

Credit Ombudsman Service

Position Statement Issue 1

March 29

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The aim of our Position Statements is to provide Members and Consumers with guidance as to how we approach particular issues.

Being the first Position Statement issued by COSL, this document is more general in its scope. It summaries the circumstances in which we can deal with complaints about our Members; how we go about resolving complaints; our position on legal proceedings when we receive a complaint; the remedies available under our process; the confidential and 'without prejudice' basis of our process; the responsibilities of Members and Consumers using our services; and how we fund our operations through a combination of membership and compliant fees.

About COSL



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1. Introduction

- 1.1 The Credit Ombudsman Service Limited ('COSL') is one of only two external dispute resolution ('EDR') schemes approved by the Australian Securities and Investments Commission ('ASIC').
- 1.2 Any individual or firm that is a holder of an Australian Financial Services licence or an Australian Credit licence (or is a credit representative of an Australian Credit licensee), is required to be a member of an ASIC-approved EDR scheme such as COSL as a condition of its licence.
- 1.3 We handle complaints about a variety of financial services, including complaints against finance brokers, mortgage managers, non-bank lenders, authorised deposit-taking institutions, micro-lenders, financial planners and trustees.
- 1.4 COSL is a not-for-profit public company. It is not Government-funded. Rather, it is funded by a combination of membership and complaint fees levied on its Members. This is because ASIC's Regulatory Guide 139 requires COSL and other approved EDR schemes to provide their services to consumers without charge to them.

2. Independence

- 2.1 COSL is required to be fair and impartial in its handling of complaints.
- 2.2 Its decision-making process is independent of its Members and sectors of the industry which provide its funding. The Ombudsman and staff of COSL are entirely responsible for the handling and determination of complaints and are not subject to external influence by any of its stakeholders.
- 2.3 It follows that COSL cannot advocate for or represent either Consumers or its Members. Its aim is to impartially assist both Consumers and its Members to resolve their grievances between themselves as far as possible without having to resort to legal proceedings.
- 2.4 The manner in which COSL operates, its corporate governance and its complaint handling processes are described in a number of documents, and in particular, its Constitution, Rules and Guidelines. These can be viewed at www.cosl.com.au.

3. Benefits of alternative dispute resolution

- 3.1 Obviously, not all Members of COSL receive complaints about them. However, complaints are a normal part of doing business and, from the Member's perspective, COSL offers its Members:
 - significant savings in their legal costs and management time;
 - faster, simpler and informal complaints resolution;

- resolution of even complex complaints, even where there is conflicting evidence or significant grey areas;
 - greater privacy in resolving a dispute than is afforded in a public courtroom;
 - the ability to better preserve valued client relationships; and
 - a confidential and 'without prejudice' process.
- 3.2 From a consumer's perspective, COSL offers:
- (a) a speedy, cost-free way to resolve complaints and reduce the risk of the costs and lengthy delays that can arise from Court proceedings;
 - (b) the opportunity to have complaints that would not be brought before a Court for financial reasons, aired and resolved;
 - (c) a way of reducing the need to undertake time-consuming and costly litigation.
 - (d) an opportunity for greater control over the dispute resolution process;
 - (e) the potential to resolve complaints in a more creative way than might be possible if it were left to a Court; and
 - (f) a way of significantly reducing the emotional toll a lawsuit can take.

4. Complaints we can consider

- 4.1 A complaint can be made about a Member if:
- (a) the Complainant is an individual or small business;
 - (b) the complaint is about a financial service; and
 - (c) the complaint is not otherwise excluded under the COSL Rules.¹
- 4.2 We will deal with a complaint if it is alleged that the Member has:
- (a) breached a relevant law, or did not give effect to a right provided by law;
 - (b) breached an applicable code of practice;
 - (c) not met standards of good practice in the finance industry; or
 - (d) acted unfairly towards a Consumer.²
 - (e) Complaints we can't consider
- 4.3 COSL is only able to consider certain types of issues under its Rules.
- 4.4 So, for example, we are generally prevented from hearing a complaint where:

¹ COSL Rules 6.1 and 10.1

² COSL Rules 7.1

- (a) the person being complained about is not a member of COSL;
 - (b) the Complainant is only seeking disciplinary action against the Member and not compensation for an alleged loss or Orders;
 - (c) the complaint is about a commercial decision made by the Member (e.g. a decision not to provide a loan because the Complainant has not met the Member's lending criteria);
 - (d) the complaint has already been dealt with by a Court, tribunal, arbitrator or another ASIC-approved EDR scheme;
 - (e) it is more appropriate that the complaint is dealt with in another forum such as a Court, tribunal or another ASIC-approved EDR scheme; or
 - (f) the complaint relates to the investment performance of an investment product, unless the complaint concerns non-disclosure or misrepresentation or misleading conduct.
- 4.5 Please refer to COSL's Rules at www.cosl.com.au for a more detailed account of when a complaint will be considered by us to be outside COSL's jurisdiction, referring particularly (but not only) to Rule 10.1.
- 4.6 We may also, at any time, declare the complaint closed if:
- (a) subsequent information we receive indicates that the complaint is one that we can't consider under our Rules (i.e. it is out of our jurisdiction);
 - (b) the complaint is withdrawn by the Complainant;
 - (c) the Complainant fails to respond to our communications within the required time (or permitted extensions); or
 - (d) we determine that the complaint has not been proved or substantiated.³

5. How we resolve complaints

- 5.1 Even if a complaint has been made to COSL, it is always open to the parties to try to resolve the complaint directly between themselves.
- 5.2 We attempt to settle complaints in a number of ways or a combination of ways, including:
- (a) Directing Complainant to the Member's internal dispute resolution process
- We often receive a complaint in circumstances where the Complainant has not raised their complaint with the Member in the first instance. Except in exceptional circumstances, we refer the Complainant back to the Member to afford the Member the opportunity of resolving the complaint internally⁴. (A holder of an Australian Financial Services licence or an Australian Credit licence is required to have an internal dispute resolution process in place which complies with the standards and requirements set by ASIC's Regulatory Guide 165.)

³ COSL Rules 35.1

⁴ COSL Rule 13.1

In a significant proportion of cases, the complaint is resolved by the Member without our further involvement.

(b) Referring the complaint to the Member again

If the complaint remains unresolved despite having been through the Member's internal dispute resolution process, the Complainant may submit their complaint to us. We review the complaint to see whether we can consider it under our Rules; consider the legal basis of the claim; and what further information may be needed to support their claim.

On receipt of this further information and if there is at least a prima facie case, we refer the complaint back to the Member and afford them another opportunity to reconsider their position given our preliminary view of the merits of the complaint.

A very large proportion of complaints are resolved in this way without further escalation.

(c) Settlement agreement

At any stage of our process, we actively facilitate the exchange of responses we receive from the parties and conduct informal and shuttle negotiations between them, with the aim of impartially assisting both parties to achieve a fair settlement.

Often the parties agree between themselves on a mutually acceptable outcome (for example, the Complainant accepts an offer made by the Member), whereupon we prepare a Settlement Agreement at no charge to the parties, expressed to be in full and final settlement of the complaint.

We also prepare a Settlement Agreement for the parties if they agree to resolve the complaint during any stage of our process.

(d) Reasonable offer basis

If, at any stage, the Member makes an offer to the Complainant that we consider reasonable, we may recommend to the Complainant that they accept the offer.⁵ If the Complainant does not accept the offer, we may close the complaint unless the Complainant provides us with further information to justify the complaint remaining open.⁶

(e) Expedited process for small claims

With a view to expediting the settlement of a complaint involving a small claim, we can make a decision as to the merits of the complaint without proceeding to a full case investigation (and so reduce the time it would ordinarily take to resolve the complaint since there is no need to prepare a detailed Case Summary, Case Assessment or Determination). The decision will be binding on the Member if the Complainant accepts the decision.⁷

⁵ COSL Rule 19.1

⁶ COSL Rule 19.2

⁷ COSL Rule 20.3

We will only conduct an expedited process if we assess the Complainant's entitlement to compensation to be less than \$3,000; we have received sufficient information from both parties to enable us to make a decision as to the merits of the complaint; and we have provided the parties with a final opportunity to provide us with additional and relevant information.⁸

(f) Conciliation conference

We may use some of the principles of alternative dispute resolution when trying to resolve a complaint. For example, we may convene a conciliation conference at any stage of our dispute resolution process if we are satisfied that doing so would lead to the more efficient and effective resolution of the complaint.⁹

The parties to the complaint, together with a COSL Conciliator, meet in person or via a telephone conference. The Conciliator assists the parties to share their views and information, identify relevant issues and generate options for resolution.

(g) Full case investigation

Once we have been provided with information and supporting material by both parties, we investigate the complaint and consider the options and alternatives that may be available to the parties. Our investigation process is both inquisitorial and consensus-based, and focuses on producing a mutually satisfactory outcome. Both Members and Complainants are afforded an equal opportunity to put forward their cases. This is intended to ensure procedural fairness and promote effective dispute resolution. Our investigation stage normally involves preparing a comprehensive written Case Summary and Case Assessment.

During this Case Summary stage, we examine the complaint further and encourage each party to move towards a mutually acceptable resolution of the complaint by reconsidering its initial position. The purpose of the Case Summary is to identify the respective position of each party; address the key issues of the complaint; address the extent to which we can consider these issues; identify the framework within which the issues can be considered by us; and request additional information that we may require.

The Case Assessment is an impartial written assessment of the issues raised in the complaint based on the information provided by the parties. It also contains a recommendation as to how the complaint should be settled. While the Case Assessment is not binding on either party, it is a strong indication of our view on the merits of the complaint. If the recommendation is not accepted by either party, the complaint may be referred to the Ombudsman for a Determination.

(h) Determination by Ombudsman¹⁰

⁸ COSL Rule 20.1

⁹ COSL Rule 18.2(d)

¹⁰ COSL Rules 22 to 25

The Ombudsman can make a Determination about the complaint if:

- the complaint is not resolved by the end of our Conciliation phase; or
- the Member has not responded to us when required to do so; or
- one or both parties has not accepted our recommendation in the Case Assessment.

Complainants are not bound by the Ombudsman's Determination. However, if the Complainant accepts the Determination in full and final settlement of their complaint, the Determination will be binding on the Member.¹¹

- 5.3 Please refer to COSL's Rules at www.cosl.com.au for more detailed information about the COSL complaint process.

6. Legal proceedings

- 6.1 A Member is not permitted to initiate or continue enforcement action (i.e. legal proceedings or other action to recover a debt, or take possession of an asset securing a debt) after COSL has received a complaint.
- 6.2 ASIC's Regulatory Guide 139-53 now also requires an ASIC-approved EDR scheme to change their Rules to prohibit a Member from continuing legal proceedings once a complaint is received. Consequently, COSL's Rules provide that we have jurisdiction to consider a complaint notwithstanding that the Member has already commenced enforcement action. The Member is required to discontinue the enforcement action and, in particular, must not seek judgement.
- 6.3 Furthermore, the Member must not sell or assign the debt or list a default on the Complainant's credit reference file while COSL is considering the complaint.
- 6.4 We may, however, in our discretion permit the Member to resume enforcement action in certain defined circumstances, such as where the borrower has taken action beyond filing a defence or where the relevant limitation period for the proceedings is about to expire.
- 6.5 The Member may resume enforcement action if:
- (a) we determine that we have no jurisdiction to deal with the complaint; or
 - (b) we consider that the complaint is not made out; or
 - (c) the Complainant declines to accept our determination of the complaint,

¹¹ COSL Rules 24.4, 38.1, 38.3 and 38.4.

provided the Member allows the Complainant 14 days to file a defence or a defence and counterclaim (if they have not already done so).¹²

7. Remedies available¹³

- 7.1 We can only accept a complaint where the loss being claimed is less than \$500,000. (The loss may be direct loss or indirect or non-financial loss.)
- 7.2 However, any compensation awarded by COSL cannot exceed its monetary compensation limit, which is \$250,000 at the date of this Position Statement. As required by ASIC's Regulatory Guide 139, the monetary compensation limit will be increased to \$280,000 on and from 1 January 2012 and, thereafter, adjusted every three years using the higher of the increase in the CPI or MTAW. E.
- 7.3 We can also award interest or earnings in addition to any compensation awarded.
- 7.4 Alternatively, or in addition to claiming monetary compensation, the Complainant may ask us to order the Member to do or refrain from doing some act.
- 7.5 The types of remedies that may be available under the COSL process include, but are not limited to:
- (a) the payment of a sum of money;
 - (b) the variation of a debt;
 - (c) the release of security for a debt;
 - (d) the repayment, waiver or variation of a fee or other amount paid to or owing to the Member;
 - (e) the discontinuation of enforcement action against the Complainant;
 - (f) in relation to a default judgement, not obtaining a writ or execution;
 - (g) the release of a Complainant from a contract; and
 - (h) the variation of the terms of a Credit Contract in cases of financial hardship¹⁴.

8. Confidential and without prejudice

- 8.1 Any information and supporting material obtained or disclosed as part of our process is 'without prejudice', which means that information provided by one party cannot be used in subsequent legal proceedings, unless required by an appropriate Court process.¹⁵ Also, any document provided to us by the

¹² COSL Rule 16.6

¹³ COSL Rule 9

¹⁴ COSL Rule 9.6

¹⁵ COSL Rule 31.1

Complainant or the Member must only be used for the purpose of resolving the complaint, and must be kept confidential and not be disclosed to third parties.¹⁶

- 8.2 If we receive any information or document from one party with a request that it be treated confidentially, we will not disclose that information or document to the other party, except:
- (a) with the consent of the person supplying the information or document; or
 - (b) as required by law.¹⁷
- 8.3 However, we are not permitted to use the confidential information or document to make a finding against the party which has not had access to the confidential information or document except in certain cases.¹⁸
- 8.4 Where a party believes that the disclosure of any information or document to us would place them in breach of a duty of confidentiality they owe to a third party, they must use their best endeavours to obtain the consent of the third party to disclose the information or document. If the consent is not given within a reasonable time, then the party claiming confidentiality will not be required to comply with any direction from us that the information or document must be provided.¹⁹

9. Legal representation

- 9.1 Neither party is required to have legal or other representation while we deal with the complaint, but if they wish to, it will be at their own cost.²⁰

10. Responsibilities of Complainants and Members

- 10.1 In order for us to properly and fairly consider a complaint, we require the Complainant and Member to willingly co-operate with us in good faith.

Co-operation and good faith

- 10.2 We ask that a Complainant:
- consider what he or she would be willing to accept as a resolution to their complaint;
 - be willing to negotiate with the Member;
 - observe the timeframes prescribed by our Rules;

¹⁶ COSL Rule 32.7

¹⁷ COSL Rule 32.2

¹⁸ COSL Rule 32.3

¹⁹ COSL Rule 32.1

²⁰ COSL Rule 30.2

- avoid making personal attacks against the Member or its employees; and
- participate in the COSL process willingly and in good faith.

10.3 Similarly, we ask that a Member:

- consider what would be a fair and appropriate resolution to the complaint;
- negotiate in good faith with the Complainant; and
- observe the timeframes prescribed by our Rules.

Offensive or defamatory information

10.4 If at any stage of a complaint we consider that any information submitted by a party is offensive to, or contains a defamatory imputation of, any other person, we may refuse to accept that information or convey it to the other person. We require the offending or defamatory material to be removed before we accept the information. If this is not done, then, in the case of the Complainant, we will treat the complaint as withdrawn; or in the case of the Member, we will proceed to consider the complaint without having regard to the information.

Extensions

10.5 We may of our own volition, or on the application of a party, extend the time within which a response is required.²¹

10.6 We may close the complaint if, despite our reminders, the Complainant does not respond to us within the time requested or has not sought or been granted an extension of time. Once closed, a complaint can only be re-opened in exceptional circumstances. Exceptional circumstances will not generally include the eventual giving of the information we originally requested.

10.7 If a Member does not, despite our reminders, respond within the requested time, and has not sought or been granted an extension, we may progress the complaint to the next stage of our process. This may have cost implications for the Member in terms of complaint fees.

11. Consistency in our decisions

11.1 We encourage our Members to take into account our previous decisions and our general approach and apply them to their own complaints handling, where appropriate. However, our primary focus is to resolve each dispute before us in a fair and effective way, rather than to provide general guidance for business.

²¹ COSL Rule 34.1



- 11.2 Consequently, Members and Complainants should be aware that the particular issues that affect the outcome in one case may be materially different to the issues in another case that, on its surface, may look similar.
- 11.3 While we are not bound by any previous decisions of COSL, we nonetheless aim to be consistent in our approach, appreciating that cases appearing to be the same or substantially the same may in fact turn on different facts and issues. The right outcome in one case will not necessarily be the right outcome for another case which appears broadly similar.

12. Funding and case fees

- 12.1 In accordance with ASIC's Regulatory Guide 139, COSL is required to provide its services to Complainants without charge. Accordingly, COSL's operations are necessarily funded by annual membership fees and complaint (or service) fees levied on its Members. Details about these fees can be found at www.cosl.com.au.
- 12.2 The annual membership fee paid by each Member is calculated according to the size and nature of the Member's business.
- 12.3 Complaint fees are billed progressively at the end of each stage of our process, namely Referral, Investigation and Determination. If a Member wishes to use its free annual complaint voucher in relation to a particular closed complaint, we will refund all complaint fees paid to us for that complaint.
- 12.4 We do not charge any fee for referring a Complainant to a Member's IDR, taking enquiries about a Member or making or taking phone calls about a complaint.

Is a complaint fee payable even if COSL subsequently finds that the complaint is unsubstantiated?

- 12.5 Unfortunately, yes. However, the complaint fee will generally be much less than the costs involved in defending a claim in Court, where negative publicity may also be damaging to the Member's business reputation.
- 12.6 It should be noted that many complaints are resolved through our process without having to declare a clear "winner" and "loser". If complaint fees were only charged where the Complainant's case was clearly substantiated, complaint fees would have to be much higher to fund our work on other complaints.

Is a complaint fee payable if the complaint is found to be outside COSL's jurisdiction?

- 12.7 This depends on when it becomes apparent to us that the complaint is outside our jurisdiction.

If:

- (a) information accompanying the complaint;

- (b) further information requested by us before we referred the complaint to the Member; and
 - (c) information provided by the Member in its IDR response,
- are sufficient for us to determine that the complaint falls outside our jurisdiction, we will close the complaint and no complaint fees are charged to the Member.

- 12.8 Consequently, it is in the Member's own interests to provide us with all available information and supporting material when providing us with a copy of its IDR response to the Complainant, so that we can determine our jurisdiction at the earliest time possible.
- 12.9 However, it is sometimes the case that we are only able to conclude that a complaint is not within our jurisdiction after receiving further information from, typically, the Member (but sometimes the Complainant); long after the complaint was first lodged with us. In these cases, a complaint fee will generally be payable.
- 12.10 It should also be borne in mind that many of the complaints we receive are not straightforward and involve complex facts and legal issues. In such cases, it is unlikely that an early determination of our jurisdiction can be made and a complaint fee will generally be payable if we later conclude that the matter is outside our jurisdiction.