

Comparison Guide

FOS to AFCA

October 2018

The Australian Financial Complaints Authority (AFCA) commences on 1 November 2018. This guide sets out some of the key differences between the complaints which FOS and AFCA will deal with.



Item	FOS	AFCA	Key Change
Jurisdiction			
Complainant Who can make a complaint?	<ul style="list-style-type: none">• Individuals• Partnerships / Small Businesses¹• Others	<ul style="list-style-type: none">• Individuals;• Partnerships / Small Businesses²• Others (including SMSF trustees and bodies corporate)	More businesses will be eligible to complain to AFCA as "Small Business" now captures any business (including groups of related entities) employing <100 employees, rather than <20 employees under FOS.

¹ Under the FOS terms of reference, Small Businesses included businesses which employed <20 employees (or <100 employees for manufacturing businesses) and included SMSF trustees, partnerships, and clubs and incorporated associations carrying on business.

² Under the AFCA Rules, there is a broader definition of Small Business which includes all businesses and groups of related companies employing <100 employees. It also includes SMSF trustees, partnerships, and clubs and incorporated associations carrying on business.

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<p>Jurisdictional Limit: Claim Amount</p> <p>This is the maximum amount the complainant can seek in their complaint in order for the complaint to be considered by FOS or AFCA.</p> <p>Limits based on the claimed amount only apply to complaints in relation to credit facilities provided to individuals (and any other borrower which is not a small business or primary producer).</p> <p>The limit based on the claimed amount is different to the maximum amount AFCA (or FOS) can award to a complainant – see below for details of this.</p>	<p>Maximum claim amount of \$500,000 for all applicants.</p>	<p>The maximum claim amount under AFCA depends on the type of complainant (type of borrower, guarantor or other complainant).</p> <p>Where the complainant is a borrower:</p> <ol style="list-style-type: none"> 1. Small Business borrower: No jurisdictional limit based on the amount claimed. 2. Primary Producer³ borrower: No jurisdictional limit based on the amount claimed. 3. Individual (or other) borrower: \$1 million. <p>Where the complainant is a guarantor:</p> <ol style="list-style-type: none"> 4. Guarantor of loan to Small Business: <ol style="list-style-type: none"> a. Security is guarantor's home: No jurisdictional limit based on the amount claimed. b. Security is NOT guarantor's home: No jurisdictional limit based on the amount claimed. c. No security for guarantee: \$1 million. 5. Guarantor of loan to Primary Producer: <ol style="list-style-type: none"> a. Security is guarantor's home: No jurisdictional limit based on the amount claimed. b. Security is NOT guarantor's home: No jurisdictional limit based on the amount claimed. c. No security for guarantee: \$1 million 6. Guarantor of facility provided to any other customer: <ol style="list-style-type: none"> a. Security is guarantor's home: Unlimited. b. Security is NOT guarantor's home: \$1 million. c. No security for guarantee: \$1 million. <p>For other credit facility related complainants:</p> <ol style="list-style-type: none"> 7. Maximum claim amount: \$1 million. 	<p>Under the AFCA Rules there is no jurisdictional limit on the amounts claimed by Small Business borrowers, Primary Producer borrowers, or guarantors of facilities held by those types of borrowers (where the guarantee is supported by security).</p> <p>The jurisdictional limit for amounts claimed by individual (or other) borrowers or guarantors of those facilities who have either given a guarantee supported by 'other security' (security which is not their principal place of residence) or given an unsupported guarantee has doubled to \$1 million.</p> <p>A guarantor of an individual borrower's facility whose guarantee is supported by security over their principal place of residence can claim an unlimited amount.</p> <p>All guarantors whose guarantees are not supported by security are subject to a maximum claim amount of \$1 million.</p>

³Primary Producer has the meaning given to that term in the Income Tax Assessment Act 1997 (Cth) and must also be a Small Business.

Item	FOS	AFCA	Key Change
<p>Jurisdictional Limit: Credit Facility Limit</p> <p>Where a complaint relates to a credit facility provided to a small business or primary producer, there is a jurisdictional limit based on the credit facility limit. If a complaint relates to a credit facility which has a limit which is higher than the jurisdictional limit, AFCA (or FOS) can refuse to consider the complaint.</p> <p>For individual borrowers, there is no jurisdictional limit based on the credit facility limit.</p>	<p>Maximum loan value for eligible complaints in relation to debt recovery against Small Business: \$2 million.</p>	<p>The jurisdictional limit based on the credit facility limit under AFCA depends on the type of complainant (type of borrower, guarantor or other complainant).</p> <p>Where the complainant is a borrower:</p> <ol style="list-style-type: none"> 1. Small Business borrower: \$5 million 2. Primary Producer* borrower: \$5 million 3. Individual (or other) borrower: No jurisdictional limit based on the credit facility limit. <p>Where the complainant is a guarantor:</p> <ol style="list-style-type: none"> 4. Guarantor of loan to Small Business: <ol style="list-style-type: none"> a. Security is guarantor's home: \$5 million b. Security is NOT guarantor's home: \$5 million c. No security for guarantee: No jurisdictional limit based on the credit facility limit. 5. Guarantor of loan to Primary Producer: <ol style="list-style-type: none"> a. Security is guarantor's home: \$5 million. b. Security is NOT guarantor's home: \$5 million. c. No security for guarantee: No jurisdictional limit based on the credit facility limit. 6. Guarantor of facility provided to any other customer: No jurisdictional limit based on the credit facility limit. <p>For other credit facility related complainants:</p> <ol style="list-style-type: none"> 7. Maximum loan value: No jurisdictional limit based on the credit facility limit. 	<p>AFCA will consider complaints in relation to significantly larger credit facilities than FOS.</p> <p>AFCA will consider complaints in relation to credit facilities of up to \$5 million to Small Businesses and Primary Producers.</p> <p>There is no jurisdictional limit based on the limit of credit facilities provided to other borrowers (e.g. individuals).</p>

Item	FOS	AFCA	Key Change
<p>Maximum Award: Credit Facility Limit</p> <p>This is the maximum amount that FOS or AFCA can award for the complainant's direct financial loss (excluding costs and interest)</p>	<p>Maximum award (excl. costs and interest): \$323,500.</p>	<p>Where the complainant is a borrower:</p> <ol style="list-style-type: none"> 1. Small Business borrower: \$1 million 2. Primary Producer borrower: \$2 million 3. Individual (or other) borrower: \$500,000. <p>Where the complainant is a guarantor:</p> <ol style="list-style-type: none"> 4. Guarantor of loan to Small Business: <ol style="list-style-type: none"> a. Security is guarantor's home: Unlimited b. Security is NOT guarantor's home: \$1 million c. No security for guarantee: \$500,000 5. Guarantor of loan to Primary Producer: <ol style="list-style-type: none"> d. Security is guarantor's home: \$5 million. e. Security is NOT guarantor's home: \$5 million. f. No security for guarantee: No jurisdictional limit based on the credit facility limit. 6. Guarantor of facility provided to any other customer: No jurisdictional limit based on the credit facility limit. <p>For other credit facility related complainants:</p> <ol style="list-style-type: none"> 7. Maximum award: \$500,000. 	<p>The maximum amount AFCA can award has significantly increased and, in relation to guarantor claims, there is no limit on the amount AFCA can award in certain circumstances.</p>

Item	FOS	AFCA	Key Change
Remedies			
Types of remedies	<ol style="list-style-type: none"> 1. the payment of a sum of money; 2. the forgiveness or variation of a debt; 3. the release of security for debt; 4. the repayment, waiver or variation of a fee or other amount paid or owing including the variation in the applicable interest rate on a loan; 5. the reinstatement or rectification of a contract; 6. the variation of the terms of a Credit Contract in cases of financial hardship; 7. the meeting of a claim under an insurance policy by, for example, repairing, reinstating or replacing items of property; and 8. in the case of a Dispute involving a privacy issue with an individual - that the Financial Services Provider should not repeat conduct on the basis that it constitutes an interference with the privacy of an individual or that the Financial Services Provider should correct, add to or delete information pertaining to the Applicant. 	<ol style="list-style-type: none"> 1. the payment of a sum of money; 2. the forgiveness or variation of a debt; 3. the release of security for debt; 4. the repayment, waiver or variation of a fee or other amount paid to or owing to the Financial Firm or to its representative or agent, including the variation in the applicable interest rate on a loan; 5. the reinstatement, variation, rectification, or setting aside of a contract; 6. the meeting of a claim under an insurance policy by, for example, repairing, reinstating or replacing items of property; 7. that the Financial Firm should not repeat conduct on the basis that it constitutes an interference with the privacy of an individual or that the Financial Firm should correct, add to or delete information pertaining to the Complainant; 8. in relation to a default judgment, not enforcing the default judgment; 9. to make an order that is generally consistent with the declarations available to the Information Commissioner when he or she makes a decision under section 52 of the Privacy Act; 10. an apology. 	<p>AFCA is expressly empowered to determine that a contract should be set aside, a default judgment not be enforced, or that an apology be given.</p>

Item	FOS	AFCA	Key Change
Maximum awards: Indirect and non-financial loss	Maximum award for consequential (indirect) loss: \$3,500. Maximum award for non-financial loss: \$3,000.	Maximum award for consequential (indirect) loss: \$5,000. Maximum award for non-financial loss: \$5,000.	Increased award caps for consequential and non-financial loss under AFCA.
Maximum award: Costs	The financial firm may be asked to pay complainants legal, professional or travel costs up to \$3,000 on top of any other award.	The financial firm be asked to pay complainants legal, professional or travel costs up to \$5,000 on top of any other award.	The complainant may be awarded costs of up to \$5,000, which is an increase from the cap of \$3,000 under FOS.

Effect of FOS / AFCA determination

Complainant does not accept determination	The complainant may pursue their claim in the Courts.	The complainant may pursue their claim in the Courts.	No change.
Complainant accepts determination - release	The complainant must complete a release if FOS' determination is accepted within 30 days.	The complainant must complete the release if asked. The release will not be effective until the financial firm fulfils all its obligations under the release.	No significant change.
Restrictions on financial firm during complaint	<p>The financial firm cannot:</p> <ul style="list-style-type: none"> instigate proceedings against the complainant, or any other affected party in relation to any aspect of the subject matter of the dispute; seek judgment in existing proceedings (if the FOS dispute is lodged before the complainant or affected party takes steps in the proceedings beyond filing a defence); or take steps to recover a debt, or protect assets securing the debt, or assign the debt. <p>An exception arises where a limitation period is about to expire and/or FOS consents.</p>	<p>The financial firm cannot:</p> <ul style="list-style-type: none"> instigate proceedings against the complainant, anyone else joined to the complaint or other affected party in relation to any aspect of the subject matter of the dispute; seek judgment in existing proceedings (if the AFCA complaint is lodged before the complainant or affected party takes steps in the proceedings beyond filing a defence); take steps to recover a debt, or protect assets securing the debt, or assign the debt; or list a default on the complainant's credit file. <p>An exception arises where a limitation period is about to expire and/or in certain circumstances, AFCA consents.</p>	The restrictions on financial firms are slightly broader under AFCA.

Item	FOS	AFCA	Key Change
Reporting to Regulators			
Systemic issues	Systemic issues are reported to the financial firm for remedial action, and must be reported to ASIC.	<p>AFCA will:</p> <ul style="list-style-type: none"> investigate systemic issues, notify the financial firm and provide it an opportunity to respond give directions to the financial firm to facilitate AFCA's investigation, remedy losses suffered by consumers and small businesses, and prevent the issue recurring report the issue to ASIC, APRA, the ATO, OAIC and any other appropriate body. See also ASIC RG 267. 	<p>AFCA will report systemic issues to all relevant regulatory bodies and take a more active role in investigating and remediating systemic issues.</p> <p>An example of a systemic issue which AFCA may report is poor internal dispute resolution procedure involving significant complaints handling delays.</p>
Serious misconduct	Serious misconduct must be reported to ASIC (includes fraudulent or grossly negligent conduct and wilful breaches of law or FOS terms of reference).	AFCA will report serious contraventions of law or the AFCA rules to ASIC. This will include reporting on settlements between a financial firm and a complainant which are overly broad, unjust, designed to avoid AFCA scrutiny, or entered into as a result of duress or misrepresentation.	Serious misconduct which will be reported by AFCA to ASIC includes terms of settlement which AFCA regards as requiring investigation – for example, for being overly broad or unjust.

Key contacts



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