

The AFCA Approach to financial difficulty: legal principles, industry codes and good industry practice

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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

This document sets out our approach to financial difficulty complaints. The approach has been adopted from AFCA's predecessor scheme, the Financial Ombudsman Service.

When a consumer (an individual or small business owner) experiences financial difficulty, they will often ask their financial firm to help them with a repayment arrangement. Many successful arrangements are entered into regularly, but sometimes the consumer and financial firm are not able to agree on an arrangement that suits them both. That's where AFCA can help.

1.2. Summary

Who should read this document?

- Financial firms that deal with credit products, consumer representatives and consumers (individuals and small business owners) experiencing financial difficulty.
- Anyone who wants to understand:
 - > the financial difficulty legal principles behind a consumer credit agreement and the industry codes of practice that are relevant to the area of financial difficulty
 - > how AFCA applies legal principles, industry codes and good industry practice when helping to resolve complaints about financial difficulty.
- Anyone experiencing financial difficulty and they are not sure what to do.

Summary of the AFCA Approach

Financial difficulty occurs when a consumer is unexpectedly unable to meet their repayment obligations. This can be as a result of a number of causes including: accident, separation, death of a family member, unexpected medical or funeral expenses, reduction of work hours, redundancy, or a downturn in business.

Understanding why a consumer is experiencing financial difficulty is important to be able to identify an appropriate solution. However, in most cases, finding out why should not be a barrier to considering a request.

In order to consider complaints that involve financial difficulty, we will look at the relevant legal principles, industry codes and good industry practice to see if financial firms have met their obligations.

If a financial firm is not a subscriber to the relevant industry code, we still expect them to follow the code's guidelines which relate to financial difficulty because it is good industry practice. For example, we expect all financial firms to consider any request for financial difficulty assistance, as outlined in the Code of Banking Practice (CBP).

AFCA can only make a financial firm vary a credit contract if it will result in the loan being repaid.

It is reasonable for a consumer experiencing financial difficulty to expect their financial firm to give thought to what assistance could help overcome it.

A consumer should make whatever repayments they can, even if the financial firm has not yet agreed to the arrangement.

2 In detail

2.1. The AFCA Approach

The following points outline how we approach legal principles, industry codes and good industry practice in relation to financial difficulty complaints:

We expect that a financial firm should give genuine consideration to a consumer's financial difficulty. This includes working with consumers to assist them to overcome their financial difficulty.

If a financial difficulty complaint is lodged with AFCA we will:

- ask the financial firm to reconsider the consumer's request for financial difficulty assistance.
- bring parties together to discuss the request, either through a process of negotiation or conciliation.
- issue a decision about whether the financial firm responded appropriately and whether the credit contract should be varied, if parties are unable to agree on an appropriate outcome.

Prior to a decision being made, we will consider whether a financial firm has genuinely considered the consumer's financial difficulty. This may be demonstrated if a financial firm:

- properly identified that the consumer was experiencing financial difficulty and provided assistance promptly and early if it was appropriate to do so
- made reasonable requests for information to allow it to offer options to assist the consumer
- provided the consumer with written reasons for its decision if it was unable to agree to a repayment arrangement based on the information available

- considered a longer-term solution, when a short-term solution was not appropriate.

We will also consider whether a consumer has cooperated with the financial firm's review. This may be demonstrated if they:

- worked with the financial firm to provide information that was requested in a reasonable timeframe
- proposed a realistic repayment plan that would result in the eventual repayment of the debt if they were able to do so
- was willing to explore alternatives if the financial firm was unable to grant the assistance requested by them
- made whatever repayments they could, even if the financial firm has not yet agreed to the arrangement.

The information AFCA may require to consider a complaint involving financial difficulty is outlined at our approach website (www.afca.org.au/approach).

If the financial firm has not responded appropriately, we will consider what an appropriate response would have been, and we may in some cases award compensation to the consumer.

Compensation for financial loss, however, may only extend to enforcement costs, default charges or fees that could have been avoided if the application for financial difficulty had been genuinely considered. In limited circumstances we may also award compensation for non-financial loss for any distress caused to the consumer.

AFCA will also consider whether the credit contract should be varied to assist the consumer with their financial difficulty. AFCA may vary the credit contract even if we consider the financial firm has responded appropriately to the consumer's financial difficulty in the past. Our approach to varying a credit contract is outlined at our approach website (www.afca.org.au/approach).

If we are satisfied that the financial firm has genuinely considered a consumer's financial difficulty on previous occasions, and the available information shows that their financial difficulties can no longer be overcome, we consider a financial firm should provide a reasonable timeframe for the customer to finalise their debt.

This may involve providing time for them to sell or voluntarily surrender assets which secure the loan or refinance their debts. Where there is deterioration in the consumer's circumstances, and there is no alternative arrangement that will see the situation overcome, there may be little further that the financial firm can do to assist.

2.2. Relevant legal principles, industry codes and good industry practice

Legal principles

Reforms have resulted in a single national credit regime governed by the *National Consumer Credit Protection Act 2009* (Cth) (NCCP), which is generally applicable to individuals. The NCC is included as Schedule 1 to the Act.

The NCC provides the right of a customer to request a hardship variation (section 72(1) of the NCC) for a facility regulated by the NCC (regulated credit contract). Facilities which are regulated by the NCC include most personal Home Loans, Credit Cards, Personal Loans and Investment Property Loans entered into after 1 July 2010. Facilities that are not regulated by the NCC include facilities provided predominately for business purposes.

Following a request for financial difficulty assistance being made, the financial firm must genuinely consider that request and confirm with the individual whether a variation to the regulated credit contract is appropriate. Prior to doing this the Financial Firm may require additional information.

If the financial firm is unwilling to vary the credit contract, it must provide reasons and provide the contact details of the approved external complaint resolution scheme of which the financial firm is a member.

Industry codes

Most facilities used by individuals are regulated by the NCC, so the legal principles that relate to financial difficulty apply. However, some may not be regulated by the NCC, for example, margin loans. Also, facilities provided for business purposes are not regulated by the NCC.

Many financial firms have developed and subscribed to industry codes of practice. Examples of these codes of practice include the Code of Banking Practice and the Customer Owned Banking Code of Practice. Within these industry codes, financial firms commit to working with consumers who may be experiencing financial difficulty.

The industry codes of practice apply to individual consumer and small business customers of a financial firm that has subscribed to the industry code.

Good industry practice

Not all financial firms subscribe to the industry codes. As AFCA considers that the industry codes reflect good industry practice, we expect non-subscribers to implement guidelines on dealing with consumers in financial difficulty. When we consider a complaint about a non-subscribing member's conduct with a consumer seeking assistance due to financial difficulty, we not only review the credit contract and any internal policy the financial firm has about consumers in financial difficulty but also apply the principles of the industry codes and good industry practice.

Conclusion

Credit contracts may be regulated by legal principles, and these contracts may be provided by financial firms who are subscribers of industry codes of conduct, or by financial firms who are not subscribers. In all cases, AFCA considers that financial firms must genuinely consider any consumer's request for financial difficulty assistance.

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 (FOS), 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: Giving consideration where all information is not available

Mark requested assistance due to a change to his financial circumstances which prevented him from meeting the required repayments to a credit card. The financial firm sought additional information from Mark to identify a reasonable repayment proposal.

Mark did not provide the requested information or assist the financial firm to identify a reasonable repayment proposal, instead he lodged a complaint with FOS. In responding to the complaint, despite the absence of the information requested from Mark or a repayment proposal, the financial firm considered the information that it already held.

Based on a review of account statements, the financial firm identified a repayment amount that it considered Mark could maintain and wrote to him offering to accept repayments at the revised amount to enable the debt to be repaid. In its letter the financial firm also identified the reasons why it considered it was a reasonable proposal.

FOS found that the financial firm had met its obligations in the circumstances as it was willing to consider Mark's financial difficulty and propose repayment variations to assist him to overcome his financial difficulty, even when he had not provided the information requested or a realistic repayment proposal.

3.2. References

Definitions

Term	Definition
CBP	Code of Banking Practice
COBCP	Customer Owned Banking Code of Practice
Consumer	An individual or small business owner who uses the services of a financial firm
Credit contract	A credit facility provided to an individual or small business which may include a consumer credit contract
Financial difficulty	A consumer (individual or small business owner) may experience financial difficulty if they are unable to meet the repayment obligations on a credit contract
Financial firm	A bank or credit provider who is a member of AFCA
NCC	National Credit Code (part of the National Consumer Credit Protection Act 2009)
Regulated credit contract	A contract regulated by UCCC or NCC
UCCC	Uniform Consumer Credit Code

Useful links

This document is one of a series we have produced about financial difficulty. We have also created documents which cover:

- early release of superannuation
- dealing with common issues
- our power to vary credit contracts
- working together to find solutions.

All five documents can be found on [our website](#)¹.

¹ www.AFCA.org.au/approach

The following sites provide useful information to help people experiencing financial difficulty:

Document	Title / Link
MoneySmart	Australian Securities and Investments Commission's MoneySmart website www.moneysmart.gov.au
Doing it tough	Australian Bankers' Association 'Doing it tough' website www.doingittough.info
Financial Counselling Australia	www.financialcounsellingaustralia.org.au
Code of Banking Practice	http://bit.ly/291ZkqN/

You may also wish to call the National Debt Helpline on 1800 007 007.

The following Codes of Practice were referred to in this approach document:

Document	Title / Link
Code of Banking Practice	http://bit.ly/291ZkqN/
Customer Owned Banking Code of Practice	http://bit.ly/28Zy6i1

The National Credit Code (NCC) is included as Schedule 1 to the [National Consumer Credit Protection Act 2009](#) (Cth) (NCCP)².

² <http://bit.ly/28ZokuH>