

# ***"They want to take our house"***

**An Investigation into  
House Repossessions  
in the ACT Supreme Court**

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## **A. Executive Summary**

Australians have traditionally seen the family home as the means of building a secure economic future for themselves and their children. For many people, being a fully participating member of Australian society is psychologically linked with owning property. Conversely, the risk of losing the family home can be emotionally devastating. Home loans that fail can bring financial disaster, eroding or eliminating the wealth held in what is often the only asset of significance a person or couple may have. This is especially the case where the failure of a loan ends in court action by a lender, and the lender takes physical possession of the borrower's home.

This report presents data from the ACT Supreme Court about the trend in the number of actions taken by lenders to repossess real property from 2002 to 2005 and the progress of those matters. The report is also informed by the experiences of clients who approached the ACT Consumer Law Centre as they were facing actions for repossession of their homes.

The main findings of the report are:

- There was a 39% increase in the number of actions by lenders seeking possession of homes between 2004 and 2005 in the ACT.
- There was an increase of 60% in the number of writs issued and an increase of 67% in writs later executed between 2004 and 2005.
- Lenders acted faster in 2005 to obtain judgments, seek enforceable orders and to execute those orders than in any other year studied.
- Preliminary data for 2006 shows that this upward trend is continuing.
- 68% of actions for possession from 2002-2005 were taken by non-bank lenders, with this percentage increasing over this four year period. Most notably, non-bank lenders were largely responsible for the substantial increase in the number of actions initiated during 2005, taking 66 of 90 (or 73%).

The Consumer Law Centre undertook this research because 2005 saw a dramatic increase in the number of clients who sought help because they were at risk of losing their homes as they could not afford the repayments on their home loan (actions for possession of real property). All of those clients presented for help after court proceedings had begun and, in most instances, after default judgment had been entered against them. All of these clients had loans originated through mortgage or finance brokers. This experience suggests that the rates at which such loans are defaulting may be influenced by:

- A number of practices within the non-bank lending sector. These include the use of lo-doc, no-doc and investment loans by non-bank lenders, and shorter timeframes for borrowers to resolve financial problems without losing their home.
- the involvement of mortgage or finance brokers.

Overall, the implications of this report's findings for homeowners in the ACT are significant as are the policy implications for government and regulators.

## **Acknowledgements**

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The Consumer Law Centre extends its gratitude to Chris Winslade, the ACT Supreme Court 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 our gratitude is also extended.

The report was written by Amy Kilpatrick. The author would like to acknowledge the work of Bronwyn Davies who volunteered her time to assist with collecting the data for this report. Ms Davies worked in conjunction with the Consumer Law Centre's Melanie Mulquiney. Their contribution to this project was invaluable and is greatly appreciated. The author would also like to acknowledge David Tennant for his thorough editorial comments and Professor Ian McAuley for discussing some key economic issues associated with the report.

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## **B. Findings**

### **1. Introduction**

This report summarises enforcement action by a range of lenders, based on an analysis of Supreme Court files. Enforcement action falls into three categories:

- Actions for Possession – this is the technical term for the document issued by the lender commencing court action seeking possession of the property.
- Default Judgements – 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 judgement automatically or by default, without the merits of the claim being tested.
- Writs of Possession – once the lender has obtained judgement they can then enforce it by asking the court for a Writ of Possession, under which the Sheriff is instructed to evict the borrowers and provide the lender with possession.

The report reviews conduct by three categories of lenders:

1. Banks
2. Credit Union/Other (including credit unions, building societies, government entities and private individuals).
3. Non-bank lenders (including non-conforming lenders, such as Pepper Homeloans, and one subsidiary of a bank (Macquarie Mortgages). These lenders are distinguished from the other categories in that they do not offer deposit facilities and therefore are not regulated by the Australian Prudential and Regulatory Authority.

### **2. Actions for Possession**

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) requires lenders to provide certain notices to borrowers regarding default prior to taking legal action.<sup>1</sup> The claims are filed in the Supreme Court by lenders, and are known as actions for possession.

A total of 256 actions for possession were brought in the ACT Supreme Court by lenders from 2002 to 2005. Table 1 describes the findings relating to the number of actions brought throughout this four year period.

**Table 1: Number of Actions Brought 2002-2005**

<b>Year</b>	<b>Number of Actions</b>
2002	53
2003	58
2004	55
2005	90
<b>Total</b>	<b>256</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

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<sup>1</sup> See Sections 96 and 97 of the *Land Titles Act* 1925 (ACT) and also Section 80 of the *Consumer Credit Code*.

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2005. The results demonstrate a 39% increase in the number of actions taken by lenders in 2005 from the prior average. Similar results have been reported in New South Wales. For example, in February 2006, the Sydney Morning Herald reported that actions for house repossessions in 2005 were higher than after the recession of the early 1990's and that actions in the NSW Supreme Court had experienced a 59% increase from 2004 to 2005.<sup>2</sup>

The dramatic jump in the number of actions taken in one year in the ACT is concerning. According to ABS data<sup>3</sup>, the ACT property market only experienced a 2% market drop during 2004/5 in contrast to a 12% drop in Sydney.<sup>4</sup> This indicates that factors such as a "property shake-out" have not been as prevalent in the ACT.

Nevertheless, the upward trend in the number of actions for possession taken each year in the ACT looks set to continue as 2006 data from the Supreme Court indicates even more actions than 2005 will occur in 2006. Table 2 sets out details on the number of actions taken from 1 January 2006 until 30 June 2006 in comparison to the same timeframe in 2005.

**Table 2: Comparison in Number of Actions During First Six Months of 2005 and 2006**

Dates	Number of Actions	Yearly Total
1 January - 30 June 2005	40	90
1 January - 30 June 2006	55	(120+)

With two interest rate increases in 2006 already finalised and predictions of a third to come, the consequent increase in repayments for borrowers will place significant financial pressure on many homeowners which has the potential to trigger even more defaults in 2006 than in 2005. Based upon the changed economic circumstances and the fact that the number of claims to 30 June 2006 already outstrips the actions from the same timeline in 2005, it is the Consumer Law Centre's view that the number of claims for all of 2006 will substantially supersede the 90 actions taken in 2005, and may go beyond 120.

The research also revealed that particular lenders took more actions for possession than did others. Overall, of the 256 actions filed from 2002 to 2005, 42 lenders were involved, but only 13 lenders took 5 or more actions and only 7 lenders took more than 10 actions. Figure 1 depicts which lenders took more than 10 actions from 2002 to 2005 and the actual number of actions those lenders took.

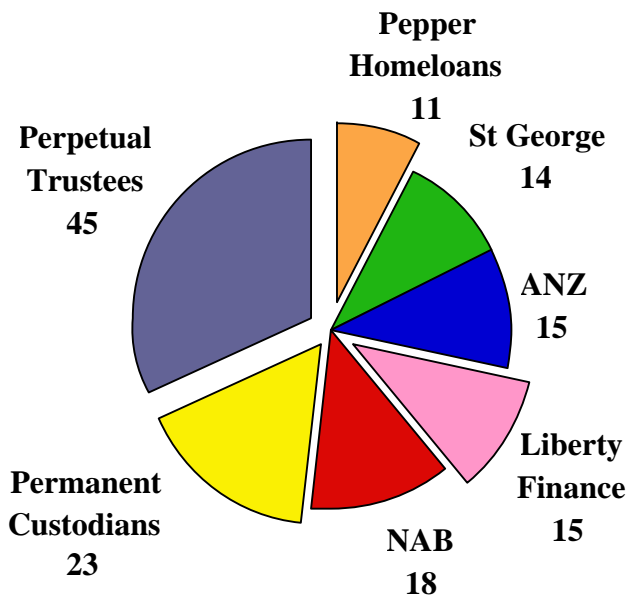
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<sup>2</sup> Matt Wade and Michael Pelly, 2 February 2006, Sydney Morning Herald.

<sup>3</sup> This data is reproduced at Annexure A.

<sup>4</sup> See Annexure B for ABS data regarding established house prices in Sydney and Canberra from September 2002 to March 2006.

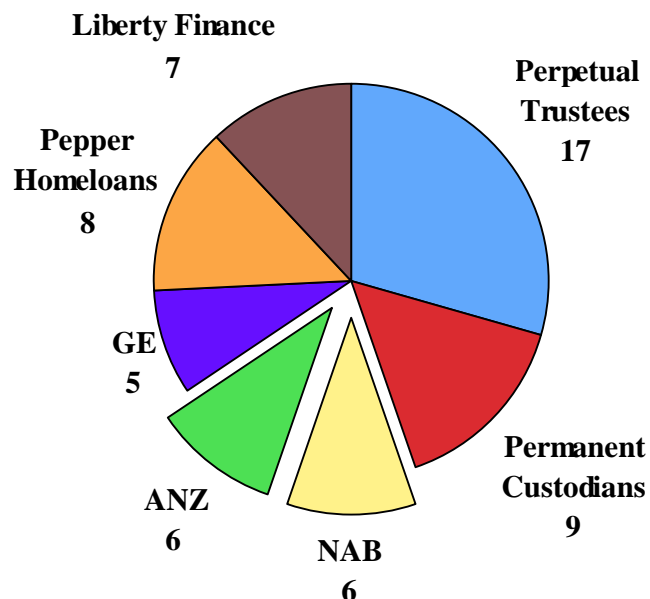
**Figure 1: Lenders Taking More Than 10 Actions 2002-05**



The 7 lenders noted in Figure 1 were responsible for 141 of the 256 actions taken from 2002 to 2005, or 55%. As Figure 1 demonstrates, four non-bank lenders (Perpetual Trustees, Permanent Custodians, Liberty Finance, and Pepper Homeloans) appear in the top 7 lenders taking action for possession, making up 67% of the of the 141 actions depicted in Figure 1.<sup>5</sup>

When the year 2005 is isolated, non-bank lenders feature predominately among the lenders taking the greatest number of actions. Figure 2 demonstrates that of the top seven lenders taking actions for possession, non-bank lenders were the top five - Perpetual Trustees, Permanent Custodians, Liberty Finance, GE Mortgages and Pepper Homeloans.

**Figure 2: Lenders Taking Most Frequent Actions – 2005**



The prevalence of the non-bank lenders in this data is discussed further below at part D.

<sup>5</sup> Full Corporate names of all lenders described in this report appears at Annexure C.

### **3. Creditors' Rights Gained by Default Judgment**

The rules of civil procedure in the ACT Supreme Court<sup>6</sup> allow for default judgment to be obtained by a lender in actions for possession. The two most common grounds for default judgment being sought by a lender is where the property owner fails to file a notice of appearance within 8 days of the action being served upon them and/or when the property owner/respondent fails to file a defence within 10 days of the appearance being filed. After the expiration of the proscribed time, a lender can seek an order for default judgment. Consideration could be given to extending these time periods. This may also be of benefit to lenders in some cases as it would allow for a longer period for borrowers to attempt to resolve matters before further legal costs are incurred.

The investigation found that there were a number of matters where default judgments were obtained by lenders throughout the four year period examined. Table 2 describes the overall findings relating to the numbers of default judgments obtained.

*Table 2: Default Judgments Obtained by Lenders*

<b>Year</b>	<b>Default Judgments</b>	<b>Number of Actions</b>
2002	20	53
2003	7	58
2004	29	55
2005	28	90
<b>Total</b>	<b>84</b>	<b>256</b>

Unlike other findings, 2005 did not note an increase in the number of default judgments obtained. However, further analysis of the data revealed that the number of days between lenders filing an action in Court and obtaining default judgments dropped an average 12.44 days in 2005 compared to the average days taken from 2002 to 2004. Table 3 details the overall findings on the average number of days taken by all lenders to obtain default judgments.

*Table 3: Number of Days from Action Filed to Default Judgment Being Obtained (Mean)*

<b>Year</b>	<b>Days</b>
2002	68.77
2003	73.43
2004	66.29
2005	57.93
<b>2002-2004</b>	<b>69.49</b>

A default judgment gives a lender the ability to seek a writ of possession. As Table 3 demonstrates, lenders moved quicker in 2005 than in any other year examined to conclude litigation, enabling them to seek enforceable orders from the Court.

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<sup>6</sup> Section 1124 of the *Court Procedures Rules 2006* (ACT) formerly Order 31 section 7 of the *Supreme Court Rules 1937* (ACT).



The manner in which actions proceeded once lodged was of particular interest to the Consumer Law Centre, as in our experience clients frequently present seeking assistance only after the lender has already obtained a default judgment. Options available to a client post judgment are different than prejudgment and can involve potentially expensive interlocutory steps (such as seeking injunctions or orders to set aside judgment).

Before attending the Consumer Law Centre, clients were largely unaware of their consumer rights prior to, during and after the court proceedings. In some instances, consumers thought once court action by their lender had begun, the battle to save their homes had ended. In the words of one client, "as soon as I received the court papers I thought this is it, it's all over". This is not a criticism of the Court, rather an observation about the confusion and other emotions clients experience when their homes are at risk.

***"As soon as I received the court papers I thought this is it, it's all over".***

Lack of knowledge of consumer rights added to losses suffered in every matter and may have resulted in default judgments and writs being obtained despite some of those consumers having apparently legitimate defences and/or counterclaims.

The experience of the Consumer Law Centre's clients suggests an urgent need for consumers struggling to meet obligations under home loans to be advised about contractual and consumer rights at a variety of points during the life of the loan, and not just the final stage of the enforcement process.

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

A creditor in an action for possession is able to apply to the Court for a writ of possession following judgment being entered against the debtor. A writ can be issued on the same day as judgment is given. To fulfil the writ, a creditor serves the writ upon the Sheriff of the Court, seeking execution. The Sheriff has the legislated power to forcibly evict, if necessary, the occupant of the property, all items therein and oversee the changing of the locks. Once possession of the property is handed over to the creditor, it can be sold.

This investigation examined the number of writs obtained and executed by lenders during 2002 to 2005. Table 4 depicts the number of writs obtained by lenders, and shows how many of those writs were later executed.

***Table 4: Writs Obtained and Executed by Lenders***

<b>Year</b>	<b>Writs Obtained</b>	<b>Writs executed</b>
2002	14	5
2003	16	3
2004	19	5
2005	40	13
<b>Total</b>	<b>89</b>	<b>26</b>

Overall, the findings demonstrate that 35% of the 256 actions initiated resulted in a writ of possession being obtained by the lender and that 10% of these actions resulted in those writs being executed between 2002 and 2005.

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Similar to the findings regarding the number of actions filed from 2002-2005, the number of writs obtained and later executed increased significantly in 2005. Indeed, of all writs obtained 45% occurred in 2005. This also represents a 60% increase on the average number of writs obtained prior to 2005. Similarly, 50% of all writs executed from 2002 to 2005, occurred in 2005. This represents a 67% increase on the average number of writs executed prior to 2005. While these increases could be viewed as a reflection of the increased number of actions filed in 2005 when taken as a proportion of actions to writs, in 2005 an action was more likely to result in a writ being obtained and a writ being executed than in any previous year. This suggests that lenders are becoming less likely to respond positively to requests by borrowers to defer eviction procedures.

***“Will that stop the Sheriff from coming?”***

Undoubtedly, a lender who becomes a writ holder, is in an extremely powerful bargaining position, especially when the debtor(s) is not represented. A writ holder can seek execution of the writ by the Sheriff at any time within 12 months from the date it is obtained.

The fear of the Sheriff turning up on doorsteps was a dominant theme among the Consumer Law Centre’s clients. When presented with a number of options and advice on how to proceed, a particularly fearful client replied; “will that stop the Sheriff from coming?” From this view, obtaining a writ can be a powerful tool for lenders.

The outcomes of actions where writs were not obtained by lenders were not collected as part of this research. However a range of possibilities were noted from the Court files including notices of discontinuance being filed, consent orders and stay of actions.

Examination of the timeframes involved in writs being obtained and executed revealed a similar trend to that relating to default judgments. It demonstrated that the number of days a lender took to move from judgment to writ decreased significantly. This means lenders moved much more quickly to secure their interests by seeking enforceable orders than before.

Table 5 sets out the average number of days lenders took to obtain a writ after filing an action as well as the number of days taken to obtain a writ following a default judgment.

***Table 5: Number of Days Lenders Took to Obtain Writs (Mean)***

Year	Number of Days to Obtain Writ	
	From Date of Default Judgment	From Date Action Filed
2002	60.08	112.85
2003	125.20	204.60
2004	52.06	126.63
2005	33.87	95.87
2002-2004	79.11	148.02

As Table 5 details, lenders took far fewer days on average to obtain a writ from both the date an action was filed (35% faster) and from the date a default judgment was obtained (57% faster) than the average days taken in 2002 to 2004. Whereas prior to 2005, lenders waited almost 2 months to obtain a writ after obtaining default judgment, in 2005 that was reduced to one month. Similarly, prior to 2005 the timeframe from date of an action being filed by a lender, to a writ being obtained took lenders almost 5 months whereas in 2005 lenders only waited 3 months.

Table 6 details the number of days lenders look before executing the writs described above, once obtained. Again, the data is broken down into the average number of days from the date of an action being filed and the number of days from the writ being obtained.

**Table 6: Days to Execution of Writ Where Default Judgment Obtained (mean)**

Year	Days to Execute Writ	
	From Day Writ Obtained	From Day Action Filed
2002	79.25	141.25
2003 <sup>7</sup>	-	-
2004	106.60	191.00
2005	40.78	100.67
2002-2004	92.92	166.13

As Table 6 details, lenders took far fewer days on average to execute a writ from both the date an action was filed (30% faster) and from the date a default judgment was obtained (56% faster). Together, the data in Tables 5 and 6 demonstrate that in 2005, if lender sought default judgment, obtained a writ of possession and executed that writ a consumer would have 2 less months to act than 2002, 2003 or 2004.

These shifts in timelines are significant for the consumers involved as it reduces the time they are able to seek help, obtain legal advice and gather funds to satisfy the arrears claimed. It is evidence that lenders gave consumers less time to deal with the consequences of the action for possession than ever before. It is also an indication that lenders may be acting with increased aggression when a borrower gets in trouble, during the litigation process and to enforce the litigation outcome.

## **5. Details of Lenders Who Took Actions and Obtained Writs**

As described above, among the various lenders who took actions for possession from 2002 to 2005, only 13 did so 5 or more times. Six of those lenders were banks, five were non-bank lenders and there was one credit union and one building society.<sup>8</sup> 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 Figure 3.

<sup>7</sup> According to court records, no writs were executed of the actions commenced in 2003 where a default judgment was obtained.

<sup>8</sup> Note that IMB took 9 actions in total, 7 in 2002 and 2 in 2003 and 0 in 2004-5.

*Figure 3: Actions Initiated and Writs Obtained, 2002-2005<sup>9</sup>*

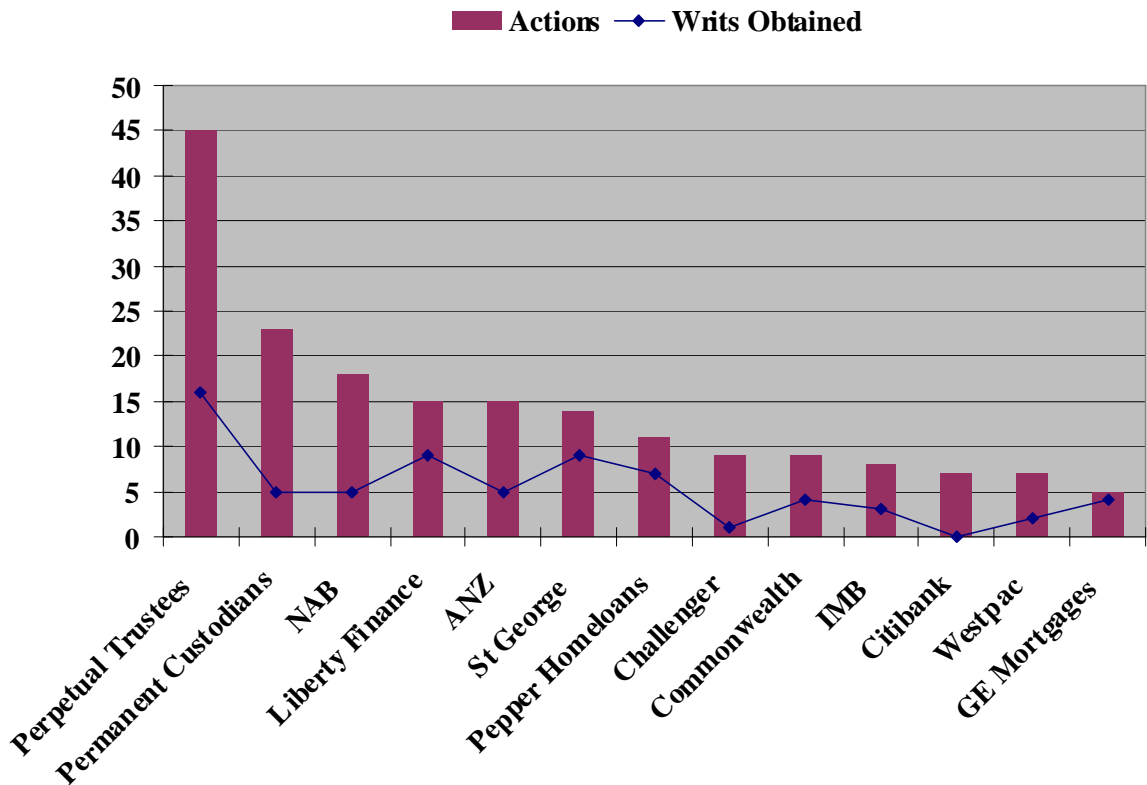


Figure 3 reveals that some lenders were more likely to seek writs from the Court than others. For example, Perpetual Trustees was the most frequent petitioner among lenders, filing 45 actions for possession from 2002 to 2005 and obtaining 16 writs during that time. This equates with 36% of Perpetual Trustees’ actions resulting in writs. By comparison, GE Mortgages took 5 actions but obtained writs in 4 of those matters (80%) and Liberty Finance took 15 actions and obtained 9 writs (60%).

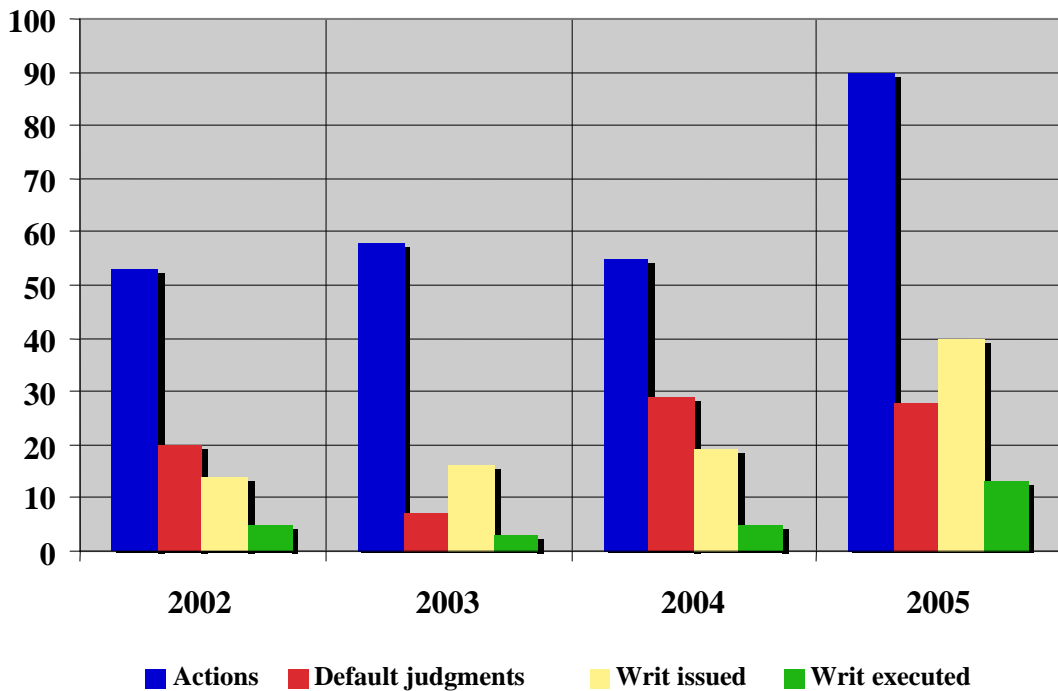
It is worth noting that all the actions taken by GE Mortgages occurred in 2005 and that GE Money only recently entered the mortgage market. It is also worth noting that Perpetual Trustees took more actions than any other lender in 2003, 2004 and 2005. Perpetual Trustees also executed 5 writs, which is more than any other lender. The prevalence of non-bank lenders within these results is discussed further in parts D and E.

## 6. Summary of Findings

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

<sup>9</sup> Some of the matters are ongoing (particularly from 2005). Therefore the data on default judgements, writs obtained and writs executed is not finalised.

*Figure 4: Trend in Number of Actions and Known Outcomes 2002-2005<sup>10</sup>*



As described above and as depicted in Figure 4, the number of actions filed, writs issued and writs executed all increased dramatically in 2005. Only the number of default judgments did not increase, although the number of days for a lender to obtain a default judgment decreased. The jump from an average 55 actions per year to 90 in 2005 is cause for concern, especially when the types of lenders leading the charge is considered.

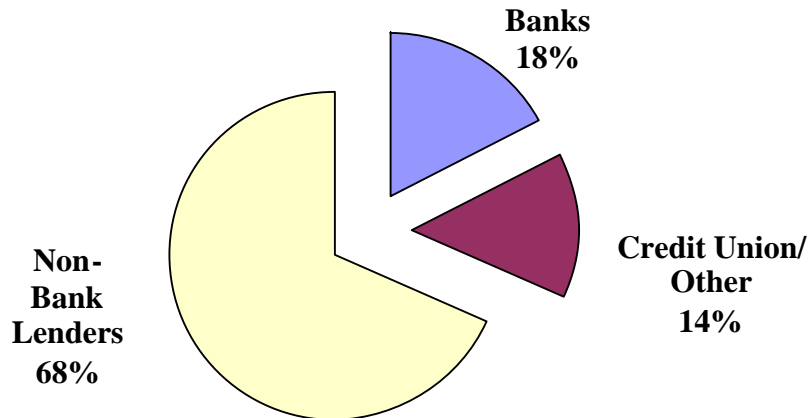
Not all these actions resulted in consumers being ordered out of their homes. No doubt, some pay their debt (by a variety of means including selling the property, selling personal affects and seeking early release of superannuation), some refinance with a different lender or negotiate alternatives with the lender in question. Some consumers found their way to the Consumer Law Centre where a variety of outcomes were achieved for clients including Deeds of Settlement, reversal of legal, enforcement and other fees and charges.

<sup>10</sup> Some of the cases (particularly from 2005) are ongoing, so the data on writs obtained and executed is not finalised and the numbers may actually increase over time.

## **C. The Rise of the Non-Bank Lender**

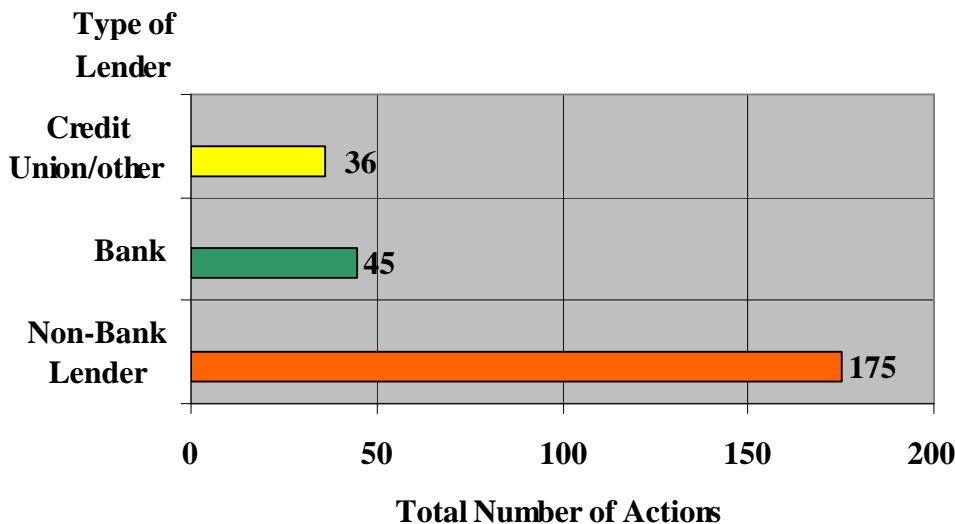
Among the most startling the findings of this investigation was the prevalence of actions taken by non-bank lenders from 2002 to 2005. Figure 5 depicts the overall percentage of actions taken during the four years by the three categories of lenders identified.

*Figure 5: Percentage of Total Actions Taken By Type of Lender, 2002-2005*



The percentage of total actions taken by non-bank lenders was more than double than that of the two other categories of lenders combined. This data is further explained in Figure 6 which depicts the overall number of those actions by the three categories of lenders identified.

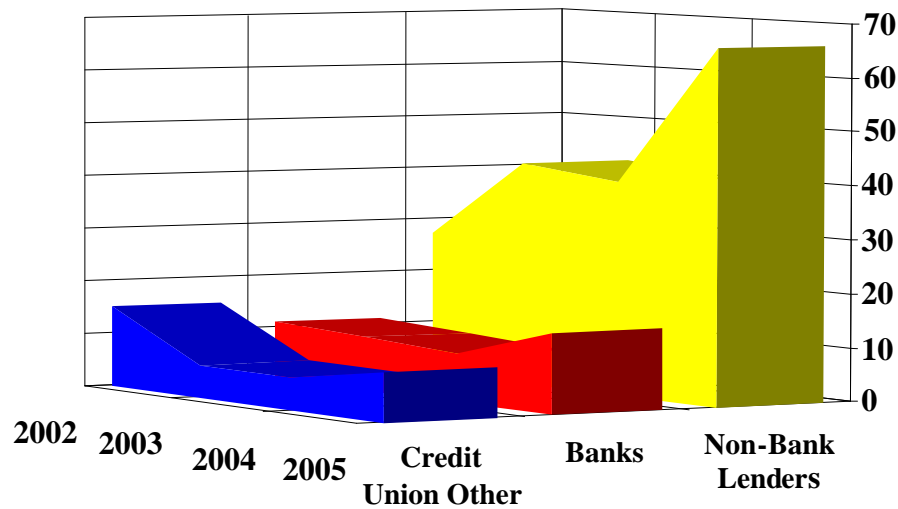
*Figure 6: Number of Actions for Repossession by Type of Lender, 2002-2005*



As Figures 5 and 6 demonstrate, non-bank lenders were, by far, the most frequent petitioners in the ACT Supreme Court seeking possession of properties from 2002 to 2005. In fact as Figure 6 demonstrates, non-bank lenders took more than triple the number of actions initiated by the any other type of lender and more than double the other two categories combined.

It is also possible to see from the data that the number of actions taken by non-bank lenders was responsible for the substantial increase in the actions taken in 2005. Figure 7 and Table 7 describe the total number of actions taken by the three categories of lenders from 2002 to 2005.

**Figure 7: Trend in Type of Lender Taking Action by Year**



The dominance of non-bank lenders in the number of actions taken and the rapid acceleration in the number of those actions from 2002 to 2005 eclipses that of the two other categories of lenders as Figure 7 clearly shows. Clients of the Consumer Law Centre who faced actions for repossession in 2005 had loans with non-bank lenders in every case.

***Non-bank lenders took more than triple the number of actions initiated by any other type of lender.***

Table 7 below, further breaks down the data in Figure 7 by setting out the numbers of actions taken by the three categories of lenders each year investigated.

**Table 7: Number of Actions taken by Types of Lenders by Year**

Type of Lender	2002	2003	2004	2005	TOTAL
Credit Union / Other	15	6	6	9	36
Banks	11	10	9	15	45
Non-Bank Lenders	27	42	40	66	175
<b>TOTAL</b>	<b>53</b>	<b>58</b>	<b>55</b>	<b>90</b>	<b>256</b>

The most recent figures available from the Reserve Bank indicates that the non-bank lenders' market share has grown significantly in recent years, with non-conforming loans estimated to account for up to 4 per cent of the value of new housing loans.<sup>11</sup> It has also been reported that the value of non-conforming loans has grown from zero about ten years ago to \$8 billion in 2006<sup>12</sup>.

As data on market share and default rates are not released by lenders, it is not possible to comment upon the number of actions taken as a percentage the total number of home loans written in the ACT. What is clear is that the 4% of the market held by non-bank lenders is far less than that held by banks, and yet as Figure 4 demonstrates, 68% of actions for possession originated from the non-

<sup>11</sup> Reserve Bank of Australia, *Financial Stability Review*, March 2005 p.41.

<sup>12</sup> Research by Australian RMBS Surveillance as reported in the *Financial Standard* 17 July 2006.

bank sector. This is some indication that perhaps loans with non-bank sector are failing at much higher rates than in other sectors. The information in this report indicates that investigation is required as to why loans written by the non-bank sector appear to be failing.

## **D. Issues within the Non-Bank Sector**

The review of repossession practices indicates that non-bank lenders operate differently from traditional lenders. It is the view of the Consumer Law Centre that there a number of reasons for this at both the sale end and the enforcement point.

Consumers with loans from non-bank lenders are likely to:

- be charged higher fees than for loans from banks or credit unions,
- pay higher interest rates than for loans from banks or credit unions,
- where the loan is a “No-Doc” and “Lo-Doc” loan, be subject to less rigorous scrutiny as to whether they can afford the repayments.

Some examples of the fees and charges required to originate or finalise loans with non bank lenders include:

- Mortgage Risk Fee - **\$3,525.00**
- Establishment Fee - **\$4,179.00**
- Deferred Establishment Fee - **\$10,569.51**
- Early Termination Fee - **\$12,026.76**

In addition, some contracts viewed by the Consumer Law Centre allow for default interest of up to 4% higher than the normal interest rate to be charged on top of regular interest charges where borrowers fall behind. Once the borrower defaults, they become liable to pay other amounts, such as default or penalty interest, administration fees, and legal, enforcement and payment dishonour fees. For some of the Consumer Law Centre’s clients, a substantial proportion of the arrears claimed by non-bank lenders constituted of default interest and other default fees rather than principle. In the Consumer Law Centre’s view, these additional costs mean that borrowers are quickly in a position where they have to pay a large lump sum in order to remedy the default. For many borrowers, this is an impossible task.

***In some matters, a substantial proportion of the arrears claimed by non-bank lenders constituted of default interest and other default fees rather than principle.***

Many non-bank lenders market themselves as the lenders of choice for self-employed consumers, those with a variety of limitations to their credit worthiness, often including low or insecure sources of income and those seeking refinance or debt consolidation. Investment loans are also



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available through these lenders. "No-Doc" and "Lo-Doc" loans are also a feature of non-bank lenders. These loans require little or no proof of income or other financial affairs of the consumer to secure a home loan. Some lenders merely require a consumer to make a one page "declaration of income and affordability" as part of the application process.

It is the Consumer Law Centre's experience that some finance brokers, when approached by consumers who have low incomes and/or insecure employment, will place them in "No-Doc", "Lo-Doc" or investment products. They recommend these products as they can disguise the borrowers' lack of capacity in the application process. These loans also require significant monthly payments due to upfront fees and higher interest rates. For many borrowers their loan was unaffordable from the start, and the broker's conduct causes significant hardship to the borrowers as they fail.

The only means available to most of the Consumer Law Centre's clients to pay arrears claimed, is through an application to the Australian Prudential and Regulatory Authority and their superannuation fund, seeking early release of their funds. The circumstances in which consumers seek early release of superannuation deserves further examination. In particular, it would be useful to examine the extent to which, first, consumers benefit from these amounts by being able to remain in the family home (or the percentage of consumers who ultimately default in any event), and, second, whether particular lenders are over-represented in claims for early release (suggesting poor assessment of capacity at the point of sale). Such an exercise is beyond the scope of this report. However it is clear that there are both short (taxation) and long term (retirement income) financial implications for clients in accessing superannuation entitlements early to satisfy a financial crisis connected to their home loan.

There is some evidence from the Consumer Law Centre's clients that consumers move from banks and other lenders to loans with non-bank lenders as a result of refinancing in response to hardship. Such refinances can include debt consolidations with other liabilities (ie. essential services, telephone accounts or overdue rates) paid out by the non-bank lender, increasing the amount borrowed and then becoming secured against the mortgaged property. While a consumer's total monthly outgoing payments could be decreased by such refinancing, the equity in the home is eroded and the overall amount paid for consolidated debts is likely to be substantially higher over the longer term.

The Reserve Bank of Australia has recently released a report on the withdrawal and injection of equity into housing. The report noted there is a trend towards equity withdrawal which is in contrast to previous decades. However, the report did not investigate if the equity withdrawals were producing positive outcomes for consumers. Where the result is a significant erosion of the equity in their home for little long-term benefit, the refinancing can, in fact, cause consumers significant financial detriment. This issue requires detailed investigation to determine what type of short and long-term results are being achieved for consumers through refinancing and equity withdrawals.

Should the loan fall into arrears, consumers with loans from non-bank lenders face a number of practices that inhibit their capacity to defend a claim:

- an inability to engage with consumers experiencing hardship, and a greater readiness to take court action.
- lack of access to or dysfunctional internal complaint mechanisms;
- lack of access to or respect for Alternative Dispute Resolution schemes (such as the Credit Ombudsman Service Limited); and
- the haste with which court proceedings are brought and concluded (which, as noted earlier in the report, is happening with increased speed).

Non-bank lenders do not have access to deposit accounts and therefore have a smaller funding base than banks or credit unions. They raise money through funding deeds with third parties. This means

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that they have less capacity to carry bad debts. It is the view of the Consumer Law Centre that they therefore are under financial pressure to take enforcement action earlier, and that they will as a consequence give borrowers less time to negotiate for a reduction in repayments or similar variations to their obligations.

Table 8 below sets out the experience of three clients of the Consumer Law Centre that exemplify the weaknesses inherent in the lending practices of non-bank lenders. It shows that:

- Two borrowers were overcommitted from inception of the loan, failing to meet repayments within the first three months of the loan.
- A lender commenced court action when the arrears were only \$2,400.
- In two of the three cases the matter was resolved with the consumer losing their home.

***Table 8: Summary of Files from the Consumer Law Centre Where “No Doc” loans failed from inception***

<b>Issues</b>	<b>Borrower 1</b>	<b>Borrower 2</b>	<b>Borrower 3</b>
Amount of Loan	\$420,000	\$365,000	\$150,000
“No-doc” or “Low-doc” loan	Yes	Yes	Yes
Month first repayment missed by borrower	Month 2	Month 3	Month 8
Court action commenced by lender	Month 18	Month 10	Month 18
Arrears claimed when court action began (approx.)	\$15,500	\$15,500	\$2,400
Did the borrower ever make up arrears & how?	No	Yes via Superannuation Funds	Yes via Superannuation Funds and Sale
Outcome	Repossession by Lender	Consumer Still in Possession	Private Sale of Home by Consumer

***“...the lender said ‘no’ over the phone without even sending us any [hardship] forms.”***

The importance of functioning internal complaints mechanisms and the ability to engage with hardship were recurrent themes in the issues raised by the Consumer Law Centre’s clients. Some of our clients instructed they had made numerous efforts to discuss their situation with their lenders when they fell behind, but failed to receive an appropriate response. According to one client, “we asked the lender to vary the loan when we could not afford to pay, but the lender told us ‘no’ over the phone without even sending us any [hardship] forms.” Other clients stated that their lenders suggested a refinance, that they take out a personal loan to pay arrears or immediately suggested early release of superannuation.

Engaging with hardship does not mean targeting a borrower's superannuation or suggesting further borrowings. In the view of the Consumer Law Centre, the ability to engage with hardship can mean the difference between a loan continuing into the future or certain default.

It may be the case that some of the home loans which failed from 2002-2005 and resulted in actions for repossession were investment loans. It was beyond the scope of this report to determine the nature of the loans between lenders and borrowers. However in the experience of the Consumer Law Centre, even where the type of loan purported to be an investment loan this may not have been the case in reality. There are significant advantages for lenders in having a loan characterised as being for investment purposes. A number of important consumer protections under the Consumer Credit Code are lost. Some of those protections include requirements for lending on just and affordable terms and hardship provisions if borrowers fall upon difficult financial times or their circumstances change.<sup>13</sup>

All of the Consumer Law Centre's clients in 2005 and 2006 who faced actions for repossession were owner occupiers. Despite this, some clients had been provided with investment loans. In each of these matters, the investment loans were generated through mortgage brokers. On our instructions those investment loans were contrary to clients' stated intentions for the relevant property in all but one matter<sup>14</sup>.

### **Case Study**

Ms H and her children were affected by the Canberra bushfires in January 2003 and needed alternative housing. She and her partner Mr W, sought the advice of a mortgage broker at a large company to find out if they could obtain a home loan together. Mr W and Ms H made it clear to the mortgage broker they were looking for a home to move into together and wanted a home loan they could afford. The mortgage broker initially advised Mr W and Ms H a loan was available from a bank, however after they had already paid a deposit on a property, the story changed. The mortgage broker then told Ms H and Mr W only a loan with a non-bank lender was available. The mortgage broker presented Mr W and Ms H with some papers for signing while they worked in a burnt out horse paddock. The mortgage broker stated the paperwork was for normal home loans with two different lenders. It was later discovered that those papers were part of a document to obtain an investment loan with a non-bank lender. Mr W and Ms H ended up with a contract for an investment loan to purchase a home which they planned on living in. Without any understanding or advice about the nature of the loan, they signed it. When they fell behind in payments, the non-bank lender moved to take possession. The outcome of this matter is still pending.

In the Consumer Law Centre's view, investment loans, lo-doc and no-loc loans offered to borrowers by non-bank lenders require investigation examining whether such loans are being used as a vehicle for obtaining unaffordable loans and avoiding or circumventing the protections under

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<sup>13</sup> See sections 70 and 66 of the Consumer Credit (Australian Capital Territory) Code 1996 respectively.

<sup>14</sup> In one matter a property had begun as an investment and was tenanted. However, the client had lost their job and was forced to move into the property when tenants failed to pay rent the lender was notified of those changed arrangements.

the Uniform Consumer Credit Code.<sup>15</sup> Complaints about a number of non-bank lenders and the nature of the products offered were raised with the Australian Securities and Investment Commission at a systemic level by the Consumer Law Centre in 2005 and 2006.

## **E. Involvement of Finance Brokers**

This report did not separately investigate the role of finance brokers in originating the loans which later resulted in the repossession actions described above. However, the business model adopted by many non-bank lenders mean that they are dependant on brokers for the following two reasons:

1. Many non-bank lenders have few or no shopfronts or branches. They are therefore more dependant on brokers to forward loan applications than traditional lenders. It is possible that this greater dependency makes them more reluctant to sanction brokers, although the Consumer Law Centre is, of course, unable to verify whether this is the case.
2. Non-bank lenders make significant use of "no-doc" or "lo-doc" loans. This means that they do not verify the borrower's income and therefore rely on the broker, as the party with face-to-face contact with the borrower, to assess the borrower's capacity. Alternatively, if the broker, misrepresents the borrower's income (with or without their knowledge), the lender cannot establish the truth prior to agreeing to fund the loan.

Clients of the Consumer Law Centre regularly advise that brokers completed information on "no-doc" or "lo-doc" loan applications without their knowledge, and in some instances, with information which was known to be false, and supported by documents manufactured by the broker.

### **Case Study**

Mr A was a 20 year old on a low and intermittent income. He received a lump sum of money. A local mortgage broker assisted him to use the money as the deposit for the purchase of a home. The broker lodged an application for a 'no-doc' loan. The application stated that Mr A had an income over \$70,000 each year and that he already held significant personal assets. The non-bank lender did not require any proof of those claims, which were untrue. This matter resulted in a complaint to ASIC and remains unresolved.

Apart from issues specific to non-bank lenders, clients of the Consumer Law Centre have raised additional issues about the conduct of brokers. Complaints include:

- brokers understating consumers' expenses, or overstating their income.
- brokers failing to disclose fees and charges payable upfront.
- brokers failing to disclose commissions they will earn as a result of the transaction.

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<sup>15</sup> Research by Center for Responsible Lending on predatory and unfair lending practices are informative on the types of products which have produced negative outcomes for consumers in certain US housing markets and issues within the various regulatory frameworks.

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- Brokers arranging inappropriate types of loans to the detriment of consumers (such as loans where the borrower cannot afford the repayments or loans incorrectly characterised as investment rather than consumer loans).

It is clear that there is a significant gap between consumers' understanding of the role of brokers and the way in which many of them operate in practice. This discontinuity was made apparent in a recent survey of brokers conducted by JP Morgan Securities Australia Ltd and Fujitsu Consulting<sup>16</sup> which found:

- 50% of consumers surveyed thought a broker would give them “objective and independent advice”.
- many brokers placed loan applications according to the size of the upfront commission and the speed of processing by the lender (which affects how quickly they will receive the commission).

Consumers who suffer loss or damage as a result of the conduct of brokers have great difficulty in obtaining redress and compensation. There are a number of reasons for this, including:

- The absence of national uniform legislation, with prescriptive obligations on brokers in relation to disclosure of financial benefits they will derive from the transaction and their obligation to arrange credit that meets the consumers needs. For example, brokers are under no obligation, when refinancing a home loan when the borrower is in arrears, to ensure the repayments under the new loan are lower and therefore more affordable. Both industry and consumer bodies alike have supported the introduction of this legislation.
- The absence of any requirement on brokers to be a member of an alternative dispute resolution scheme, giving consumers access to a low cost redress mechanism. Many brokers, particularly those who are less professional brokers, are not members, making litigation the only real option if agency cannot be shifted to the lender. This is a significant gap in the consumer protection framework.

Attention on the conduct of brokers is urgently required as the proportion of broker-originated home loans continues to increase, reaching about 35% of mainstream loans and over 45% of low doc loans as at October 2005.<sup>17</sup>

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<sup>16</sup> Id

<sup>17</sup> JP Morgan “Australian Mortgage Industry – Volume 2: Low Doc Loans - A growing segment”, JP Morgan Securities Australia Limited and Fujitsu Consulting, Asia Pacific Equity Research, 11 October 2005.

## **F. Summary and Recommendations**

This report demonstrated that the total number of actions for house repossessions, writs of possession obtained and executed increased substantially in 2005. Further, lenders on average acted faster in 2005 to obtain default judgments, seek enforceable orders and execute those orders than in 2002, 2003 or 2004. It was also demonstrated that non-bank lenders took more than double the number of actions from 2002 to 2005 than all other lenders combined and that non-bank lenders have been responsible for taking an increasing proportion of all actions, especially in 2005.

It has been suggested that the results of this investigation indicates there are problems within the non-bank lending sector, which may be influencing the rates at which their loans are defaulting. In particular, the use of Low-Doc, No-Doc and investment loan vehicles deserves careful attention as does the involvement of mortgage or finance brokers in originating such loans.

### **Recommendations**

The following recommendations are suggested for law reform and further research:

- 1. Research and investigation is required into the prevalence of consumers accessing superannuation to pay arrears on home loans and which lenders are involved.**
- 2. An investigation is required into the churn of loans to determine whether consumers are benefiting from refinances, or whether changes in lenders are being driven by intermediaries.**
- 3. An investigation should be conducted into the use of investment loans to determine if they are being used as a vehicle for avoiding the regulation of the Consumer Credit Code for owner-occupiers.**
- 4. Law reform is required regarding the law of agency in relation to the conduct of mortgage and finance brokers to afford better consumer protection.**
- 5. National regulation of mortgage and finance brokers should be introduced as soon as possible.**
- 6. Prudential regulation of non-bank lenders should be a priority for the Commonwealth.**
- 7. Law reform is required in relation to the provision of credit for housing, which would require lenders to undertake a reasonable assessment of a borrower's capacity to pay regardless of the type of loan sought. Legislation similar to that of section 28A of the ACT Fair Trading Act could provide a useful model for reform.**
- 8. Law reform is required if the time periods for borrowers filing an appearance and a defence in response to an Action for Possession are to be extended.**

# Annexures

## **Annexure A**

### **Methodology**

#### **1. Data Collection**

The Consumer Law Centre contacted the ACT Supreme Court Sheriff Chris Winslade seeking access to information held by the Court about actions filed during 2002-2005 where creditors sought orders of possession for real property. Mr Winslade provided the Consumer Law Centre with data providing the file numbers of all such actions in this period. This data was later sought for the number of actions taken to 30 June 2005 and 30 June 2006. Mr Winslade then gave permission for the Consumer Law Centre to manually search Court records including the Cause Book and Writ Book.

The data was collected by two researchers<sup>18</sup> working on behalf of the Consumer Law Centre who attended the ACT Supreme Court over a period of two days in April 2006. Clerks at the Court provided the researchers with the physical Court files where information taken from the Cause Book was cross referenced with information about default judgments and that taken from the Writ List. Names of creditors were matched with file numbers by the researchers and where possible, outcomes of those matters were also recorded by reference to the Court files.

The Supreme Court data does not distinguish between the type of loan facility underpinning the actions. Some of the loans may have been "investment loans" rather than "consumer loans". However, in the experience of the Consumer Law Centre, the distinction is of little value as owner-occupiers can have loans which in name are investment loans, but in reality are consumer loans. This issue is addressed below in Part E.

#### **2. Data Analysis**

The researchers manually compiled the Court information into several Excel spreadsheets. In May and June 2006 the data was organised into categories from which tables and figures were extracted.

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<sup>18</sup> The researchers were volunteer final year graduate law student Bronwyn Davies and the Consumer Law Centre's Melanie Mulquiney.

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## Annexure B

### *Indicator variable housing lending rates - percent*

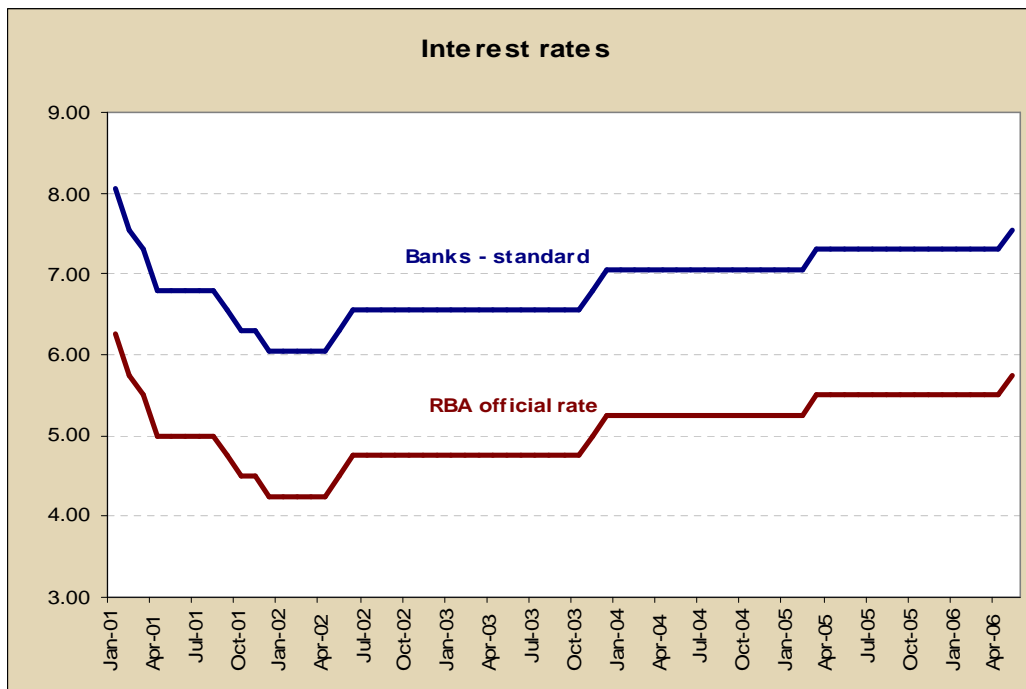
	Banks		Building societies	Mortgage managers		RBA official rate
	<i>Standard</i>	<i>Basic</i>	<i>Standard</i>	<i>Standard</i>	<i>Basic</i>	
Jan-2001	8.05	7.50	7.95	7.65	7.20	6.25
Feb-2001	7.55	7.00	7.45	7.25	6.85	5.75
Mar-2001	7.30	6.80	7.20	6.95	6.50	5.50
Apr-2001	6.80	6.25	6.70	6.45	5.95	5.00
May-2001	6.80	6.25	6.70	6.45	5.95	5.00
Jun-2001	6.80	6.25	6.70	6.35	5.95	5.00
Jul-2001	6.80	6.25	6.70	6.45	5.95	5.00
Aug-2001	6.80	6.25	6.65	6.45	5.95	5.00
Sep-2001	6.55	6.00	6.40	6.20	5.70	4.75
Oct-2001	6.30	5.75	6.20	5.95	5.45	4.50
Nov-2001	6.30	5.75	6.20	5.95	5.45	4.50
Dec-2001	6.05	5.50	5.95	5.70	5.20	4.25
Jan-2002	6.05	5.50	5.95	5.70	5.20	4.25
Feb-2002	6.05	5.50	5.95	5.70	5.20	4.25
Mar-2002	6.05	5.50	5.95	5.70	5.20	4.25
Apr-2002	6.05	5.50	5.95	5.70	5.20	4.25
May-2002	6.30	5.75	6.15	5.95	5.45	4.50
Jun-2002	6.55	6.00	6.45	6.20	5.70	4.75
Jul-2002	6.55	6.00	6.45	6.20	5.70	4.75
Aug-2002	6.55	6.00	6.45	6.20	5.70	4.75
Sep-2002	6.55	6.00	6.45	6.20	5.65	4.75
Oct-2002	6.55	6.00	6.45	6.20	5.65	4.75
Nov-2002	6.55	6.00	6.45	6.20	5.65	4.75
Dec-2002	6.55	6.00	6.45	6.25	5.65	4.75
Jan-2003	6.55	6.00	6.45	6.25	5.70	4.75
Feb-2003	6.55	6.00	6.45	6.20	5.70	4.75
Mar-2003	6.55	6.00	6.45	6.20	5.70	4.75
Apr-2003	6.55	6.00	6.45	6.20	5.70	4.75
May-2003	6.55	6.00	6.45	6.20	5.70	4.75
Jun-2003	6.55	6.00	6.45	6.20	5.70	4.75
Jul-2003	6.55	6.00	6.45	6.20	5.70	4.75
Aug-2003	6.55	6.00	6.45	6.20	5.70	4.75
Sep-2003	6.55	6.00	6.45	6.20	5.75	4.75
Oct-2003	6.55	6.00	6.45	6.20	5.75	4.75
Nov-2003	6.80	6.25	6.70	6.45	6.00	5.00
Dec-2003	7.05	6.50	7.00	6.70	6.25	5.25
Jan-2004	7.05	6.50	7.00	6.70	6.25	5.25
Feb-2004	7.05	6.50	7.00	6.70	6.25	5.25
Mar-2004	7.05	6.50	7.00	6.70	6.25	5.25
Apr-2004	7.05	6.50	7.00	6.70	6.25	5.25
May-2004	7.05	6.50	7.00	6.70	6.25	5.25
Jun-2004	7.05	6.50	7.00	6.70	6.25	5.25
Jul-2004	7.05	6.50	7.00	6.70	6.25	5.25
Aug-2004	7.05	6.50	7.00	6.70	6.25	5.25
Sep-2004	7.05	6.50	7.00	6.70	6.25	5.25
Oct-2004	7.05	6.50	7.00	6.70	6.25	5.25



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	Banks		Building societies	Mortgage managers		RBA official rate
	Standard	Basic	Standard	Standard	Basic	
Nov-2004	7.05	6.50	7.00	6.70	6.25	5.25
Dec-2004	7.05	6.50	7.00	6.70	6.25	5.25
Jan-2005	7.05	6.50	7.00	6.70	6.25	5.25
Feb-2005	7.05	6.50	7.00	6.70	6.25	5.25
Mar-2005	7.30	6.75	7.20	6.95	6.40	5.50
Apr-2005	7.30	6.75	7.25	6.95	6.40	5.50
May-2005	7.30	6.75	7.25	6.95	6.40	5.50
Jun-2005	7.30	6.75	7.25	6.95	6.40	5.50
Jul-2005	7.30	6.75	7.25	6.95	6.35	5.50
Aug-2005	7.30	6.75	7.25	6.95	6.35	5.50
Sep-2005	7.30	6.75	7.25	6.95	6.35	5.50
Oct-2005	7.30	6.75	7.25	6.95	6.35	5.50
Nov-2005	7.30	6.75	7.25	6.95	6.35	5.50
Dec-2005	7.30	6.75	7.25	6.95	6.35	5.50
Jan-2006	7.30	6.75	7.25	6.95	6.35	5.50
Feb-2006	7.30	6.75	7.25	6.95	6.35	5.50
Mar-2006	7.30	6.75	7.25	6.90	6.30	5.50
Apr-2006	7.30	6.75	7.25	6.90	6.30	5.50
May-2006	7.55	7.00	7.45	7.15	6.55	5.75

Source: RBA Table F05



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**Official interest rates**

	<b>Change</b>	<b>Rate</b>
2-Feb-2000	+0.50	5.50
5-Apr-2000	+0.25	5.75
3-May-2000	+0.25	6.00
2-Aug-2000	+0.25	6.25
7-Feb-2001	-0.50	5.75
7-Mar-2001	-0.25	5.50
4-Apr-2001	-0.50	5.00
5-Sep-2001	-0.25	4.75
3-Oct-2001	-0.25	4.50
5-Dec-2001	-0.25	4.25
8-May-2002	+0.25	4.50
5-Jun-2002	+0.25	4.75
5-Nov-2003	+0.25	5.00
3-Dec-2003	+0.25	5.25
2-Mar-2005	+0.25	5.50
3-May-2006	+0.25	5.75

Source: RBA Table A02

**Index numbers - project home prices**

	Not adjusted for inflation			Adjusted for inflation				
	<i>Canberra</i>	<i>Sydney</i>	<i>Weighted average all capitals</i>	<i>CPI Base 89-90</i>	<i>CPI Base 03-04</i>	<i>Canberra</i>	<i>Sydney</i>	<i>Weighted average all capitals</i>
Sep-02	89.0	95.0	91.3	138.5	96.5	92.2	98.4	94.6
Dec-02	90.2	95.5	92.1	139.5	97.2	92.8	98.2	94.7
Mar-03	92.0	96.7	93.5	141.3	98.5	93.4	98.2	94.9
Jun-03	95.3	97.2	95.6	141.3	98.5	96.8	98.7	97.1
Sep-03	98.7	98.4	97.7	142.1	99.1	99.6	99.3	98.6
Dec-03	99.8	99.2	99.3	142.8	99.5	100.3	99.7	99.8
Mar-04	100.4	100.4	100.7	144.1	100.5	99.9	99.9	100.2
Jun-04	101.1	102.0	102.3	144.8	100.9	100.2	101.0	101.3
Sep-04	101.6	103.1	103.6	145.4	101.4	100.2	101.7	102.2
Dec-04	101.6	104.8	105.4	146.5	102.1	99.5	102.6	103.2
Mar-05	101.8	106.1	107.1	147.5	102.8	99.0	103.2	104.2
Jun-05	102.9	107.0	108.2	148.4	103.5	99.5	103.4	104.6
Sep-05	103.7	107.4	109.1	149.8	104.4	99.3	102.8	104.5
Dec-05	104.9	107.7	110.0	150.6	105.0	99.9	102.6	104.8
Mar-06	105.9	107.5	110.4	151.9	105.9	100.0	101.5	104.3

Source: ABS 6416.0 (House prices) and ABS 6401.0 (CPI)  
Reference base: 2003-04 =100

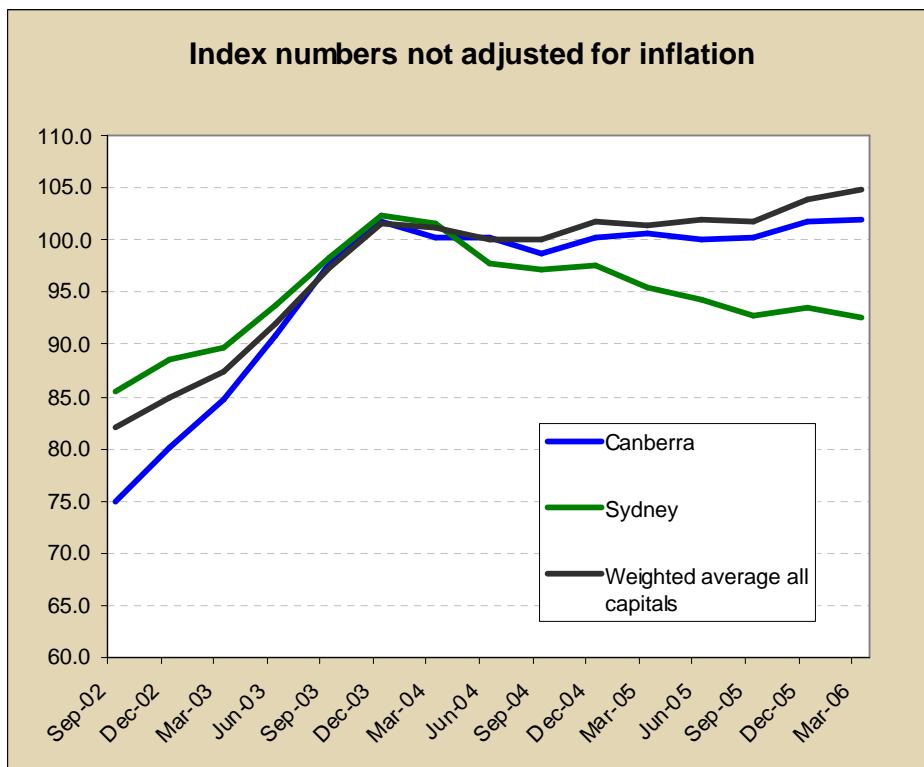
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**Annexure C**

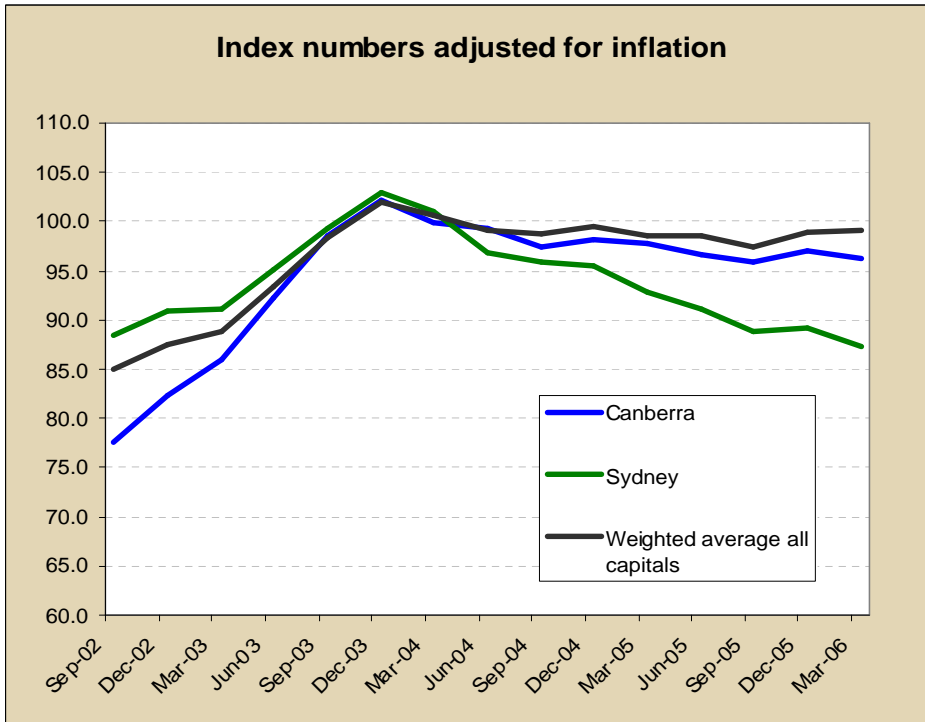
*Index numbers - established house prices*

	Not adjusted for inflation					Adjusted for inflation		
	Canberra	Sydney	Weighted average all capitals	CPI Base 89-90	CPI Base 03-04	Canberra	Sydney	Weighted average all capitals
Sep-02	74.9	85.4	82.0	138.5	96.5	77.6	88.5	84.9
Dec-02	80.1	88.5	85.0	139.5	97.2	82.4	91.0	87.4
Mar-03	84.7	89.7	87.4	141.3	98.5	86.0	91.1	88.7
Jun-03	90.9	93.7	92.0	141.3	98.5	92.3	95.1	93.4
Sep-03	97.7	98.4	97.4	142.1	99.1	98.6	99.3	98.3
Dec-03	101.7	102.4	101.5	142.8	99.5	102.2	102.9	102.0
Mar-04	100.3	101.5	101.2	144.1	100.5	99.8	101.0	100.7
Jun-04	100.3	97.7	100.0	144.8	100.9	99.4	96.8	99.1
Sep-04	98.7	97.1	100.0	145.4	101.4	97.4	95.8	98.7
Dec-04	100.3	97.6	101.7	146.5	102.1	98.2	95.6	99.6
Mar-05	100.6	95.5	101.3	147.5	102.8	97.8	92.9	98.5
Jun-05	100.0	94.2	101.9	148.4	103.5	96.7	91.1	98.5
Sep-05	100.2	92.7	101.7	149.8	104.4	96.0	88.8	97.4
Dec-05	101.8	93.6	103.9	150.6	105.0	97.0	89.2	99.0
Mar-06	102.0	92.5	104.9	151.9	105.9	96.3	87.4	99.1

Source: ABS 6416.0 (House prices) and ABS 6401.0 (CPI)  
Reference base: 2003-04 =100



**"They want to take our house"**  
**An Investigation into House Repossessions in the ACT Supreme Court**



## **Annexure D**

ANZ - Australia and New Zealand Banking Group Limited

Challenger – Challenger Proprietary Limited

Citibank – Citibank Proprietary Limited

Commonwealth – Commonwealth Bank of Australia

GE Mortgages – GE Money Mortgage Services

Liberty Finance – Liberty Financial Proprietary Limited

NAB - National Australia Bank Limited

Pepper Homeloans - Pepper Homeloans Proprietary Limited

Permanent Custodians - Permanent Custodians Limited

Perpetual Trustees - Perpetual Trustee Company Limited

St George – St George Bank Limited

Westpac - Westpac Banking Corporation