

The FOS Approach to Financial difficulty series: Legal principles, industry codes and good industry practice

1	At a glance	2
1.1	Scope	2
1.2	Summary	2
2	In detail	3
2.1	The FOS Approach	3
2.2	FOS's approach if legal principles apply	4
3	Context	6
3.1	Case studies	6
3.2	References	6

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

These documents explain the way we approach some common issues and dispute types that we see at FOS. However, it is important to understand that each dispute 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 FOS Approach document can cover everything you might want to know about key issues.

1 At a glance

1.1 Scope

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

1.2 Summary

Who should read this document?

1. Financial services providers (FSPs) that deal with credit products, consumer representatives and consumers (individuals and small business owners) experiencing financial difficulty.
2. 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 FOS applies legal principles, industry codes and good industry practice when helping to resolve disputes about financial difficulty.
3. Anyone experiencing financial difficulty and they are not sure what to do.

Summary of the FOS Approach

Financial difficulty occurs when a consumer is unexpectedly unable to meet their repayment obligations. This can be as a result of a variety 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 disputes that involve financial difficulty, we will look at the relevant legal principles, industry codes and good industry practice to see if FSPs have met their obligations.

If an FSP 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 FSPs to consider any request for financial difficulty assistance, as outlined in the Code of Banking Practice (CBP).

FOS can only make an FSP vary a regulated credit contract if it will result in the loan being repaid.

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

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

2 In detail

2.1 The FOS Approach

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

We expect that an FSP 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 dispute is lodged with FOS we will:

- Ask the FSP 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 FSP responded appropriately and whether the regulated 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 an FSP has genuinely considered the consumer's financial difficulty. This may be demonstrated if an FSP:

- 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 FSP's review. This may be demonstrated if they:

- Worked with the FSP 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 FSP was unable to grant the assistance requested by them.
- Made whatever repayments they could, even if the FSP has not yet agreed to the arrangement.

The information FOS may require to consider a dispute involving financial difficulty, is outlined at [our approach website](http://www.fos.org.au/approach) (www.fos.org.au/approach).

If the FSP 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. Non-financial loss is not applicable for a company.

If we are satisfied that the FSP 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 an FSP should provide a reasonable timeframe for the customer to finalise their debt.

This may involve providing time for them to 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 FSP can do to assist.

2.2 FOS's approach if legal principles apply

If legal principles apply because the credit contract is regulated by the National Credit Code (NCC), FOS will apply the above approach. FOS will also consider whether the regulated credit contract should be varied to assist the individual with their financial difficulty. FOS may vary the regulated credit contract even if we consider the FSP has responded appropriately to the individual's financial difficulty in the past. Our approach to varying a regulated credit contract is outlined at [our approach website](http://www.fos.org.au/approach) (www.fos.org.au/approach).

We discuss legal principles in more detail in the next section.

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. This replaced the former Uniform Consumer Credit Code (UCCC). If a loan was entered into before the NCC commenced and was regulated by the UCCC, the NCC will usually apply.

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 (Investment Property Loans entered into before that date are not regulated under the UCCC). 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 FSP must give genuine consideration to that request and confirm with the individual whether a variation to the regulated credit contract is appropriate. Prior to doing this the FSP may require additional information.

If the FSP is unwilling to vary the credit contract, it must provide reasons and provide the contact details of the approved external dispute resolution scheme of which the FSP 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 (or earlier UCCC), for example, margin loans. Also, facilities provided for business purposes are not regulated by the NCC (or earlier UCCC).

Many FSP's have developed and subscribed to industry codes of practice. Examples of these codes of practice include the Code of Banking Practice and the Mutual Banking Code of Practice. Within these industry codes, FSPs commit to working with consumers who may be experiencing financial difficulty.

The industry codes of practice apply to all consumer and small business customers of an FSP that has subscribed to the industry code. In the case of a small business, it may be a micro-business or a large operation. The definition of a small business is outlined in our small business financial difficulty article in [Circular 2](#)¹.

Good Industry Practice

Not all FSPs subscribe to the industry codes. As FOS 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 dispute 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 FSP has about consumers in financial difficulty but also apply the principles of the industry codes and good industry practice.

Conclusion

¹ FOS Circular - Issue 2 (http://www.fos.org.au/custom/files/docs/circular_issue_2.pdf)

Credit contracts may be regulated by legal principles, these contracts may be provided by FSPs who are subscribers of industry codes of conduct, or by FSPs who are not subscribers. In all cases, FOS considers that genuine consideration must be given by an FSP to a consumer's request for financial difficulty assistance.

3 Context

3.1 Case studies

Case 1: Giving consideration where all information is not available

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

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

Based on a review of account statements, the FSP 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 FSP also identified the reasons why it considered it was a reasonable proposal.

FOS found that the FSP 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
Consumer	An individual or small business owner who uses the services of a financial services provider
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 unexpectedly unable to meet the repayment obligations on a credit contract

Term	Definition
FSP	financial services provider (a business that has chosen FOS as their external dispute resolution scheme)
MBCP	Mutual Banking Code of Practice
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:

- Working together to find solutions
- Dealing with common financial difficulty issues
- Our power to vary regulated credit contracts

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

- www.fos.org.au/approach

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

Australian Securities and Investments Commission's [MoneySmart website](#)

- www.moneysmart.gov.au

Australian Bankers' Association '[Doing it tough](#)' website

- www.doingittough.info

[Financial Counselling Australia](#) website

- www.financialcounsellingaustralia.org.au

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

[The Code of Banking Practice](#)

- <http://bit.ly/28Pv9zO>

The [Mutual 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)

- <http://bit.ly/28ZokuH>