006.
2. Non-Authorised Deposit Taking Institutions were responsible for 38 of these actions (or 46%), a disproportionately high level given their relatively small market share.
3. Changes to the information provided to defaulting borrowers with legal claims for repossessions have been effective in that they have increased the number of people seeking advice from the Consumer Law Centre before judgment rather than afterwards.
4. Borrowers who attempted to refinance to meet financial hardship without addressing the underlying financial problems increased the risk of defaulting.

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<sup>1</sup> Consumer Law Centre of the ACT, *They Want to Take Our House: An Investigation into House Repossessions in the ACT Supreme Court*, September 2006, Canberra.

The average time between the loan and the commencement of court action was 50.4 months where the borrower did not refinance. Where the borrower refinanced once this period reduced to 26.4 months, and where there were 2 or more refinances between court action this period reduced to 18.3 months.

5. There have been huge increases in consumers accessing superannuation funds from APRA:
  - a. the value of funds approved for early release increased by 428% between 2001 and 2006, and by 76% between 2005 and 2006; and
  - b. the number of applications for early release increased by 119% between 2001 and 2006, and by 32% between 2005 and 2006.

Based on material contained in this report, we make the following additional recommendations:

1. Data in relation to proceedings for possession of real property from each of the State and Territory Supreme Courts should be collated and analysed.<sup>2</sup>
2. APRA should compile and release detailed information regarding applications for early release of superannuation.
3. The links between refinancing and home loan failure should be further investigated as a matter of urgency.

## **Acknowledgements**

The Consumer Law Centre of the ACT is a project of Care Inc Financial Counselling Service and receives funding from the ACT Department of Justice and Community Safety. The Centre for Commercial Law is located in the ANU College of Law in the Australian National University.

The Consumer Law Centre and the Centre for Commercial Law sincerely thank Chris Winslade, the ACT Supreme Court Deputy Sheriff, for providing access to Court data and for his timely and efficient provision of information. Officers at the ACT Supreme Court provided a great deal of assistance to the researchers for which we are also grateful.

The report was primarily written by Consumer Law Centre Principal Solicitor, Amy Kilpatrick. Amy Kilpatrick left the Consumer Law Centre in October 2007 to take up a position with the Public Interest Law Clearing House in Sydney. Subsequent to October 2007, further editorial review and writing was undertaken by Pauline Ridge, Director of the Centre for Commercial Law, and David Tennant, Director of Care Inc Financial Counselling Service and the Consumer Law Centre.

The Consumer Law Centre and the Centre for Commercial Law would also like to acknowledge the contribution of the Australian Securities and Investment Commission in obtaining and funding the title searches for 2006 repossession actions. Invaluable assistance in research and preparation of the report was provided by Jessica Casben, Administrative Support worker with the Consumer Law Centre.

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<sup>2</sup> We note that a recommendation to this effect was also made by the House of Representatives Standing Committee on Economics, Finance and Public Administration, *Inquiry into home loan lending practices and the processes used to deal with people in financial difficulty*, September 2007, Canberra.

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## B. Analysis of Court Data

### 1. Introduction

This section summarises enforcement action taken by a range of lenders, based on an analysis of ACT Supreme Court files for the calendar years 2002-2006 and comparable data where it is available in other Australian jurisdictions. It provides an update on the data for the calendar years 2002-2005 collected by the Consumer Law Centre in its 2006 report.

Loan contracts secured by real property provide lenders with the right to take legal action seeking payment of all monies owed and seeking possession of the secured property where a borrower fails to pay. The *Consumer Credit (Australian Capital Territory) Code* 1996 and the *Land Titles Act* 1925 (ACT) require lenders to provide certain notices to borrowers regarding default prior to taking legal action.<sup>3</sup> Legal enforcement action by lenders falls into three categories:

- a) **Actions for Possession** – this is the technical term for the court action commenced by the lender seeking possession of the secured property. It is important to note that not every claim for possession results in the borrower being evicted from their property. Even if a judgment is made in favour of the lender and an Order for Possession of Land is obtained, the lender and borrower may resolve the claim outside of the court process by:
  - re-negotiating the term of the loan (eg through hardship variations);
  - payment in full of the loan through re-financing with a different lender; or
  - sale of the property.
- b) **Judgments** – the borrower has only a short period of time to file a defence in court in response to the lender's claim. If they do not meet this deadline the lender can obtain judgment by default (that is, automatically) without the merits of the claim being tested. A lender can also obtain a judgment for possession after a hearing of a defence filed by the borrower. A judgment does not entitle the lender to evict the borrower.
- c) **Writs of Possession**<sup>4</sup> – once the lender has obtained judgment the lender can then enforce it by applying to the court for a Writ of Possession under which the Sheriff is instructed to evict the borrowers and provide the lender with possession.

The properties involved in claims for repossession can be:

- owner-occupier residential properties;
- investment properties; or
- unimproved land.

It was not always possible to determine from an examination of the court files, the true nature of a loan claimed to be in default. In the experience of the Consumer Law

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<sup>3</sup> See, eg, sections 96 and 97, *Land Titles Act* 1925 (ACT); section 80 *Consumer Credit (Australian Capital Territory) Code* 1996.

<sup>4</sup> Under the *Civil Procedures Rules 2006* (ACT) which came into force on 1 July 2006 what was previously a Writ of Possession is now referred to as an 'Order for Delivery of Possession of Land' under Rule 2440. For the purposes of this Report they will continue to be referred to as Writs of Possession.

Centre, however, owner-occupiers are regularly, and inappropriately, sold investment loans for their residential properties. Furthermore, it is often the case that loans for investment properties are also secured against the homes of owner-occupiers. Mixing of funds and descriptions of purpose in this way can blur the line between consumer and investment borrowing.

An important feature of this report is an examination of the conduct of the two different categories of lenders that take action for possession. To date, no other report or data is available which differentiates between the conduct of lenders in this way.<sup>5</sup> The two categories of lenders are:

- b) **Authorised Deposit Taking Institutions (ADIs)**. These lenders include banks, credit unions and building societies.
- c) **Non-Authorised Deposit Taking Institutions (Non-ADIs)** (including non-bank lenders such as Perpetual Trustees, Permanent Mortgages, Aussie Home Loans Macquarie Mortgages, and GE Money; and including non-conforming lenders such as Liberty Funding, Bluestone Mortgages and Pepper Homeloans). These lenders are distinguished from the first category in that they do not offer deposit facilities. Therefore, their lending standards are not regulated by the Australian Prudential and Regulatory Authority (APRA). The Australian Bureau of Statistics categorises them as “wholesale lenders”.

Whilst the actual number of court actions commenced in the ACT Supreme Court is very small in comparison to other eastern states of Australia, the ACT provides a useful sample to paint a national picture. In fact, the data in the ACT may be a best case scenario for three reasons:

- The ACT has the lowest rate of unemployment in Australia.<sup>6</sup>
- ACT residents have the highest median income levels in Australia.<sup>7</sup>
- The ACT has not experienced a fall in property prices like that experienced in other jurisdictions. According to ABS data<sup>8</sup>, the ACT property market only experienced a 2% market drop during 2004/5 in contrast to a 12% drop in Sydney. This indicates that factors such as a “property shake-out” have not been as prevalent in the ACT as reported to be in areas like western Sydney.

Thus, the issues explored in this report are of national relevance and may point to issues of greater concern outside the ACT.

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<sup>5</sup> See, however, the recommendation of the House of Representatives Standing Committee on Economics, Finance and Public Administration in September 2007 above n.2.

<sup>6</sup> Australian Bureau of Statistics, Labour Force, 6202.0. September 2007.

<sup>7</sup> Australian Bureau of Statistics, Average Weekly Earnings, 6302.0, May 2007.

<sup>8</sup> See, Australian Bureau of Statistics, Australian Social Trends, 4102.0, 2007.

While data on the home equity of owner occupiers for the period since 2003–04 is not currently available, recent trends in the change in house prices from the established house price index may provide an indication of the direction and magnitude of the home equity differentials among the capital cities since that time. Sydney was the only capital to record a decrease in house prices over the period (4%). However, this followed the very large gains of the preceding decade in which Sydney house prices grew significantly faster than all other capital cities. Apart from Sydney, most of the remaining capitals had more modest growth in established house prices over the June 2004 to March 2007 period, ranging from 13% in Canberra to 24% in Hobart.

## 2. Actions for Possession

A total of 339 actions for possession were brought in the ACT Supreme Court by lenders from 2002 to 2006. Table 1 describes the findings relating to the number of actions brought throughout this five year period.

**Table 1: Number of Actions Brought in ACT 2002-2006**

| Year         | Number of Actions |
|--------------|-------------------|
| 2002         | 53                |
| 2003         | 58                |
| 2004         | 55                |
| 2005         | 90                |
| 2006         | 83                |
| <b>Total</b> | <b>339</b>        |

As Table 1 demonstrates, the number of actions was relatively steady from 2002 to 2004, at an average of 55 per year. This was followed by a substantial increase in the number of actions in 2005, which has levelled out in 2006.

A similar levelling in the number of actions for possession seems to have occurred in NSW. Whereas from 2004 to 2005 there was a 59% increase,<sup>9</sup> according to data released by the NSW Supreme Court in February 2007, the number of applications made in 2006 increased by only 10% from 2005 figures. Nevertheless, the total number of actions taken in NSW in 2005 and 2006 are higher than those which followed the recession of the early 1990's as depicted in Table 2.

**Table 2: Number of Actions Brought in NSW 1990-2006**

| Year | Number of Actions |
|------|-------------------|
| 1990 | 2481              |
| 1991 | 3287              |
| 1992 | 2288              |
| 1993 | 2005              |
| 1994 | 1300 (estimated)  |
| 1995 | 1522              |
| 1996 | 1806              |
| 1997 | 1568              |
| 1998 | 2162              |
| 1999 | 2095              |
| 2000 | 2151              |
| 2001 | 2671              |
| 2002 | 2189              |
| 2003 | 2361              |
| 2004 | 3061              |

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<sup>9</sup> Matt Wade and Michael Pelly, *Sydney Morning Herald*, 2 February 2006; see also court data at: [http://www.lawlink.nsw.gov.au/practice\\_notes/nswsc\\_pc.nsf/6a64691105a54031ca25688000c25d7/6b1d0e7a7075abbcca2572ed000cecac?OpenDocument](http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/6a64691105a54031ca25688000c25d7/6b1d0e7a7075abbcca2572ed000cecac?OpenDocument)

|      |      |
|------|------|
| 2005 | 4873 |
| 2006 | 5368 |

Figures obtained by *The Age* from the Supreme Court of Victoria reveal the number of repossessions in that state is also at a new high. Figures from the Victorian Supreme Court show there were 2765 actions for possession in 2006, up 31% from 2112 in 2005 and 1773 in 2004. As Table 3 depicts, the 2006 figure has more than doubled since 2003, when there were 1225.<sup>10</sup>

**Table 3: Number of Actions Brought in Victoria 2001-2006**

| Year | Number of Actions |
|------|-------------------|
| 2001 | 892               |
| 2002 | n/a               |
| 2003 | 1225              |
| 2004 | 1773              |
| 2005 | 2112              |
| 2006 | 2765              |

Comparable figures from other jurisdictions are unavailable. However, anecdotal information gathered by consumer advocates in Queensland and Western Australia suggests that the upward trend in actions for possession over the past few years is a national phenomenon. Information obtained from the Bailiff<sup>11</sup> of the Queensland Supreme Court, for example, indicates that possession orders in 2005 increased by nearly 100%, rising from around 100 in 2004 to over 190 in 2005. Recent newspaper articles indicate that 2006 figures for Queensland have further increased to 756 in this year alone.<sup>12</sup> In Western Australia, verbal communications with the Sheriff<sup>13</sup> confirmed that in 2006 there were 83 writs of possession issued, of which 37 were executed, with no historical data provided. It was not possible to obtain comparable information from South Australia, Tasmania or the Northern Territory.

### 3. Which Lenders Took Action For Possession?

Investigation of ACT Supreme Court records for 2006 confirmed the trend reported in the Consumer Law Centre’s previous report concerning the type and range of lenders taking action for possession. Overall, of the 339 actions filed from 2002 to 2006, 43 lenders were involved, but only 9 lenders took 10 or more actions during that time. Figure 1 depicts which lenders took more than 10 actions from 2002 to 2006 and the number of actions those lenders took.

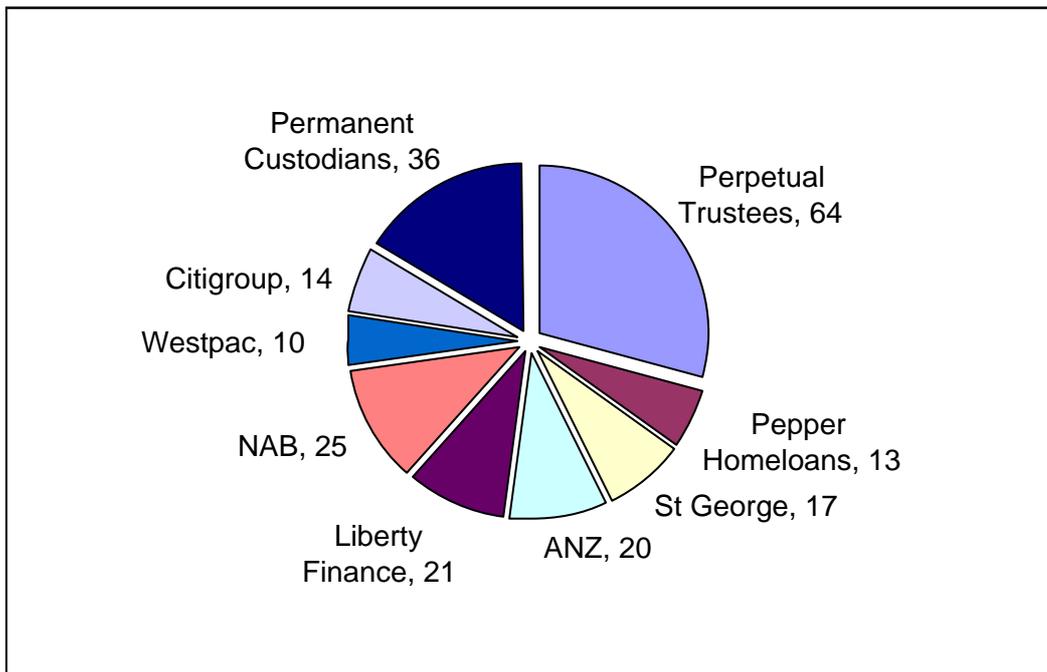
<sup>10</sup> Nassim Khadem, “Mortgage defaults on the rise” *The Age*, 23 May 2007; see also, Anthony Klan “True rate of home defaults hidden” *The Australian*, 17 May 2007.

<sup>11</sup> This information was obtained by Catherine Uhr, Solicitor, Legal Aid Commission, Queensland.

<sup>12</sup> “Qld home repossession rate skyrockets” AAP published on news.com.au, September 24 2007, <http://www.news.com.au/business/story/0,23636,22470647-37037,00.html>. A total of 484 properties were repossessed in 2004, 869 in 2005 and 910 in 2006

<sup>13</sup> This information was obtained by Alison Pigeon, Principal Solicitor, Consumer Credit Legal Service, WA.

**Figure 1: Lenders Taking 10 or More Actions 2002-2006**

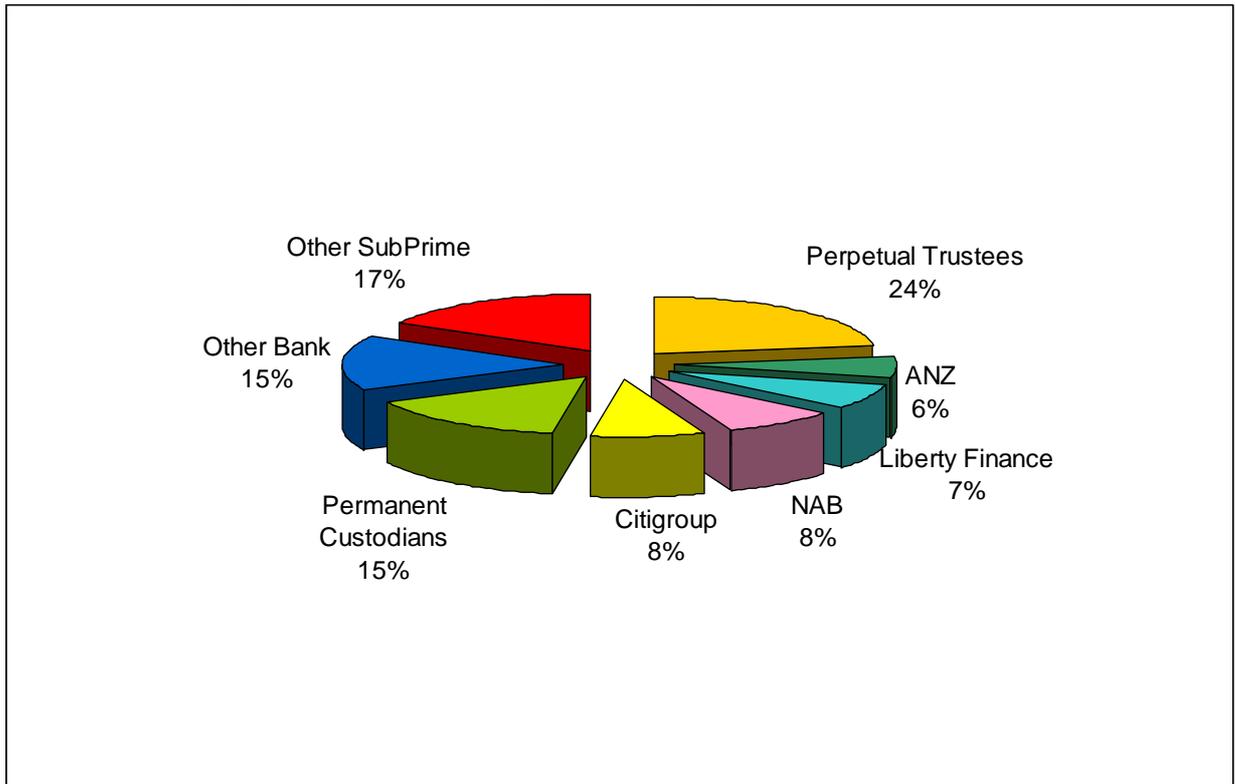


The 9 lenders noted in Figure 1 were responsible for 220 of 338 actions taken from 2002-2006 (that is, 65% of all actions). As figure 1 demonstrates, 4 non-ADI lenders (Pepper Homeloans, Liberty Finance, Perpetual Trustees and Permanent Custodians) were included in this number and accounted for 134 (40%<sup>14</sup>) of all actions taken.

When the 2006 calendar year is isolated, non-ADI lenders again feature prominently. As Figure 2 demonstrates, 3 non-ADI lenders dominate the year's actions for possession at 46% of all actions taken.

<sup>14</sup> Percentages are rounded up to nearest whole number.

**Figure 2: Lenders Taking Most Frequent Actions 2006**



As Figures 1 and 2 demonstrate, non-ADI lenders make up a significant proportion of the lenders initiating actions for possession in the ACT Supreme Court. The concentration of non-ADI lenders in this data is a theme which requires careful consideration due to:

- Their proportionately lower, but growing, market share;
- The lack of regulation in the sector;
- Their proportionately greater reliance on the largely unregulated broker sector to secure business; and
- The influence their funding models may have on requirements to take possession action faster and for lower levels of default than other lenders.

Conversely, the 2007 House of Representatives Standing Committee Report into home lending practices concluded that the rising level of arrears on non-ADI loans is simply reflective of the riskier nature of the loans that this sector writes, particularly non-conforming and sub-prime loans.<sup>15</sup>

<sup>15</sup> House of Representatives Standing Committee on Economics, Finance and Public Administration, "Inquiry into home loan lending practices and the processes used to deal with people in financial difficulty", September 2007, Canberra, pages 21-22.

#### 4. Monetary Value of Defaults Claimed

The amount of arrears claimed by lenders in different actions can, in some matters, be ascertained by inspecting the statements of claim on the court files. The amount that a borrower is in arrears can be influenced by the size of the overall loan and the number of payments missed. Table 4 depicts the value of arrears claimed in actions for possession by particular lenders during 2006. Comparable data for the years 2002-2005 is not available.

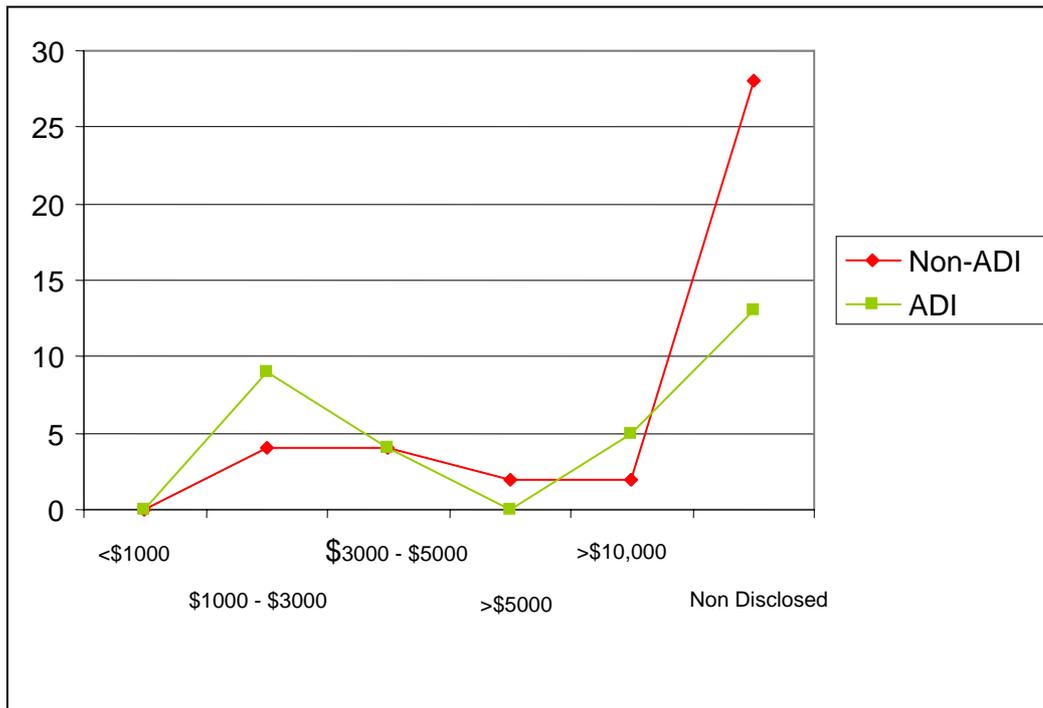
**Table 4: Value of Arrears Claimed - 2006**

| Lender               | \$1000 - \$3000 | \$3001 - \$5000 | >\$5000 | >\$10,000 | Not Disclosed |
|----------------------|-----------------|-----------------|---------|-----------|---------------|
| Pepper Homeloans     |                 |                 |         |           | 2             |
| Liberty Funding      | 3               |                 |         | 2         | 1             |
| Perpetual Trustees   | 1               | 4               |         |           | 14            |
| Permanent Custodians |                 |                 | 2       |           | 11            |
| Citigroup            | 3               | 4               |         |           |               |
| ING                  | 2               |                 |         |           |               |
| CBA                  | 1               |                 |         |           | 2             |
| NAB                  |                 |                 |         | 3         | 4             |
| ANZ                  | 3               |                 |         | 1         | 1             |
| Westpac              |                 |                 |         | 1         | 3             |
| St George            |                 |                 |         |           | 3             |

Information about the amount of arrears claimed and the implications of default must be given to the borrower by the lender in a Notice at least one month before an action for possession can commence. This is a requirement of section 80 of the *Consumer Credit (Australian Capital Territory) Code* (1996) and of the *Land Titles Act 1925* (ACT). The Notice requirements can be and usually are combined in the one document. The purpose of the Notice is to give consumers the opportunity to answer the demand for payment with certainty about the amounts claimed.

Based on Table 4, it seems that some lenders do not plead this basic information in statements of claim. Further, as depicted in Figure 3, 28 actions taken by non-ADI lenders did not disclose the value of the arrears claimed while only 13 of the ADI actions did not disclose the value. It is not clear why all statements of claim do not contain this information and why non-ADI lenders are less likely to disclose the arrears claimed than banks.

**Figure 3: Value of Default by Lender Type**



## 5. Lender's Right to Possession Gained by Default Judgment

Procedural rules in the ACT Supreme Court<sup>16</sup> allow for default judgment to be obtained by a lender in actions for possession. Having a default judgment enables a lender to seek enforceable orders from the Court to take possession of a property through the office of the Sheriff.

The two most common grounds for default judgment being sought by a lender during the period 2002-2006 were that the property owner failed to file a notice of appearance and/or failed to file a defence. Prior to the enactment of the *Court Procedures Rules 2006* (ACT) defendants had only 8 days to file a notice of appearance and 10 days to file a defence. Since the legislative changes took effect on 1 July 2006, that time line is now 28 days and brings the ACT into line with other jurisdictions. After the expiration of the prescribed time, a lender can seek an order for default judgment.

Table 5 describes the overall findings relating to the numbers of default judgments obtained between 2002 and 2006.

<sup>16</sup> Rule 1124 of the *Court Procedures Rules 2006* (ACT) formerly Order 31 section 7 of the *Supreme Court Rules 1937* (ACT).

**Table 5: Number of Default Judgments Obtained by Lenders in the ACT Supreme Court 2002-2006**

| Year  | Number of Actions | Default Judgments |
|-------|-------------------|-------------------|
| 2002  | 53                | 20                |
| 2003  | 58                | 7                 |
| 2004  | 55                | 29                |
| 2005  | 90                | 28                |
| 2006  | 83                | 42                |
| Total | 339               | 126               |

The increase in the number of default judgments in 2006 is significant. Based on these figures, 50% of all actions for possession in 2006 resulted in lenders obtaining judgment without the borrower defending the claim in any way.

Further analysis of the 126 actions in the period 2002-2006 which involved default judgments reveals significant fluctuation in the number of days between lenders filing an action in Court and obtaining a default judgment. Table 6 details the overall findings regarding the average number of days taken by all lenders to obtain the 126 default judgments from the day the action was first filed.

**Table 6: Number of Days from Action Filed to Default Judgment Being Obtained (Mean)**

| Year      | Number of Days |
|-----------|----------------|
| 2002      | 68.77          |
| 2003      | 73.43          |
| 2004      | 66.29          |
| 2005      | 57.93          |
| 2006      | 94.61          |
| 2002-2006 | 72.20          |

As Table 6 demonstrates, lenders moved quicker in 2005 than in any other year examined to apply for default judgment and were considerably slower in 2006 to do so.

## **6. Consumer Advice for Borrowers Prior to Default Judgment**

The manner in which actions proceeded once lodged is of particular interest to the Consumer Law Centre. In the experience of consumer advocacy services clients frequently seek assistance only after default judgment been obtained. Options available to a client post-judgment are different to those available pre-judgment and can involve potentially expensive interlocutory steps (such as seeking injunctions or orders to set aside judgment). In 2006, however, unlike previous years, only two new clients sought assistance from the Consumer Law Centre after default judgment had been issued. This is a significant improvement from 2005 where every client presented post-judgment. In 2006, clients presenting pre-court action and pre-judgment had the opportunity to avoid an escalation in lenders' legal costs and were able to raise legitimate defences and counterclaims.

This improvement may be because both the ACT Supreme Court and the ACT Magistrates Court now require lenders to provide borrowers with a form containing additional information. The form outlines the implications of the lender's claim and provides details of where to find help. The Consumer Law Centre and Care Inc Financial Counselling Service are listed amongst those contacts. A number of new clients to both services have made reference to the court form at the time of making contact. The additional information is a welcome and apparently effective initiative that has enabled more borrowers to seek help at a crucial time. The experience of the Consumer Law Centre's clients does suggest, however, an urgent need for consumers struggling to meet obligations under home loans to be advised about contractual and consumer rights at a number of points during the life of the loan, and not just when an allegation of default becomes the subject of court proceedings.

## **7. Legal and Enforcement Fees Claimed by Lenders**

The amount of legal and enforcement expenses claimed by lenders can, in some instances, be ascertained by inspecting the statements of claim and/or from judgment documents on the court file. Lenders' loan contracts disclose some of these fees at the time of contract. Other fees are not ascertainable at the time of contracting and may depend on the particular lender's approach and whether the claim is defended by the consumer. For example, a defended claim is likely to result in the lender incurring higher legal costs. Some lenders simply apply higher charges when an account goes into default.

As with the amount of arrears claimed, it was not possible to discern from court records the legal and enforcement costs claimed by the lender in all matters. Only 27 of 83 matters disclosed this information. Those which did so employed a range of descriptions such as: "disbursements, service and filing", "general fees and costs" and simply "costs".

Table 7 shows the value of legal and enforcement expenses claimed during 2006 in actions for possession according to the category of lender. Comparable data is not available for the years 2002-2005.

**Table 7: Legal and Enforcement Expenses Claimed - 2006**

| <b>Costs</b>      | <b>No. Actions</b> | <b>ADI</b> | <b>Non ADI</b> |
|-------------------|--------------------|------------|----------------|
| < \$100           | 3                  | 0          | 3              |
| \$100 - \$500     | 11                 | 3          | 9              |
| \$500 - \$1,000   | 3                  | 0          | 3              |
| \$1,001 - \$2,000 | 7                  | 5          | 2              |
| \$2,001 - \$3,000 | 2                  | 0          | 2              |
| > \$10,000        | 1                  | 0          | 1              |

The small number of matters in which information concerning legal and enforcement expenses was included in the statements of claim makes it difficult to analyse differences between lenders.

The *Consumer Credit (Australian Capital Territory) Code* (1996) prohibits *unreasonable* enforcement expenses and fees. It is standard for law firms to use template court documents and pleadings in actions for possession. Where matters are not defended and result in default judgments, it is arguable that the legal costs should be comparatively low.

In relation to the 27 actions where costs were disclosed it was possible to further consider whether they were concluded by way of default judgment or otherwise. Table 8 describes the costs claimed in the 14 matters where default judgment was obtained.

**Table 8: Costs Claimed if Default Judgment Obtained - 2006**

| <b>Costs</b>      | <b>No. Actions</b> | <b>ADI</b> | <b>Non ADI</b> |
|-------------------|--------------------|------------|----------------|
| < \$100           | 3                  | 0          | 3              |
| \$100 - \$500     | 7                  | 2          | 5              |
| \$500 - \$1,000   | 2                  | 0          | 2              |
| \$1,001 - \$2,000 | 2                  | 2          | 0              |
| \$2,001 - \$3,000 | 0                  | 0          | 0              |
| > \$10,000        | 0                  | 0          | 0              |

## **8. Writs of Possession and Execution of Writs**

A lender in an action for possession is able to apply to the Court for a writ of possession after judgment has been entered against the debtor. A writ can be issued on the same day as judgment is given. To fulfil a writ, the lender serves the writ on the Sheriff of the Court, seeking execution. The Sheriff has the statutory power under a writ of possession to forcibly evict, if necessary, the occupants of the property and all items therein, and to oversee changing of the locks. Once possession of the property is handed over to the lender, it can be sold or rented to other persons. Usually the property is subject to an auction.

This investigation examined the number of writs obtained and executed by lenders from 2002 to 2006. Table 9 depicts the number of writs obtained by lenders, and shows how many of those writs were later executed.

**Table 9: Writs Executed 2002-2006**

| <b>Year</b>    | <b>Writs Obtained</b> | <b>Writs Executed</b> |
|----------------|-----------------------|-----------------------|
| 2002           | 14                    | 5                     |
| 2003           | 16                    | 3                     |
| 2004           | 19                    | 5                     |
| 2005           | 40                    | 16                    |
| 2006           | 24                    | 7                     |
| <b>2002-06</b> | <b>113</b>            | <b>36</b>             |

As Table 9 shows, the number of writs obtained and executed in 2006 decreased significantly from the 2005 figure. However, 3 of the 16 writs executed from 2005 actions were not concluded until dates in 2006. It may be that actions commenced in 2006 where writs have been obtained are still being executed in 2007.

Closer inspection of the 2006 court records found that Permanent Custodians was the lender in 3 of the 7 executed writs. The remaining lenders who enforced writs in 2006 were St George, Bank of Western Australia, Citigroup and Australian Wholesale Lending.

Not every action for repossession by a lender results in a repossession of property. Overall, the findings demonstrate that 113 or 33% of the 339 actions initiated from 2002 to 2006 resulted in a writ of possession being obtained by the lender and that less than 31% of these actions resulted in those writs being executed.

The outcomes of matters where a writ of possession was obtained but not executed are not known. Some matters were not completed during 2006 or 2005 and may be ongoing. For example, in one matter involving Consumer Law Centre clients, the action for possession commenced in early 2005 but settlement involving a claim of unjust lending was not reached until the end of 2006, without the court record reflecting this settlement. Other possible outcomes include discontinuance, consent orders, actions lapsing and injunctions being granted. In addition, consumers can stave off repossession proceedings in a variety of ways including by private sale, refinancing with a new lender, negotiating payment of arrears through superannuation release or by other means of settlement.

## **9. Which Lenders Obtained Writs?**

A review of actions to determine which lenders obtained writs of possession in the period 2002-2006 reveals a striking difference between ADI and non-ADI lenders. Of all the lenders who took actions for possession from 2002 to 2006, only 13 did so on five or more occasions. Of those 13 lenders, all continued their claims so as to secure writs of possession. The number of actions brought by those 13 lenders and the frequency with which those lender's actions resulted in writs of possession being obtained is described by Table 10.

**Table 10: Actions Initiated and Writs Obtained  
By Lender - 2002-2006<sup>17</sup>**

| <b>Lender</b>        | <b>Actions 2002-06</b> | <b>Writs 2002-06</b> |
|----------------------|------------------------|----------------------|
| Perpetual Trustees   | 64                     | 21                   |
| Permanent Custodians | 36                     | 10                   |
| NAB                  | 25                     | 6                    |
| Liberty              | 21                     | 11                   |
| ANZ                  | 20                     | 6                    |
| St George            | 17                     | 10                   |
| Citigroup            | 14                     | 4                    |
| Pepper Homeloans     | 13                     | 8                    |
| Westpac              | 11                     | 2                    |
| CBA                  | 10                     | 5                    |
| Challenger           | 9                      | 1                    |
| IMB                  | 8                      | 3                    |
| GE Mortgages         | 6                      | 4                    |

A writ holder can seek execution of the writ by the Sheriff at any time within 12 months from the date it is obtained. In the experience of the Consumer Law Centre, fear of the Sheriff turning up on doorstep is common amongst clients.

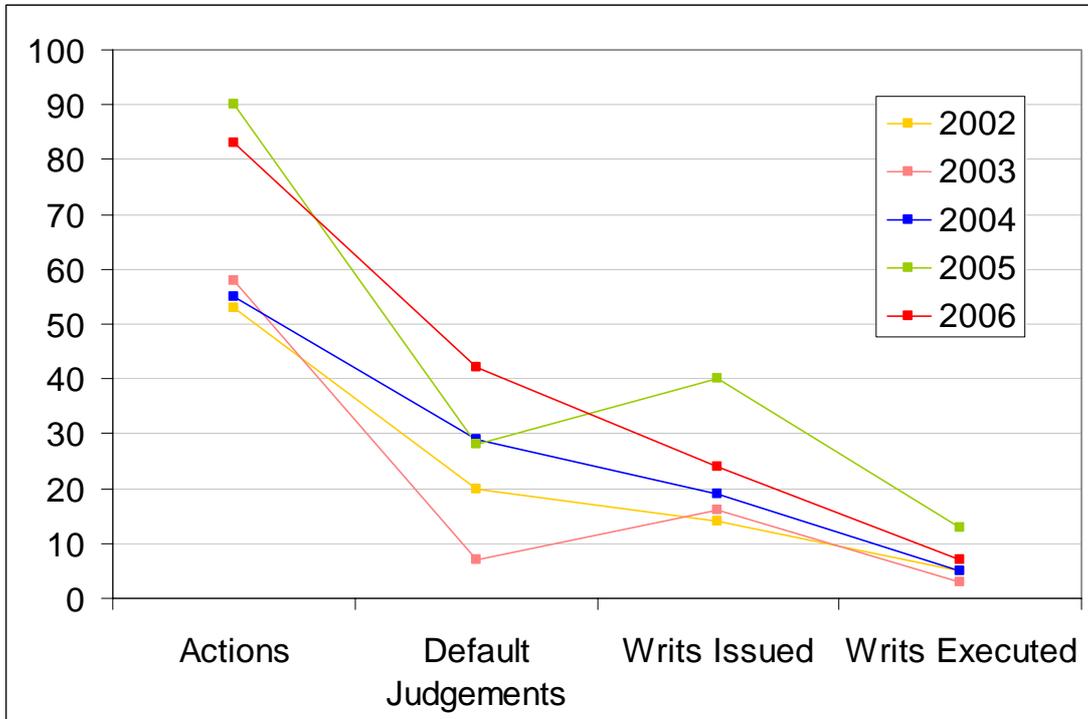
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<sup>17</sup> Some of the matters are ongoing (particularly from 2006). Therefore the data on writs obtained is not finalised.

## 10. Summary of Findings

Figure 4 maps the overall trends in the number of actions taken, writs obtained, writs executed, and default judgments obtained across the five years studied.

**Figure 4: Known Outcomes of Actions - 2002-2006<sup>18</sup>**



As noted, not all actions for possession result in debtors being removed from their homes. Some consumers pay their debt, or resolve the immediate problem through a variety of means including selling the property, selling personal effects and seeking early release of superannuation. Some refinance with a different lender or negotiate alternatives with the lender in question. When consumers sought help from the Consumer Law Centre favourable outcomes were achieved, including changes to take account of a period of hardship, reopening of unjust transactions, Deeds of Settlement, and reversal of legal, enforcement and other fees and charges.

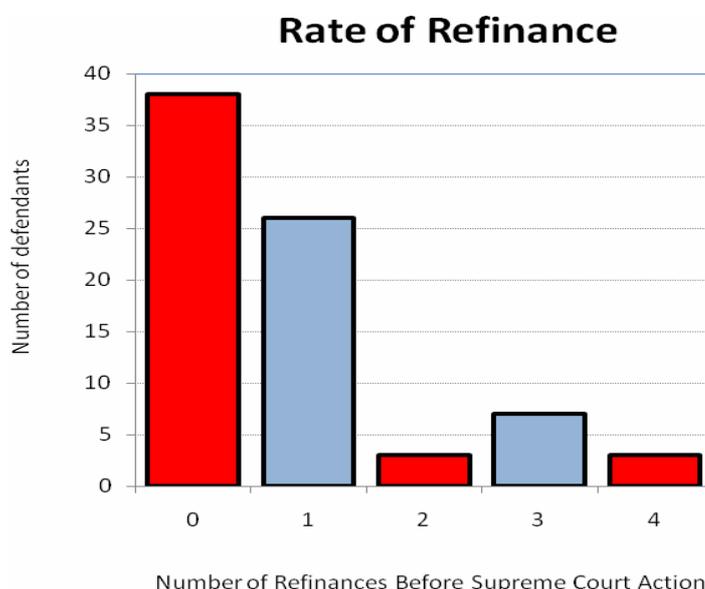
### C. Testing for links between foreclosure and refinancing activity

The additional assistance available in the preparation of this report made it possible to undertake more detailed analysis of the 2006 Supreme Court data. Title searches were ordered from the ACT Land Titles Office for all properties where individuals were subject to possession proceedings through the Court. The title searches recorded in summary form dealings on the title from the date of transfer to the owner against whom proceedings were taken to the date of the searches (November 2007). As a result we were able to test for links between foreclosure and refinancing activity.

<sup>18</sup> Some of the cases (particularly from 2005) are ongoing, so the data on writs obtained and executed is not finalised.

A cull of the titles/properties which appeared to be ‘commercial’ left a sample of 75. Within that 75 refinancing had occurred on 38 occasions. Within those 38, multiple refinances had occurred on 12 of the titles. Figure 5 below provides a breakdown of the incidence of refinancing activity.<sup>19</sup>

**Figure 5: Rate of Refinance**



In total, amongst the 75 titles reviewed, there were 61 refinances undertaken by the owners against whom possession proceedings were commenced, prior to those proceedings.<sup>20</sup>

Analysis of the duration of ownership prior to the commencement of proceedings in the Supreme Court was also undertaken and is detailed in tables 11 and 12.

**Table 11: Time between ownership/most recent refinance and the commencement of proceedings in the ACT Supreme Court**

|                                   | Average time between ownership/most recent refinance and commencement of Proceedings (in months) | Where Lender was an ADI | Where lender was a non-ADI |
|-----------------------------------|--------------------------------------------------------------------------------------------------|-------------------------|----------------------------|
| <b>Single Loan (No Refinance)</b> | 50.4                                                                                             | 53.4                    | 47.2                       |
| <b>One Refinance</b>              | 26.4                                                                                             | 28.6                    | 24.9                       |
| <b>Multiple Refinances</b>        | 18.3                                                                                             | n/a                     | 18.3                       |

<sup>19</sup> Efforts have been made to exclude further consideration of titles searches which appeared to relate to commercial ventures. Specifically, titles indicating that action taken in the ACT Supreme Court involved defendants that were incorporated entities were excluded. Beyond this the data analysed was not capable of being consistently labelled as ‘commercial’ or ‘non-commercial’.

<sup>20</sup> Where information from the Registrar General’s Office appeared incomplete we have worked from the information available. In the small number of affected cases this makes the data appear more positive than it probably is in reality.

The data in Table 11 shows that:

- The period of time between the most recent refinance and the commencement of proceedings shortened as the number of refinances increased. The period of time before proceedings where there was a single refinance was just over 2 years. This decreased to 1 ½ years where there were two or more refinances.
- The time between refinance and the commencement of proceedings was significantly shorter for non-ADI lenders than ADI lenders.
- In instances where there were multiple refinances, there were no occasions where the lender taking court action was an ADI. This suggests that some borrowers sought to resolve financial difficulties by refinancing to lenders with less stringent eligibility criteria.

Each refinance results in cost to the borrower, for example in application fees, fees associated with establishing new and discharging existing mortgages and termination fees charged by exiting lenders. Termination fees, in particular, can be substantial in the first two or three years of a loan, and are likely to have been a factor in instances of multiple refinancing. Borrowers refinancing on numerous occasions in relatively short periods are likely to erode their equity and, where the property is sold within a few years of refinance, less likely to recoup additional costs through general increases in property values.

**Table 12: Comparison (in years) based on the incidence of refinance**

|                     | < 1 year | 1-2 years | 2-3 years | > 3 years | Total |
|---------------------|----------|-----------|-----------|-----------|-------|
| No refinance        | 6        | 7         | 5         | 20        | 38    |
| One refinance       | 1        | 8         | 14        | 2         | 25    |
| Multiple refinances | 4        | 4         | 2         | 1         | 11    |
|                     |          |           |           |           | 74    |

Table 12 shows that in 4 of 11 instances where there were multiple refinances court action commenced within 12 months of the final loan in the series. The period of time between refinancing and defaulting was necessarily less again as the lender had to take a number of formal steps, including compliance with notice requirements before proceedings could have commenced. This suggests that these borrowers defaulted within just a few months of taking out the loans which suggests further that they were never in a position to meet the payments on the loans.

The borrowers with multiple refinances are the group most likely to have been experiencing the highest level of financial difficulty, suggesting a cycle of default and refinance. The cycle continues until the borrowers are unable to obtain further loans, possibly because the accumulating transaction costs in each refinance have reduced

the equity in the property to a point where it is no longer sufficient to support even a marginal loan.

Figure 6 breaks down the incidence of refinancing as between ADI and non-ADI lenders:

**Figure 6: Trends in Refinancing**

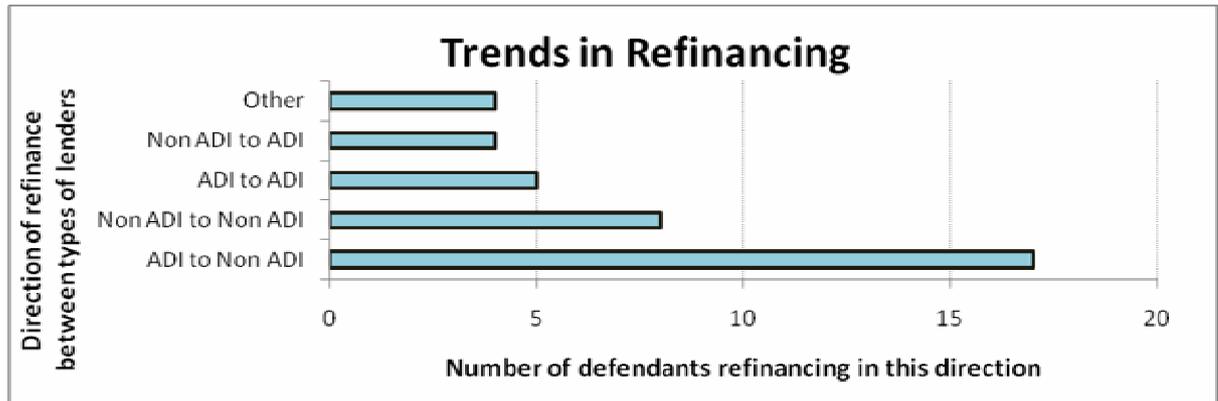


Figure 6 shows a significant inclination toward non-ADI lenders when refinancing. Approximately two thirds of the total number of refinances occurred with non-ADI lenders, and by far the largest movement was from ADI lenders to non-ADI lenders.

As is noted elsewhere in this report, not all actions for possession of property result in Orders being made and in turn not all Orders made are enforced. The title searches also provided information about what followed the commencement of proceedings. Figure 7 outlines the result of that analysis.

**Figure 7: What happened on the title after the commencement of Proceedings**



It is interesting to note from Figure 7 that non-ADI lenders were involved in 12 of the 15 refinances post the commencement of proceedings. Given the preceding information in Tables 11 and 12 it would be interesting to investigate how many of these refinances fail and in what timeframe.

### **Summary of Findings:**

There may be many reasons why borrowers seek to refinance their home loans. The analysis of the title searches outlined in this section, suggests that problems in making payment on loans may be a significant trigger for some borrowers to refinance in response to those problems. That is a view supported by the Consumer Law Centre's casework experience.

Each refinance involves the potential of significant additional expenditure in the associated fees and charges. That has the potential to erode the borrower's equity in the secured property where the refinance does not result in lower repayments or address the underlying issues of affordability.

The data suggests that borrowers who are desperate to refinance are more likely to be approved by non-ADI lenders, in that:

- The time between the refinance and the commencement of proceedings was significantly shorter for non-ADI than ADI lenders.
- No ADI lender sought possession where there had been multiple refinances, suggesting that borrowers involved in these matters were able to obtain a loan with a non-ADI lender in circumstances where they were no longer eligible for a bank loan. This is consistent with the Consumer Law Centre's casework experience.

The sample is self evidently dealing with loans that experienced considerable problems – hence the commencement of proceedings for possession. The findings invite a much broader study into the role of refinancing in precipitating or exacerbating financial difficulty, especially in relation to instances of multiple refinancing.

### **D. Using Superannuation to Pay Mortgage Defaults**

There are limited circumstances in which people can access their preserved superannuation benefits before retirement in order to pay loan arrears. The Australian Prudential Regulatory Authority (APRA) is authorised to administer release of superannuation savings on “compassionate grounds”. These grounds include severe financial hardship causing mortgage default. APRA's guidelines pursuant to Regulation 6.19A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) are included in Appendix 1 to this Report.

The maximum amount which can be accessed is the equivalent of 3 months of loan repayments and 12 months of interest payments on the outstanding balance of the loan. There are also specific requirements to ensure that the loan in default relates to the applicant's “principal place of residence”. This means that defaults on investment properties will not attract approval of fund release from APRA.

Where a consumer is experiencing short-term financial hardship, but in the longer term will be able to meet home loan repayments, accessing superannuation funds to meet mortgage arrears can be highly beneficial. However, where a loan is likely to fail because it is simply unaffordable, paying superannuation money to cover arrears delays the inevitable and potentially undermines the borrower's future financial security that superannuation is intended to assist.

Evidence from the Centre for Consumer Law's casework suggests that a growing number of clients have been encouraged to access their superannuation to pay mortgage arrears, rather than negotiating other outcomes. Under section 66 of the *Consumer Credit (Australian Capital Territory) Code 1996*, a consumer who is unable to meet obligations under their owner-occupier home loan because of circumstances such as illness or job loss, can request a hardship variation from their lender to reduce payments for a period of time. However, the experience reported by many of the CLC's clients has been that lenders suggest accessing superannuation to pay arrears in the first instance.

Engaging with hardship has been a core focus of reform within the Banking industry.<sup>21</sup> Indeed, a Determination by the committee which oversees the *Code of Banking Practice* stated that the *Code* requires Bank members to advise their customers about the right to request a hardship variation where they become aware that the customer is in financial difficulty. The situation in the non-ADI sector has been slower to develop. The need for enhanced access to hardship variations is even greater in this sector, given that the data outlined earlier in this report suggests relatively more consumers who borrow from non-ADIs are likely to find themselves in financial hardship. The Mortgage and Finance Association of Australia (MFAA) is the peak industry body in the non-ADI and, with assistance from the Credit Ombudsman Service, announced that it had incorporated hardship provisions into its member's *Code of Practice* in October 2007.<sup>22</sup> These changes create a similar obligation to the *Code of Banking Practice*, in that they require lenders to actively assist borrowers who are having difficulty in meeting repayments. However, the change only applies to non-ADI lenders who are members of the MFAA.

There are potentially other significant issues of consumer protection regulation involved. For example, encouraging or telling consumers to draw on their superannuation may constitute either providing financial advice or dealing in a financial product, requiring lenders to hold an Australian Financial Services Licence covering these activities.<sup>23</sup> Providing such advice without a licence could represent an offence under the *Corporations Act 2001* (Cth).

In June 2007, the Consumer Law Centre requested data from APRA under the *Freedom of Information Act 1999* (Cth). The request sought:

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<sup>21</sup> The main self-regulatory instrument in the banking sector for dealing with customer hardship is clause 25.2 of the Code of Banking Practice, Australian Bankers' Association, Sydney, August 2003.

<sup>22</sup> The Mortgage and Finance Association of Australia announced the insertion of clauses 65 to 72, dealing with financial hardship, into its Code of Practice on 10 October 2007. It therefore was not in effect during 2006, the period in which repossessions examined in this report occurred.

<sup>23</sup> See Section 766B and 766C of the *Corporations Act 2001* (Commonwealth).

- The number of ACT applications from 2000 until the end of 2006 for early release of superannuation funds made for the purpose of preventing foreclosure or sale;
- The amount of funds sought through those applications; and
- The number of times certain lenders were involved in those applications.

The request was refused on the grounds that the information was “not available in documents held by APRA and is not able to be drawn accurately from APRA’s database.”

APRA does, however, keep records of the aggregate number of applications received nationally for early release on compassionate grounds, including the number of applications approved as well as the total value of the approved funds. That data was presented to the House of Representatives by the Commonwealth Treasurer, the Hon. Peter Costello, on 13 June 2007 in response to a Question in Writing from the Hon. Chris Bowen, MP. The results are detailed below in tables 13 and 14.

**Table 13: Total Claims Received by APRA 2001-2006<sup>24</sup>**

| <b>Year</b> | <b>Claims Received</b> |
|-------------|------------------------|
| 2001        | 11,763                 |
| 2002        | 11,186                 |
| 2003        | 11,732                 |
| 2004        | 11,300                 |
| 2005        | 12,779                 |
| 2006        | 16,500                 |

**Table 14: Total Claims Approved by APRA 2001-2006<sup>25</sup>**

| <b>Year</b> | <b>Claims Approved</b> |
|-------------|------------------------|
| 2001        | 6,331                  |
| 2002        | 6,788                  |
| 2003        | 7,775                  |
| 2004        | 9,212                  |
| 2005        | 10,459                 |
| 2006        | 13,871                 |

As Tables 13 and 14 demonstrate, there was a marked rise in the number of applications for release between 2005 and 2006 as well as in applications approved. The increase in application numbers was 29% with a corresponding 33% in the applications approved. For the reasons noted above, what is unknown is the type of

<sup>24</sup> Hansard 13 June 2007 House of Representatives, Answers to Questions in Writing: Australian Prudential Regulation Authorisation, page 258 Question Number 5332.

<sup>25</sup> Hansard 13 June 2007 House of Representatives, Answers to Questions in Writing: Australian Prudential Regulation Authorisation, page 258 Question Number 5332.

grounds specified as a reason for early release. Even more dramatic than the increase in numbers of applications for early release received and approved, are the amounts of superannuation approved for release:

**Table 15: Total Amount of Funds Approved for Release by APRA 2001-2006<sup>26</sup>**

| <b>Year</b> | <b>Funds Approved for Release</b> | <b>Yearly Increase</b> |
|-------------|-----------------------------------|------------------------|
| 2001        | \$31,607,258.97                   | n/a                    |
| 2002        | \$37,828,316.13                   |                        |
| 2003        | \$48,381,407.92                   |                        |
| 2004        | \$64,548,847.99                   |                        |
| 2005        | \$76,661,728.27                   |                        |
| 2006        | \$135,328,742.13                  |                        |

**Table 15: Average Amount Approved for Release by APRA per Application 2001-2006**

| <b>Year</b> | <b>Funds Approved per Application</b> |
|-------------|---------------------------------------|
| 2001        | \$4,992                               |
| 2002        | \$5,572                               |
| 2003        | \$6,222                               |
| 2004        | \$7,007                               |
| 2005        | \$7,329                               |
| 2006        | \$9,756                               |

The overall amount of funds released in 2005 and 2006, combined with nationwide evidence that mortgage default rates are increasing, suggests that the increase in applications to APRA for early release of superannuation may be related to mortgage defaults. Indeed, the House of Representatives Standing Committee Inquiry into home loan lending, in the context of predatory lending practices, quoted from a submission by APRA and the Reserve Bank of Australia concerning the significant increase in applications to APRA for early release of superannuation funds.<sup>27</sup>

As APRA does not keep data on the State and Territory breakdown of the figures, it is not possible to say if the actual court actions taken in the ACT during 2006, and earlier, were influenced by consumers tapping into their superannuation to stop enforcement action. Evidence from the CLC's clients however indicates that this is exactly what is occurring.

A significant question is whether the legislation which informs APRA's guidelines is sufficiently vigorous or adequate in an environment where lenders are pushing early

<sup>26</sup> Source: Hansard 13 June 2007 House of Representatives, Answers to Questions in Writing: Australian Prudential Regulation Authorisation, page 258 Question Number 5332.

<sup>27</sup> House of Representatives Standing Committee on Economics, Finance and Public Administration, "Inquiry into home loan lending practices and the processes used to deal with people in financial difficulty", September 2007, Canberra, 25.

access as a means of payment for consumers. The criteria used by APRA in deciding whether or not to release funds does not include any assessment of whether the borrower is likely to avoid defaulting in the future. The outcomes cannot therefore be tested to determine the number of borrowers who ultimately had to sell their homes.

This lack of analysis suggests there is a need to revisit the policy objectives underpinning early release, and in particular consideration of whether it is appropriate to use it to subsidise what may be poor lending decisions. Notwithstanding, the current reporting and data collection system at APRA is not sufficient to inform policy responses in relation to the abuse of early access mechanisms by particular lenders or a class of lenders.

## **E. Recommendations**

The primary purpose of this report is to analyse data from the ACT Supreme Court detailing actions for possession of real property commenced in 2006. The report adds to an earlier data set covering the years 2002-2005, released in September 2006. Additional support in the preparation of this report has enabled further material to be analysed, in particular:

- Information regarding early access to superannuation overseen by the Australian Prudential Regulatory Authority (APRA) and
- The relationship between actions for possession of property and refinancing activity.

The House of Representatives Inquiry into Home Lending made a variety of important recommendations in relation to gathering additional information to inform public policy discussion and debate. The Consumer Law Centre and the Centre for Commercial Law strongly support those recommendations and this report has been prepared with that spirit of information sharing and transparency in mind. Based on material contained in this report, we make the following additional recommendations:

**RECOMMENDATION 1: Data in relation to proceedings for possession of real property from each of the State and Territory Supreme Courts should be collated and analysed.**

Supreme Courts around Australia should be encouraged to provide access to their data on actions for house repossession. Central to this access should be information on which lenders are responsible for taking the actions.

**RECOMMENDATION 2: APRA should compile and release detailed information regarding applications for early release of superannuation.**

There is a paucity of data available from APRA regarding applications for early release of superannuation related to home loan difficulties. That data should be collected and shared, informing better guidelines on how and when access is granted. In particular access to early release of superannuation should not relieve lenders from their proper obligations as diligent and prudent credit providers or from requirements to properly consider and respond to consumers in financial hardship.

**RECOMMENDATION 3: The links between refinancing and home loan failure should be further investigated as a matter of urgency.**

The additional material gathered from conducting title searches shows a significant correlation between refinancing activity and proceedings for possession of property. The data is clearer in instances of multiple refinancing suggesting non-ADI lenders are providing refinances that are doomed to failure.

## Appendix 1

### **SUPERANNUATION INDUSTRY (SUPERVISION) REGULATIONS 1994 - REG 6.19A**

#### **Release of benefits on compassionate grounds**

(1) A person may apply to the Regulator for a determination that an amount of the person's preserved benefits, or restricted non-preserved benefits, in a superannuation entity may be released on the ground that it is required:

- (a) to pay for medical treatment or medical transport for the person or a dependant;  
or
- (b) to enable the person to make a payment on a loan, to prevent:
  - (i) foreclosure of a mortgage on the person's principal place of residence; or
  - (ii) exercise by the mortgagee of an express, or statutory, power of sale over the person's principal place of residence; or
- (c) to modify the person's principal place of residence, or vehicle, to accommodate the special needs of the person, or a dependant, arising from severe disability; or
- (d) to pay for expenses associated with the person's palliative care, in the case of impending death; or
- (e) to pay for expenses associated with a dependant's:
  - (i) palliative care, in the case of impending death; or
  - (ii) death; or
  - (iii) funeral; or
  - (iv) burial; or
- (f) to meet expenses in other cases where the release is consistent with a ground mentioned in paragraphs (a) to (e), as the Regulator determines.

(2) The Regulator must determine, in writing, that the person has satisfied, for the purposes of subregulation 6.18 (1) or 6.19 (1), a condition of release on a compassionate ground if the Regulator is satisfied that:

- (a) the release is required on a ground mentioned in subregulation (1); and
- (b) the person does not have the financial capacity to meet an expense arising from that ground.

(3) The Regulator cannot be satisfied that money is required for medical treatment unless 2 registered medical practitioners (at least one of whom must be a specialist) certify that:

- (a) the medical treatment is necessary to:
  - (i) treat a life threatening illness or injury; or

- (ii) alleviate acute, or chronic, pain; or
  - (iii) alleviate an acute, or chronic, mental disturbance; and
- (b) the treatment is not readily available to the person, or the dependant, through the public health system.
- (4) The Regulator cannot be satisfied that money is required for medical transport unless the medical treatment for which the medical transport is required has been certified, under subregulation (3), as necessary for a reason mentioned in paragraph (3) (a).
- (5) The Regulator cannot be satisfied that money is required on the ground mentioned in paragraph (1) (b) unless the person gives to the Regulator a written statement from the mortgagee that:
  - (a) payment of an amount is overdue; and
  - (b) if the person fails to pay the amount, the mortgagee will:
    - (i) foreclose the mortgage on the person's principal place of residence; or
    - (ii) exercise its express, or statutory, power of sale over the person's principal place of residence.
- (6) A statement under subregulation (5) must include the following information:
  - (a) the amount that is equal to 3 months' repayments under the mortgage; and
  - (b) the amount that is 12 months' interest on the outstanding balance of the loan at the time the statement is made.
- (7) In this regulation:

***medical transport*** means transport, for medical attention, by land, water or air.