

# The AFCA Approach to non-financial loss claims

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We have created a series of AFCA Approach documents, such as this one, to help consumers and financial firms better understand how we reach decisions about key issues.

These documents explain the way we approach some common issues and complaint types that we see at AFCA. However, it is important to understand that each complaint that comes to us is unique, so this information is a guide only. No determination (decision) can be seen as a precedent for future cases, and no AFCA Approach document can cover everything you might want to know about key issues.

# 1 At a glance

## 1.1 Scope

AFCA can require a financial firm to compensate a complainant for non-financial loss caused by the firm's conduct.

This document sets out our approach to assessing claims for compensation for non-financial loss by outlining:

- the circumstances in which a claim for non-financial loss can arise
- AFCA's expectations of a complainant in dealing with a problem
- limits on awards of compensation
- principles applied in awarding compensation.

This Approach will assist financial firms and complainant to understand principles of compensation for non-financial loss. The approach has been adopted from AFCA's predecessor scheme, the Financial Ombudsman Service.

## 1.2 Summary

AFCA will only award compensation for non-financial loss where there has been an unusual amount of physical inconvenience, time taken to resolve a situation, or interference with the complainant's expectation of enjoyment or peace of mind.

In a privacy complaint, AFCA may award compensation if the complainant has suffered humiliation or injured feelings. There are limits on AFCA's ability to compensate non-financial loss in superannuation complaints.

In assessing whether to award compensation, AFCA expects complainants to be moderately robust, bear the normal degree of inconvenience experienced when a problem occurs, and take reasonable steps to minimise the inconvenience suffered. Where a complainant has contributed to their loss arising from the financial firm's conduct, their level of compensation may be reduced accordingly.

When doing so, AFCA considers the severity and impact of the financial firm's conduct on the particular complainant. For example, a complainant in financial difficulty would be more impacted by unreasonable delays by a financial firm.

AFCA takes a conservative approach to assessing compensation for non-financial loss. The maximum amount AFCA can award for non-financial loss is \$5,400 per claim. AFCA may also decide a non-financial remedy, such as a letter of apology, is appropriate.

It is not necessary for the complainant to request compensation for their non-financial loss; AFCA can award compensation if it considers it appropriate.

Where AFCA awards compensation and there is a related debt owing to the financial firm, it will usually be appropriate to apply the compensation to the debt.

## 2 In detail

### 2.1 When can AFCA award compensation for non-financial loss?

AFCA will only award compensation for non-financial loss where:

1. There has been an unusual amount of:
  - physical inconvenience
  - time taken to resolve a situation
  - interference with the complainant's expectation of enjoyment or peace of mind, or
2. In a privacy complaint, the complainant has suffered humiliation or injured feelings.

### 2.2 What amount can AFCA award?

AFCA takes a conservative approach to assessing compensation for non-financial loss.

An award of compensation for non-financial loss is unlikely to be substantial, and is likely to be in the hundreds, not thousands, of dollars. The maximum amount AFCA can award for non-financial loss is \$5,400 per claim.

AFCA may decide a non-financial remedy, such as a letter of apology, is appropriate.

### 2.3 What is AFCA's overall approach to assessing claims for non-financial loss?

In assessing whether to award compensation for non-financial loss, AFCA expects complainants to:

- be moderately robust
- bear the normal degree of inconvenience experienced when a problem occurs, and
- take reasonable steps to minimise the inconvenience suffered.

AFCA cannot award compensation for non-financial loss in a complaint arising from a claim on a general insurance policy that excludes such liability. It can, however, compensate a complainant for non-financial loss arising from the financial firm's poor management of the claim.

In the case of non-financial loss arising from poor financial advice, the complainant's stress and inconvenience must be greater than that associated with having made an investment and lost money. The circumstances where it is appropriate to award

compensation for non-financial loss usually involve the complainant undertaking a degree of stressful remediation.

## **2.4 Understanding our governing principles**

### **Each complainant can be compensated**

It is not necessary for the complainant to request compensation for their non-financial loss; AFCA can award compensation if it considers it appropriate.

Where there is more than one complainant, and each Complainant suffered non-financial loss, each can be awarded compensation.

### **Compensation is limited to natural persons**

AFCA will normally only award compensation for non-financial loss to individuals ('natural persons').

However, if the Complainant is a company, but the company is simply a business vehicle for a 'sole trader' or self-managed superannuation fund, AFCA may award compensation to the individuals behind the company, if that is otherwise appropriate.

### **Compensation can be applied to debt**

Where AFCA awards compensation for non-financial loss and there is a related debt owing to the financial firm, it will usually be appropriate to apply the compensation to the debt.

This will not be appropriate where, for example, the complainant is bankrupt, since the claim for compensation for non-financial loss is akin to a claim for damages for personal injury and the compensation is paid to the complainant personally, and not to the trustee in bankruptcy for distribution amongst the complainant's creditors.

### **Compensation can be discounted to recognise the complainant's contribution to their loss**

Where a complainant has contributed to their loss arising from the financial firm's conduct, it may be appropriate to apportion liability for the financial loss between the financial firm and the complainant.

The complainant may still be entitled to compensation for non-financial loss but the compensation may be discounted to account for their contribution to the loss.

### **There can be several claims for compensation for non-financial loss in a complaint**

AFCA takes the view that a 'claim' refers to the set of facts that, put together, gives the complainant the right to ask for a remedy. This means a set of separate events that led to the alleged loss.

When considering non-financial loss for, say, inappropriate debt collection activity, AFCA will determine whether there is one claim or several. This will depend upon the connection between the various offending acts. For example, seven telephone calls in the course of two weeks are likely to constitute one claim of harassment. However, where the complainant complains they received seven telephone calls in the course of the month and also was inappropriately contacted at their place of employment, this will constitute two claims.

Similarly, a complainant receiving five telephone calls in March and then a further seven telephone calls in May is likely to have two claims for non-financial loss, since each sequence of calls constitutes an act of harassment.

Where there is repeated conduct by a financial firm (for example, repeated instances of debt collection activity while the AFCA file is open), each event may cause the complainant additional non-financial loss, and so the amount of compensation for each claim may increase.

The \$5,400 compensation cap for non-financial loss claims applies to each claim, so AFCA can award a complainant more than \$5,400 in total in a complaint if he has several claims.

### **The impact of the financial firm's conduct will vary between complainants, and so will the award of compensation for non-financial loss**

When considering an award for non-financial loss, AFCA considers the severity and impact of the financial firm's conduct on the particular complainant.

AFCA looks at all the complainant's circumstances when assessing the impact of the financial firm's conduct. If, for example, there is a delay in the financial firm's response to a complainant's reasonable request for documents, it may have a greater impact if the complainant is also in financial difficulty. If a complainant is young, inexperienced and vulnerable, a financial firm's inappropriate debt collection activity may have a more significant impact on their peace of mind than it would on an experienced business person.

A complainant may be under significant stress and experiencing significant inconvenience for reasons unrelated to the financial firm's conduct, for example, a marriage breaks up. In these circumstances, AFCA will weigh up the additional stress the conduct caused the complainant and if appropriate, award compensation for it.

Inconvenience can lead to non-financial loss but AFCA would not award compensation for a level of inconvenience that is a normal part of doing business.

### **Superannuation complaints are subject to specific limits**

When AFCA determines a superannuation complaint, it does not award compensation for loss. Instead, it stands in the shoes of the trustee (or insurer, RSA provider or other decision-maker) to review the decision the complaint is about.

If AFCA concludes the original decision was unfair or unreasonable, it can vary that decision or replace it with a new decision. That decision must be one which the original decision maker could make, that is it must be not only fair and reasonable but also consistent with:

- law
- the governing rules of the superannuation fund or approved deposit fund, where relevant
- the terms and conditions of the annuity policy or retirement savings account, where relevant.

AFCA will only include compensation for non-financial loss in a determination about a superannuation complaint if it meets all these requirements as well as being consistent with AFCA's general approach to non-financial loss as explained above.

## 3 Context

### 3.1 Case studies

The case studies below are based on determinations by one of AFCA's predecessor schemes, the Financial Ombudsman Service, in which awards were made for non-financial loss. While previous determinations (by AFCA or by its predecessor schemes) are not binding precedents, where relevant they will inform AFCA's approach to an issue.

#### **Case 1: Financial firm repeatedly contacting or attempting to contact the complainant to recover the debt**

The 2005 ACCC and ASIC Debt Collection Guideline for Collectors and Creditors provides that a collector should not contact a debtor more than 3 times per week, or 10 times per month.

The financial firm made repeated telephone calls to the complainant's home and mobile numbers between November and January. In one week in November, the FF made 24 calls to the complainant (14 of which were answered) and sent one collection letter. The financial firm made similar numbers of calls to the complainant, on a weekly and monthly basis, during December and January.

FOS determined:

- The financial firm's conduct had breached the debt collection guideline and caused the complainant significant stress and unnecessary interference with his peace of mind.
- The repeated breaches of the guideline caused the complainant additional non-financial loss for each claim.

- There were three separate claims for non-financial loss and awarded the complainant \$1,000 compensation for the November claim, \$2,000 for the December claim and \$3,000 for the January claim.

### **Case 2: Financial firm's failure to update a default listing to 'paid' within a reasonable time**

The financial firm recorded a default listing on the complainant's consumer credit file. Eight months later, the complainant paid the relevant credit card debt.

The financial firm failed to update the default listing to reflect that the credit card debt had been paid until almost 3½ years later. The financial firm also failed to explain clearly to a prospective lender the Complainant's payment of the credit card debt and its significant delay in updating the default listing.

FOS determined that the financial firm's conduct caused the complainant unnecessary stress and inconvenience and awarded him \$500 for his non-financial loss.

### **Case 3: Irresponsible lending**

FOS concluded that the financial firm's advance of an investment loan to the husband and wife complainants (who were made bankrupt on the petition of the strata plan owner of the block in which they had purchased the investment flat) represented irresponsible lending.

FOS concluded the complainants had contributed to their loss by signing the loan application which they did not read, and which had been completed incorrectly by their broker. Given this, FOS apportioned liability for their financial loss 50:50 between the Complainants and the financial firm. (The lending had occurred before the NCCP Act became law).

FOS determined the complainants had suffered considerable stress, upset and inconvenience as a result of the irresponsible lending and all that had flowed from it, including their consequent financial difficulty, the need to move from their home, the strata plan owner's issue of proceedings and obtaining of judgment against them, and ultimately, its petitioning for their bankruptcy. Taking into consideration their contribution to their loss, FOS awarded each complainant \$1,500 for their non-financial loss, to be paid to them personally, and not to their trustee in bankruptcy.

### **Case 4: financial firm issuing unnecessary court proceedings**

The complainant was in default under her home loan and voluntarily surrendered her home to the financial firm which nonetheless continued with court proceedings and obtained default judgment for possession. The financial firm later set aside the judgment by consent.

FOS determined it was unnecessary for the financial firm to obtain the default judgment and the complainant had suffered significant stress which interfered unnecessarily with her peace of mind when served with the default judgment after handing her home to the financial firm for sale. FOS awarded the complainant \$2,000 for her non-financial loss.

### **Case 5: Poor response to financial difficulty**

The complainant requested a payment arrangement for his home loan, which was in joint names with his ex-partner. The financial firm declined to assist the complainant unless the co-borrower consented to any variation. It also required the co-borrower to provide a statement of financial position before it would consider any payment arrangement.

FOS determined that the financial firm should have considered the complainant's financial difficulty request even though the co-borrower was not involved, and its failure to do so caused the complainant unnecessary stress and inconvenience. FOS awarded the complainant \$500 for his non-financial loss, to be applied to reduce the home loan balance.

### **Case 6: Poor service by the financial firm in arranging reinstatement of damaged refrigerators**

The complainant operated a milk bar which was damaged by fire in July 2012. She took steps to re-open the business in June 2013 but was forced to delay doing so for more than a month due to the malfunctioning replacement refrigerators.

The financial firm's reinstatement agents had attended the complainant's premises many times from mid May 2013 to attempt to rectify the problems with the replacement refrigerators. The problems were still occurring when the complainant lodged the FOS complaint in January 2014.

FOS determined the financial firm had not met its obligations under the policy as it had:

- not returned the complainant to the position she was in prior to the loss, and
- replaced the damaged refrigeration units with defective units.

The financial firm did not provide the complainant with the level of service reasonably expected from an insurer and in particular, had failed to fix the defective replacement refrigerators.

FOS determined that these circumstances were very inconvenient for the complainant, interfered unnecessarily with her peace of mind, and remained unresolved for an unreasonable period. It awarded her \$2,000 compensation for her non-financial loss.



### Case 7: Financial firm's delay in arranging repairs of damaged motor vehicle

The complainants' motor vehicle was stolen and recovered, damaged, two days later. The financial firm delayed delivering the car to a repairer for 8 weeks, and there were continuing problems with effecting the repairs to the car three months later. The complainants had attempted to resolve issues with the financial firm by making reasonable enquiries about the delays. Through its repairer, the financial firm misled the Complainants as to the status of the repairs.

The complainants ultimately removed the vehicle from the repairer, arranged separate repair quotes and paid for the repairs prior to being reimbursed by the financial firm.

FOS determined that the financial firm's conduct, including its repairer's conduct, resulted in an unusual amount of time to resolve the situation and an unusual amount of inconvenience to the complainants. It awarded the complainants, jointly, \$1,000 compensation for non-financial loss.

### Case 8: Poor financial advice

FOS concluded the complainant, who was retired, held on to investments that she otherwise would have sold based on the very poor advice of the financial firm. As a result, the complainant lost over \$356,000. FOS determined the complainant had suffered non-financial loss in the form of an unusual degree of physical inconvenience in that she was required to return to work to earn an income and was required to sell her home to repay her investment loan. FOS awarded the complainant \$3,000 compensation for non-financial loss.

### Case 9: Poor financial advice

The financial firm advised the complainant, who is permanently incapacitated, to consolidate her superannuation and make a \$240,000 contribution to an account-based pension. The advice could not be implemented, as the complainant's superannuation fund did not accept 'permanent incapacity' as a basis for accessing funds. The advice was therefore inappropriate. FOS determined that given the complainant's health, the financial firm's inappropriate advice had a greater negative impact on her than it would have on another person and caused her additional stress. It awarded her \$3,000 compensation for non-financial loss.

## 3.2 References

### Definitions

Term	Definition
AFCA	the Australian Financial Complaints Authority
Complainant	individual or small business that has lodged a complaint with AFCA

Term	Definition
financial firm	a business that has AFCA as its external dispute resolution scheme and provides a financial service
Rules	The rules which, along with the Corporations Act, govern AFCA's jurisdiction, powers and procedures

## Useful links

Document	Link
<a href="#">Rules</a>	<a href="http://afca.org.au/rules">afca.org.au/rules</a>
<a href="#">Determination 232561</a>	<a href="http://bit.ly/28ZUBn9">http://bit.ly/28ZUBn9</a>
<a href="#">Determination 226190</a>	<a href="http://bit.ly/28YDVex">http://bit.ly/28YDVex</a>
<a href="#">Determination 266293</a>	<a href="http://bit.ly/290dMxw">http://bit.ly/290dMxw</a>
<a href="#">Determination 313410</a>	<a href="http://bit.ly/29iVtmu">http://bit.ly/29iVtmu</a>
<a href="#">Determination 341379</a>	<a href="http://bit.ly/290dJ53">http://bit.ly/290dJ53</a>
<a href="#">Determination 348410</a>	<a href="http://bit.ly/29iVDu1">http://bit.ly/29iVDu1</a>
<a href="#">Determination 349861</a>	<a href="http://bit.ly/28Zzi3A">http://bit.ly/28Zzi3A</a>
<a href="#">Determination 227484</a>	<a href="http://bit.ly/294esoA">http://bit.ly/294esoA</a>
<a href="#">Determination 334049</a>	<a href="http://bit.ly/28ZUN4R">http://bit.ly/28ZUN4R</a>