

Article Information

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Westpac and ASIC back in the ring following rejected settlement

Following Justice Perram's rejection of the \$35 million agreed settlement between Westpac and ASIC last year, the parties have returned to court to determine whether Westpac has breached the responsible lending laws.

Westpac and ASIC have returned to court to have their once-cooperative settlement turned responsible lending precedent-setting case heard.

Following Justice Perram's rejection of the \$35 million agreed settlement between the parties last year, the Federal Court began hearing both parties' submissions on 6 May 2019, with the hearing expected to continue until mid this week.

ASIC has contended that all uses of the HEM Benchmark, instead of a customers' declared living expenses, are a breach of the National Consumer Credit Protection Act 2009 (Cth) (**NCCP Act**), not just instances where the customers' declared living expenses were higher than HEM.^[1] Consequently, ASIC argues that all 261,987 home loans approved through the automated decision system breached the NCCP Act, regardless of what the consumers' declared living expenses were, as the use of HEM does not constitute proper assessment required under the NCCP Act.^[2] Westpac has criticised ASIC for changing positions on responsible lending, arguing it acted in good faith to ensure customers could afford their loan repayments.^[3]

Although Westpac collected additional information during the loan application process, ASIC argues that it did not amount to proper assessment under the NCCP Act, as Westpac only used HEM in calculating whether a customer could service the loan.^[4] Westpac argues that it also protected customers by acting in compliance with prudential requirements in using an interest rate buffer to test whether applicants could make repayments in the case of an interest rate rise.^[5]

Westpac argues that ASIC has provided inconsistent guidance on the use of the HEM Benchmark. In the current hearing, ASIC has argued that HEM is a 'frugal' measure of household expenditure that suggests similar expenses to people living on the Henderson Poverty Line, and does not appropriately reflect the individual circumstances of households.^[6] However, in a 2014 media release, ASIC stated that "credit licensees cannot rely solely on benchmark living expense figures",^[7] which Westpac argues does not rule out the use of benchmarks altogether.^[8]

Westpac rejects ASIC's "19th Century" approach to taking a consumers' income and subtracting their expenses to assess whether the consumer can repay the loan, and only lending when the result is a suitably positive number.^[9] Westpac believes its "21st Century system" is much more sophisticated than this approach by using a '70% rule' that refers customers for manual assessment if declared living expenses exceeds 70% of their verified monthly income.^[10]

Stay tuned for the outcome of this case, as it is revealing critical details on how ASIC is now interpreting the responsible lending laws. In the rejected settlement between ASIC and Westpac, ASIC only raised issue with Westpac using the HEM Benchmark when declared living expenses were higher. However, ASIC is now contending that relying on the HEM Benchmark at all is a breach of the NCCP Act. It appears ASIC's view on benchmarks is that they should only be used for guidance and not a final figure on assessing the suitability of a loan.

If Justice Perram reveals any deficiencies in the current responsible lending provisions of the NCCP Act, we could expect to see amendments to the law, something encouraged by Commissioner Hayne in his final report of the Banking Royal Commission.^[11]

[1] Stephanie Chalmers, 'Westpac and ASIC fight over responsible lending after court rejects \$35m settlement' *ABC News* (6 May 2019) <https://www.abc.net.au/news/2019-05-06/westpac-asic-responsible-lending-case-court/11083236>.

[2] *Ibid.*

[3] Misa Han, 'Westpac accuses ASIC of shifting rules on lending' *Australian Financial Review* (7 May 2019) <https://www.afr.com/real-estate/residential/westpac-accuses-asic-of-shifting-rules-on-lending-20190507-p51kr6>.

[4] Chalmers, above n 1.

[5] Han, above n 3.

[6] *Ibid.*

[7] Australian Securities and Investments Commission, 'ASIC releases updated responsible lending guidance' (Media release 14-290MR, 5 November 2014) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2014-releases/14-290mr-asic-releases-updated-responsible-lending-guidance/>.

[8] Han, above n 3.

[9] James Eyers and Misa Han, 'The case that could reshape banking' *Australian Financial Review* (10 May 2019) <https://www.afr.com/business/banking-and-finance/inside-the-westpac-case-that-could-alter-banking-20190510-p51lz4>.

[10] Han, above n 3.

[11] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report (Volume 1) 57.