The AFCA Approach to financial difficulty: early release of superannuation

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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 Purpose of this approach

1.1 Scope

The purpose of AFCA's approach documents is to explain how we look at common issues and complaint types. This approach outlines how AFCA considers complaints about the early release of superannuation when consumers are experiencing financial difficulty.

This approach is consistent with AFCA's obligation to deal with complaints in a cooperative, efficient and timely way, and to make decisions that are fair in all the circumstances. It is important to understand that each complaint that comes to us has a unique set of facts and this information is a guide only.

1.2 Who should read this document?

This document is intended to assist:

- financial firms, consumers and consumer representatives who have a complaint involving an application for early release of superannuation
- anyone else who wants to understand how AFCA approaches this issue.

1.3 Summary of this approach

AFCA sometimes receives complaints in which consumers experiencing financial difficulty seek early release of their superannuation. This document relates to a financial firm's obligations when considering a request to support an early release of superannuation.

A consumer may ask their financial firm to support the release of superannuation by providing a letter for the Australian Taxation Office (ATO) that meets certain criteria (see below).

When deciding whether to support the release, a financial firm should:

- treat it as a request for financial difficulty assistance
- consider the request consistent with its financial difficulty obligations and assessment processes.

This may identify alternative options for the financial firm to help a consumer in financial difficulty.

This approach document explains the matters AFCA will consider when we make a decision on complaints about early release of superannuation.

2 Jurisdiction

2.1 AFCA's purpose

AFCA is the independent external dispute resolution (**EDR**) scheme for the financial services sector. AFCA's purpose is to provide fair, independent and effective solutions for financial disputes. We do this by providing fair dispute resolution services. We also work with financial firms to improve their processes and standards of service to minimise future complaints. In addition to resolving financial complaints, AFCA identifies, resolves and reports on systemic issues and serious contraventions of the law.

2.2 AFCA's jurisdiction

AFCA can consider complaints against financial firms that are members of AFCA.

When a complaint is not resolved by agreement, negotiation or conciliation, we make a decision. Our decision reflects what is fair in all the circumstances having regard to legal principles, applicable industry codes or guidance, good industry practice and previous decisions of AFCA or predecessor schemes (which are not binding).[1]

When assessing conduct of a financial firm, we have regard to the law, codes, and standards of industry practice that were in place at the time of the conduct.

We may decide that a financial firm must compensate a consumer for direct financial loss, indirect financial loss or non-financial loss.[2] We may also decide that a financial firm is required to take, or refrain from taking, particular actions. If a consumer accepts our decision, the financial firm is bound by that decision.[3]

Fair in all the circumstances

Our decisions are intended to reflect what is fair in the circumstances of each complaint. This includes providing a fair outcome in cases where we find an error or breach has occurred.

In assessing what is fair, we apply a standard of fairness which focuses on concepts such as fair dealing, fair treatment and fair service. This allows us to assess the conduct of a financial firm over the life cycle of the firm's relationship with its customer.

The primary focus of our investigation is to assess whether the financial firm breached its obligations to the consumer. However, we also consider the conduct of the consumer when determining a fair outcome.

[1] See AFCA Rule A.14.2.
[2] See AFCA Rule D.3.
[3] See AFCA Rule A.15.3.

3 In detail

3.1 Overview

Early superannuation release to repay arrears on a loan should be considered only as a last resort. Even though the consumer may have requested a release, there will generally be other ways of better assisting them. Financial firms should ensure that they fully explore all options for assistance with the consumer.

Financial firms are best placed to make an appropriate decision and meet their obligations if the request is considered by staff properly trained in the financial firm's financial difficulty processes and obligations.

In most cases that we have reviewed, we have found that it was not appropriate for the financial firm to support a release because better alternatives for providing assistance were available, or it was unlikely that a release would help the consumer overcome their difficulty. In almost all instances where a financial firm declined to support a release, we found that decision was appropriate.

3.2 Grounds for early release of superannuation

There are limited circumstances in which a person may apply for their superannuation to be released early to help meet their loan obligations. These are:

- severe financial hardship
- compassionate grounds of mortgage assistance.

Severe financial hardship

A person who has received an eligible government support payment continuously for 26 weeks may be entitled to an early release of superannuation on the grounds of severe financial hardship. On this basis, a person may access up to $10,000 in any twelve-month period. To do so, they must apply directly to their superannuation fund. The payment can be used for any purpose and the financial firm's support is not required.

Compassionate grounds – mortgage arrears

A person can apply for early release of superannuation on specific compassionate grounds. One of these is payment of mortgage arrears to prevent the person losing their home. This process is administered by the ATO.

A person applying to the ATO for payment of mortgage arrears will need to provide a letter from their lender stating:

- a payment of an amount is overdue, and
- if the overdue amount is not paid by the due date, the mortgagee will foreclose or force the sale of the person's home.

The letter from the lender must be no more than 30 days old, and must also include the following information:

- the amount equal to three months' repayments for the loan
- the amount equal to 12 months' interest on the outstanding loan balance.

The maximum amount that can be requested for mortgage release in each 12-month period is the sum of three months of repayments and 12 months' interest on the outstanding loan balance. The amount released will only be the amount necessary to stop foreclosure or forced sale.

There will often be tax implications for a person receiving an early release of superannuation.

3.3 What financial firms should do

Financial firms should genuinely consider requests for financial difficulty assistance. Even where a person asks only that the financial firm support their request for early release of superannuation, the financial firm should be willing to consider alternatives. This is because supporting an early release is an option of last resort because of the long-term implications for a person's retirement. In many cases more appropriate options may be available if the customer and the financial firm work together.

To meet its financial difficulty obligations, a financial firm should:

- take appropriate steps to understand the consumer's financial position, and how their position may change in the future
- consider the consumer's request as well as any reasonable alternatives that may help them
- decide what assistance it will provide to help the consumer (this decision should be reasonable and based on legitimate considerations)
- communicate its decision to the consumer and provide reasons if it declines the consumer's request.

3.4 Factors for financial firms to consider

When considering whether to support a consumer's request for early release of superannuation:

- Financial firms should not insist that a consumer apply for early release of superannuation to repay outstanding arrears.
- Financial firms should explore alternative options with the consumer.
- If it is apparent that the consumer can afford ongoing repayments but cannot clear the arrears on a loan, the financial firm should consider whether it is appropriate to capitalise the arrears. This will resolve the arrears on the loan as well as preserve the person's superannuation balance.

- Where it is uncertain whether a consumer may be able to meet their loan obligations, it may be more appropriate for financial firms or to suspend repayments for a reasonable period to allow time for the person's situation to improve.
- If it is clear that the consumer cannot meet their long-term obligations, supporting a superannuation release is unlikely to be appropriate. This is because the release will merely delay inevitable default. The consumer is still likely to lose their home and will also have lost part of their superannuation. In these cases, financial firms should consider alternatives such as offering time to sell the security property.
- Where superannuation releases have been tried in the past and have not helped to relieve the consumer's financial difficulty, financial firms should exercise even greater caution before supporting further applications for early release.

It is never certain that a consumer's application to the ATO will be successful. This means that even when a financial firm decides to support an early release of superannuation, it needs to consider what assistance it can provide if the consumer's application is unsuccessful. This might include offering time to sell the security property.

3.5 Where a financial firm does not meet its obligations

Where we consider that a financial firm has not met its obligations, we may award compensation for financial or non-financial loss suffered by the consumer.

If a financial firm has supported an early release of superannuation that we considered inappropriate, we will consider what loss the consumer has suffered as a result. In most cases, the consumer will have obtained the benefit of the funds and will have saved interest and fees on the loan. However, there may also be circumstances where the early release has contributed to the consumer suffering further loss due to remaining in an unaffordable loan for an extended period.

4 Application

4.1 Case studies

The case studies below are based on principles applied in determinations issued by AFCA or its predecessor schemes. 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. Parties have been de-identified to protect their privacy.

Case study 1 – Financial firm inappropriately consents to superannuation release

Chris had been experiencing difficulty meeting repayments on his home loans. He initially obtained two superannuation releases, with the support of the financial firm. At this stage, it was not clear that the Chris's were long term.

The financial firm subsequently consented to a further superannuation release. The contact notes showed the financial firm had concluded Chris could not afford the loans. The financial firm declined to offer any repayment arrangements for this reason.

AFCA found that it was inappropriate for the financial firm to support the second release because:

- Superannuation release had been tried in the past and had not succeeded in improving the Chris's position.
- The financial firm did not perform proper hardship assessments and failed to consider whether superannuation releases would help the Chris overcome his financial difficulty.
- Even though the financial firm concluded that the Chris could not afford the loans, it agreed to support the superannuation releases. This was likely to lead to Chris losing his superannuation as well as his home.

AFCA decided that the financial firm should restore the Chris to the position he would have been in had the bank not breached its financial difficulty obligations and inappropriately consented to the release.

AFCA directed the financial firm to reverse the final three superannuation releases by transferring the money it received back to the Chris's superannuation account. AFCA also awarded compensation for non-financial loss.

Case study 2 – Financial firm declined to support release

Kim had been experiencing hardship as a result of a workplace accident that left her with a spinal injury. She was also suffering from chronic pain and severe and prolonged depression.

Although she had received a compensation payout relating to the accident, that money had depleted over a two-year period and she was unable to meet her home loan repayments with the financial firm.

Kim requested that the financial firm support her request for an early release of superannuation, in the hope of saving her home. The financial firm declined the request because it appeared Kim's difficulties were long term. It said that supporting the release would only be delaying the inevitable sale of her home.

The financial firm instead offered to allow Kim four months to sell her home without taking further action, and a further period for any contract to settle. The financial firm noted that Kim had a reasonable amount of equity in her property, and if she were to sell, she would likely be able to afford to buy a smaller home.

In this case, we found that the financial firm had met its financial difficulty obligations and that its decision to decline to support the release was appropriate. This is because:

- The financial firm took steps to understand Kim's financial position and how it may change.
- The information and material Kim provided to the financial firm showed that she could not afford the loan and her circumstances were unlikely to improve. If the release was approved, it would not prevent Kim from eventually losing her home, and she would also have lost part of her superannuation.
- There were no other reasonable options for assisting. For example, extending the term of the loan would not have reduced repayments to an amount that she could afford. In these circumstances, the financial firm's offer to allow Kim time to sell the property herself was an appropriate response to her request for assistance.

Case study 3 – Financial firm should support the release

Jan and Jamila asked the financial firm to support their request for an early release of their superannuation. The financial firm performed a hardship assessment and declined the request because the available information showed that the Jan and Jamila could not afford the loan. The financial firm had concerns that supporting the release would just delay inevitable default.

Jan and Jamila lodged a dispute with AFCA requesting that we direct the financial firm to consent to the release. The Jan and Jamila were a young and well qualified couple who, although unemployed, reasonably expected to return to work.

In this case, we directed the financial firm to consent to the release. This is because:

- Jan and Jamila would have many years to rebuild their superannuation.
- The amount required was a modest portion of their superannuation.
- Although they needed time to find work, they were very employable.
- They understood the risks.
- They reasonably believed that they would be able to resume their normal repayments in three months.
- Because there was uncertainty about their future financial position, the release would allow the Jan and Jamila breathing space and increase the likelihood that they would be able to meet their long-term obligations.
- The financial firm had previously provided extensive assistance, and we considered it appropriate for the financial firm to support a release to give the Jan and Jamila a final chance.

Although we formed a different view to what the financial firm had initially decided and directed the financial firm to support the release, we still considered that the financial firm had met its financial difficulty obligations. This is because the financial firm followed an appropriate hardship process, and made a reasonable decision based on the information it had available at the time.

5 References

5.1 Definitions

Term	Definition
ATO	Australian Taxation Office
Complaint	A complaint lodged at AFCA by a complainant about the actions of their financial firm
Financial firm	A credit provider who is a member of AFCA

5.2 Useful links

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

- how AFCA approaches financial difficulty, taking into consideration legal principles, industry codes and good industry practice
- dealing with common issues
- our power to vary credit contracts
- working together to find solutions.

All five documents can be found on the AFCA website[4].

5.3 Useful documents

Document	Title / Link
Rules	www.afca.org.au/rules

[4] www.afca.org.au/approach