

Insolvent consumers

The Australian Financial Complaints Authority (AFCA) offers fair, free and independent dispute resolution for consumers and small businesses who are unable to resolve complaints with member financial firms.

A not-for-profit, non-government organisation, AFCA resolves complaints quickly and efficiently, providing a cheaper alternative than going to court. Our service is free of charge for consumers and small businesses, with the costs of running the service being met by our members.

The incidence of complaints by insolvent consumers or small businesses has been rising. As a result, we have been interacting more with insolvency practitioners. This fact sheet explains our role and our engagement with the insolvency practitioner when a bankrupt or director of a company under external administration submits a complaint. It does not cover our engagement with insolvency practitioners appointed to a financial firm that is an AFCA member.

What complaints do we investigate?

AFCA can consider complaints about a wide range of investment, insurance, credit, payment system, deposit taking, trustee, and superannuation products and services provided by a broad range of financial firms. Our members include banks, credit unions, financial planners, general insurers, insurance brokers, life insurers, stock brokers, warranty companies, entities managing investments and making a market, and superannuation fund trustees.

A complaint can be submitted by an individual, partnership, trustee, charity, club or association. If the entity lodging a complaint (the complainant) carries on a business, the business must be a Small Business, which is defined in AFCA's Rules as:

“means a Primary Producer or other business that had less than 100 employees at the time of the act or omission by the Financial Firm that gave rise to the complaint.”

In most cases, we may consider a complaint where the value of the complainant's claim does not exceed \$1 million, and can award compensation up to \$500,000. If an complainant's loss is greater than \$500,000, they are required to waive their claim to any excess in settlement of the complaint.

In the following types of cases, higher compensation and claim limits apply:

- a superannuation complaint (unlimited compensation and claim amounts)
- a complaint about a Primary Producer credit facility (up to \$2 million compensation amount can be awarded)
- a complaint lodged by a small business (who is not a primary producer) about a credit facility up to \$5 million (up to \$1 million can be awarded)
- a complaint to set aside a guarantee supported by security over the guarantor's primary place of residence (unlimited compensation and claim amounts).

What if the complainant is insolvent?

We often receive complaints from individuals who are bankrupt and corporate small businesses which are under external administration. In particular, we consider complaints from insolvent individuals and companies about:

- their credit provider's response to their prior requests for assistance in financial difficulty; and
- whether their credit provider complied with its obligations to lend responsibly when it granted their loan.

1. In a superannuation complaint, no consent of the insolvency practitioner is required

Generally, a bankrupt's superannuation interests are excluded from property available to creditors. A bankrupt superannuation fund member's benefit that has not vested in the member's trustee in bankruptcy can submit a superannuation complaint without the consent of their trustee in bankruptcy.

2. In non-superannuation cases, we need the consent of the Trustee, Administrator or Liquidator

When an applicant is bankrupt or under external administration, as control of their financial affairs has vested in the Insolvency Practitioner – i.e. the Trustee, Administrator or Liquidator – we can only consider the complaint if we have the Insolvency Practitioner's consent. If they do not give their consent, we will not consider the complaint and our file will be closed.

An Insolvency Practitioner may lodge a complaint on behalf of the insolvent estate. If a bankrupt or a director of a company under external administration lodges a complaint, we will ask them to obtain the Insolvency Practitioner's consent. We will give them an authority form, on which the Insolvency Practitioner consents to the complaint being lodged at AFCA and appoints an agent for us to communicate with during the course of our investigation. The Insolvency Practitioner may appoint the bankrupt or director as their agent, as they may have the information

we will need to complete our investigation. However, the Insolvency Practitioner may alternatively appoint a member of their staff as their agent, or deal with us directly.

If a company is in receivership, we will consider a claim by the directors of the company that the financial firm was not entitled to appoint a Receiver, or about the financial firm's acts or omissions prior to the appointment of the Receiver, and this complaint will be investigated without the Receiver's consent. Any decision we make is binding on the financial firm if it is accepted by the complainant. While we cannot make any enforceable directions against the Receiver, if the Ombudsman concludes that the financial firm was not entitled to appoint the Receiver, we would expect the financial firm to appropriately direct the Receiver to retire.

Other than these circumstances, we cannot consider a complaint lodged by a director of a company in receivership without the Receiver's consent. We also cannot intervene in or review any actions taken by the Receiver.

We may also consider a complaint brought by a guarantor of a bankrupt or an insolvent company without requiring the Insolvency Practitioner's consent.

3. We may ask the Trustee or Liquidator to participate in settlement discussions

In most cases, we seek to resolve a complaint by negotiation brokered by the case manager or by a telephone conciliation conference facilitated by one of our trained conciliators.

When a complaint is about a financial firm's response to the complainant's request for assistance with their financial difficulty, potential outcomes to the complaint may include the refinancing of a debt or a timeframe for the sale of a secured property. For example, a bankrupt and their spouse may seek to refinance their home loan into the name of the spouse only. Alternatively, they may seek time to sell the property.

We may seek the Insolvency Practitioner's participation in any settlement discussions, as the claim being negotiated and potentially compromised is an asset of the insolvent estate. For example, if the spouse of a bankrupt wishes to refinance the home loan into their name alone, it may not be sufficient for the spouse to obtain finance to pay out the financial firm, as the Insolvency Practitioner may have a claim for the bankrupt's equity in the property. The efforts of the bankrupt's spouse and the financial firm may be thwarted if the Insolvency Practitioner does not engage in the discussions and subsequently makes a claim.

If we consider that it would assist settlement discussions if the Insolvency Practitioner was involved, our case worker who is facilitating the negotiations will contact the Insolvency Practitioner to arrange a time for a telephone conciliation conference that is convenient to all the parties, including the Insolvency Practitioner. If the Insolvency Practitioner is unwilling to participate in this process, the options available to the financial firm and the complainant (including solvent partners) may be limited.

Alternatively, if the Insolvency Practitioner's engagement is needed to determine the matter, we may not be able to consider the complaint without the Insolvency Practitioner's cooperation, as we cannot compel the Insolvency Practitioner to participate in our process. Our rules provided that we may finalise a complaint where we cannot effectively investigate the circumstances and allegations without the involvement of another person who is not a party to the complaint.

4. Any compensation for financial loss will be paid to the Trustee or Liquidator

As the insolvent's financial estate has vested in the Insolvency Practitioner, the benefit of any award of compensation we make for financial loss due to an error by the financial firm vests in the Insolvency Practitioner and the financial firm is directed to pay the compensation to the Insolvency Practitioner.

Further information

More details on AFCA, our complaint process and our approach to certain types of complaints are available on our website: www.afca.org.au.

If you wish to submit a complaint on behalf of an insolvent estate you are administering against its financial firm, you can use our online complaint form.

If you have any queries regarding a particular complaint involving an insolvent estate you are administering, or about a potential claim, you can also contact us on 1800 931 678.