

Impact of family law settlements – banking and finance complaints

This fact sheet outlines how AFCA deals with complaints by consumers who say their financial firm enabled wrongful conduct by their ex-partner, where there has been a family law settlement.

This fact sheet includes information about when AFCA will exclude these kinds of complaints. It does not cover other issues related to family law settlements.

When does this issue arise?

AFCA receives complaints from consumers who seek compensation from a financial firm in circumstances where their spouse or de facto partner has caused or contributed to their loss. Examples include where:

- One partner withdraws funds from a joint transaction account and the complainant says their financial firm should not have allowed the transaction to occur
- One partner obtains a loan in joint names and the other partner says they did not know about, or consent, to the loan.

In some cases, the complainant and their ex-partner may have reached a family law property settlement, either by agreement or under court orders made in family court proceedings.

AFCA will review whether the settlement agreement or court orders affect our ability to consider the complaint.

Why are family law settlements relevant?

In these complaints, the complainant is concerned about their ex-partner's actions as well as the actions of the financial firm.

AFCA can only consider and make findings about the actions of the financial firm, not the ex-partner. However, in many cases the losses that flow from those actions are the same – that is, the funds withdrawn from the joint account or the extra debt resulting from the loan.

Where there has been a family law settlement between the complainant and their ex-partner, we will consider whether these losses have already been taken into account in the settlement.

If we decide the complainant has already been fully compensated for their losses by the family law settlement, we will not award compensation, even if we find the financial firm had breached its obligations.

When will AFCA exclude the complaint?

Where the complainant's loss has been taken into account under a family law settlement, AFCA may exercise its discretion under Rule C.2.2 to exclude the complaint.

We will only exercise our discretion to exclude a complaint if there are compelling reasons to do so. We would need to be satisfied that the complainant has been compensated for the amount AFCA would award if the financial firm was found to have made an error.

How will AFCA decide whether to exclude the complaint?

Where there has been a family law settlement, AFCA will not automatically assume that the losses claimed by the complainant have been taken into account. We recognise that:

- Both parties in family court proceedings may not have equal bargaining power
- A party may agree to a settlement without the benefit of legal advice or being able to thoroughly consider their position. This is of particular concern in circumstances where there is family violence, including economic abuse
- The court may take the view that family law proceedings are not an appropriate place to consider issues of fault or decide whether wrongful conduct has occurred.

Where there has been a family law settlement, AFCA will review the facts of each complaint to decide whether it is appropriate to continue to consider the complaint or to exclude it, including:

- The court orders and / or settlement agreement
- Correspondence between the parties and their lawyers about the division of assets and liabilities
- Any other relevant information about the division of assets and liabilities.

In making our decision, we will consider whether the complainant's concerns were considered by the court (or as part of the settlement agreement) in a way which changed the split of assets and liabilities. We may need to seek further information about the issues raised during the court proceedings or discussed in the lead-up to the property settlement.

When requesting documents, we will be mindful that the documents may contain sensitive information and we will adopt a trauma-informed approach.

We may also consider if:

- The complainant was aware of, and was able to, raise the issue (i.e., withdrawal of funds or increase in loans) before the family law settlement was made
- The complainant has suffered loss caused by the financial firm's conduct which was not addressed by the property settlement
- We need additional information about the division of assets and liabilities, and the parties are unable or unwilling to provide that information.

If it is unclear whether the complainant has been compensated for the claimed losses, then we will not exclude the complaint.

If there are ongoing family law proceedings (or settlement discussions) when the complaint is lodged with AFCA, it may be appropriate to defer consideration of the complaint until the family law matters have been resolved.



Case study

AFCA decided to consider the complaint

The complainant (Ms Z) and her ex-husband (Mr Z) held several loans with the bank. In late 2013, the couple separated, and Ms Z, who was vulnerable, living with depression and anxiety, left the family home and moved interstate. Ms Z said that Mr Z financially controlled her and forged her signature to obtain a line of credit (LOC) for \$350,000 in their joint names after the separation.

Family Court proceedings related to the separation were settled by consent orders in January 2018. The disputed loan was listed as a joint liability in the consent orders. Ms Z said she raised the issue of the forgery during mediation, but her lawyers advised her not to pursue it.

AFCA requested further information from the parties about the family law settlement and obtained Ms Z's consent to speak to her family law solicitor directly. We discovered that:

- Ms Z had raised the issue of the forgery, but her lawyer told her that without the relevant documents she wouldn't be able to prove anything
- The LOC documents were not available because the bank failed to comply with a subpoena issued by Ms Z's lawyer during the Court proceedings
- Given Ms Z's vulnerability and limited resources, her lawyer advised her not to pursue the issue but to focus on reaching a settlement
- The bank provided additional documents relating to the LOC sometime after the Family Court proceedings were settled.

On this basis, AFCA was satisfied that the issues with the LOC were not dealt with in the Family Court settlement. We decided it was appropriate to consider Ms Z's complaint.

Following investigation of the complaint, an AFCA Panel found that:

- All the accounts held by Mr and Ms Z were managed by the same staff member at the bank, who worked with Mr Z's sister. The staff member only interviewed Mr Z for the LOC and did not contact Ms Z, despite being aware the couple had separated.
- Ms Z should not have been a borrower under the LOC as she did not receive a benefit.
- Ms Z's signature on the LOC documents did not match sample signatures which should have been another red flag. AFCA's independent handwriting expert confirmed Ms Z's signature on the LOC documents was forged.
- The bank should have taken more care to compare the signatures on the loan documents and make sure Ms Z was receiving a benefit. The LOC was controlled by Mr Z and most of the funds were used for his benefit
- The bank was required to compensate Ms Z for her share of the equity (\$190,000) which was lost when the couples' home was sold to repay the LOC. It was also required to pay Ms Z a total of \$5,000 non-financial loss compensation for the severe stress and anxiety she suffered as a result of the bank's conduct.

Case study

AFCA exercised discretion to exclude the complaint

A complaint was lodged with AFCA by a joint borrower (Mr H) who said his ex-wife (Mrs H) withdrew \$100,000 from their joint account without his knowledge after he had called the bank to say that they were separating. Mr H said the bank confirmed that the account required signatures from both himself and Mrs H to make withdrawals.

The Family Court had recently made orders dividing the couple's assets and liabilities.

The bank accepted that it had made an error by allowing Mrs H to make the withdrawal without Mr H's signature but said that Mr H had already been compensated through Family Court proceedings.

When the orders were made by the Court, the judge stated that Mrs H should not have been allowed to make the transaction. However, the judge also found that:

- Under the property settlement, Mrs H was entitled to more than the \$100,000 she had withdrawn from the joint account because the joint account balance at the time of the withdrawal was \$400,000 and this should be split 50/50, or two equal parts.
- Mrs H was therefore entitled to a further \$100,000 from the joint account, taking her total share to \$200,000 and leaving the remaining \$200,000 for Mr H.

AFCA decided the issues raised in the complaint had already been dealt with by the Court and Mr H had been compensated for his loss caused by the bank's error.

Mr H was aware of the unauthorised withdrawal and had clearly raised this as an issue to be considered by the Court. The amounts received by Mr and Mrs H under the property settlement were adjusted to compensate Mr H for his loss from the unauthorised withdrawal.

In the circumstances, we did not consider that Mr H had suffered any indirect financial loss or non-financial loss for which AFCA would award compensation.

We decided that Mr H was not entitled to additional compensation for the bank's error because he had already been compensated for his financial loss through the Family Court proceeding. If Mr H was dissatisfied with the outcome, it was appropriate for him to pursue this with the Court.