

— Chanticleer

ASIC's lending loss a win for common sense

Justice Nye Perram has dealt ASIC a triple blow in dismissing its responsible lending case against Westpac, questioning the watchdog's very understanding of the laws.



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Not only has Federal Court judge Justice Nye Perram completely destroyed the corporate [watchdog's claims that Westpac repeatedly breached responsible lending laws](#) in the way it assessed borrowers' expenses, but he has deliciously mocked the idea that a would-be borrower's living expenses will not or cannot change.

"The only way that one or more declared living expenses can be shown to be necessarily relevant to the issue of whether the consumer can afford to make the repayments is by identifying some living expenses which simply cannot be foregone or reduced beyond a certain point," Justice Perram says in his judgment, [which found against ASIC and ordered it to pay Westpac's costs](#).



ASIC chairman James Shipton will need to go back to the drawing board on responsible lending. **David Rowe**

"For example, everyone has to eat so there must be an amount of food for which the minimum which can be conceivably spent...knowing how much the consumer actually spends on food does not tell one anything about that conceptual minimum.

"I may eat Wagyu beef everyday washed down with the finest Shiraz but, if I really want my new home, I can make do with more modest fare. Knowing the amount I actually expend on food tells one nothing about what that conceptual minimum is."

It's a very elegant way of pointing out the problem that lies at the heart of lending.

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That is, a bank must make their best assessment of a borrower's worthiness at a point in time, in the knowledge that his assessment could be out of date as soon as the loan papers are signed.

The borrower could get their loan and lose their job, or get a new one. They could get a dog, or have a baby, or get an inheritance from granny. They could get very sick. Or they could slash their living expenses by turning vegan or swearing off the booze – although naturally we hope Justice Perram won't do either.

The point is, borrowers' circumstances change, and it is almost never the relatively minor expenses that lead to loans going bad, but big life events like unemployment, illness or family tragedy.

Or as Justice Perram put it far more entertainingly: "To foreshadow what lies ahead, one may ask what knowing that a consumer currently spends \$500 per month on wine tells one about whether the consumer can afford the repayments on a proposed \$2 million loan...or whether, whilst able to afford to make the repayments on that loan, the consumer could do so only by being placed in circumstances of substantial hardship."

This is the first punch in a trio of blows that this judgment delivers to ASIC as chairman James Shipton – a clear questioning of the very idea that [focusing on one expense or another tells you an awful lot about whether a loan will push the borrower into substantial hardship](#).

The second blow comes from Justice Perram's very direct dismissal of ASIC's argument that Westpac was wrong to use the Household Expenditure Measure (HEM) benchmark to assess a borrower's expenses, instead of the actual expenses declared by the customer.

"Whilst I accept that the Act requires a credit provider to ask the consumer about their financial situation...I do not accept that this has the further consequence that the credit provider must use the consumer's declared living expenses in doing so."

The third blow is that the judge has declared that the National Consumer Credit Protection Act "does not operate as ASIC alleges".

This is a particularly nasty hit. But perhaps it also provides the watchdog with the ammunition to turn this brutal loss into a victory.

Surely ASIC will have no option but to attempt to use this judgment to push for legislative reform, such that the regulator's view of responsible lending is better reflected in the law of the land. This view would be informed by this

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case, by the royal commission's work and by [ASIC's current inquiry into responsible lending](#).

It is worth noting that Commissioner Ken Hayne refrained from making specific recommendations around the use of the HEM because of this Westpac case, but suggested a quick response was necessary depending on the outcome of the legal stoush.

Let's hope that response does listen to the common sense at the heart of Justice Perram's judgment.

Responsible lending is about building up a holistic picture of a borrower's circumstances. The extraordinary focus on the set of expenses that should be used to assess a loan application risk missing the bigger picture – both for an individual and for a banking sector where loan arrears are historically low.

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James Thomson is a Chanticleer columnist at The Australian Financial Review based in Melbourne. James was previously the Companies editor and the editor of BRW Magazine. *Connect with James on [Twitter](#). Email James at j.thomson@afrc.com*



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