

The AFCA Approach to complaints lodged by guarantors

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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 and its predecessor schemes often receive complaints from guarantors.

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

A guarantor is a person or business who guarantees to pay back a loan if the borrower does not. We can consider most complaints lodged by guarantors who have guaranteed the debts of individual or small business borrowers (including primary producers). This document sets out the types of guarantor complaints we can consider, and outlines the things we take into account when considering whether a financial firm fulfilled its obligations when it accepted the guarantee.

1.2 Summary

Who should read this document?

- Financial firms that obtain guarantees from individuals or small businesses (including primary producers).
- Individuals or small business owners (including primary producers) who have provided guarantees to a financial firm.
- Anyone required by a financial firm to make payment on a guarantee (or likely to be pursued for payment) who does not consider they are liable for all or part of the amount being sought.
- Anyone required by a financial firm to make payment on a guarantee who thinks they will experience financial difficulty because of repaying the amount.
- Anyone who wants to understand:
 - > how AFCA resolves complaints involving guarantees, and
 - > how we decide whether we can consider complaints involving a guarantee.

Summary of the AFCA Approach

We can review most complaints lodged by guarantors, if they are within our Rules¹.

¹ Rules (<http://www.afca.org.au/rules>)

If the guarantor or borrower is a company, we can only consider the complaint if they are a 'small business' or 'primary producer' as defined in our Rules.

If a financial firm is not a subscriber to the Code of Banking Practice (CBP), we still expect them to generally follow the Code's guidelines which relate to taking guarantees. This is because the Code generally represents good industry practice.

In some limited circumstances, a guarantor may lodge a complaint that would normally be brought by the borrower.

Guarantors can lodge a complaint at AFCA if they are experiencing financial difficulty because of making payments under a guarantee.

2 In detail

2.1 The AFCA Approach

What complaints about guarantees can AFCA consider?

Our [Rules](#) describe the types of complaints we can consider.

We can consider a complaint about a guarantee, or security for or repayment of a loan or other financial accommodation (for example, a lease) if both:

- the complainant, and
- the borrower provided with the loan or other financial accommodation

are an 'eligible person' as defined under our Rules (such as an individual, partnership, a small business as defined etc).

So, if a borrower is not eligible to lodge a complaint with AFCA (i.e. the borrower must have had fewer than 100 employees at the time of the act or omission by the financial firm that gave rise to the complaint), the guarantor will not be able to lodge a complaint about the guarantee of the borrower's debt.

If the guarantor is also a company, then it must also fit the small business definition to lodge a complaint.

If the complaint is about a guarantee provided for a small business, a guarantor can lodge a complaint about the circumstances of entering the guarantee no matter what the solvency or registration status of the borrower is.

Monetary and compensation limits on a guarantor's claim

Our Rules state that we cannot consider a complaint if the value of the consumer's claim exceeds our limits. The table below sets out AFCA's monetary and compensation caps under the Rules that apply to complaints lodged by guarantors.

However, these limits do not apply to a complaint to set aside a guarantee supported by the guarantor’s primary place of residence.

Type of claim		Compensation cap per claim	Monetary cap on AFCA’s jurisdiction		
Claim under a credit facility given to a small business or primary producer	Claim by a guarantor to set aside a guarantee supported by security over.	The guarantor’s principal place of residence	Unlimited	Credit facility must not exceed \$5 million	
		Other security	For a small business loan	\$1 million	Credit facility must not exceed \$5 million
			For a primary producer loan	\$2 million	
Claim under a credit facility given to someone other than a small business or primary producer		The guarantor’s principal place of residence	Unlimited	Unlimited	
		Other security	\$500,000	Amount claimed must not exceed \$1 million	

We cannot set aside a portion of a guarantee. This means that for complaints involving guarantors to which a compensation cap applies (as set out in the above table), if the guarantor is seeking that the guarantee be set aside, the guaranteed debt must be less than the cap.

However, if a financial firm is seeking to recover a final amount to repay the debt, which is less than any compensation cap that applies to the guarantor’s complaint, we will generally consider the complaint even if the full guarantee limit is more than the cap.

If the guarantor’s complaint is about a request for financial difficulty assistance, we will consider the complaint regardless of the guarantee amount.

What is good industry practice for financial firms when obtaining a guarantee?

When we make decisions about complaints, we consider what is fair in all the circumstances, and consider things like legal principles, good industry practice and any applicable industry codes.

Even if a financial firm is not a subscriber to the Code of Banking Practice, we still expect it to follow the Code's guidelines that relate to the taking of guarantees. This is because the Code represents good industry practice and generally reflects the financial firm's common law obligations.

If we find that the financial firm did not meet its obligations to the guarantor when it obtained the guarantee, we may decide that the firm cannot rely on the guarantee. We will look at whether the financial firm:

- gave the guarantor sufficient notice about seeking independent legal and financial advice and about the financial risks involved in providing a guarantee
- gave the guarantor sufficient information about the borrower or credit facility.
- gave the guarantor a copy of the related credit contract, letter of offer or other relevant information.
- gave the guarantor sufficient time in which to consider the information relevant to the guarantee.
- provided the guarantee to the guarantor or to a third party for signing, and if it was to a third party, whether that was appropriate.
- ensured the guarantee was signed in an appropriate environment.

Can a guarantor raise a claim on behalf of the borrower?

There might be times when a guarantor considers that they should not be liable for the full amount of the guarantee that the financial firm is asking them to pay. This can happen where, for example, it is suggested that the financial firm has sold the borrower's assets for less money than they were worth.

The borrower would usually bring this complaint, not the guarantor. However, if the borrower is not able to formally lodge the complaint themselves (for example, if they are bankrupt or in liquidation), then we may consider accepting the complaint from the guarantor if the financial firm is asking them to repay the debt.

We will assess the circumstances of each complaint before we decide whether a guarantor can lodge a complaint to reduce the amount they have to pay by the amount of the borrower's claim. An example of when we would accept the complaint from the guarantor, is if we thought it would be unfair for the financial firm to recover a debt from the guarantor without taking the borrower's claim into account.

However, wherever possible, we consider that the borrower should lodge the complaint themselves if they are able to do so (i.e. they are not bankrupt or in liquidation).

If a guarantor lodges a complaint at AFCA and the borrower has not lodged a complaint, then the financial firm is able to pursue the borrower for the debt even while the guarantor's complaint is open at AFCA.

What if there are multiple guarantors?

If a guarantor lodges a complaint with AFCA, the financial firm cannot act to recover the debt from the guarantor while the complaint remains open. The financial firm can, however, still try to recover the debt from the original borrower.

If there is more than one guarantor, the financial firm may still act to recover the debt from any guarantors who have not lodged a AFCA complaint.

However, the financial firm cannot act against other guarantors to recover the debt if this action will affect any guarantors who have lodged AFCA complaints. For example, if multiple guarantors own the same property over which the financial firm has security for their liability, including the guarantor who lodged the complaint, the firm cannot repossess the property because this action would affect the guarantor who had lodged the AFCA complaint.

What if the guarantor is experiencing financial difficulty?

If a guarantor experiences financial difficulty because of repaying a guaranteed debt, they can lodge a complaint with AFCA about their financial difficulty. We will consider these complaints regardless of the amount guaranteed.

If a guarantor acknowledges their liability, but is having difficulty repaying it, we consider it is good industry practice for a financial firm to give genuine consideration to the guarantor's financial difficulty.

Some options available to the financial firm to provide financial difficulty assistance include arranging a 'time to pay' arrangement, or an instalment arrangement.

If the parties cannot agree on a realistic repayment arrangement, the financial firm should consider allowing a reasonable time for the guarantor to sell assets, or negotiate a timeframe for the guarantor to try to refinance the debts into their own name.

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: Guarantee for a company's debts

A small business defaulted on its repayments. The bank took possession of the company's assets and then sold them, which resulted in a shortfall of \$100,000. The company was then placed in liquidation and the bank claimed the shortfall debt from the guarantor, Mr B.

Mr B had concerns about the way the bank had sold the company's assets, and lodged a complaint at FOS.

Even though the company borrower was in liquidation, we decided that the guarantor was entitled to lodge a complaint claiming that the bank had failed to comply with its duties as a mortgagee in possession when it sold the company's assets. We decided this because in the circumstances, it would have been unfair to allow the creditor to recover the debt under the guarantee without considering this part of the complaint.

After we asked the bank to give us more information about the process it followed when it sold the company's assets, the bank decided to abandon its claim against Mr B.

Case 2: Guarantor's remorse

Charlie's friend wanted a personal loan to purchase a popular restaurant and cafe in the city, and he asked Charlie to be a guarantor. Charlie obtained a copy of the relevant documents (including the proposed guarantee) from the bank, and sought independent financial and legal advice. After a few days, Charlie signed the guarantee and provided the bank with security over his home.

Charlie's friend's business failed after running up debts of \$250,000 and Charlie's guarantee was called on to cover his friend's debts.

Charlie regretted his decision to sign the guarantee and refused to acknowledge any liability. He lodged a complaint at FOS.

We found that the bank had:

- given Charlie sufficient notice about seeking independent legal and financial advice and about the financial risks involved in providing a guarantee
- given Charlie sufficient information about the credit facility
- given Charlie a copy of the credit contract and guarantee, and
- given Charlie sufficient time in which to consider all the information relevant to the guarantee.

On this basis, we determined that Charlie was liable for the full amount of the guarantee. A guarantor is not able to avoid liability simply because they later regret the decision to sign the guarantee.

3.2 References

Definitions

Term	Definition
Borrower	A consumer who receives an amount of money from a lender, and is obligated to repay it
Financial firm	Financial firm, a business that has chosen AFCA as its external complaint resolution scheme and provides a financial service
CBP	Code of Banking Practice
Consumer	An individual or small business owner (including a primary producer) who uses the services of a financial firm
Primary producer	A primary production business under the Income Tax Assessment Act 1997 (such as agriculture, forestry and fishery businesses). The primary producer must also be a Small Business
Small business	A primary producer or other small business that has less than 100 employees at the time the act or omission by the financial firm that gave rise to the complaint

Useful links

These 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/
AFCA Approaches	We have published other documents that outline the AFCA Approach. www.afca.org.au/approach
AFCA website	The AFCA website contains more information about what we do, the types of complaints we can consider, and our complaint resolution processes. www.afca.org.au .