

# The FOS Approach to Non-financial loss claims

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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

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## 1.1 Scope

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FOS can require a financial services provider (FSP) to compensate an Applicant (who is a natural person) for non-financial loss caused by the FSP's conduct.

This document sets out our approach to assessing claims for compensation for non-financial loss by outlining:

- the circumstances in which a claim for non-financial loss can arise
- FOS's expectations of an Applicant in dealing with a problem
- limits on awards of compensation
- principles applied in awarding compensation

This Approach will assist FSPs and Applicants to understand principles of compensation for non-financial loss.

## 1.2 Summary

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FOS will only award compensation for non-financial loss where there has been an unusual amount of physical inconvenience, time taken to resolve a situation, or interference with the Applicant's expectation of enjoyment or peace of mind. In a privacy dispute, FOS may award compensation if the Applicant has suffered humiliation or injured feelings.

In assessing whether to award compensation for non-financial loss, FOS expects Applicants to be moderately robust, bear the normal degree of inconvenience experienced when a problem occurs, and take reasonable steps to minimise the inconvenience suffered. Where an Applicant has contributed to their loss arising from the FSP's conduct, their level of compensation may be reduced accordingly.

FOS can compensate an Applicant for non-financial loss arising from the FSP's poor management of the claim. When doing so, FOS considers the severity and impact of the FSP's conduct on the particular Applicant. For example, an Applicant in financial difficulty would be more impacted by unreasonable delays by an FSP.

FOS takes a conservative approach to assessing compensation for non-financial loss. The maximum amount FOS can award for non-financial loss is \$3,000 per claim. FOS may also decide a non-financial remedy, such as a letter of apology, is appropriate.

It is not necessary for the Applicant to request compensation for their non-financial loss; FOS can award compensation if it considers it appropriate.

Where FOS awards compensation for non-financial loss and there is a related debt owing to the FSP, it will usually be appropriate to apply the compensation to the debt.

## 2 In detail

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### 2.1 When can FOS award compensation for non-financial loss?

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FOS will only award compensation for non-financial loss where:

1. There has been an unusual amount of:
  - physical inconvenience
  - time taken to resolve a situation
  - interference with the Applicant's expectation of enjoyment or peace of mind, or
2. In a privacy dispute, the Applicant has suffered humiliation or injured feelings.

### 2.2 What amount can FOS award?

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FOS takes a conservative approach to assessing compensation for non-financial loss.

An award of compensation for non-financial loss is unlikely to be substantial, and is likely to be in the hundreds, not thousands, of dollars. The maximum amount FOS can award for non-financial loss is \$3,000 per claim.

FOS may decide a non-financial remedy, such as a letter of apology, is appropriate.

### 2.3 What is FOS's overall approach to assessing claims for non-financial loss?

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In assessing whether to award compensation for non-financial loss, FOS expects Applicants to:

- be moderately robust
- bear the normal degree of inconvenience experienced when a problem occurs, and
- take reasonable steps to minimise the inconvenience suffered.

FOS cannot award compensation for non-financial loss in a dispute arising from a claim on a general insurance policy that excludes such liability. It can, however, compensate an Applicant for non-financial loss arising from the FSP's poor management of the claim.

In the case of non-financial loss arising from poor financial advice, the Applicant's stress and inconvenience must be greater than that associated with having made an investment and lost money; the circumstances where it is appropriate to award compensation for non-financial loss usually involve the Applicant undertaking a degree of stressful remediation.

## 2.4 Understanding our governing principles

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### **Each Applicant can be compensated**

It is not necessary for the Applicant to request compensation for their non-financial loss; FOS can award compensation if it considers it appropriate.

Where there is more than one Applicant, and each Applicant suffered non-financial loss, each can be awarded compensation.

### **Compensation can be applied to debt**

Where FOS awards compensation for non-financial loss and there is a related debt owing to the FSP, it will usually be appropriate to apply the compensation to the debt.

This will not be appropriate where, for example, the Applicant is bankrupt, since the claim for compensation for non-financial loss is akin to a claim for damages for personal injury and the compensation is paid to the Applicant personally, and not to the trustee in bankruptcy for distribution amongst the Applicant's creditors.

### **Compensation can be discounted to recognise the Applicant's contribution to their loss**

Where an Applicant has contributed to their loss arising from the FSP's conduct, it may be appropriate to apportion liability for the financial loss between the FSP and the Applicant.

The Applicant may still be entitled to compensation for non-financial loss but the compensation may be discounted to account for their contribution to the loss.

### **There can be several claims for compensation for non-financial loss in a dispute**

FOS takes the view that a 'claim' refers to the set of facts that, put together, gives the Applicant the right to ask for a remedy. This means a set of separate events that led to the alleged loss.

When considering non-financial loss for, say, inappropriate debt collection activity, FOS will determine whether there is one claim or several. This will depend upon the connection between the various offending acts. For example, seven telephone calls in the course of two weeks are likely to constitute one claim of harassment. However, where the Applicant complains he received seven telephone calls in the course of the month and also was inappropriately contacted at his place of employment, this will constitute two claims.

Similarly, an Applicant receiving five telephone calls in March and then a further seven telephone calls in May is likely to have two claims for non-financial loss since each sequence of calls constitutes an act of harassment.

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Where there is repeated conduct by an FSP (for example, repeated instances of debt collection activity while the FOS file is open), each event may cause the Applicant additional non-financial loss, and so the amount of compensation for each claim may increase.

The \$3,000 compensation cap for non-financial loss claims applies to each claim, so FOS can award an Applicant more than \$3,000 in total in a dispute if he has several claims.

### **The impact of the FSP's conduct will vary between Applicants, and so will the award of compensation for non-financial loss**

When considering an award for non-financial loss, FOS considers the severity and impact of the FSP's conduct on the particular Applicant.

FOS looks at all the Applicant's circumstances when assessing the impact of the FSP's conduct. If, for example, there is a delay in the FSP's response to an Applicant's reasonable request for documents, it may have a greater impact if the Applicant is also in financial difficulty. If an Applicant is young, inexperienced and vulnerable, an FSP's inappropriate debt collection activity may have a more significant impact on their peace of mind than it would on an experienced business person.

An Applicant may be under significant stress and experiencing significant inconvenience for reasons unrelated to the FSP's conduct, for example, a marriage break up. In these circumstances, FOS will weigh up the additional stress the FSP's conduct caused the Applicant and if appropriate, award compensation for it.

Inconvenience can lead to non-financial loss but FOS would not award compensation for a level of inconvenience that is a normal part of doing business.

## 3 Context

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### 3.1 Case studies

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#### **Case 1: FSP repeatedly contacting or attempting to contact the Applicant to recover the debt**

The 2005 ACCC and ASIC Debt Collection Guideline for Collectors and Creditors provides that a collector should not contact a debtor more than 3 times per week, or 10 times per month.

The FSP made repeated telephone calls to the Applicant's home and mobile numbers between November and January. In one week in November, the FSP made 24 calls to the Applicant (14 of which were answered) and sent one collection letter. The FSP made similar numbers of calls to the Applicant, on a weekly and monthly basis, during December and January.

FOS determined:

- the FSP's conduct had breached the Debt Collection Guideline and caused the Applicant significant stress and unnecessary interference with his peace of mind
- the repeated breaches of the Guideline caused the Applicant additional non-financial loss for each claim
- there were three separate claims for non-financial loss and awarded the Applicant \$1,000 compensation for the November claim, \$2,000 for the December claim and \$3,000 for the January claim.

#### **Case 2: FSP failure to update a default listing to 'paid' within a reasonable time**

The FSP recorded a default listing on the Applicant's consumer credit file. Eight months later, the Applicant paid the relevant credit card debt.

The FSP failed to update the default listing to reflect that the credit card debt had been paid until almost 3½ years later. The FSP also failed to explain clearly to a prospective lender the Applicant's payment of the credit card debt and its significant delay in updating the default listing.

FOS determined that the FSP's conduct caused the Applicant unnecessary stress and inconvenience and awarded him \$500 for his non-financial loss.

#### **Case 3: Irresponsible lending**

FOS concluded that the FSP's advance of an investment loan to the husband and wife Applicants (who were made bankrupt on the petition of the strata plan owner of the block in which they had purchased the investment flat) represented irresponsible lending.

FOS concluded the Applicants had contributed to their loss by signing the loan application which they did not read, and which had been completed incorrectly by their broker. Given this, FOS apportioned liability for their financial loss 50:50 between the Applicants and the FSP. (The lending had occurred before the NCCP Act became law).

FOS determined the Applicants had suffered considerable stress, upset and inconvenience as a result of the irresponsible lending and all that had flowed from it, including their consequent financial difficulty, the need to move from their home, the strata plan owner's issue of proceedings and obtaining of judgment against them, and ultimately, its petitioning for their bankruptcy. Taking into consideration their contribution to their loss, FOS awarded each Applicant \$1,500 for their non-financial loss, to be paid to them personally, and not to their trustee in bankruptcy.

#### **Case 4: FSP issuing unnecessary court proceedings**

The Applicant was in default under her home loan and voluntarily surrendered her home to the FSP which nonetheless continued with court proceedings and obtained default judgment for possession. The FSP later set aside the judgment by consent.

FOS determined it was unnecessary for the FSP to obtain the default judgment and the Applicant had suffered significant stress which interfered unnecessarily with her peace of mind when served with the default judgment after handing her home to the FSP for sale. FOS awarded the Applicant \$2,000 for her non-financial loss.

#### **Case 5: Poor response to financial difficulty**

The Applicant requested a payment arrangement for his home loan, which was in joint names with his ex-partner. The FSP declined to assist the Applicant unless the co-borrower consented to any variation. The FSP also required the co-borrower to provide a statement of financial position before it would consider any payment arrangement.

FOS determined that the FSP should have considered the Applicant's financial difficulty request even though the co-borrower was not involved, and its failure to do so caused the Applicant unnecessary stress and inconvenience. FOS awarded the Applicant \$500 for his non-financial loss, to be applied to reduce the home loan balance.

#### **Case 6: Poor service by the FSP in arranging reinstatement of damaged refrigerators**

The Applicant operated a milk bar which was damaged by fire in July 2012. She took steps to re-open the business in June 2013 but was forced to delay doing so for more than a month due to the malfunctioning replacement refrigerators.

The FSP's reinstatement agents had attended the Applicant's premises many times from mid May 2013 to attempt to rectify the problems with the replacement

refrigerators. The problems were still occurring when the Applicant lodged the FOS dispute in January 2014.

FOS determined the FSP had not met its obligations under the policy as it had:

- not returned the Applicant to the position she was in prior to the loss, and
- replaced the damaged refrigeration units with defective units.

The FSP did not provide the Applicant with the level of service reasonably expected from an insurer and in particular, had failed to fix the defective replacement refrigerators.

FOS determined that these circumstances were very inconvenient for the Applicant, interfered unnecessarily with her peace of mind, and remained unresolved for an unreasonable period. It awarded her \$2,000 compensation for her non-financial loss.

### **Case 7: FSP's delay in arranging repairs of damaged motor vehicle**

The Applicants' motor vehicle was stolen and recovered, damaged, two days later. The FSP delayed delivering the car to a repairer for 8 weeks, and there were continuing problems with effecting the repairs to the car three months later. The Applicants had attempted to resolve issues with the FSP by making reasonable enquiries about the delays. Through its repairer, the FSP misled the Applicants as to the status of the repairs.

The Applicants ultimately removed the vehicle from the repairer, arranged separate repair quotes and paid for the repairs prior to being reimbursed by the FSP.

FOS determined that the FSP's conduct, including its repairer's conduct, resulted in an unusual amount of time to resolve the situation and an unusual amount of inconvenience to the Applicants. It awarded the Applicants, jointly, \$1,000 compensation for non-financial loss.

### **Case 8: Poor financial advice**

FOS concluded the Applicant, who was retired, held on to investments that she otherwise would have sold based on the very poor advice of the FSP. As a result, the Applicant lost over \$356,000. FOS determined the Applicant had suffered non-financial loss in the form of an unusual degree of physical inconvenience in that she was required to return to work to earn an income and was required to sell her home to repay her investment loan. FOS awarded the Applicant \$3,000 compensation for non-financial loss.

### **Case 9: Poor financial advice**

The FSP advised the Applicant, who is permanently incapacitated, to consolidate her superannuation and make a \$240,000 contribution to an account-based pension. The advice could not be implemented, as the Applicant's superannuation fund did not accept 'permanent incapacity' as a basis for accessing funds. The advice was therefore inappropriate. FOS determined that given the Applicant's health, the FSP's



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inappropriate advice had a greater negative impact on her than it would have on another person and caused her additional stress. It awarded her \$3,000 compensation for non-financial loss.

## 3.2 References

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### Definitions

Term	Definition
applicant	individual or small business that 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

### Useful links

Document	Link
<a href="#">Terms of Reference</a>	You can access the Terms of Reference on the FOS website at <a href="http://www.fos.org.au/tor">www.fos.org.au/tor</a>
<a href="#">Determination 232561</a>	<a href="http://bit.ly/28ZUBn9">http://bit.ly/28ZUBn9</a>
<a href="#">Determination 226190</a>	<a href="http://bit.ly/28YDVex">http://bit.ly/28YDVex</a>
<a href="#">Determination 266293</a>	<a href="http://bit.ly/290dMxw">http://bit.ly/290dMxw</a>
<a href="#">Determination 313410</a>	<a href="http://bit.ly/29iVtmu">http://bit.ly/29iVtmu</a>
<a href="#">Determination 341379</a>	<a href="http://bit.ly/290dJ53">http://bit.ly/290dJ53</a>
<a href="#">Determination 348410</a>	<a href="http://bit.ly/29iVDu1">http://bit.ly/29iVDu1</a>
<a href="#">Determination 349861</a>	<a href="http://bit.ly/28Zzi3A">http://bit.ly/28Zzi3A</a>
<a href="#">Determination 227484</a>	<a href="http://bit.ly/294esoA">http://bit.ly/294esoA</a>
<a href="#">Determination 334049</a>	<a href="http://bit.ly/28ZUN4R">http://bit.ly/28ZUN4R</a>