

The FOS Approach to Financial difficulty series: Our power to vary regulated credit contracts

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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

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?

Anyone who wants to understand our power to vary regulated credit contracts (as set out in our Terms of Reference), and wants to know how and when FOS applies this power to financial difficulty disputes.

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.

We have the power to vary regulated credit contracts that are regulated by the National Credit Code (NCC), but we will only use this power in circumstances where a variation will see the repayment of the loan in a reasonable period.

The main thing we look at when considering varying a regulated credit contract is whether the individual can demonstrate an ability to service the loan in the future.

The Codes that are part of our approach

Since 1 January 2010 FOS has had the power to vary regulated credit contracts that are regulated by the NCC or Uniform Consumer Credit Code (UCCC). Even if the credit contract is not regulated, we still expect FSPs to give genuine consideration to requests for assistance by an individual.

Our power to vary regulated credit contracts does not extend to facilities not regulated by the NCC. This includes business facilities.

2 In detail

2.1 The FOS Approach

If a financial services provider (FSP) does not agree to a reasonable request to vary a credit facility's terms, FOS can review that decision and may, in some instances, require the FSP to vary a regulated credit contract.

We will firstly encourage parties to negotiate a realistic solution, and we will only consider using the power to vary a regulated credit contract as a last resort, where negotiations have failed to resolve the dispute.

We will only require an FSP to vary a regulated credit contract if we are satisfied that:

- the individual can demonstrate an ability to repay the debt in full if the contract is varied, even if this is over a longer period, and
- assistance would be appropriate – taking into account the individual's current financial position.
- demonstrating capacity to repay a debt can be achieved in a number of ways, including:
 - Regularly making repayments at a level to show that the debt can be repaid in a reasonable time if it was varied.
 - An individual providing information about their financial position to show how their circumstances have or will change, to enable future repayments to be met.
 - A combination of the above.

While all options should be considered by an FSP, FOS will only vary a regulated credit contract if the individual has provided information about their situation.

If the debt is secured, the level of security is not necessarily relevant to the decision to vary a regulated credit contract if the individual has demonstrated they have the ability to repay the debt. This is because a variation will provide an opportunity for the debt to be repaid without the need for the security to be sold.

The decision of whether to vary a regulated credit contract depends on the individual circumstances. This means that we need them to give us all the relevant information and supporting documents that we ask for.

If a loan is secured over an asset (for example a home loan or vehicle loan) and the individual has not demonstrated that they will be able to meet their contractual repayments in the long term, the most appropriate resolution may be to sell the asset. If this is the case, we will encourage parties to discuss this option. We may also arrange a telephone conciliation conference to discuss a timeframe for the individual to sell the asset voluntarily.

3 Context

3.1 Case studies

Case 1: Car loan

Nick requested assistance when he was unable to make full repayments on his car loan, which had three years remaining. He provided the FSP with a Statement of Financial Position (SOFP) that showed that he could afford repayments of \$120 per month if the loan term was extended by a further year.

The FSP declined to vary the loan term and sought additional information from Nick, including a statement from his non-English speaking partner regarding the payment of household expenses. Nick lodged a dispute with FOS. FOS contacted the FSP and noted that the proposal put forward appeared to be reasonable based on the information held by the FSP. This was because the SOFP showed that:

- Nick could afford repayments of \$120 per month
- he had been making repayments of this amount for several months, and
- the extension of the loan term by one year would see the remaining debt repaid.

FOS considered that Nick had demonstrated an ability to repay the debt if the contract was varied. Therefore, it was appropriate for the Ombudsman to exercise his power to vary the credit contract if a resolution was not reached between parties. The FSP reconsidered its position and accepted Nick's proposal without the need for further information. The resolution was formalised in a settlement agreement.

Case 2: Home loan

Sarah had fallen into arrears with her home loan due to a failed business. Sarah's income was no longer enough to service the loan by herself. Her husband was also earning an income, however he was not a party to the loan and he was bankrupt. The couple had been meeting repayments from their combined income for a period of five months. The FSP was reluctant to take into account the husband's income because he was not a party to the loan.

A telephone conciliation conference was held and during the discussion the FSP reassessed its position and identified that if the contract was varied the couple could repay the loan. The parties agreed that the couple would continue to make repayments for a further three months to demonstrate service ability. At the end of that time, the FSP agreed to adjust the loan so that it was no longer in arrears.

3.2 References

Definitions

Term	Definition
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
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
SOFP	Statement of financial position is used to provide current and accurate details of all aspects of a consumer's financial position
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:

- How FOS approaches financial difficulty, taking into consideration legal principles, industry codes and good industry practice
- Working together to find solutions
- Dealing with common financial difficulty issues

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](http://www.moneysmart.gov.au) website www.moneysmart.gov.au
- Australian Bankers' Association 'Doing it tough' website www.doingittough.info

Financial Ombudsman Service

- [Financial Counselling Australia](http://www.financialcounsellingaustralia.org.au) website
www.financialcounsellingaustralia.org.au

The following Code of Practice was referred to in this approach document:

- The National Credit Code (NCC) is included as Schedule 1 to the [National Consumer Credit Protection Act 2009](#) (Cth) (NCCP) which can be viewed here: <http://bit.ly/28ZokuH>