

01 May 2023

By email: approaches@afca.org.au

Senior Consultant – Approach Frameworks
Australian Financial Complaints Authority
GPO Box 3
Melbourne VIC 3001

Dear Senior Consultant

AFCA's approach to claims for non-financial loss

1. Thank you for the opportunity to respond to the proposed amendments to the Australian Financial Complaints Authority's (AFCA) approach to non-financial loss claims (**Amended Approach**). Consumer Action generally supports the goal of providing additional guidance to help clarify the scale of non-financial loss that AFCA may award.
2. However, we have some significant concerns, set out below, about the content and particularly the case studies that AFCA has chosen to use as examples of how the Amended Approach would work in practice. In our view these seem to chronically underassess the impact of financial firms' conduct on complainants in circumstances where non-financial loss should be awarded.
3. After reviewing the Amended Approach, we have formed the conclusion that, overall, the changes proposed appear primarily to only involve an attempt to re-order some of the existing content. This in our view, wastes the opportunity that AFCA currently has to widen the existing narrow approach to compensation and address the pressing need to award non-financial loss to victims as compensation for the harm and injuries they have suffered. **Removing references to the "Conservative Approach"**
4. We query why AFCA considers that a conservative approach should be taken at all to the assessment of non-financial loss claims. The concept of conservatism is undefined and only serves to limit or undermine the Amended Approach. It implies that if there is any doubt or uncertainty, AFCA will not consider non-financial loss and essentially empowers decision makers to ignore or minimise the award of non-financial loss.
5. It is unnecessary to include a concept of a conservative approach given that the Amended Approach sets out a clear matrix of when non-financial loss is considered appropriate. The conservative nature of the Amended Approach also need not be specified because it is clear from the very low limits of compensation available, given the maximum threshold for the award of non-financial loss of \$5,400 per claim. . By way of contrast, a person who has experienced distress or humiliation from a course of conduct of prohibited debt collection practices could seek compensation in a court or tribunal of up to \$10,000.¹
6. AFCA's website states that AFCA is "committed to being accessible to all Australians and... particularly focussed on ensuring vulnerable and disadvantaged people can use our service".² In recognition of

¹ Section 45, *Australian Consumer Law and Fair Trading Act 2012* (Vic)

² <https://www.afca.org.au/make-a-complaint/accessibility-and-support>

AFCA's public commitment, the Amended Approach should include language that encourages complaints about non-financial loss, with a particular emphasis on how AFCA will consider the impact on vulnerable people under AFCA's existing guides on working with people experiencing vulnerability. When searching AFCA's website, we have been unable to find any such published guide. Such guidance should be publicly available. Please see paras 14-22 below for further submissions on how the Amended Approach should address the needs of people experiencing vulnerability.

7. The sentence "AFCA takes a conservative approach to assessing compensation for non-financial loss" appears twice within a few lines of one another on page 4 of the Amended Approach. After the second mention, a new addition also clarifies that an award is unlikely to be large, before the award limit is specifically referenced. This is unnecessary inclusion and repetition.

RECOMMENDATION 1: AFCA should delete all references to AFCA taking a 'conservative approach' and delete unnecessary repetitive language.

Rejection of "Moderately robust"

8. The Amended Approach sets out AFCA's expectation that complainants should be "moderately robust" three times – once more than in the existing Approach document.
9. This language that people effectively need to "toughen up" should be removed altogether as it gives the impression that the resilience of complainants will be closely and critically assessed. It will also discourage important complaints from being made and bad conduct exposed. We refer to our comments below about the barriers to access to justice faced by people experiencing vulnerability and Aboriginal and Torres Strait Islander complainants.

RECOMMENDATION 2: AFCA should delete all references to complainants being 'moderately robust', and delete unnecessary repetitive language that appears intended to reduce complainants' expectations of compensation.

Addressing the needs of people suffering from vulnerability

10. From our considerable experience as a specialist community legal centre, we recognise that people suffering from vulnerability face significant barriers in accessing justice, including accessing dispute resolution services and being able to successfully self-advocate for fair outcomes.
11. Moreover, the impact of a financial firm's conduct on vulnerable people is often greater than on non-vulnerable people. For example, if a financial firm provides an unaffordable loan secured on a complainant's car and a vulnerable person was reliant on their car as part of their safety plan for escaping family violence and for support for physical and mental health conditions, the impact of the loss of the car would be greater than upon someone who was not suffering from such vulnerabilities.
12. Similarly, we assist vulnerable clients, who often suffer profound impacts from prohibited debt collection practices and the inappropriate refusal of hardship requests.

13. AFCA's website states that AFCA is "committed to being accessible to all Australians and... particularly focussed on ensuring vulnerable and disadvantaged people can use our service".³
14. In contrast to the emphasis on conservatism and robustness of complainants, the Amended Approach only references the consideration of impact on vulnerable people once. The example cited refers to a complainant being "young, inexperienced, and vulnerable".
15. In recognition of AFCA's public commitment, the Amended Approach should include language that encourages complaints about non-financial loss, with a particular emphasis on how AFCA will consider the impact on vulnerable people under AFCA's existing guides on working with people with vulnerability. When searching AFCA's website, we have been unable to find any such published guide. Such guidance should be publicly available.
16. When listing examples of circumstances of vulnerability, AFCA should specifically include circumstances of homelessness, mental illness, family violence, people from culturally and linguistically diverse backgrounds, LGBTIQ complainants, people living with disabilities and Aboriginal and Torres Strait Islander people (in addition to those cited in the Amended Approach).
17. The Amended Approach should include a specific statement that the circumstances of vulnerability should be taken into account even if the financial firm did not know or ought to know about these circumstances at the time of the relevant conduct. As set out below, this principle was applied in determination, 688824.

RECOMMENDATION 3: The Amended Approach should specifically encourage complaints about non-financial loss by vulnerable people by:

- (i) including an inclusive list of key circumstances of vulnerability;
- (ii) clarifying that these circumstances of vulnerability should be considered even if the financial firm was unaware of these at the time of the relevant conduct; and
- (ii) including a number of case studies or examples which recognise how the impact of a financial firm's conduct could significantly affect vulnerable people and therefore, impact the award of non-financial loss.

Approach regarding Aboriginal and Torres Strait Islander People

18. We are extremely disappointed that the Amended Approach makes no reference to Aboriginal and Torres Strait Islander complainants, who frequently suffer from consumer issues and suffer significant barriers to achieving fair outcomes.
19. We refer to the Law Council of Australia's Consultation Paper for the Justice Project in relation to Aboriginal and Torres Strait Islander People,⁴ which notes the following:
 - a. "A legacy of dispossession, marginalisation and exclusion have created conditions wherein Aboriginal and Torres Strait Islander peoples experience serious and multiple forms of disadvantage. These include poor health outcomes, low socio-economic outcomes, high rates of family violence and contact with child protection and limited literacy" (page 2);

³ <https://www.afca.org.au/make-a-complaint/accessibility-and-support>

⁴ Law Council of Australia, Consultation Paper, the Justice Project, August 2017, <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Consultation%20Papers/Aboriginal%20and%20Torres%20Strait%20Islander%20Peoples.pdf>

- b. "Aboriginal and Torres Strait Islander people are more likely than the equivalent general population to experience multiple legal problems. This includes elevated legal need in areas of crime, government, child protection, tenancy, discrimination, social security, **credit and consumer issues** and family law and family violence" (page 2, emphasis added);
- c. "Some Aboriginal and Torres Strait Islander people lack awareness about applicable legal rights and have difficulty identifying which problems have a legal dimension. As a result, individuals can be less likely to take action, particularly in civil and family areas" (page 2);
- d. "Services for Aboriginal and Torres Strait Islander people must be designed to be culturally competent. Training for members of the judiciary, lawyers and other service providers is essential to developing cultural competency" (page 4).

RECOMMENDATION 4: The Amended Approach should specifically encourage complaints about non-financial loss by Aboriginal and Torres Strait Islander people by:

- (i) including wording that is reviewed for cultural competence that specifically acknowledges the consideration of impact on Aboriginal and Torres Strait Islander complainants; and
- (ii) provides examples and case studies, which provide an understanding of how the assessment of impact in relation to non-financial loss could be much greater in the context of a legacy of dispossession, marginalisation and exclusion, distrust of authorities and institutions and the multiple forms of disadvantage and legal issues often faced by Aboriginal and Torres Strait Islander people.

The relationship between Non-Financial Loss and Financial Loss Claims

- 20. The Amended Approach should clarify that non-financial loss is available regardless of whether or not AFCA orders financial compensation and regardless of the amount of financial compensation ordered.
- 21. For example, small amount credit contracts can involve considerably smaller amounts than home loan disputes, however, the impact of the firm's conduct on the complainant can be just as significant. This should be specifically noted in the Amended Approach.
- 22. One of our stakeholders recently reported to us that an AFCA case manager advised that AFCA would only award non-financial loss when determining the amount in dispute. In other words there was a direct link between the financial and non-financial loss. The case manager stated that in circumstances in which the amount in dispute is small, any award of non-financial loss would be rare and only a small amount would be awarded. We are extremely concerned by this approach which will serve only to negatively impact disadvantaged people who despite only obtaining relatively small amount credit contracts from exploitative lenders, experience significant stress as a result. Please refer to our recent submission Senate Economics Legislation Committee's (the Committee) inquiry on the Financial Sector Reform Bill 2022 (the FSR Bill), which provided a comprehensive overview, and included case studies, to demonstrate the harms and non-financial losses caused by vulnerable consumers entering into small loans from exploitative lenders⁵.
- 23. It is also worth noting that we commonly see complaints regarding breaches of the Privacy Act, where non-financial loss is the only monetary remedy sought. Please see paras 26-27 for more detailed submissions in relation to other situations involving non-financial loss claims.

⁵ [31. Consumer Action Law Centre Redacted.pdf](#)

RECOMMENDATION 4: The Amended Approach should clarify that non-financial loss is available regardless of whether or not AFCA orders financial compensation and regardless of the amount of financial compensation ordered.

Impact on Complainants and Relevant Circumstances

24. We support section 3.5 of the Amended Approach that states that it “is not necessary for the complainant to ask for compensation for their non-financial loss”. However, the Amended Approach should go further and specify that AFCA will ensure that complainants are aware of when they are entitled to claim for non-financial loss, what it is, and what facts are relevant to AFCA in determining the amount to award. It is inherently problematic that a complainant could be potentially awarded non-financial loss but they are not given any indication from AFCA that they can seek it, or what information would be needed to support or strengthen a claim.
25. There are many reasons why a complainant may not set out circumstances of vulnerability or the impact of a financial firm’s conduct upon them in the course of making a complaint.
 - a. Complainants may not be aware of the availability of non-financial loss.
 - i. Non-financial loss does not appear to be promoted throughout the application process. AFCA’s online application form, provides the complainant with the following options regarding the outcome sought:
 - “I am seeking compensation”;
 - “I am not seeking compensation”; or
 - “I am not sure if I am seeking compensation”
 - ii. The examples cited in the Application Form only refer to compensation for financial loss.
 - b. If complainants are unaware of the potential for seeking non-financial loss, they may have no reason to outline their circumstances or the impact of the relevant conduct, especially if they are ashamed or embarrassed or traumatised. As set out above, vulnerable people and Aboriginal and Torres Strait Islander people face many barriers to accessing the justice system and achieving fair outcomes when utilising legal avenues.

The Amended Approach should require case managers to inform complainants about the availability of non-financial loss and specifically enquire about the impacts of the financial firm’s conduct on the complainant and their particular circumstances. As set out in the ancillary recommendations below, case managers should receive particular training to do this, as without appropriate cultural sensitivity and expertise, such enquiries could actually increase barriers to accessing justice by vulnerable people.

RECOMMENDATION 5: The Amended Approach should require case managers (equipped with appropriate training) to advise complainants of the availability of non-financial loss and specifically enquire about the impacts of the financial firm’s conduct and the complainant’s circumstances.

Non-financial remedies

26. We do not consider that non-financial remedies such as apologies are specifically relevant to the consideration of non-financial loss. We cannot see any circumstance in which a non-financial remedy would replace an award of non-financial loss. If AFCA determines that the matrix is applicable, non-financial loss should be awarded.
27. If the intention of the Amended Approach is to consider non-financial remedies as an addition to an award of non-financial loss, this should be specifically clarified. If so, the Amended Approach should include examples other than an apology such as the requirement to remove an inappropriate adverse listing on a complainant's credit report.

RECOMMENDATION 6: The Amended Approach should clarify that non-financial remedies do not replace non-financial loss and include examples other than giving an apology.

Guidance on the matrix

28. We generally support the introduction of the assessment matrix to guide compensation assessments. However, we recommend that AFCA should not treat the tier a person falls in the matrix as an unbreakable rule, and should introduce a specific sentence clarifying that compensation may fall outside of the tiers set out in the guide in more extreme cases.
29. For example, the impact of mandating strict adherence to the tiers on compensation awards where the impact was 'medium' is that it effectively would reduce the possible compensation ever available to \$4,000. This may not be appropriate if the conduct went on for years (or a shorter, but extremely long time relative to the nature of the complaint).
30. We are also concerned that the tier matrix effectively clarifies that if the impact is "very low", no compensation will be available, regardless. This impact classification should be described as "no impact" if compensation is never going to be payable.

RECOMMENDATION 7: Clarify that the compensation tier guidance in the Amended Approach in the table on page 5 is a guide only and not binding.

31. We are also concerned with the guidance on timeframes that appears immediately below the matrix on page 5, particularly regarding the "long" classification. Whether the duration of relevant conduct is short, medium or long depends a lot on the context and subject matter of the complaint is about. For example, if the complaint relates to a home building insurance claim after an extreme weather event and this impacts the complainant's living situation, an unjustified delay of days (especially if it delays make safe works) may be appropriately considered a relatively long one. Our comments on the case studies below expand upon this. Obviously in these circumstances the classification of the impact could be increased to address this issue and address inappropriate classification on the matrix, but relying on this solution too much would reduce the value of making two assessments at all.

RECOMMENDATION 8: Clarify that a complaint involving conduct of a “long” duration may be much shorter than 6 months in some circumstances, depending on the nature of the complaint.

Concerns with the classification of case studies under the matrix

The case studies provided with the Amended Approach, which will be used to guide complainants and decision makers, may lead to AFCA under-classifying the duration and impact of complaints. In our view, Case Studies 1-6, which we examine below, are poor decisions that AFCA should not be offering as case studies. We urge AFCA to reassess the appropriateness of the case studies and the underlying determinations as leading examples of good conclusions, and the conclusions about the appropriate amount of non-financial loss payable.

Case Study 1:

32. The summary of the case in the Amended Approach appears incorrect.
 - a. The determination states that the “bank’s undue delay caused the complainant financial loss in the form of interest, and stress inconvenience and upset. It is fair that the bank pays the complainant compensation of \$500.”⁶ It later clarifies that \$75 was awarded for interest and the remainder was ordered for stress, inconvenience and upset.⁷ This latter payment appear to constitute non-financial loss.
 - b. In contrast, the summary in the Amended Approach states that “no compensation was payable”.
33. We disagree with the assessment of impact as ‘very low’ rather than ‘low’ regarding this conduct.
34. The apology issued during the complaints handling process should be irrelevant to the award of non-financial loss as this has no bearing on the impact on the conduct at the time of its occurrence or its impact on the complainant. This should be clarified as a notation to the case study.

Case Study 2:

35. In case study 2, a 45 day delay in arranging for repairs to a car (it was an extra 45 days beyond what was reasonable) should not be considered a short delay. This is an extremely concerning standard to offer as guidance for insurers.
36. The classification of a 45 day delay as “short” appears inconsistent with the wording of section 3.5 of the Amended Approach, which defines a short duration as “likely to be only minutes, hours or days” and medium duration as “a few weeks to a few months”.
37. We also query the assessment of impact as low. For many people, a car is absolutely essential for daily living and losing it is a huge inconvenience. The determination also indicates that hire vehicle cover was not provided under the insurance policy, so the customer was out of pocket and without a car for this period.⁸ It appears the complainant also lost work because of the delay.
38. It is extremely difficult to understand how AFCA made this assessment, let alone came to the conclusion that it was a good example of a low, short impact. In our view, this is an entirely inappropriate case study example and one where we consider AFCA’s assessment of non-financial loss to be extremely disappointing.

Case Study 3:

⁶ AFCA Determination 804426, page 1: <https://service02.afca.org.au/CaseFiles/FOSSIC/804426.pdf>

⁷ AFCA Determination 804426, page 4: <https://service02.afca.org.au/CaseFiles/FOSSIC/804426.pdf>

⁸ AFCA determination 781598, page 2: <https://service02.afca.org.au/CaseFiles/FOSSIC/781598.pdf>

39. The determination for this case study states that English was not the complainant's first language and language barriers were raised in the complaint. It also states that the complainant stated that he had planned to purchase a property but could not bid because of his credit rating issues (which we presume relates to concerns in obtaining a loan as a result of the inappropriate adverse credit report listing by the financial firm). It also states that the complainant suffered from anxiety and sleepless nights.
40. The determination states: "I am not able to establish from the available information that the RHI would cause all and any loan application to be declined. The complainant has not provided a decline notice citing the RHI".⁹
 - a. This case appears to be an example of AFCA placing unnecessary obstacles on a vulnerable client suffering from anxiety and language barriers.
 - b. There are many reasons why someone would not seek a loan if they thought it would be declined, particularly because credit enquiries by prospective lenders are recorded on credit reports and such enquiries can often be a cause of scepticism regarding future credit applications.
41. We consider that the impact in this case study should be assessed as high, noting the circumstances above.

Case Study 4:

42. The circumstances of case study 4 surely amount to a high or severe impact upon the complainant.
43. The facts in the determination indicate that there were significant defects with works arranged by the insurer throughout many (surely close to all) rooms in the house.¹⁰ A repeated failure of an insurer to properly complete make safe works at a residential property (seemingly the complainant's place of residence) surely should justify a higher impact assessment than "medium".
44. In our view, this is another concerning example of a determination under-assessing the impact of a financial firm's conduct.

Case Study 5:

45. The facts of case study 5 also lead us to question the classification of the impact of the conduct as medium.
46. In the determination, AFCA appears to have been satisfied that the loan ruined a pensioner's relationship with his daughter, and pushed him into financial hardship.¹¹ It is again hard to understand how this could be considered only a medium impact.

Case Study 6:

47. The determination that case study 6 is based upon saw the maximum award of compensation paid. While the assessment matrix does not require classification as a 'severe' impact to justify a \$5,400 payment, it leaves us genuinely wondering what would justify a severe impact. The complainant's home was left in limbo for years.

Need for Additional Case Studies

⁹ AFCA determination 784267, page 7: <https://service02.afca.org.au/CaseFiles/FOSSIC/784267.pdf>

¹⁰ AFCA determination 818778, page 3: <https://service02.afca.org.au/CaseFiles/FOSSIC/818778.pdf>

¹¹ AFCA determination 790097, page 10: <https://service02.afca.org.au/CaseFiles/FOSSIC/790097.pdf>

48. We are concerned that there are no case studies that appear to address common scenarios where claims for non-financial loss are made by vulnerable complainants, particularly case studies about prohibited debt collection practices and inappropriate refusal of financial hardship. Such case studies were present in the previous version of the approach and suitable examples should be included in the Amended Approach.
49. Similarly, we commonly see complaints regarding breaches of the Privacy Act, where non-financial loss is the only monetary remedy sought. A relevant case study should be included in the Amended Approach.
50. We also consider that case studies should be included that outline how the impact will be assessed on people experiencing vulnerability and Aboriginal and Torres Strait Islander people. We note some examples below:
- a. In Determination 667461, AFCA awarded non-financial loss of \$4,000 where a financial firm breached its responsible lending obligations regarding a car loan. The complainant had formed a significant attachment to the vehicle subject of the loan and at one stage “was homeless and sleeping in his car so that he could afford to make repayments on his vehicle”.¹²
 - b. In AFCA Determination 688824, AFCA awarded \$2,500 in non-financial loss for a financial firm breaching its responsible lending obligations. AFCA noted that the complainant was a victim/survivor of family violence and suffered significant stress as a result of the financial firm’s conduct. AFCA made this award regardless of its finding that the financial firm was not aware of the family violence at the time of entering the loan. This therefore presents a good example that circumstances of vulnerability should be taken into account even if the financial firm did not know or ought to know about these circumstances at the time of the relevant conduct. Whilst we understand that this determination has not been published, we note that each example in the Amended Approach is de-identified and suggest that this case could be similarly included.
51. We do see good AFCA determinations on non-financial loss – it is not as though we disagree with all conclusions on this issue. That is why it is quite concerning that AFCA has identified some particularly problematic determinations on non-financial loss as the ones it wishes to highlight in the Amended Approach. We urge you to reconsider the case studies being used.

RECOMMENDATION 9: Re-assess the appropriateness of the case studies and the underlying determinations as leading examples of good conclusions, and the conclusions about the appropriate amount of non-financial loss payable. AFCA should:

- (i) replace case studies 1, 2, 4, 5 and 6 with more appropriate case studies and re-consider the impact for case study 3;
- (ii) include specific case studies regarding inappropriate refusal of financial hardship, prohibited debt collection, Privacy Act breaches; and
- (iii) include case studies awarding non-financial loss with consideration to the impact on vulnerable and Aboriginal and Torres Strait Islander complainants.

¹² <https://service02.afca.org.au/CaseFiles/FOSSIC/667461.pdf>

Ancillary Feedback

52. We also wish to take this opportunity to provide the following ancillary feedback on issues raised in this submission.

Application for Non-Financial Loss

53. As set out above, AFCA's online application form does not appear to clearly alert complainants to the availability of non-financial loss.

ANCILLARY RECOMMENDATION 1: AFCA should amend its online Application form to ask complainants if they are seeking compensation for non-financial loss, clarify that non-financial loss can be available even where no financial loss has been suffered and include appropriate examples.

Threshold for Non-Financial Loss

54. As set out above, the threshold for non-financial loss is too low and should be at least \$10,000 per claim, which would be consistent with compensation that can be claimed for experiencing distress or humiliation from a course of conduct of prohibited debt collection practices.¹³

55. Case study 6 of the Amended Approach presents an example in which the maximum award of non-financial loss is manifestly inadequate. We recognise that this change would need to be made to the AFCA Rules and therefore refer to our forthcoming submissions on this consultation.

ANCILLARY RECOMMENDATION 2: AFCA should increase its threshold for non-financial loss to at least \$10,000 per claim.

Training and Approach regarding Vulnerable and Aboriginal and Torres Strait Islander People

56. In our comments above, we noted that AFCA should specifically consider the impact of a financial firm's conduct on vulnerable and Aboriginal and Torres Strait Islander people when forming assessments of non-financial loss.

57. In making this comment, we acknowledge that it is a difficult task for AFCA to make decisions regarding this impact. Such judgments require understanding and training of specific aspects of vulnerability and cultural competence.

58. To support the implementation and as a measure of quality review regarding execution of the Amended Approach, AFCA should undertake relevant regular training, together with the implementation of a system of oversight and review by suitable experts to ensure that vulnerability is appropriately understood and applied in decision making.

¹³ Section 45, *Australian Consumer Law and Fair Trading Act 2012* (Vic)

ANCILLARY RECOMMENDATION 3: AFCA should undertake training, including from people with lived experience and cultural competence training, to enable case managers to appropriately enquire about and assess the impact on vulnerable people and Aboriginal and Torres Strait Islander complainants.

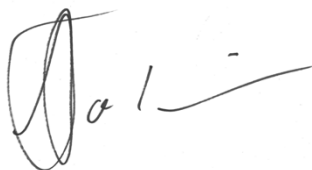
ANCILLARY RECOMMENDATION 4: AFCA should employ social workers and appropriate experts from Aboriginal and Torres Strait Islander communities to provide specialist advice to case managers and conduct regular audits of decisions to ensure that vulnerability is appropriately considered in awarding non-financial-loss.

ANCILLARY RECOMMENDATION 5: AFCA should publish its approach about working with vulnerable people and Aboriginal and Torres Strait Islander people. This approach should then be referenced in the Amended Approach.

Please contact Policy Officer **Tom Abourizk** (Senoir Policy Officer) on (03) 9670 5088 or at tom.a@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE



Stephanie Tonkin | CEO