

The AFCA Approach to financial elder abuse

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We have created a series of AFCA Approach documents, such as this one, to help consumers and financial firms better understand how we reach decisions about key issues.

These documents explain the way we approach some common issues and complaint types that we see at AFCA. However, it is important to understand that each complaint 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 AFCA 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 firm.

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 complaints involving financial elder abuse and review common issues.

1.2. Who should read this document?

- 1 Financial firms, consumers and consumer representatives who have a complaint at AFCA 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 Financial firm employees who need to recognise warning signs and respond appropriately in accordance with good industry practice.
- 4 Anyone who wants to understand how AFCA applies legal principles, industry codes and good industry practice when considering complaints 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 AFCA 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 complaints 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 financial firm exercise its duty to take reasonable care and skill and question the customer's authorisation of a transaction?

- If so, should the financial firm 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 is 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. Financial firm employees may be in the best, and sometimes the only, position to recognise financial elder abuse as it occurs. Financial firm employees need to be encouraged to trust their instincts.

In complaints we see arising from alleged financial elder abuse, a common claim is that the financial firm 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.

AFCA’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.

AFCA'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 financial firm 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 financial firm
- have unpaid bills that they should be able to afford to pay – e.g. complain of having no heating even though 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 complaints that have come to AFCA.

There are other red flags that may be noticed by someone visiting the elderly person in their home. Financial firm 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 financial firm-customer relationship

Contractual nature

The relationship between the financial firm and the customer is essentially a contractual one. Generally, the financial firm 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 financial firm does have a duty of care to exercise reasonable care and skill in carrying out transactions for its customer.

Good industry practice

Financial firms 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 financial firm will also have a statutory obligation to provide its services covered by the licence efficiently, honestly and fairly.

Financial firms 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.”

AFCA accepts this as good industry practice which should apply to all financial firms, regardless of whether a financial firm 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 financial firm

explored appropriate options with the elderly person. For example, where the financial firm is aware that a caregiver does the elderly person's banking, the financial firm 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 financial firms' customers who may be affected by financial elder abuse. This includes:

- developing internal guidelines and procedures to assist financial firm employees to respond when 'red flags' or warning signs appear
- ensuring financial firm 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 financial firm
- referring financial firm 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 a financial firm subscribes to it.

What is expected of the financial firm

Often a financial firm 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.

Financial firm 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 a financial firm takes once 'red flags' or warning signs appear will affect the outcome of the complaint:

- We expect a financial firm 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 a financial firm should be willing to have a conversation with them about the reason for the financial transaction.
- Financial firm employees should listen carefully to what the customer says.
- Financial firm employees should discreetly discuss the financial transaction to test the credibility of the explanation. However, the conversation should not be an interrogation.
- Financial firm 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 financial firm 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 financial firm should take steps to contact the Guardian and not perform the financial transaction until it has been confirmed by the Guardian.
- Financial firm employees should escalate their concerns to the appropriate senior person before conducting the financial transaction.
- A financial firm 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.
- Financial firm employees should feel free to ask the customer if there is another family member or friend the financial firm 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.
- financial firm 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 financial firm to explain why.

Information we expect the financial firm to provide

When we consider complaints, which include issues involving financial elder abuse, we ask the financial firm 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 financial firm took to delay the transaction or take other preventative action.
- details of any conversations held with the customer
- if the financial firm 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 financial firm employees involved in transactions which are the subject of the complaint
- copies of its internal policy and procedures in relation to financial elder abuse, and specific steps the financial firm 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 complaint.

Possible outcome to a complaint

AFCA 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), AFCA generally requires the financial firm 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, AFCA generally requires the financial firm 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 financial firm taking a mortgage over the elderly person's home or property, AFCA generally requires a release of the mortgage and reimbursement of all fees, charges and interest paid by the elderly person.

AFCA will also consider if it is appropriate to award non-financial loss. Although the maximum amount we can award is \$5,000 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 \$5,000 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 complaints this may be appropriate when taking into account the stress and inconvenience caused to the elderly person.

2.4. Common issues arising in complaints involving financial abuse

When a financial firm may be legally liable for a customer's losses

A financial firm 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 financial firm 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, a financial firm 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 financial firm 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 a financial firm 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

Financial firm employees are not expected to be detectives and are entitled to proceed on the assumption they are dealing with honest people. However, a financial firm's duty to exercise reasonable care and skill includes an obligation to question the customer's authorisation of a transaction. This means financial firm 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 financial firm 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 financial firm was on notice of a customer's incapacity yet proceeded anyway, we may set aside a contract or transaction.

The financial firm will be on notice if its employees were aware, or ought to have been aware, of a customer's incapacity. However, financial firm 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 financial firm 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 financial firm 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 financial firm 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 financial firm 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 financial firm 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 financial firm 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 be 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 financial firm 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 a financial firm 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 financial firm received no benefit and it was not fraudulent or dishonest itself.

Liability will be established where the financial firm 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 complaints, it may be claimed that a financial firm 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 a financial firm'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 financial firm is clearly entitled (and possibly required) to report the matter to police. The financial firm 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 financial firm 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 a financial firm giving its customer information about relevant agencies or seeking direct consent of the customer to notify third parties.

2 Context

3.1. Case studies

The case studies below are based on determinations by one of AFCA's predecessor schemes, the Financial Ombudsman Service. While previous determinations (by AFCA or by its predecessor schemes) are not binding precedents, where relevant they will inform AFCA's approach to an issue.

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 financial firm. In 2014 they signed a power of attorney providing the complainant's daughter and her husband's son with authority to access online banking to view statements only. In April 2015 the complainant's daughter rang the financial firm 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 financial firm. 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 complainant's knowledge.

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

FOS concluded the financial firm 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 financial firm had been notified may have not been acting in the best interests of both account holders.

The FOS determination:

- said the financial firm did not comply with good industry practice to protect the complainant from potential financial abuse, and

- required the financial firm to transfer half the funds plus interest into an account nominated by the complainant.

Case 2: Complying with good industry practice

Roy attended a branch of a financial firm 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.

Roy's guardian lodged a complaint 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 financial firm should have questioned Roy about the relatively large amount of the withdrawal as it was inconsistent with the previous contact of the account
- the financial firm should also have questioned Roy's capacity and prevented the transactions.

FOS considered the complaint and found the financial firm 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 financial firm 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
Complainant	individual or small business that has lodged a complaint with AFCA
Financial firm	An organisation or individual that is a Member of AFCA
POA	Power of Attorney

Useful documents

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