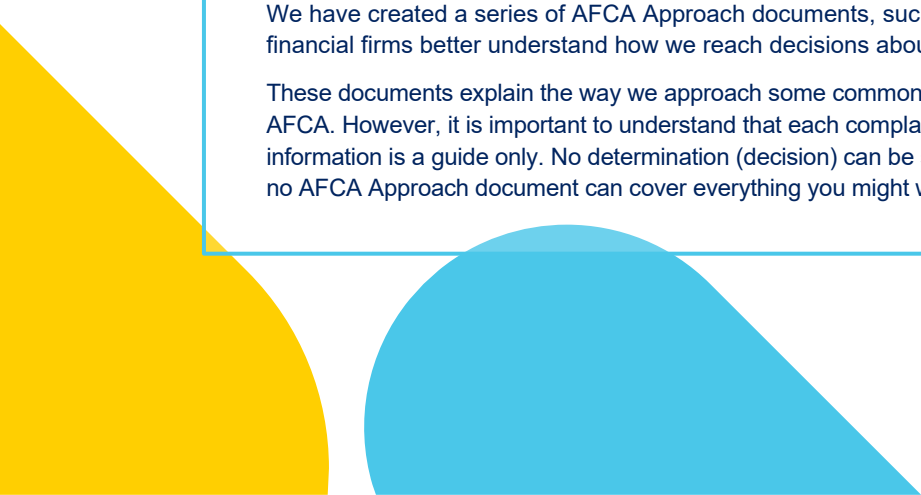


The AFCA Approach to financial difficulty: legal principles, industry codes and good industry practice

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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 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 will investigate and resolve complaints from individuals and small businesses that relate to financial difficulty.

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. This is where AFCA can help.

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?

- 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 legal principles and industry codes of practice that are relevant to the area of financial difficulty for credit contracts
 - > how AFCA applies legal principles, industry codes and good industry practice when helping to resolve complaints about financial difficulty, and
- Anyone experiencing financial difficulty who is not sure of what to do.

1.3 Summary of our 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 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.

AFCA will only make a financial firm vary a credit contract if it will result in the loan being repaid within a reasonable period of time.

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

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

2 Jurisdiction

2.1 AFCA's purpose

AFCA is the independent external dispute resolution 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 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

¹ See AFCA Rule A.14.2.

² See AFCA Rule D.3.

³ See AFCA Rule A.15.3.

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.

3 In detail

3.1 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 the parties together to discuss the request, either through a process of negotiation or conciliation, and
- issue a decision about whether the financial firm responded appropriately and whether the credit contract should be varied, if the 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, and
- considered a longer-term solution, when a short-term solution was not appropriate.

We will also consider whether a consumer has co-operated 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 within a reasonable timeframe 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, and
- made whatever repayments they could, even if the financial firm had 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 will usually only extend to enforcement costs, default charges or fees that could have been avoided if the financial firm had genuinely considered the application for financial difficulty assistance. Where appropriate, we may also award compensation for non-financial loss for 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 and the available information shows that their financial difficulties cannot 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 the consumer's circumstances are getting worse, and there is no alternative arrangement that will help them overcome the situation, there may be little further that the financial firm can do to assist.

3.2 Relevant legal principles, industry codes and good industry practice

Legal principles

The *National Consumer Credit Protection Act 2009* Cth (**NCCP**) and its attached National Consumer Credit Code (**NCC**) generally applies to credit provided to individuals wholly or mainly for personal, household or domestic purposes.

The NCC gives a customer the right to request a hardship variation (section 72(1)) for a facility regulated by the NCC (called a '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 mainly for business purposes.

A request for financial difficulty assistance may be oral or in writing. Where a customer makes a request, the financial firm must genuinely consider that request and confirm with the customer whether it agrees to change the credit contract. 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 the reasons for its decision and contact details for AFCA.

Industry codes

Many financial firms have also developed and subscribed to industry codes of practice. Examples of these codes of practice include the Banking Code of 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. When AFCA considers a financial difficulty complaint against a financial firm which does not subscribe to a code, we review the credit contract and any internal policy the financial firm has about dealing with consumers in financial difficulty. We also apply principles of good industry practice. In some cases, we may consider that industry codes reflect good industry practice across the entire industry, not just for subscribers.

Conclusion

Credit contracts may be regulated by legal principles, industry codes of conduct, or good industry practice. In all cases, AFCA considers that financial firms must genuinely consider any consumer's request for financial difficulty assistance.

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 - Giving consideration where all information is not available

Samesh requested assistance due to a change to his financial circumstances which prevented him from making the required repayments to a credit card. The financial firm sought additional information from Samesh to identify whether it was possible to agree a reasonable repayment proposal.

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

Based on a review of account statements, the financial firm identified a repayment amount that it considered Samesh 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 the proposal was reasonable.

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

Case study 2 – Requesting inappropriate information

Jenny requested assistance because she had sustained an injury which prevented her from making the required repayments to her home loan. The financial firm sought additional information from Jenny to identify whether it was possible to agree a reasonable repayment proposal. The information was a large pro-forma request which included BAS and Centrelink statements.

Jenny did not provide the requested information or assist the financial firm to identify a reasonable repayment proposal, and the financial firm commenced enforcement proceedings. Jenn then lodged a complaint with AFCA.

AFCA found that the financial firm had enough information to provide Jenny with a short moratorium (or grace) period before it commenced enforcement proceedings, which it should have done.

AFCA awarded Jenny non-financial loss compensation and time to sell the property.

5 References

5.1 Definitions

Term	Definition
BCP	Banking Code of 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

5.2 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](#)⁴.

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
Australian Bankers' Association Guide to Financial Difficulty	Australian Bankers' Association Guide to Financial Difficulty website https://www.ausbanking.org.au/assistance/
Financial Counselling Australia	www.financialcounsellingaustralia.org.au

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
Banking Code of Practice	https://www.ausbanking.org.au/banking-code/
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)⁵.

⁴ www.AFCA.org.au/approach

⁵ <http://bit.ly/28ZokuH>