

The FOS Approach to Early release of superannuation

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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

FOS sometimes receives disputes in which borrowers experiencing financial difficulty seek early release of their superannuation.

A borrower may ask their financial services provider (FSP) to support the release of superannuation by providing a letter to the Department of Human Services (DHS) that meets certain criteria (see below).

When deciding whether to support the release, an FSP should:

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

This may identify options to help a borrower in financial difficulty, one of which may be for the FSP to provide a letter to DHS.

1.2 Summary

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

FSPs are best placed to make an appropriate decision and meet its obligations if the request is considered by a dedicated hardship team or staff properly trained in the FSP's hardship processes and code obligations.

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

2 In detail

2.1 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 once a year. To do so, they must obtain a supporting letter from DHS and then apply directly to their superannuation fund. The payment can be used for any purpose and the FSP's support is not required.

Compassionate grounds – mortgage assistance

A person can apply for early release of superannuation on specific compassionate grounds. One of these is mortgage assistance to prevent the foreclosure of a mortgage, or the exercise of a mortgagee's power of sale over the person's principal place of residence. This process is administered by DHS. Foreclosure is rare, so this article focuses on the power of sale.

DHS may approve the release only if the borrower provides a written statement from the mortgagee that:

- a payment of an amount is overdue and
- if the person fails to pay the amount, the mortgagee will:
 - foreclose the mortgage on the person's principal place of residence or
 - exercise its power of sale of the person's principal place of residence.

The statement from the mortgagee must also include the following information:

- the amount equal to three months' repayments under the mortgage
- the amount that is 12 months' interest on the outstanding loan balance.

A limit (called the cashing limit) applies such that in each 12-month period, DHS may approve the release of an amount of a person's preserved benefits in a superannuation entity only where that amount does not exceed three months of repayments plus 12 months' interest on the outstanding loan balance.

An amount released on the compassionate grounds of mortgage assistance is taxed as a normal superannuation lump sum, which means there will often be tax implications for the borrower.

2.2 What FOS expects of FSPs

We expect FSPs to genuinely consider requests for financial difficulty assistance. Even where a borrower is asking only that the FSP support the request for release, the FSP must be willing to consider alternatives. This is because supporting a release is an option of last resort – in many cases more appropriate options may be available if the parties work together.

To meet its financial difficulty obligations, we expect an FSP to:

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

An FSP following the above guidance should consistently meet its obligations.

2.3 Factors for FSPs to consider

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

- FSPs cannot insist that a borrower apply for early release of superannuation to repay outstanding arrears (for example, clause 28.9(a) of the Code of Banking Practice states: We will not require you to apply for early release of your superannuation benefits to repay the whole or any part of your credit facility with us).
- FSPs should explore alternative options with the borrower.
- If it is apparent that the borrower can afford ongoing repayments but cannot clear the arrears on a loan, it may be more appropriate for FSPs to capitalise the arrears. This will resolve the arrears on the loan as well as preserve the borrower's superannuation balance.
- Where it is uncertain whether a borrower may be able to meet their loan obligations, it may be more appropriate for FSPs to offer a serviceability test or a reasonable repayment moratorium to allow time for the borrower's situation to improve.

- If it is clear that the borrower 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 borrower is still likely to lose their home, and will also have lost part of their superannuation. In these cases, FSPs should consider alternatives such as offering time to sell the security property.
- Where superannuation releases have been tried and not helped to relieve the borrower's financial difficulty, FSPs should exercise greater diligence before supporting further applications for release.

It is never certain that a borrower will be successful in their application to DHS. This means that even when an FSP decides to support a superannuation release, it needs to consider what assistance it can provide if the borrower's application is unsuccessful. This might include offering time to sell the security property.

2.4 Where an FSP does not meet its obligations

Where we consider that an FSP has not met its obligations, the usual remedies apply for a failure to meet financial difficulty obligations under the FOS Terms of Reference. This often includes compensation for non-financial loss. The borrower may also have suffered financial loss for which we would award compensation.

If an FSP has supported a release of superannuation that we considered inappropriate, we will generally not require an FSP to refund the superannuation amounts received, or reimburse any tax paid by the borrower as a result of the withdrawal of those funds. This is because, in most cases, the borrower will have obtained the benefit of the funds and will have saved interest and fees on the loan.

3 Context

3.1 Case studies

Several relevant case studies can be found on our website [here](#).

3.2 References

Definitions

Term	Definition
applicant	individual or small business that has lodged a dispute with FOS
FSP	financial services provider, a business that has chosen FOS as its external dispute resolution scheme and provides a financial service

Useful documents

Document	Title / Link
Terms of Reference	Financial Ombudsman Terms of Reference www.fos.org.au/tor