The FOS Approach to financial elder abuse

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

Elder abuse can take many forms, such as physical, psychological, sexual and/or financial. Appropriate safeguards need to be put in place to help protect vulnerable consumers (such as older people) when they obtain a financial service or conduct a financial transaction with a financial services provider (FSP).

This document focuses on financial elder abuse, which is one of the most common forms of elder abuse. The scope of this approach relates mainly to financial elder abuse in banking transactions. We explore the challenges to identifying warning signs of financial elder abuse and discuss what is considered good industry practice when faced with such challenges. We also discuss how we assess disputes involving financial elder abuse and review common issues.

1.2 Who should read this document?

1. FSPs, consumers and consumer representatives who have a dispute at FOS that includes issues of financial elder abuse.
2. Anyone dealing with or working within the elderly community including carers, powers of attorney, family members and professionals such as lawyers and accountants.
3. FSP employees who need to recognise warning signs and respond appropriately in accordance with good industry practice.
4. Anyone who wants to understand how FOS applies legal principles, industry codes and good industry practice when considering disputes where the issue of financial elder abuse is raised.

Consumers who experience family violence and financial abuse (other than elder abuse) can also experience problems in banking transactions. *The FOS Approach to Joint Facilities and Family Violence* provides further guidance on dealing with these complex issues.

1.3 Summary of our approach

When we consider disputes where issues of financial elder abuse are raised, in particular we will ask:

- Were there warning signs known as ‘red flags’ which may have been indicators of financial abuse of a vulnerable elderly person?
- Did the FSP exercise its duty to take reasonable care and skill and question the customer’s authorisation of a transaction?
- If so, should the FSP have delayed the transaction or taken other preventative action?

2 In detail

2.1 Elder abuse and financial abuse

What is elder abuse?

Elder abuse as described by the World Health Organisation (WHO) as:

- A single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.

In February 2016, the Australian Institute of Family Studies (AIFS) issued its research report on elder abuse. In May 2017, the Australian Law Reform Commission (ALRC) published its report “Elder Abuse – A National Legal Response”. Both of these reports considered the WHO description of elder abuse.

The AIFS confirms the commonly recognised definition in Australia adopted by the Australian Network for the Prevention of Elder Abuse in 1999 as:

- Any act occurring within a relationship where there is an implication of trust, which results in harm to an older person.

One of the difficulties in defining elder abuse is establishing at what age a person might be considered an elder. The AIFS research report adopted the Australian Bureau of Statistics definition of an older person which classifies people over 65 as “older”. However, there are many other studies and services that use 60 as the starting point for considering elder abuse.

Financial elder abuse often takes the form of misuse of, or theft from, a bank account or other financial services product. FSP employees may be in the best, and sometimes the only, position to recognise financial elder abuse as it occurs. FSP employees need to be encouraged to trust their instincts.

In disputes we see arising from alleged financial elder abuse, a common claim is that the FSP and its employees should have recognised financial abuse was taking place and could have taken steps to prevent loss. Whether potential abuse was visible at the time and what could and should have been done are always difficult issues.

FOS’s view is that financial abuse occurs where a third party uses the funds or assets of an elderly person to the detriment of the elderly person. The misuse can be by illegal conduct (such as fraud or forgery) or by abusing the incapacity, trust or confidence of the vulnerable elderly person.

Vulnerability combined with a detrimental impact on the elderly person can help to identify improper conduct. It is important to note that while vulnerability can be related to incapacity, it can also be due to dependence on, or trust in, a third party.

It is important to distinguish potential financial abuse from what is actually an informed decision made by an elderly person with capacity to make a decision, who makes it free from any improper or influence from a third party.

Detrimental impact is where the elderly person is left in a worse financial position than before the improper conduct occurred.

What is financial abuse?

Financial abuse includes criminal conduct such as fraud, theft or obtaining financial advantage by deception. However, what occurs may be improper conduct rather than illegal because:

- the act or omission may not be deliberately abusive or malicious, or
- a relationship of trust or dependence may cloud the question of consent.

FOS's view is that conduct will be improper when it involves intimidation, deceit, coercion, emotional manipulation, physical or psychological abuse, undue influence or empty promises. To be improper, the conduct does not need to involve malicious intent and an abuser may have a mistaken sense of entitlement.

Improper conduct includes:

- an abuse of trust – where a trusted third party persuades the elderly person to act in a way contrary to their interests, or
- conduct resulting in personal gain for a third party in a formal position of trust giving rise to fiduciary duties, such as the holder of a Power of Attorney.

Financial abuse does not only happen in situations where a person lacks legal capacity. Although cognitive incapacity can increase the risk of financial abuse, vulnerability may be increased when an older person has reduced mobility, vision or hearing, or has any physical dependence on another person for care or assistance with tasks including banking. Financial abuse can occur even when a person has the capacity to make a banking decision. A person's age itself is not an indicator of potential financial abuse.

Who are possible abusers?

It appears abusers are most likely to be relatives and caregivers. Less commonly, they are opportunistic strangers who 'befriend' the elderly person or who make contact through a scam. Gender does not seem to be a factor.

Generally, a sense of entitlement by the abuser seems to be common. The abuser often does not recognise that the money is not theirs.

2.2 Examples of financial elder abuse and warning signs

Recognising potential financial abuse: 'red flags' or warning signs

There are a number of 'red flags' that may indicate financial abuse of a vulnerable elderly person. The red flags are warning signs that indicate the need for inquiry and caution, including, where appropriate, delaying the transaction or taking other preventative action.

The red flags potentially visible to FSP employees include that the elderly person may:

- engage in financial activity that is unusual, erratic or uncharacteristic
- be accompanied by a new acquaintance to make a large or unusual withdrawal of cash
- be accompanied by a family member or other person who seems to coerce them into making transactions
- transactions by a caregiver that do not seem to be in the interests of the customer, for example a holiday or a car
- not be allowed to speak for themselves, or the other party does all the talking (particularly in combination with either of the two above situations)
- start to appear fearful (particularly of the person accompanying them) or withdrawn
- have withdrawal slips signed by the elderly person where the rest of the slip is filled out in different hand writing presented by a third party
- adding a person to the account followed by the balance being transferred out
- have large withdrawals or transfers made on behalf of the elderly person without prior direct contact from them
- not understand or be aware of recently completed transactions
- give implausible explanations about or appear confused about what they are doing with their money
- suddenly register for internet banking when prior financial activity has been branch based and there has been no preliminary contact with the FSP
- have unpaid bills that they should be able to afford to pay – eg complain of having no heating despite the fact that they can afford to have it, or that they are being evicted
- be concerned about missing funds or financial service related documents
- indicate that mail, such as account statements, is no longer being delivered to their home.

More often than not, one of these factors has been present in the disputes that have come to FOS.

There are other red flags that may be noticed by someone visiting the elderly person in their home. FSP employees should take note if it becomes apparent the elderly person has:

- a lack of food, clothing or utilities when they can afford them
- recent and new acquaintances who may take up residence with the elderly person
- mail that does not appear to be arriving
- services paid for, but not received
- become fearful they will be evicted, or institutionalised if money is not given to their caregiver

- become uncared for, or the residence is unkempt when arrangements have been made for providing personal care or home-maintenance services.

2.3 What is considered good industry practice

The FSP-customer relationship

Contractual nature

The relationship between the FSP and the customer is essentially a contractual one. Generally, the FSP does not have a duty to advise a customer that a transaction or product is not in their interests, nor is it obliged to put the customer's interests ahead of its own. However, the FSP does have a duty of care to exercise reasonable care and skill in carrying out transactions for its customer.

Good industry practice

FSPs that subscribe to the Code of Banking Practice have an obligation to exercise the care and skill of a diligent and prudent lender. As a financial services licensee, the FSP will also have a statutory obligation to provide its services covered by the licence efficiently, honestly and fairly.

FSPs that subscribe to the Code of Banking Practice acknowledge their customers with special needs in clause seven, which states:

> "**We** recognise the needs of older persons and customers with a disability to have access to transaction services, so **we** will take reasonable measures to enhance their access to those services."

FOS accepts this as good industry practice which should apply to all FSPs, regardless of whether an FSP actually subscribes to the Code of Banking Practice.

When considering whether reasonable measures to enhance access are taken, we would consider the type of financial transaction and whether the FSP explored appropriate options with the elderly person. For example, where the FSP is aware that a caregiver does the elderly person's banking, the FSP should discuss a separate login for the caregiver to distinguish who is conducting the transaction.

Guidance from industry associations

In November 2016 the Australian Bankers' Association (ABA) published its Industry guideline: *Financial abuse and family and domestic violence policies*. The ABA encourages its members to use the Industry guideline in their internal processes, procedures and policies. In particular, it sets out a framework to raise awareness and support for FSPs' customers who may be affected by financial elder abuse. This includes:

- developing internal guidelines and procedures to assist FSP employees to respond when 'red flags' or warning signs appear

- ensuring FSP employees are aware of the guidelines and procedures by providing training that is relevant to the employee's role
- giving frontline employees specific instructions regarding the procedures and their escalation protocols
- making it easier for customers to communicate with the FSP
- referring FSP customers to external support agencies where appropriate
- understanding and recognising that financial abuse can result in, or significantly contribute to, financial hardship
- promoting financial abuse policies and financial hardship assistance so that customers feel more comfortable disclosing any financial abuse they may be experiencing

The ABA also considers that the Code of Banking Practice demonstrates good industry practice, regardless of whether an FSP subscribes to it.

What is expected of the FSP

Often an FSP employee may have concerns about what they are observing, and have an instinct that something is not right. Understandably, they may be wary about voicing their concerns about a customer being financially abused especially if the suspected abuser may be a family member.

FSP employees who suspect financial abuse need to recognise it is highly unlikely a dependent elderly person will be able to respond meaningfully or openly to questions about a transaction if another person is present.

The steps an FSP takes once 'red flags' or warning signs appear will affect the outcome of the dispute:

- We expect an FSP to talk to the elderly person separately and in private about the financial transaction. We consider a conversation must be more than one question.
- A third party should not be present during this conversation.
- When the customer is alone an FSP should be willing to have a conversation with them about the reason for the financial transaction.
- FSP employees should listen carefully to what the customer says
- FSP employees should discreetly discuss the financial transaction to test the credibility of the explanation. However, the conversation should not be an interrogation.
- FSP employees should check the elderly person's account records, account operating instructions and who is authorised to operate the account. If there is more than one account holder or person authorised to operate the account, the FSP should contact the other account holder or authorised person before allowing the financial transaction to occur.

- Where a Power of Attorney (POA) is acting on behalf of the elderly person, check the POA to see if there is another attorney who can verify that the financial transaction is appropriate and not to the detriment of the elderly person.
- Has a Guardian been appointed? If so, is the person accompanying the elderly person the Guardian? If not, the FSP should take steps to contact the Guardian and not perform the financial transaction until it has been confirmed by the Guardian.
- FSP employees should escalate their concerns to the appropriate senior person before conducting the financial transaction.
- An FSP may consider declining or delaying the transaction, for example by asking the customer to come back the next day if they still want to proceed.
- FSP employees should feel free to ask the customer if there is another family member or friend the FSP can talk to about the financial transaction before proceeding with it.
- If there is no other family or friend, a referral to a relevant support service might be appropriate.
- FSP employees should follow their internal policies and procedures whenever they see warning signs of financial abuse. If there are no policies and procedures are in place, we expect the FSP to explain why.

Information we expect the FSP to provide

When we consider disputes which include issues involving financial elder abuse, we ask the FSP to provide information including:

- contemporaneous customer notes about transactions where financial elder abuse was of concern. This should set out the circumstances giving rise to the concern and the steps the FSP took to delay the transaction or take other preventative action.
- details of any conversations held with the customer
- if the FSP did not discuss their concerns separately and in private with the elderly person, an explanation of why this did not occur
- details of any specific preventative action taken
- recollections of events from FSP employees involved in transactions which are the subject of the dispute
- copies of its internal policy and procedures in relation to financial elder abuse, and specific steps the FSP took to comply with those internal policies and procedures
- where applicable, contemporaneous notes or relevant documents showing the customer received a benefit from the transaction in dispute.

Possible outcome to a dispute

FOS can award compensation for financial, consequential and non-financial loss. If the financial abuse results in funds being removed from an elderly person's account (term deposit/savings/passbook/cheque/credit card), FOS generally requires the FSP to reinstate funds back into the elderly person's account. This may include an award of interest if the funds were held in an interest bearing account.

If the financial abuse results in a guarantee being provided by the elderly person, FOS generally requires the FSP to release the elderly person from the guarantee and to reimburse all fees and charges paid by the elderly person.

If the financial abuse results in the FSP taking a mortgage over the elderly person's home or property, FOS generally requires a release of the mortgage and reimbursement of all fees, charges and interest paid by the elderly person.

FOS will also consider if it is appropriate to award non-financial loss. Although the maximum amount we can award is $3,000 per claim, if there are multiple withdrawals from an account, we will assess if this gives rise to multiple claims. In such cases an award of up to $3,000 can be made per claim.

We will also assess non-financial loss in cases where the financial abuse does not result in any detriment to the elderly person. In some disputes this may be appropriate when taking into account the stress and inconvenience caused to the elderly person.

2.4 Common issues arising in disputes involving financial abuse

When an FSP may be legally liable for a customer's losses

An FSP may be liable to reimburse losses to a customer who has been the victim of financial abuse under a number of legal and equitable principles including if:

- the customer is unable to read due to blindness or illiteracy
- the customer's signature on withdrawal or other transaction documents has been forged
- an unauthorised electronic transaction has been performed and liability is allocated to the FSP under the ePayments Code
- it is on notice of the customer's mental incapacity
- it is on notice of undue influence
- it has assisted in a breach of trust
- it has itself taken advantage of a vulnerable elderly person so as to have engaged in unconscionable conduct.

Authorisation

Unless otherwise required by law, an FSP must pay to its customer all or part of the amount available to them in their account, when authorised by the customer to do so. The customer's authority must be clear and not open to interpretation.

If it is unclear, there is any uncertainty, or there are 'red flags', the FSP should exercise reasonable care and skill to make enquiries and ensure the instructions are the customer's wishes.

Forgery

A forged signature does not constitute a customer's authorisation, not matter how good it appears to be or how closely it resembles the customer's actual signature. If an FSP pays an amount from a customer's account based on a forged signature, it has no authority to debit the customer's account.

Duty to inquire

FSP employees are not expected to be detectives and are entitled to proceed on the assumption they are dealing with honest people. However, an FSP's duty to exercise reasonable care and skill includes an obligation to question the customer's authorisation of a transaction. This means FSP employees are not entitled to turn a blind eye to known facts or circumstances. This includes where there may be a serious possibility that a customer is being financially abused or the use of funds is not consistent with the customer's wishes or for their benefit.

The FSP may be liable for any loss if it is on notice of the:

- customer's incapacity, or
- influence of a third party

and proceeds with a transaction which is not in the best interests of the customer.

Incapacity

A customer may lack the capacity to make a particular decision, or a range of decisions, if they have a disability such as:

- intellectual impairment
- brain injury
- mental illness
- dementia.

Disabilities may affect a customer's ability to understand the nature and consequences of their decision. If the FSP was on notice of a customer's incapacity yet proceeded anyway, we may set aside a contract or transaction.

The FSP will be on notice if its employees were aware, or ought to have been aware, of a customer's incapacity. However, FSP employees are entitled to assume an elderly person has capacity unless there are indications to the contrary. Indications might include if the customer:

- does not seem to understand the transaction, or its effect on their account or financial position

- does not seem to understand what is being suggested by the FSP or third party, or what their options are
- seems confused about the state of their account and, despite explanation, appears to remain confused.

We consider the FSP is on actual notice of incapacity if it has received a copy or notification of an order made by a court or tribunal to:

- appoint a guardian or administrator, or
- to otherwise make formal arrangements for a person's financial affairs on the basis of incapacity.

The FSP would also be considered on notice if it received a medical report to the effect that the customer did not have capacity.

Notice of undue influence

The FSP should consider whether a customer may be under the undue influence of another party, particularly where the customer is elderly or vulnerable and is conducting an unusual transaction in the presence of another person.

Notice of undue influence may be actual or constructive.

Actual undue influence

The FSP was or ought to have been aware that improper conduct by a person having influence over an elderly person was taking place.

Presumed undue influence

The FSP was or ought to have been aware that the elderly person was in a relationship of trust or dependence on them, and the transaction appeared to be of no benefit to the elderly person.

Whether or not constructive notice is established will depend on the particular circumstances. Reference to the 'red flags' or warning signs may, however, provide some general guidance about situations that require further inquiry and caution. This is particularly so where third parties are involved.

Unconscionable conduct

A claim of unconscionable conduct is sometimes raised instead of a claim of undue influence. Unconscionable conduct is distinguished from undue influence by looking at whether the weaker party's will was overcome. It is the inability to judge what is in their interests, as a result of special disability or disadvantage, which is the important factor.

For the conduct to be unconscionable:

- the person taken advantage of must be under a special disability or disadvantage, which is or ought to be obvious to the other person
- the transaction must not of benefit to the person under the disability or disadvantage, and
- no steps will have been taken to ensure the person understands the transaction or obtains independent advice about the nature and effect of it.

Where it is alleged that the FSP has engaged in unconscionable conduct, a special disadvantage is not generally required, however we would take into account the factors set out in Section 12CC of the *Australian Securities and Investments Commission Act* (2001).

Assisting a breach of fiduciary duty

If an FSP knowingly assists a fiduciary, such as a trustee or the holder of a Power of Attorney, to misappropriate or misuse funds, it may be liable for the loss even if the FSP received no benefit and it was not fraudulent or dishonest itself.

Liability will be established where the FSP did not act as a reasonable person in the circumstances, by failing to take the necessary steps and/or make the necessary enquiries to discover fraud or breach of duty.

Privacy and confidentiality

In some disputes, it may be claimed that an FSP should have taken steps to notify family members or relevant authorities that fraud or financial abuse may have been occurring.

Clause 24 of the Code of Banking Practice acknowledges an FSP's common law duty in relation to privacy and confidentiality:

> "**We** acknowledge that, in addition to **our** duties under the Privacy Act 1988, **we** have a general duty of confidentiality towards **you**, except in the following circumstances:
>
> a. where disclosure is compelled by law;
>
> b. where there is a duty to the public to disclose;
>
> c. where **our** interests require disclosure; or
>
> d. where disclosure is made with **your** express or implied consent."

Where fraud is suspected, the FSP is clearly entitled (and possibly required) to report the matter to police. The FSP may also be entitled, under the National Privacy Principles, to notify protective agencies such as the Public Advocate if a customer has a decision-making disability and appears to be a victim of financial abuse.

In our view, it is less clear whether the FSP would be entitled under the exceptions to the duty of confidentiality to notify a family member without the consent of the customer if:

- the family member does not hold a formal position such as Attorney under Power of Attorney, or
- has not been appointed as an Administrator by a guardianship and administration tribunal or court.

The duty of confidentiality would not prevent an FSP giving its customer information about relevant agencies or seeking direct consent of the customer to notify third parties.

3 Context

3.1 Case studies

Case 1: Signs of undue influence

A married couple in their 90s, although not separated, were living in separate nursing homes and held funds in a joint account with the FSP. In 2014, they signed a power of attorney providing the applicant's daughter and her husband's son with authority to access online banking to view statements only. In April 2015, the applicant's daughter rang the FSP to report suspected unauthorised transactions on the joint account by the husband's son.

Five days later, the son took his father in his wheelchair to a branch of the FSP. The husband closed the joint account and transferred the funds of almost $140,000 into a different account, in the husband's name only, without the applicant's knowledge.

The applicant said the FSP should not have allowed her husband to close the joint account and transfer the funds into his name without her knowledge and consent.

FOS considered the dispute and found the FSP's notes showed FSP employees considered whether the applicant's husband had capacity to conduct the transaction. However, the FSP employees should have made inquiries of the husband in the absence of his son, and of the applicant, before closing the account and transferring the funds. If they had done so, the applicant would most likely not have consented to the transaction.

FOS concluded the FSP did not exercise appropriate care and skill in response to the following 'red flags':

- the unusual nature of the disputed transaction
- the husband who conducted the transaction was in his 90s, in a wheelchair and accompanied by a person who the FSP had been notified may have not been acting in the best interests of both accountholders.

The FOS determination:

- said the FSP did not comply with good industry practice to protect the applicant from potential financial abuse, and
- required the FSP to transfer half the funds plus interest into an account nominated by the applicant.

Case 2: Complying with good industry practice

Roy attended a branch of an FSP with new acquaintance, Olivia, and completed a third party operating authority allowing Olivia to operate on his personal account. Roy and Olivia also asked to withdraw $30,000 from Roy's personal account, but they were told to return at a later date when cash would be available. Two days later, Roy and Olivia returned to the same branch to complete the $30,000 cash withdrawal.

One month later, Roy was admitted to hospital and was subsequently declared incompetent. Eleven weeks later a guardian was appointed to administer Roy's financial affairs. Olivia kept the $30,000 cash withdrawn from Roy's personal account.

Roys' guardian lodged a dispute and said:

- Roy would have been incapable of consenting to the account operating authority and cash withdrawal at the time
- Roy was induced by Olivia to change the account operating authority and withdraw the cash
- the FSP should have questioned Roy about the relatively large amount of the withdrawal as it was inconsistent with the previous contact of the account
- the FSP should also have questioned Roy's capacity and prevented the transactions.

FOS considered the dispute and found the FSP did not comply with good industry practice in relation to the cash withdrawal because Roy:

- appeared elderly and dishevelled, and
- withdrew a large amount of cash while accompanied by a new acquaintance.

The FSP was required to make a refund of $30,000 to Roy because in these circumstances, they should have:

- discussed the transaction with Roy separately from Olivia, and
- taken steps to identify and protect Roy from potential financial abuse.

3.2 References

Definitions

Term	Definition
applicant	individual who 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
POA	Power of Attorney

Useful documents

Document type	Title
Approach	Financial Ombudsman Service Australia *Joint facilities and family violence*
Code	Australian Bankers' Association Inc. *Code of Banking Practice*
Industry Guideline	Australian Bankers' Association Inc. *Financial abuse and family and domestic violence policies*
Report	Age UK *Age-friendly banking: What it is and how you do it*
Report	Australian Institute of Family Studies - Elder abuse *Understanding issues, frameworks and responses*
Report	Australian Law Reform Commission *Elder Abuse – A National Legal Response*
Report	Australian Securities & Investments Commission *Building Seniors' Financial Capability: Overview of market research conducted to support strategy development for the 55+ population*
Report	Consumer Financial Protection Bureau *Recommendations and report for financial institutions on preventing and responding to elder financial exploitation*
Tip sheet	AARP Banksafe Initiative *Spotting the red flags of financial exploitation*