



3 October 2023

Suanne Russell
Lead Ombudsman – Small Business and Transactions
Australian Financial Complaints Authority
GPO Box 3
Melbourne VIC 3001
by email: consultation@afca.org.au

Dear Ms Russell

AFCA's Appropriate Lending to Small Business Approach

Thank you for the opportunity to comment on AFCA's Appropriate Lending to Small Business Approach.

The Financial Rights Legal Centre's (**Financial Rights**) work on the National Debt Helpline is largely limited to assisting individual consumers with credit and debt issues rather than small business debts. However we do from time to time advise and work with people whose small business and personal finances are intermingled in ways that leads to our working with the limited rights and protections afforded small business borrowers. We are also often faced with consumers wrongly placed in business loans, who ought to have been afforded the protections provided under the *National Consumer Credit Protection Act 2009*. Our comments are limited to this experience.

1. Do you have any comments about our proposed approach to assess whether a small business loan is appropriate?

3.3 Consider the financial firm's obligations and good industry practice - Industry Codes

Given the relative significance and importance of industry codes in providing any rights or protections for small business lending, we think that it would be useful to expand this section.

For example, while the "diligent and prudent banker" standard found in the ABA Code is referenced in the example, it would be worth providing further information as to what this concept may mean and how it is applied, since it is a central concept considered in many cases. This could be easily drafted in plain English and without necessarily providing footnotes to case law or other references. A basic example case study may also be useful to enliven the concept for lay readers.

It would be worth mention too that the “diligent and prudent banker” standard is also a feature of the COBA Code, but not of the AFIA codes.

It may be worth referencing also some of the other key commitments that are available to small business providers.

While we acknowledge that it may be hard to provide links to the Codes themselves given they can be at times updated and moved, it would be worth pointing readers in the direction of where to obtain a copy of a code and how and where to check to see if the lender that they are complaining about is a subscriber to a particular code.

Finally, there may be good industry practice as outlined in industry body guidelines that apply to situations that small business complainants would find instructive and useful.

3.4 The purpose of the credit contract - Considering if a business purpose declaration (BPD) is effective

It would help if the Approach document could outline AFCA’s approach to the situation where there is no business purpose declaration at all, as opposed to an ineffective business purpose declaration – a scenario that does arise from time to time.

2. Do you have any comments about the non-exhaustive list of factors on page 19 that we may consider were appropriate for a financial firm to obtain or consider during their lending assessment?

3.5 Considering if the credit assessment was appropriate – Relevant factors or information

We note that one of the relevant factors included in the list on pages 19 and 20 is the personal contributions of those involved in the business, credit history and other relevant factors that demonstrate a willingness to repay.

This is an important factor in a number of cases and we support its inclusion in the list. However further information on when factors such as this will *not* be taken into account by AFCA would be useful.

We raise this because of a recent case that we were involved in: Determination 821824. The case involved a survivor of domestic violence and financial abuse who had been induced by the perpetrator to sign a guarantee over the business loans. The bank’s lending guidelines required acceptable franchisees to have a clear credit report. The bank argued that this referred to the franchisee business. As the franchisee business had no trading history, it was pointless to obtain a credit report as against the business. AFCA accepted this argument.

However, it remains our view that in the circumstances, a prudent lender would have obtained a copy of the perpetrator’s personal credit report since he was the proposed director of the business. How he managed his own finances was directly relevant to the likely success or failure of the business.

Further explanation of AFCA’s approach with respect to the relevance of personal credit histories would be welcome.

6. Do you have any comments about our use of the phrase “appropriate lending” as a description of the standard to be applied for small business lending? This phrase is not widely used outside AFCA, but we wanted to find and use a phrase to describe small business lending that was different to “responsible lending” (which applies to loans to consumers) and “unregulated lending” (because small business lending does have regulations).

Appropriate Lending

We understand that the term “appropriate lending” has been used in this approach to avoid the use of responsible lending since it has a legislated meaning under the *National Credit Act* and a term was required that was not unregulated lending since small business is not wholly unregulated. This is understandable and we support the use of this term. However we wish to raise the possibility of referencing unregulated small business lending as “fair and appropriate small business lending” to embed the concept of fairness into the approach AFCA takes to decision making. While “appropriate” connotes suitability, propriety or conformity with standards, fairness connotes equity and justice, concepts that are appropriate to apply in a largely unregulated space.

7. Do you have any other feedback about changes that could be made to the draft Approach to better achieve our objectives?

Acknowledging financial and/or economic abuse

As stated above Financial Rights’ work on the National Debt Helpline is largely limited to assisting individual consumers with credit and debt issues rather than small business debts. However we do see and work with people whose small business and personal finances are intermingled in ways that are complex. These complexities can at times involve sham business loans, as well as forms of financial and/or economic abuse.

We work with, for example, a number of victim survivors who have been listed as guarantors, silent partners, co-directors or even sole directors in small businesses through forms of coercive control. In most instances, the victim survivor is denied any decision-making powers or access to financial information. They are pressured to sign documents without know the detail and face threats if they resist.

This can lead to the victim being held liable for a share of the debt, being made bankrupt, or losing their home. Victim survivors ultimately struggle to extricate themselves from the financial complexities that their perpetrator has imposed upon them and find it difficult to re-establish independent financial lives.

It is important then in the context of AFCA’s appropriate lending to small business that matters of financial and economic abuse – as well as other forms of vulnerability – are taken into account and referenced in appropriate places throughout the document.

For example,

- the section on industry codes should refer to the commitments made with respect to vulnerability and financial abuse, as well as guarantors that apply in the small business context;

- the list of relevant factors or information that AFCA will consider whether a financial firm has made an appropriate credit assessment should include whether there were any signs of financial or economic abuse that the lender should have been alert to; or
- highlight the need to undertake further inquiries if there are any signs of financial or economic abuse.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact Financial Rights on (02) 9212 4216.

Kind Regards,



Alexandra Kelly
Director of Casework
Financial Rights Legal Centre

About Financial Rights

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters.