

# The AFCA Approach to joint facilities and family violence

<b>1</b>	<b>At a glance</b> .....	<b>2</b>
1.1	Scope .....	2
1.2	Summary .....	2
<b>2</b>	<b>In detail</b> .....	<b>3</b>
2.1	Issues that may arise with joint facilities .....	3
2.2	Understanding and responding to family violence .....	3
2.3	Account management where there is family violence .....	5
2.4	Options for protecting a customer’s confidentiality and safety .....	5
2.5	Preventing financial abuse at the time of lending or funds withdrawal .....	6
2.6	Financial difficulty and joint debts .....	8
2.7	Financial difficulty in the context of family violence .....	12
2.8	Credit reporting and default listing .....	12
<b>3</b>	<b>Context</b> .....	<b>13</b>
3.1	Case studies .....	14
3.2	References .....	17

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 At a glance

## 1.1 Scope

Where customers have entered into loans or other facilities jointly with one or more other borrowers, problems can sometimes arise. This will commonly occur where there is a relationship breakdown. There may also be other factors involved, such as family violence and financial abuse.

This approach document covers issues that may arise with credit facilities or transaction accounts entered into during a relationship, including when family violence or financial abuse is a factor. These issues include claims that a person should not be held liable for a debt, for example because they were coerced to take out a loan in their own name or jointly with another person and received no benefit from it. Another common issue we see is co-borrowers who are experiencing financial difficulty following the breakdown of a relationship.

Elder abuse is one form of family violence which can also involve financial abuse. While we do not cover this topic specifically here, some of the same general principles covered will also apply to elder abuse situations. We will deal with the topic of elder abuse in a separate approach document.

The approach has been adopted from one of AFCA's predecessor schemes, the Financial Ombudsman Service.

## 1.2 Summary

Dealing with issues arising from joint facilities can be challenging, particularly where there is family violence involved or where only one borrower engages with the financial firm. We expect financial firms to follow some general principles when engaging with customers in this situation:

- understand that these customers are likely to be experiencing considerable stress
- be willing to work with their customers individually
- be flexible in their approach
- be mindful of any access or safety concerns.

Financial firm staff also need to be trained to recognise the warning signs of potential financial abuse, particularly at the time of lending, and know how to respond appropriately. We encourage financial firms to provide ongoing support for their staff, to help them deal with these matters when they arise.

## 2 In detail

### 2.1 Issues that may arise with joint facilities

Joint facilities may include transaction accounts or liabilities such as home loans and personal loans held in the name of two or more borrowers. Each customer will be jointly and severally liable for any debts held in joint names. This means they are each individually responsible for the whole debt and the lender can pursue either of them for the entire amount owing.

Joint facilities can lead to problems where a relationship breaks down, or where there is financial abuse or other forms of family violence.

Some of the issues that we commonly see arising in complaints include:

- One borrower is pressured to enter into a loan which is not for their benefit, or they are unaware that a loan has been taken out in their name.
- A guarantee is signed under duress, or else the guarantor was misled and did not understand what they were signing.
- One borrower wants to split or sever a joint loan following a relationship breakdown, so that they become responsible for none or only part of the debt, but the other borrower does not agree.
- One borrower is experiencing financial difficulty and requires hardship assistance, while the other borrower refuses to engage in any hardship discussions.
- Co-borrowers disagree about how a joint debt should be repaid.
- One account holder makes withdrawals or other transactions without the other account holder's knowledge or consent.
- A customer's privacy is breached. This may have particularly serious consequences if family violence is involved.
- One borrower's actions result in credit reporting and default listing of both co-borrowers.

### 2.2 Understanding and responding to family violence

#### What is domestic and family violence?

Domestic and family violence can be defined as:

“a pattern of abusive behaviour in an intimate relationship or other type of family relationship where one person assumes a position of power over another and causes fear...It is often referred to as a pattern of coercion and control.” (1800respect)

Family violence can have serious detrimental effects on a person's physical and emotional health and financial well-being. While anyone can be a victim of family violence, the majority of victims are women, and the perpetrators of violence are usually men.

Financial abuse is a form of family violence that involves financial control. It can include forcing someone to enter into debt, making all the key financial decisions in a relationship, spending joint funds without the other person's knowledge or consent, or using joint assets and debts to control someone, for example to prevent them from leaving an abusive relationship. An abuser may also withhold child support, or use joint debts or jointly owned assets to continue to exert control over their victim even after a relationship has ended, obstructing that person's efforts to recover from the abusive relationship and rebuild their economic independence and security.

### Warning signs of potential financial abuse

In November 2016, the Australian Bankers' Association (ABA) published an industry guideline on financial abuse and family and domestic violence policies. While not all financial firms are ABA members, we consider that this guideline reflects good industry practice. In particular, it is important that financial firm staff are appropriately trained to understand family violence and financial abuse, and can recognise and respond appropriately to the warning signs of family violence, particularly at the time of lending.

Some indications that there may be financial abuse at the time of lending include when a customer:

- is seen or heard to be taking instructions from another party
- remains silent while another party does all the talking
- appears fearful (particularly of the person accompanying them), unfocused or withdrawn
- is agreeing to offer additional security or take on additional liabilities when there is no apparent benefit to them from doing so
- does not understand or is unaware of recent transactions on an account, or loans or guarantees in their name
- appears confused or reluctant to talk about what the funds being borrowed or withdrawn will be used for
- is not physically present during the transaction, instead allowing the co-borrower to handle the matter
- expresses concern about their privacy and disclosure of information to a co-borrower
- appears reluctant to involve a co-borrower when seeking assistance to repay a debt
- mentions that an intervention order (or equivalent) is, or has recently been, in place
- is agreeing to take on liability or provide security for an ex-partner.

## Engaging effectively

It will often be difficult for a customer experiencing family violence to discuss their situation with their financial firm. For this reason, financial firm staff should be trained to ask appropriate and sensitive questions where there are warning signs of potential family violence or financial abuse, in order to find out more about the customer's situation.

Where customers disclose family violence, we expect financial firms to handle this information sensitively and offer flexible options to their customer, such as:

- Minimising the number of times a customer needs to disclose their situation to the financial firm by, for example, having a dedicated staff contact.
- Recognising that someone experiencing family violence may not have access to their financial records and other documents. financial firms' requests for information should therefore not be onerous.
- Working with the customer's appointed representative or referring them to appropriate support agencies if required.
- Providing information about how the financial firm can assist the customer to protect their accounts, for example by setting up a separate account in their own name, or by changing an operating authority on a joint facility to 'both to sign'.

### 2.3 Account management where there is family violence

A financial firm has obligations to protect the personal information of their customers. A customer experiencing family violence may require additional assistance from a financial firm to ensure their contact information is kept secure and confidential from the other co-borrower. We have seen instances where a perpetrator of family violence has been able to access information about a vulnerable customer by contacting the financial firm. Such privacy breaches can place the vulnerable customer in physical danger or exacerbate an existing threat to them or other family members such as children.

### 2.4 Options for protecting a customer's confidentiality and safety

Options for financial firms to protect the confidentiality of customers experiencing family violence include:

- Ensuring that it does not disclose personal information to the other borrower or account holder that may put the customer at risk, such as new address or contact details.
- Discussing safe ways to communicate with the customer experiencing family violence.
- Setting up new accounts (including 'silent' accounts) or changing access codes, passwords and operating authorities for existing accounts.
- Foregoing any requirement for the customer to make direct contact with the abuser

- Limiting access to the account to staff specifically trained on family violence protocols.
- Informing customers of the nature of the information they are going to need to share with the other borrower, such as information about a child's account, so the customer can make appropriate arrangements.
- Supporting their customer to make contact with family violence services for assistance in managing their safety, or with emergency services if there is an immediate threat to their safety.

While it is crucial that financial firms ensure they do not share current information about one borrower with the other borrower, this does not mean that financial firms should decline all requests for information from borrowers. In particular, financial firms should be willing to provide documents relating to obtaining the loan if requested, such as the loan application form. This is important because a customer who has experienced family violence may have difficulty remembering the circumstances of the original loan.

## **2.5 Preventing financial abuse at the time of lending or funds withdrawal**

### **Recognising and acting on warning signs**

Financial firms should do all that they can to prevent financial abuse, for example where a customer enters into a loan or withdraws funds under duress. Acting on warning signs of undue influence at the time of lending may help prevent financial abuse from taking place. One example of where early awareness may help make a difference is at a car dealership, where a male customer who is rejected for finance later returns with a female friend or partner, and the loan is approved in her name even though the car is registered solely in the male's name.

We expect financial firms to be alert to the warning signs of potential financial abuse at the time of lending or withdrawal of funds. A financial firm should not approve a loan or other transaction if it suspects that financial abuse may be occurring, without first making further enquiries.

It is highly unlikely that a vulnerable person will be able to respond meaningfully to questions about a transaction, when these questions are asked in the presence of the potential abuser. For this reason, it is essential that financial firms ask to speak with the customer separately from their companion or co-borrower if any warning signs of potential financial abuse are present. Financial firms need to ensure that their frontline staff are trained to make this request carefully and sensitively, because if the potential abuser is put on notice about what is happening, this could have serious consequences for the victim.

The purpose of holding a private conversation with the person who appears to be under the influence of another is to ensure they understand what they are doing, will receive a benefit from the transaction, and are entering into the transaction of their

own free will. The financial firm should make a note of the conversation and retain this as part of its records.

Where a financial firm becomes aware of family violence after the time of lending, we expect financial firms to proactively explore with their customer whether financial abuse was present at the time of lending, and if so, whether there was anything the financial firm could have done at the time to identify and prevent the abuse from occurring. An example might be if a customer requesting financial difficulty assistance discloses that they did not obtain any benefit from the loan. If there were warning signs at the time of lending which the financial firm missed, then we would expect the financial firm to take steps to rectify the issue, for example by agreeing to waive debt where appropriate.

### **Where a borrower does not benefit from a credit facility**

A financial firm should not accept a customer as a borrower for a credit facility if it is aware that the customer will not benefit from the facility. Examples could include a loan in joint names where only one borrower benefits, a credit card account that is to be used only by the secondary cardholder, or a loan solely in the customer's name that is obtained for another person's benefit. If the customer will not benefit from the funds advanced, then they cannot be regarded as a borrower or co-borrower and should instead be treated as a guarantor. Guarantors receive special protection because they do not benefit from the loan.

Where a customer did not benefit from a credit facility, and the financial firm was or should have been aware of this at the time of lending, we will expect the financial firm to release the customer from liability for the facility. This includes where warning signs of potential financial abuse were present at the time of lending, and a financial firm failed to recognise or act on those warning signs. The customer is not liable for the facility in these circumstances because as a borrower, they would not have been afforded the protections that guarantors are entitled to receive, for example a warning to seek independent advice.

Where a customer only partially benefitted from the funds, then it will usually be appropriate for the financial firm to release the customer from liability for any portion of the loan which did not benefit them. As one of the warning signs of potential financial abuse is where a borrower receives only a small benefit from a loan, where an financial firm is aware of this at the time of lending it should ensure it makes further enquiries before approving the loan.

Case Study One below provides an example of where a financial firm failed to act on signs of potential financial abuse at the time of lending, and the customer received only partial benefit from the loan. In that case, AFCA's predecessor scheme FOS decided that the customer should be released from liability for a portion of the loan.

## Disputed transactions

Transactions may be disputed on the basis that they were unauthorised. Alternatively, an authorised transaction may be disputed because a customer believes they should not be liable, for example because they obtained no benefit from the transaction. Where transactions are disputed, the onus is on the financial firm to demonstrate that the transactions were correctly authorised.

Where a financial firm becomes aware that the parties to a jointly held facility are in dispute with each other, it should change the operating authority for the account so that both parties are required to sign. This will help to preserve any joint assets until the account holders are able to resolve their complaint, for example through the Family Court. If the financial firm is aware that the parties to a joint account are going through a separation but is uncertain whether the account is in dispute, it would be prudent for the financial firm to ask the parties if the operating authority should be changed to both to sign.

As explained above, a financial firm also needs to be alert to warning signs of family violence, including where a customer may be subject to undue influence. If warning signs are present, then a financial firm should make further enquiries before approving any transaction, even if the customer has authorised the transaction.

In Case study two below, a financial firm approved a number of increases to a joint home loan facility. The financial firm was unable to establish that some of these transactions had been correctly authorised. Other transactions had been made under duress. The outcome was that the customer was not liable for the additional borrowings, but those borrowings were still secured by the co-borrower's share of the property.

## 2.6 Financial difficulty and joint debts

### Requests for assistance from individual borrowers

In our financial difficulty approach document series, we explain that we expect financial firms to work with an individual borrower who is requesting assistance with a joint loan, and discuss options for resolving their financial difficulty. If there is a suitable variation that would assist an individual borrower, then we would expect the financial firm to implement this. It is not necessary for the financial firm to first obtain the other borrower's consent.

The National Credit Code, the Code of Banking Practice and the Customer Owned Banking Code of Practice all refer to an individual debtor being able to request assistance, including contract changes, where they are experiencing financial difficulty. There is no requirement for a request to come jointly from all borrowers to a loan. As each borrower is both jointly and severally liable to repay the full amount of the loan, it is our view that each borrower is also individually entitled to ask for assistance if they are having difficulty meeting their obligations.

## Assessing requests for assistance

Where only one borrower requests assistance on a joint facility, the financial firm needs to take into account that borrower's financial situation when considering how it might assist. Depending on the circumstances, a financial firm may need to ask the borrower for information about their position. Any information requests should be kept to a minimum to avoid this becoming a barrier to assistance.

Where the financial firm does request information and the customer fails to provide this, then the financial firm should still work to identify what options are available based on the information it does have, even if this is limited.

The financial firm should not require the customer to contact a co-borrower to obtain information or consent in relation to a request for assistance. This is the case regardless of whether the hardship is short term or longer term. Where there is a co-borrower who is not involved in the request for assistance and who is also not contributing to the loan, then it will generally be inappropriate for the financial firm to ask for information about that co-borrower's financial circumstances. This is because such information is unlikely to be relevant in exploring options for the borrower who has asked for assistance. The borrower requesting assistance will generally need to show that they can repay the debt alone, without help from the co-borrower, if the financial firm assists them.

## Options for assistance

Solutions offered to the borrower seeking assistance will depend on that borrower's individual circumstances. Options for assistance include:

- Capitalising arrears. This is likely to be suitable where the borrower is able to meet ongoing payments, but is not able to clear the arrears.
- Extending the loan term. This may help to reduce repayments to a level that is affordable by one borrower alone.
- Reducing or waiving repayments, interest and/or fees for a period. This could allow time for the borrower's situation to improve, for one borrower to refinance the loan into their own name, or for co-borrowers to resolve their disagreements, for example in the Family Court. We would not, however, expect a financial firm to wait for an indefinite period without any repayments.
- Agreeing not to pursue one borrower for the loan, while retaining the financial firm's right to pursue the other borrower. This is covered in more detail below.
- Waiving part or all of a debt (debt reduction). This is covered in more detail below.

## Agreeing to settle a debt where there is joint and several liabilities

As mentioned earlier, each borrower on a joint loan is jointly and severally liable to repay the full amount of the debt. In our view, this does not prevent a financial firm from agreeing to settle or waive a debt with one borrower only, while retaining its right to pursue the other borrower(s) for the remaining balance. Alternatively, a financial

firm may agree to separate settlements with each borrower individually, or waive debt for all borrowers on the loan.

Examples of cases we have seen where customers are experiencing financial difficulty and financial firms have agreed to waive either part or all of a debt, for both secured and unsecured loans, include:

- Where a customer is experiencing, or has in the past experienced, family violence (and there were no warning signs at the time of lending).
- Where a customer is otherwise particularly vulnerable, for example due to mental health issues or physical disability.
- Where the debt is unsecured, the customer has no assets, and their circumstances are unlikely to improve in the foreseeable future.

If an financial firm agrees to waive one borrower's liabilities under a secured debt, for example a home loan, this may have the unintended effect of also benefitting the other borrower because the equity in the jointly owned asset will increase. This can also occur if a borrower intends to repay a secured loan by themselves, without assistance from the co-borrower. For this reason, where financial firms are considering these types of solutions, they should encourage their customer to seek independent legal and/or financial advice. It may be that the customer will be able to take steps to recover any benefit gained by the co-borrower, for example through Family Court proceedings.

Case Study Three below gives an example of where a financial firm agreed to waive a substantial portion of a joint home loan, in order to assist a customer who was a survivor of family violence to keep her home.

### **Collection of debts when a settlement is agreed**

Where a financial firm does agree to settle a debt with one borrower on a joint loan, it should not outsource collection of the debt or sell the debt to third party debt collection agencies. This is because there is a risk that the collection agency will attempt to pursue both borrowers for the full amount of the debt, which would be in breach of the settlement that the financial firm reached with one of the borrowers.

If a debt has already been outsourced or sold to a third party collection agency and the financial firm subsequently agrees to a settlement with one borrower, it should work with the collection agency to effect options such as:

- buying back the debt from the third party, if appropriate
- instructing the collection agency to pursue only the other borrower for the debt.

### **Where financial difficulty cannot be overcome**

In some cases, there may be no form of assistance an financial firm can provide that would enable a borrower to overcome their financial difficulty and repay a joint debt

alone, even in the longer term. If the debt is secured by an asset, such as a house or vehicle, then the only realistic solution may be to sell that asset. In these circumstances, we encourage financial firms to consider allowing their customer a reasonable time to sell the asset themselves.

### **A financial firm's obligations to co-borrowers**

As all co-borrowers are jointly and severally liable for the debt, it is in the interests of all borrowers, as well as the financial firm, to see the loan repaid. We have explained above that we expect financial firms to work with individual borrowers who request financial difficulty assistance. If there is a solution that will assist an individual borrower to repay the debt alone, and which does not require the other borrower to contribute, then the financial firm should be prepared to implement that arrangement without requiring the other borrower's consent.

Where a financial firm declines to assist a customer solely on the basis that one borrower does not agree to a variation requested by another borrower, it is our view that the financial firm will not have met its financial difficulty obligations.

Where a financial firm does agree to a loan variation with one borrower, it is good industry practice for the financial firm to notify the other borrower and give that person an opportunity to start making payments or put forward an alternative repayment proposal. If the other borrower does make an alternative proposal, then the financial firm should consider this. However, where the other borrower disagrees with the variation but cannot provide a reasonable alternative repayment proposal, then in our view the other borrower's objection should not prevent the financial firm from going ahead with the variation if this will see the debt repaid.

A financial firm may sometimes have concerns that a borrower who has requested assistance may not be able to afford a proposed variation. If the borrower cannot meet the new repayments then there is a risk that interest will accumulate and the debt will increase, potentially placing all borrowers in a worse position. If a financial firm has concerns about affordability, it may be prudent to require the borrower who has asked for assistance to show that they can make payments at the agreed level for a period of time, for example six months, before the financial firm agrees to vary the loan by capitalising arrears or extending the loan term.

Case study four below gives an example of where a financial firm assisted one borrower by varying a joint loan, and the other borrower objected to the variation. In that case, AFCA's predecessor scheme FOS decided that the financial firm had not breached any obligation to the objecting borrower by varying the loan.

### **Where a co-borrower seeks the sale of property securing a loan**

We have seen instances where one borrower has asked the financial firm to assist them to remain in the security property, while the other borrower wants the financial firm to take possession of the property and sell it. As explained above, the financial firm's obligations are to the borrower who is seeking assistance to make loan

repayments. If there is an affordable variation that would see the loan repaid, then we would expect the financial firm to consider this. Where borrowers disagree about what should happen to jointly owned property, it may be appropriate to refer them for family law advice.

Sale of a security property, particularly a home, should always be considered as a last resort. It would usually only be appropriate where neither borrower is able to repay the loan, even if assistance is provided.

## **2.7 Financial difficulty in the context of family violence**

The principles outlined above for handling financial difficulty requests made by one borrower to a joint loan also apply in situations where family violence is involved. This includes the expectation that a financial firm will work with an individual borrower who is requesting assistance, without requiring the consent of the other borrower.

Additional considerations where a borrower is or may be experiencing family violence include:

- Where a customer discloses family violence then the financial firm should take this on face value and not require the customer to provide evidence, for example, in the form of an intervention order.
- As it may be difficult for a customer experiencing family violence to gather supporting documents such as payslips or account statements, a financial firm should be willing to consider providing assistance without these documents.
- Waiving a debt may be an appropriate solution, if this will assist the customer to move on from an abusive relationship and achieve economic independence.
- As safety considerations will be particularly important, a financial firm should ensure that any discussions or correspondence it has with the other borrower, or with third parties such as collection agencies, protects the confidentiality and safety of their customer.

## **2.8 Credit reporting and default listing**

Financial firms have an obligation to provide accurate information if they are reporting credit or default information to credit reporting bodies. Because co-borrowers are jointly and severally liable for joint debts, it means that if one borrower stops servicing the loan, both borrowers are at risk of being credit listed. In situations where family violence is present, this may represent one form of coercion by one borrower over the other.

We understand that adverse credit information on an individual's credit report can be a significant barrier to recovery and achieving financial independence. Taking this into account, there may be occasions, in particular if family violence is present, where it will be appropriate for financial firms to remove or refrain from entering credit information about a vulnerable borrower.

### **If a financial firm is on notice that a borrower is experiencing family violence**

The F should not default list the borrower. Instead it should place enforcement action on hold while it works with the borrower to overcome his or her financial difficulty with the loan. This does not prevent the financial firm from making arrangements to enter a default listing against the other borrower, if appropriate.

### **If a financial firm is unaware family violence is or was present until after a default listing is made**

Where a financial firm default lists a borrower who has experienced family violence because it was not aware of the borrower's circumstances at the time of the listing, we consider it to be good industry practice for the financial firm to remove the listing.

This is because customers who have experienced family violence are likely to struggle to achieve financial autonomy if they have adverse information on their credit file.

### **If a customer did not receive any benefit from a loan**

We have explained above that where a customer entered into a loan because they were subject to duress and received no benefit from the funds, and the financial firm was or should have been aware of this at the time of lending, then the financial firm should release the customer from liability under the loan. At the same time, the financial firm should also remove any adverse credit information related to the debt.

### **Comprehensive credit reporting**

A financial firm may agree to a repayment arrangement for a joint debt, or agree to settle or waive its contractual rights with one borrower only. In this case, repayments under the contract will no longer be due and payable by that borrower. However the contractual repayments will remain due and payable by the other borrower.

This means that it would be inappropriate for the financial firm to list credit information, such as missed payments, against the borrower who has entered into an arrangement, as long as the borrower is keeping to the terms of arrangement. This does not prevent the financial firm from entering credit information against the other borrower if appropriate.

## **3 Context**

The case studies below are based on determinations by one of AFCA's predecessor schemes, the Financial Ombudsman Service, in which awards were made for non-financial loss. 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.

### 3.1 Case studies

#### Case 1: Failure to recognise signs of potential financial abuse

Ms G obtained a joint home loan of \$150,000 with her then partner. The loan funds were used to refinance Ms G's prior home loan with another financial services provider as well as other loans owed solely by her partner. It also provided additional funds to both borrowers. Ms G said the financial firm should not have provided her with the loan because she received no benefit from it and was acting under duress from her partner at the time of lending.

FOS investigated and found that the financial firm had not complied with good industry lending practices, and should not have accepted Ms G as co-borrower for the following reasons:

- The security for the loan was a property in Ms G's sole name and part of the purpose of the loan was to repay debts that she did not owe.
- The financial firm should have taken steps to ensure Ms G was not subject to potential financial abuse.
- Specifically, the financial firm should have discussed the loan with Ms G in private, without the co-borrower present.

Ms G said she presented at the financial firm branch as subdued, unfocused, and unwilling to take part in discussion about the lending. She said it would have been evident that she was experiencing mental illness and was in an abusive relationship with the co-borrower.

Good industry practice in these circumstances required the financial firm to recognise and act on the warning signs of potential undue influence, and to speak with her separately from the co-borrower to ensure that she understood what she was doing and was entering into the transaction of her own free will. It should also have made a note of that conversation and retained it with the lending file.

FOS found that Ms G was not liable for the portion of the loan that was used to refinance her former partner's debts. The financial firm could only hold the complainant liable for, and could only use her property as security for, an amount of approximately \$80,000.

#### Case 2: Unauthorised transactions on a joint home loan

Ms Y had a home loan in joint names with her former partner, Mr Y. Their jointly-owned property was security for the loan. The financial firm had approved several top-up increases to the home loan, some of which were requested through online banking. Ms Y said that she had not authorised four of these increases.

FOS investigated the complaint and found that the financial firm was required to obtain both Ms and Mr Y's consent before it could increase their liabilities under the

loan, and it failed to do so. Ms Y did not sign the contract for the first top up increase. The second and third increases were requested through online banking, and the financial firm was unable to establish that Ms Y had authorised these transactions, or benefited from them. For the fourth increase, FOS found the financial firm was on notice that Ms Y may have agreed to the increase under duress from Mr Y, and so the financial firm should have recommended Ms Y obtain legal advice before advancing the top up funds.

FOS found that Ms Y was not liable for the losses arising from the disputed top ups. The loan balance was adjusted for the principal amounts of the top ups, as well as the interest, fees and costs on those amounts, and Ms Y and Mr Y were jointly and severally liable for the revised loan balance. The remaining balance owing under the loan (that is, the disputed top up amount) was still secured by Mr Y's half share of the security property, and so could potentially be recovered by the financial firm if the property was subsequently sold.

### **Case 3: Waiver of secured debt for a customer in financial difficulty**

Ms C had experienced family violence and had taken out at least five apprehended violence orders against her ex-partner. This placed her into financial difficulty with her home loan, which was held in joint names with her ex-partner.

She agreed to a financial hardship arrangement with the financial firm whereby the financial firm would defer repayments on her home loan for a six month period. After this time, if Ms C made three monthly repayments (serviceability test), the financial firm agreed to capitalise the arrears owing on the loan.

Before the end of the serviceability test, Ms C attended a branch and was advised to access her superannuation to clear the arrears even though this was not a part of the hardship arrangement. She also said that her personal circumstances were discussed publicly and she was not given the opportunity to have a private conversation with the financial firm in the branch.

Ms C's representative lodged a complaint with FOS, asking the financial firm to capitalise the arrears on the home loan, and also extend the term of the loan so that repayments would be reduced to \$900 per month.

During a FOS telephone conciliation conference, the financial firm offered to waive \$100,000 of the secured debt, which would reduce the repayments to approximately \$700 per month. These repayments were affordable for Ms C.

The financial firm explained to Ms C that as the home was a jointly owned asset, Ms C's ex-partner would also benefit from the partial debt waiver and from Ms C's repayments, because the equity in the property would increase. Ms C's legal representative explained to her that this would be taken into account in proposed Family Court proceedings. Ms C accepted the financial firm's offer.

#### Case 4: Objection from one borrower to another borrower's request for financial difficulty assistance

Mr F had a joint home loan with his ex-wife. The property that secured the loan had become subject to Family Court proceedings.

Initially, the loan repayments were principal and interest. In June 2016, based on a request from Mr F's ex-wife for financial difficulty assistance, the financial firm varied the terms of the loan to interest only repayments until March 2017. Mr F's ex-wife had told the financial firm that she was unable to afford the principal and interest repayments while the property settlement proceedings were ongoing.

Mr F did not consent to the variation. He wanted the financial firm to reverse the loan back to principal and interest repayments.

FOS investigated the complaint and found that the financial firm had not made any error by changing the payments from principal and interest to interest only at the request of one of the borrowers.

In our Preliminary View, we explained that this was because:

- The financial firm has obligations under the National Consumer Credit Code to consider a financial hardship request from an individual borrower who is in financial difficulty.
- Industry Guidelines issued by the Australian Banking Association also make it clear that it is acceptable for a bank to vary a contract when requested by a joint borrower, without the consent of the other borrower.
- The interest only arrangement was reasonable in the circumstances, as it allowed time for the Family Court proceedings to be heard.

Further, we were not satisfied that Mr F had incurred any loss as a result of the financial firm agreeing to the interest only arrangement with his ex-wife. This is because the arrangement prevented the loan from going into arrears and allowed it to remain on foot, pending the outcome of the property settlement. Without the arrangement, it is possible that the loan would have defaulted and the financial firm would have been entitled to take possession of the security property.

We also found that it was open to Mr F, as the co-borrower, to make additional repayments towards the loan, if he was concerned that the principal was not decreasing at the rate it would otherwise have been.

## 3.2 References

### Definitions

Term	Definition
Complainant	individual or small business that has lodged a complaint with AFCA
Financial firm	An organisation or individual that is a Member of AFCA
Capitalising arrears	Where overdue amounts are absorbed into the loan so that they are not repayable immediately in a lump sum, but instead are repaid over the remaining term of the loan

### Useful documents

Document type	Title
<a href="#">Rules</a>	<a href="http://www.afca.org.au/rules">www.afca.org.au/rules</a>
<a href="#">ABA Industry Guideline</a>	Financial abuse and family and domestic violence policies