

with their finance problems. It is therefore crucial that the law protects the borrowers.

Fighting for Transparency in Home Mortgagee Sale¹

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Introduction

The dream of owning a home has driven thousands of borrowers in Fiji to take on home loans. This is very likely to be a consumer's biggest debt after car loan. If there is an economic downturn, a borrower's dream of owning a home can turn into a nightmare. Defaults on home loans can cause intense personal hardship to individuals and families, especially in cases of home repossessions.

Generally, for home loans, there is a long-term relationship between a borrower and the lender. Home loan is generally taken at a young age and the payment continues for next 20-30 years. During this period it is expected that a borrower's ability to meet repayment obligation is likely to change from time to time, which should not come as a surprise to a prudent lender.

The main drivers for defaults on home loans are:

- Sudden loss of income resulting from losing or changing jobs, or loss of overtime;
- Increase in interest rates and higher house prices;
- Personal relationship breakdown;
- High indebtedness and financial over-commitment;
- Changes in retirement age and in rate of superannuation payments;
- Illness; and
- Disability

It should be noted that mortgage providers are not in the business of 'Saving Families' Homes', they are in the business of lending money. Credit providers do not have the time or inclination to assist borrowers

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Legislative Provisions

Prior to the Consumer Credit Act 1999, there was no legal safeguard for the consumers. Credit transactions occurred mainly by contractual agreements prepared by credit providers and consumers had no option but to accept the terms and conditions imposed by the credit providers. The Consumer Credit Act 1999 and subsequent Amendment Act 2006 and Regulations 2009 were enacted to remedy this imbalance in power of the two parties. This Act covers mortgage from the time the borrower initiates home loan to repossession of home if payments are not made regularly.

The Consumer Credit Act is implemented by the Ministry of Industry and Trade.

Statistics on Mortgagee Sale

The statistic given below establishes the minimum number of houses going on mortgagee sale. Business properties were not included. In the last 3 years 439 properties were put on mortgagee sale worth almost 50 million dollars.

Year	No. of Mortgage Sale	Value (\$)
2011	143	\$14,493,644.50
2010	172	\$25,256,637.70
2009	124	\$10,156,679.34
Total	439	\$49,906,961.54

We have found bank officers buying mortgaged property from another bank. For example:

- Bank Officer from ANZ buying mortgaged property from BSP.
- BSP officer buying mortgaged property from FDB for \$191,000 whereas mortgagor paid \$300,000.

Lawyers and Real Estate Agents have been buying mortgaged properties by forming companies or under their wife and children's name.

Issues with Mortgagee Sale

Mortgagee sale is the most painful experience a person goes through. Borrowers have a strong attachment to their home and are motivated by a desire to avoid its sale. In some cases, the borrower will access superannuation or resort to refinancing options to save his/her home. By doing this, the borrower loses not only the home but also superannuation funds and ends up with more debts after the mortgagee sale.

The existing loopholes in the current policies and practices on mortgagee sale are the root cause of many consumers losing their homes. Other reasons are lack of statistics and poor enforcement of the legislation to understand the extent of the problems and remedies that must be put in place to protect borrowers. Imbalance of power is the first thing that staggers the homeowner and their confidence to seek for any justice. Following are some of the loopholes associated with mortgagee sale:

No pre-contractual disclosure: Banks and financial providers fail to give out information that can be easily compared prior to taking loans. The intended borrower is given the contract document to read and sign. The potential buyer is not provided with all the necessary information in a simple format to shop around for the best home loan. In Australia, home loan fact sheets provide a standardized layout of information for a loan. Because lenders provide information in the same way, it becomes easier to compare loans to make a wise decision.

Insurance: With the current Consumer Credit Act, a consumer pays for credit insurance but the credit provider receives commission rather than the consumer. This practice is unfair to consumers. If any commission is received, it must be passed on to the consumers either as cash payments or as credits to their accounts to reduce their debt.

Financial hardship: A consumer who enters into a home loan contract at a particular annual interest rate has no clue what the future has in store for him or her. Any change in the earning ability, interest rate and in real estate prices makes the households vulnerable. These are the inherent features of taking home loan which borrowers cannot foresee. The lenders should recognize this and respond to such changes in good faith. The application of financial hardship clause in the law must be applied consistently by lenders to assist borrowers experiencing difficulties in meeting the repayments on their mortgage. It must be noted that financial hardship can be triggered by fluctuations in the interest rate which is not known to

the consumer when signing up for home loan. The Council has noted that the financial hardship assistance is used by lenders differently which is subjective in nature. The Council has found that practices are inconsistent and vary greatly among industry players. How are financial hardship assistance promoted by different lenders? What we need is an interest rate ceiling to prevent the most irresponsible business models for lending.

Promoting financial hardship: Most borrowers receive very little information on relief that lenders offer when borrowers face financial hardship. Problems include the lack of positive obligations on the part of lenders to assist people facing financial hardship. Lenders should ensure that information about options and assistance in the event of financial hardship is accessible and available to all borrowers. In other words, lenders should exhaust all possible ways to assist the borrowers in saving their homes. In Australia, financial institutions have to prove to the court that the borrower was assisted during hardship when lender approaches the Court for home repossession. In Fiji, on the other hand, an acceleration clause is operative if the mortgagor is in default. The credit provider is required to give the mortgagor a default notice and where the notice is not remedied within the period specified in the default notice, the banks are at liberty to enforce the acceleration clause at their own terms.

Default notice: Default notice sent to borrowers when they miss a payment should be improved with better and clearer information on options available for restructure. Borrowers would benefit from being provided with information on their rights to request relief or assistance on the grounds of financial hardship and the options available to them under the Consumer Credit Act. The Council has witnessed a number of cases where banks are not willing to assist home owners with a restructure. In such cases the borrower has to seek court's help. In Fiji, this provision in the law is subjective rather than objective. It is left to the discretion of an individual bank officer who is normally in charge of the mortgagor's account. In Australia, banks are not only expected to assist borrowers during hardship but also inform them on the options available under the law before the property is repossessed.

Mortgagee sale: In Fiji, financial institutions and their lawyers initiate mortgagee sale where a consumer has no say. In Australia, a Court/Tribunal order must be sought by the lender before the house is put on auction or mortgagee sale. In other words, the Court independently assesses to which extent financial institutions assisted the home owner dur-

ing hardship. In the Court/Tribunal the lender has to convince with facts and evidence that all opportunities were given to the mortgagor and foreclosure is the last resort. In Fiji, the current law expects the borrower to go to the court to seek relief (if denied by the banks) for changes to credit contract under hardship, to postpone mortgagee sale or re-open any unjust transaction.

Conflict of interest of lawyers: In mortgagee sales, lawyers are appointed by the bank but paid by the borrower. If a lawyer is engaged by the financial institution then the payment should be made by them. The settlement also takes much longer because the lawyers protect the interests of the financial institutions to remain on their panel of solicitors. A lengthier period means more legal fees for the lawyers and more interest earnings for the banks.

High legal fees: This is another issue in mortgagee sales where home owners have no say. The legal fee is decided by the bank and the lawyer. It is found the legal cost is normally high for lawyers who are nominated by the banks as compared to those lawyers who are not on the bank's panel of solicitors. If a borrower is expected to pay the legal fees than it is only fair the borrower decides on the appointment of the lawyer based on the fee he/she can afford.

Tender process: The tender process called for mortgagee sale is not transparent. A home owner is not invited or involved when tenders are opened and awarded. The Council has come across situations where properties are bought by lawyers and bank officers.

Unclear time frame to settle the deal for properties sold by way of mortgagee sale: Dragging the deal means more money for the financial institutions where interest continues to accrue and charged until the day of settlement. For lawyers, it is a 'billing opportunity' guised under 'follow-ups'. Hence, it becomes an enhanced income generation for the financial institutions and the other parties involved when the settlements are not concluded expeditiously. A deal should be settled within a specified time period and the banks' mortgagee policy should contain such a provision.

Information leak: The information on the amount owed by the homeowner is leaked by solicitors and bank officers to other bank staff or their acquaintances. This is where bank staff's close relatives, solicitors, or bank officers themselves buy the property at a much lower price and then

they sell it off to make huge profits. This practice has been going on for a long time and it must stop. With the present practice, homeowners are simply demanded to pay and forced to be tagged as bankrupt in most cases.

Mortgaged property often get sold well below market value: It is hard to believe that things get above board when it comes to mortgagee sale. One has to look at the price fetched by a property put on mortgagee sale as compared to other properties sold around the same time. Why is the interest of the homeowner always disregarded? In most cases the properties are sold much below the market value. It is important that the property be sold through normal sale or through auction. This will ensure that the property is sold at or above market value.

No financial statement: It is also disappointing to see that in most cases, neither the financial institution nor the lawyer provide a final statement to the home owner giving details such as what was owed to the financial institution, how much the property was sold for, any reimbursement of insurance, other fees and charges, what is the accrued interest etc. As a result, many property owners have suffered at the hands of banks and their lawyers.

Reforms

The need for consumer protection arises from *an imbalance of power, information and resources* between consumers and their financial service providers, placing consumers at a disadvantage. Consumer protection aims to address this market failure. Reform in consumer credit law has taken place recently in New Zealand, Australia, Canada, UK and the USA. Consumer credit reform has been tagged as a priority with global recession where economic conditions have changed leaving many consumers with personal debt. Economic and technological change has also increased the choice available to consumers as well as the technical complexity of credit products.

Based on consumer complaints and evaluation of the Consumer Credit Act from consumers' perspectives, the Council has identified numerous problem areas. There is no doubt a need to further strengthen the Act in Fiji to better protect home owners from mortgagee sale.

Establishment of Independent Financial Commission

The need for a Financial Commission arises for the following reasons:

- The Reserve Bank of Fiji does not have any specific powers to impose penalties/conditions against the financial institutions licensed by RBF. Whilst RBF does investigate complaints, it is from the perspective of assessing whether a regulatory breach has occurred rather than for redress;
- All the unlicensed financial institutions (non-banks such as Dominion Finance Co. Ltd, Finance Pacific Corporation Ltd, etc, and Carpenters Finance, which are not licensed by the RBF, will come under the Commission's umbrella and will be regulated by the same. Through monitoring by the Commission, the unlicensed financial institutions will be under strict scrutiny and this will avoid consumers being unfairly treated;
- To register and deregister financial companies, financial advisors and intermediaries that have bad track record;
- To oversee the operation of the Data Bureau;
- To enforce Consumer Credit Act. In Australia, the Uniform Consumer Credit Code (similar to Consumer Credit Act) is administered by Australian Securities and Investments Commission (ASIC);
- To conduct research on home loans and other credits to provide change in policies on a regular basis; and
- To handle complaints against financial institution.

Auction a Better Option

Public auctions would be a fairer and more transparent way of selling repossessed properties. Policymakers and stakeholders should seriously consider implementing rules to govern the sale of mortgaged property. Auctions can be made mandatory and regulations be imposed to control the bidding process so that everyone knows their rights and responsibilities through the auction process. This would avoid the current discrepancies in the system. Auction laws should take modern business practice into account and go into details about what an auctioneer must say at an auction, how auction companies should advertise and what their contracts must say. Cue should be taken from countries like Australia that has real estate auctions with mandatory provisions to govern the auction

process. Unlike mortgagee sales, auctions can reveal the true market value of a property. Auctions are conducted in an open forum where all bids are known and participants are given immediate feedback on the property's value. This process will eliminate long negotiation periods where interests on mortgagors' accounts pile up, and buyers know they are competing fairly and on the same terms as all other buyers. Needless to say they will receive comprehensive information on property via due diligence packet. A consumer taking part in an auction can easily and quickly make market comparisons when he/she sees biddings at the same place and at the same time.

Changes to the Consumer Credit Act

The Council is proposing the following changes:

- Lenders to provide standardized home loan fact sheets based on a simple format to all potential home loan debtors. If lenders provide consumers with information in the same way, it will be easier to compare loans to make a wise decision;
- If any insurance commission is received by the financial institutions, it must be passed on to the consumers either as cash payments or as credits to their accounts to reduce their debt;
- Set up processes and procedures i.e. minimum standards lenders should follow to assist borrowers experiencing difficulties in meeting the repayments on their mortgage on the grounds of financial hardship;
- Obligation on the lenders to promote assistance and information available to borrowers to deal with financial hardships;
- To introduce sale of mortgaged property through auctions;
- Lender to obtain Court/Tribunal decision before the house is put on auction or mortgagee sale. This is where the financial institutions have to prove to the court that the borrower was assisted during financial hardship;
- Default Notice sent to borrowers when they miss a payment should be improved with better and clearer information on options available for restructure; and
- Setting a minimum amount of default before acceleration clause is applied;

Other Changes proposed by the Council include:

- Set fee which the lawyers can charge for conveyancing documents;
- Home owner should be present during opening and awarding of the tender to the potential buyers;
- Clear time line within which the settlement of mortgaged property must be concluded; and
- The property to be advertised as normal property without any indication that the property is a repossessed one.

Author

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