

**CREDIT OMBUDSMAN SERVICE  
LIMITED**

ACN 104 961 882

**CREDIT OMBUDSMAN SERVICE  
RULES**

**Third Edition**

In force on and from 21 February 2007

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# **CREDIT OMBUDSMAN SERVICE LIMITED**

# **CREDIT OMBUDSMAN SERVICE RULES**

## **Third Edition**

## **About the Credit Ombudsman Service**

### **Introduction**

1. Credit Ombudsman Service (COS) is an External Dispute Resolution (EDR) scheme established by Credit Ombudsman Service Limited (the Company). COS provides Consumers with an accessible alternative to legal proceedings for the resolution of their complaints against members of the Company (Members).
2. The broad aim of COS is to provide for the independent and prompt resolution of Consumers' complaints against Members, having regard to:
  - (a) relevant legal requirements;
  - (b) the MFAA Code of Practice and other Recognised Codes of Practice;
  - (c) good practice in the Credit Industry; and
  - (d) fairness in all the circumstances.
3. COS considers Consumers' complaints against Members in accordance with these Rules and looks to resolve complaints by:
  - (a) agreement between the parties;
  - (b) making recommendations to the parties;
  - (c) making a determination;
  - (d) making an Award; or
  - (e) some other appropriate means.

4. COS does not provide general information about Members, Members' business operations or services, or the Credit Industry.
5. Consumers who take their complaint to COS are not bound COS' determination. Consumers who do not accept COS' determination still retain any legal rights they have to refer their complaint to a Court or a tribunal or other similar body.
6. However COS' determination will be binding on a Member only if the Consumer accepts that determination in full and final settlement of their complaint against the Member. Consumers who accept COS' determination will be required to sign a document called a Deed of Release in such form or to such effect as COS specifies from time to time that has the effect of preventing them from later bringing legal or other proceedings against the Member in relation to the matters that were the subject of their complaint. A Member may not require a Consumer to sign a Deed of Release or any other document to the same or similar effect as a condition of or otherwise in connection with the acceptance by the Consumer of the Credit Ombudsman's determination.

### **Who is Credit Ombudsman Service Limited?**

7. This is an incorporated company. The Members of the Company are individuals, firms and corporations that operate in the Credit Industry and who agree to be bound by the Credit Ombudsman Rules and the MFAA Code of Practice or other Recognised Code of Practice. So that COS is and is seen to be independent, the Company has a board of directors which comprises:
  - (a) an independent Chairman; and
  - (b) an equal number of Consumer Representatives and Member Representatives.
8. The main objectives of the Company are to:
  - (a) act as the primary disputes resolution body for the Credit Industry; and
  - (b) actively facilitate the resolution of disputes concerning all aspects of the provision of Credit and directly incidental financial products and services\* to Consumers by Members.

*\* see definition of "Member Services" at Rule 142.*

### **How does COS work?**

9. The Company has established and supervises COS. COS operates under a set of rules called the Credit Ombudsman Service Rules ("COS Rules"). These Rules set out:
  - (a) who can make a complaint to COS;
  - (b) what matters can be the subject of a complaint;
  - (c) what matters are not covered by COS; and

- (d) what procedures apply for making a complaint to COS and having that complaint resolved.
10. The Board may from time to time approve and have published on the Company's web site:
- (a) procedures manuals and handbooks;
  - (b) guidelines to these Rules and COS procedures;
  - (c) policies and policy guidelines; and
  - (d) other documents relating to the COS process;
- but these always have to be read subject to the Rules.
11. COS:
- (a) receives and investigates complaints; and
  - (b) carries out a conciliation role as between Consumers and Members;
- and if the parties are unable to resolve the complaint themselves, the Credit Ombudsman makes a Determination.
12. COS is not bound by any legal rule of evidence and may inform itself about the complaint and all matters relating to it in whatever manner and by whatever means in its discretion it thinks appropriate.
13. COS can require a Member who is the subject of a complaint:
- (a) to give COS; or
  - (b) to cause another person (not the Consumer) to give COS;
- any information or document COS considers necessary to deal with the complaint in accordance with the Rules.
14. Subject to Rules 114 to 120 (these are rules about confidentiality) a Member must comply with a COS requirement under Rule 13.
15. Subject to Rules 114 to 120, COS may at its discretion give all relevant information and documents it receives to all other parties. However, COS need not give other parties any information or document that COS receives and relies upon provided it is identified in COS' written reasons and is made available to the other parties when requested.
16. If COS believes it is appropriate to do so, COS may extend with or without conditions any time period under these Rules to enable a party to access and respond to any information or document COS relies upon but has not provided to that party.
17. Where practicable, COS will:
- (a) by whatever means COS regards as appropriate, keep all parties informed of the progress of a complaint;

- (b) subject to Board approval, publish its Rules, procedures, guidelines, manuals, handbooks, policies, Practice Notes, By-laws, edited copies of determinations on the Company and other documents relating to the COS process on the Company's web site; and
  - (c) provide parties with copies of or extracts from COS policies that are relevant to a particular complaint.
18. At any time and from time to time during the COS process, if it thinks it appropriate to do so, COS can suggest that the complaint be withdrawn or settled with or without conditions with the agreement of both parties in full and final settlement of the complaint. If this happens and one of the parties requests it, COS will prepare a Settlement Agreement. If the parties do not agree to the withdrawal or settlement of the complaint, COS will continue the COS process.

### **What does the Credit Ombudsman do?**

19. The Board appoints the Credit Ombudsman. The Credit Ombudsman is COS' decision maker and the person who can make:
- (a) any decision allowed for under the Rules, including a decision about whether or not a complaint is within COS jurisdiction;
  - (b) any order allowed for under the Rules;
  - (c) a determination; and
  - (d) a binding Award.
20. The Credit Ombudsman:
- (a) has the powers, functions and duties conferred by the Company's Constitution and these Rules, and as conferred and delegated by the Board from time to time;
  - (b) has overall management responsibility for COS;
  - (c) establishes systems and procedures to ensure COS' efficient and effective operations in accordance with the Rules.
21. The Credit Ombudsman may delegate all or any of his or her powers, functions and duties to employees of COS and to other persons approved by the Board, except:
- (a) the power to make a determination or Award; and
  - (b) the Credit Ombudsman's power to delegate.

### **What complaints do this edition of the Rules apply to?**

22. Different versions of the COS Rules operate in respect of a complaint depending on the date of its receipt.

23. This Third Edition of the Rules takes effect on 21 February 2007, and applies to every complaint received on or after that date. This Third Edition also applies to all legal proceedings to set aside or otherwise challenge a COS decision or a Board Direction commenced after this Third Edition takes effect irrespective of whether:
- (a) the subject complaint was received before or after this Third Edition took effect; and
  - (b) the particular COS decision was made or Board Direction was issued before or after this Third Edition took effect.

### **Who can make a complaint to COS?**

24. A complaint can be made to COS about Member Services provided by a Member if:
- (a) the complainant is a Consumer; and
  - (b) in relation to those Member Services, the Consumer has dealt with a Member:
    - (i) as a Borrower or prospective Borrower; or
    - (ii) as a Loan Guarantor or prospective Loan Guarantor.

### **What about individuals and companies who are not Consumers?**

25. Even if the complainant is not a Consumer, if:
- (a) the Board gives its approval;
  - (b) the complainant complies with all conditions the Board imposes in respect of its approval;
  - (c) the complainant pays whatever fee the Board prescribes for the purpose; and
  - (d) the Member gives its consent;
- the complainant can make a complaint to COS about Member Services provided to them by a Member where, in relation to those Member Services, the complainant has dealt with a Member as a:
- (e) Borrower or prospective Borrower; or
  - (f) Loan Guarantor or prospective Loan Guarantor.
26. If the complainant is not a Consumer but they meet all the requirements in Rule 25, the COS Rules apply to the handling of their complaint as if they were a Consumer.

### **What kinds of complaint does COS cover?**

27. A complaint can be made to COS about Member Services provided to a Consumer by a Member so long as those Member Services:
- (a) directly relate to the Consumer's:

- (i) being provided with Credit; or
  - (ii) applying to be provided with Credit; or
  - (iii) becoming a Loan Guarantor; or
  - (iv) being a Loan Guarantor; or
  - (v) being invited to become a Loan Guarantor; or
- (b) were provided or were suggested or proposed to be provided by the Member to the Consumer at the time of or otherwise in connection with the circumstances contemplated in paragraph (a) above.
28. COS will deal with the Consumer's complaint if the Member has, in providing Member Services to the Consumer:
- (a) breached relevant laws;
  - (b) breached the MFAA Code of Practice or other Recognised Code of Practice;
  - (c) not met standards of good practice in the Credit Industry; or
  - (d) acted unfairly towards the Consumer.
29. Once the Conciliation and Investigation Phase of the COS process commences but before the start of the Determination Phase, the Consumer may only raise new grounds of their complaint with COS' approval. COS will generally give its approval unless COS considers that the Consumer has been tardy in raising the new grounds of complaint or it has by then become unreasonable for the Member to have to respond to the new grounds of complaint.
30. Once the Determination Phase of the COS process commences, the Consumer may not raise any new ground of their complaint unless:
- (a) COS is satisfied that exceptional circumstances exist justifying allowing this to happen;
  - (b) the Member consents in writing; and
  - (c) COS consents in writing on such terms and conditions as COS regards as appropriate.

### **What compensation can a Consumer ask for?**

31. The Consumer can claim compensation up to \$250,000 for any loss they have suffered as a result of the Member's conduct. The Board may increase this amount from time to time. COS will publish any increase in the compensation limit on the Company's web site.
32. The Consumer can claim compensation for loss that is:
- (a) Direct Loss, or

- (b) other indirect or non-financial loss or disadvantage as the Board specifies as recoverable from time to time and publishes on the Company's web site.
33. Alternatively or in addition to claiming compensation, the Consumer can ask the Credit Ombudsman to order the Member to do or to refrain from doing some act in relation to the subject matter of the complaint.

### **What kinds of complaint doesn't COS cover?**

34. COS will not deal with a complaint if, at the time of receiving the complaint or at any time during the COS process, COS is satisfied that the complaint falls into one or more of the following cases:
- (a) the complaint is about a Member's acts or omissions that do not comprise or otherwise are not directly related to the Member providing Member Services to the Consumer;
  - (b) the complaint is about someone who:
    - (i) was not a Member at the time of the acts or omissions the Consumer is complaining about; or
    - (ii) is not a Member at the time the complaint is made;
  - (c) the complaint is about a Member who is not obliged to comply with these Rules because that Member is a member of another external disputes resolution scheme approved by the Board;
  - (d) the Consumer is claiming more than \$250,000 compensation:
    - (i) in respect of the complaint; or
    - (ii) in the aggregate of all the complaints that are or could be based on the same subject matter against the same Member;
  - (e) to the extent that the complaint relates to the level of any legally permissible fee, charge or commission;
  - (f) to the extent that any aspect of the complaint relates to acts, omissions, policies or commercial or other matters by or concerning someone other than the Member the Consumer is complaining about eg. a Lender's decision to refuse the Consumer's Loan application or approve it on conditions, Loan interest rates, a Lender's policy to require mortgage insurance;
  - (g) in the case of a Member who is a Credit Provider, the Member's commercial judgment about lending or security for a Loan eg. the Member's assessment of lending risk, or of financial or commercial criteria, or of character; the Member's decision to refuse the Consumer's Loan application or to approve it on conditions; the Member's Loan interest rates; the Member's policy to require mortgage insurance;

- (h) to the extent that the complaint relates to any transaction entered into outside Australia;
- (i) in the case of a secured Loan, where the security is situated or legally registered outside Australia or is governed by laws other than the laws of Australia;
- (j) to the extent that the Consumer is not seeking compensation or orders (see Rules 31 to 33) against a Member;
- (k) to the extent that the Consumer is seeking compensation other than compensation for loss (see Rules 31 to 33);
- (l) the Consumer is not the Borrower, prospective Borrower, Loan Guarantor or prospective Loan Guarantor to whom the Member Services in question were directly provided by the Member;
- (m) the Member's act or omission being complained about (or the earliest of them) occurred more than 6 years before the date of receipt of the complaint by COS;
- (n) the complainant has previously made a complaint about the same Member in relation to the same subject matter which has been considered by COS, unless relevant new evidence is available;
- (o) the subject matter of the complaint is, was or becomes the subject of proceedings before a court, tribunal, arbitrator, other ombudsman or other complaints or dispute resolution body, scheme or procedure or is, was or becomes under investigation by any ombudsman, unless:
  - (i) both the Consumer and the Member consent in writing to the complaint being considered by COS; or
  - (ii) the Member commenced the proceedings on or after the date COS received the Consumer's written complaint – but this exception will not apply if the proceedings are commenced in accordance with the Objection Notice procedure outlined in Rules 97 to 105;
- (p) the complaint has already been determined by a court, tribunal, arbitrator or ombudsman, or other complaints or dispute resolution body, scheme or procedure unless the particular proceedings leading to the determination of the complaint were commenced on or after the date COS received the written complaint – but this exception will not apply if the proceedings are commenced in accordance with the Objection Notice procedure outlined in Rules 97 to 105;
- (q) it is more appropriate that the Consumer's complaint is dealt with by a court, tribunal, arbitrator, or another complaints or dispute resolution body, scheme or procedure;
- (r) the complaint involves an issue which the Member believes might have important consequences for the Member or the Credit Industry or raise an important or novel point of law, and is dealt with under the special procedures set out in Rules 97 to 105;
- (s) even if the matters set out in the complaint were found to be true, these matters would not constitute:

- (i) a breach of relevant laws by the Member;
- (ii) a breach of the MFAA Code of Practice or other Recognised Code of Practice by the Member;
- (iii) a failure by the Member to meet standards of good practice in the Credit Industry; or
- (iv) the Member acting unfairly towards the Consumer; or
- (t) the complaint is frivolous or vexatious or is being pursued by the Consumer in a frivolous or vexatious manner or for an improper purpose.

35. If COS thinks that it is appropriate to refer the complaint and the information and documents the Consumer has provided to another independent complaints or dispute resolution or arbitration body, scheme or procedure, before doing so it will obtain the Consumer's consent.

### **What happens if COS doesn't cover the complaint?**

36. If the complaint is not covered by COS, COS will write to the Consumer letting them know that, and setting out the reasons why the complaint is not covered by COS.

### **Does a Consumer have to pay fees to have the complaint heard by COS?**

37. The complainant does not have to pay any fee if they are a Consumer.
38. Other complainants who are not Consumers need Board approval to bring a complaint to COS and must:
- (a) comply with all conditions the Board imposes in granting approval; and
  - (b) pay whatever fees the Board prescribes from time to time.
39. Before it deals with a complaint, COS will let the complainant know if they will be required to pay COS a fee.
40. If a fee is payable to COS or if the complainant needs to satisfy conditions imposed by the Board, then COS does not have to do anything about the complaint until the fee is paid in full and all the conditions are satisfied.

### **Is there anything the Consumer needs to do first before making a complaint to COS?**

41. Before taking a complaint to COS the Consumer must first of all try to resolve their complaint with the Member concerned using the Member's Internal Dispute Resolution (IDR) procedures. COS will not consider the complaint unless the Consumer has first attempted to resolve it with the Member.

42. Every Member must have IDR Procedures in place. As part of these IDR Procedures, the Member must give the Consumer the name and contact details of the Member's "Complaints Contact Person":
- (a) in the "Finance Broker Contract", or other agreement between the Consumer and the Member, or
  - (b) before the Member starts to do the things it has agreed to do for the Consumer.

The Member must also promptly give the Consumer a copy of its IDR Procedures if it is asked for.

43. In addition, COS can tell the Consumer what they need to do to have their complaint dealt with under the Member's IDR Procedures.

44. The Member's IDR Procedures require the Member to give the Consumer a substantive response as soon as possible, but within 45 days, after the Consumer lodges their complaint. If the Member cannot do this, the Member must:

- (a) give the Consumer reasons for the delay; and
- (b) inform the Consumer of their right to take the complaint to COS.

45. COS regards the Member as having given the Consumer a substantive response if the Member:

- (a) accepts the complaint and if appropriate offers the Consumer redress; or
- (b) offers the Consumer redress without accepting the complaint; or
- (c) rejects the complaint.

46. Subject to Rule 47, if:

- (a) the Member does not give the Consumer a substantive response to their complaint within 45 days; or
- (b) the Member gives a substantive response but the Consumer considers that the response does not satisfactorily resolve their complaint;

the Consumer may make a complaint to COS.

47. If COS thinks it appropriate to do so, COS may, at its discretion with or without conditions:

- (a) regard the Member's IDR Procedures as having been completed even though 45 days have not elapsed; or
- (b) decide that the Consumer has met COS' requirement that they first of all try to resolve their complaint with the Member; or
- (c) waive this requirement.

In any of these cases, COS may accept the Consumer's written complaint and commence the COS process.

## **Complaints against two or more Members**

48. If the Consumer wants to make a complaint about two or more Members in relation to the same subject matter, the Consumer can do so. But the Consumer must first of all try to resolve their complaint with each of the Members concerned. These Rules apply with any necessary modifications in respect of a complaint against two or more Members in relation to the same subject matter.

## **COS' guiding principles**

### **What principles does COS have regard to in dealing with a complaint?**

49. In dealing with a complaint at any stage of the COS process, COS has regard to:
- (a) relevant legal requirements
  - (b) the MFAA Code of Practice or other Recognised Code of Practice, where relevant
  - (c) good practice in the Credit Industry, and
  - (d) fairness in all the circumstances.
50. Dealing with a complaint includes:
- (a) deciding if the complaint is covered by COS;
  - (b) assessing the merits of the complaint;
  - (c) making recommendations to the Consumer and the Member about resolving it;
  - (d) making a determination;
  - (e) making an order; and
  - (f) making an Award.
51. In considering what is good practice in the Credit Industry COS:
- (a) may consult within the Credit Industry;
  - (b) may seek, but is not bound by, advice from such persons (including but not limited to those in the Credit Industry) as COS regards as suitably qualified to give that advice; and
  - (b) must have regard to, but is not bound by:
    - (i) Practice Standards set out in the MFAA Code of Practice or the relevant provisions of other applicable Recognised Codes of Practice; and
    - (iii) if a Member is not a member of the MFAA or another Recognised Industry Body, Practice Standards set out in the MFAA Code of Practice or the relevant provisions of other Recognised Codes of Practice.

## **Making a Complaint to COS - the Initial Referral Phase**

### **How does a Consumer make a complaint to COS?**

52. A Consumer may make a complaint to COS:
- (a) by writing to COS
  - (b) by completing the complaint information through the Company's web site
  - (c) by phoning COS and giving details of the complaint to COS.
53. If the Consumer phones COS, a written complaint setting out the complaint must be sent to COS afterwards.
54. If the Consumer has any difficulty in presenting their complaint, COS will help them prepare it. In doing so, COS will not be "taking sides" but will simply help the Consumer present their complaint as clearly and concisely as possible. COS will not do anything that could impair or could be seen to impair its impartiality.
55. When a Consumer makes a complaint:
- (a) they do not need to use any formal, legal or technical language;
  - (b) they must tell COS what compensation they want the Member to give them, or what corrective action the Consumer wants the Member to take to resolve the complaint;
  - (c) the Consumer must give COS a copy of every document relevant to their complaint; and
  - (d) the Consumer must give written consent to COS sending a copy of their complaint, and copies of their documents to the Member they are complaining about.

### **What happens when COS receives a complaint?**

56. When COS receives a written complaint, that complaint is immediately recorded as received. Then, if it has not done so already, COS assesses whether the complaint is covered by COS. If it is not, COS writes to the Consumer letting them know why their complaint is not covered by COS. COS' decision that the complaint is not covered by COS is final and binding on the Consumer.
57. COS will also:
- (a) check whether or not the Consumer has satisfied the requirement to try to resolve their complaint with the Member as required by Rule 41; and
  - (b) consider whether or not Rule 47 applies in the Consumer's case.

### **What happens once the complaint is accepted?**

58. Provided that the Consumer has given all necessary consents, and COS is satisfied that Rule 41 or Rule 47 have been complied with and that the complaint is within COS jurisdiction, COS:
- (a) records the complaint as accepted;
  - (b) sends the Consumer's complaint and the information and documents they have provided COS to the Member concerned; and
  - (c) tells the Member it is required to provide COS with a response within 21 days.
59. The Member's response must comply with the requirements COS specifies.
60. The Member must give its response to the complaint to COS within 21 days after COS has sent the Member a copy of the complaint.
61. When COS receives the Member's response, it will send the response to the Consumer for their consideration.
62. If the Consumer is not satisfied with the Member's response, the Consumer may, within 21 days of COS sending the Consumer the Member's response, request COS to deal with the complaint. COS will advise the Consumer of their right to do this.

### **Dealing with the Consumer's complaint – the Conciliation and Investigation Phase**

#### **What if the Consumer is not happy with the Member's response?**

63. Once the Consumer notifies COS that it is not satisfied with the Member's response to their complaint, COS will begin the Conciliation and Investigation Phase of the COS process.
64. In the Conciliation and Investigation Phase COS can, subject to any Board Direction, carry out whatever conciliation and investigation process it thinks appropriate to deal with the Consumer's complaint.
65. Without in any way limiting what COS can do, COS can do all or any of the following things:
- (a) ask any party questions in relation to the Consumer's complaint;
  - (b) ask any party to give COS information or documents;
  - (c) ask any party for their comments generally on the other party's responses to COS;
  - (d) send to one party copies of:

- (i) the other party's comments on the Consumer's complaint;
  - (ii) the other party's answers to questions asked; and
  - (iii) information provided to COS by the other party;
- (e) prepare a Complaint Summary for the parties and tell them what COS sees as:
- (i) the key issues in the case;
  - (ii) the strengths and weaknesses in each party's case;
- (f) conduct a Conciliation Conference to be attended by both parties and their permitted representatives, if any;
- (g) conduct a Hearing to be attended by both parties and their permitted representatives, if any;
- (h) continue to carry out the investigation process until COS is reasonably satisfied that it is in possession of all relevant information;
- (i) facilitate informal negotiations between the parties to resolve the matter;
- (j) invite the parties to participate in any form of recognised alternative dispute resolution in relation to the complaint;
- (k) obtain whatever advice from whatever source COS thinks will assist in dealing with the complaint;
- (l) having completed its investigation:
- (i) give the Consumer and the Member COS' assessment of the merits of the complaint; and
  - (ii) make a recommendation to the Consumer and the Member about resolving the complaint.
66. COS may convene a Hearing or a Conciliation Conference if it is satisfied that doing so would lead to the more efficient and effective resolution of the complaint.
67. However, COS does not have power to subpoena witnesses or take evidence on oath or cross examine witnesses, so generally COS would regard:
- (a) a Hearing as appropriate only where COS believed that a question and answer investigation format would help clarify issues; and
  - (b) a Conciliation Conference as appropriate only where the Member agreed that an error had been made and that the only question to be determined was the amount of Direct Loss suffered by the Consumer because of the Member's error.

### **How long does the Conciliation and Investigation Phase last?**

68. Normally COS will try to complete the Conciliation and Investigation Phase within 45 days. However COS may allow up to 90 days for a resolution of the complaint if COS thinks this is appropriate. COS will let the Consumer know as soon as practicable if it is going to allow the Conciliation and Investigation Phase to last up to 90 days.

69. If at any time COS thinks that it will be unable for whatever reason to further assist the parties to achieve resolution of the complaint in the Conciliation and Investigation Phase, COS may declare the Conciliation and Investigation Phase completed and move on to the Determination Phase.

### **What if the Member and the Consumer come to an agreement during this phase?**

70. If the Consumer and the Member come to an agreement about resolving the complaint during the Conciliation and Investigation Phase, and one of the parties asks for it, COS will prepare a Settlement Agreement.
71. Both the Consumer and the Member must sign the Settlement Agreement for it to be binding on the Member.
72. If COS is satisfied that:
- (a) the Settlement Agreement was validly signed by both the Consumer and the Member;
  - (b) the complaint was one which could be dealt with by COS; and
  - (c) the Member has failed to comply with the Settlement Agreement;
- COS can make an Award in terms of the Settlement Agreement to enforce it.

## **Dealing with the complaint – The Determination Phase**

### **What if the Conciliation and Investigation Phase doesn't work?**

73. If the complaint is not resolved by the end of the Conciliation and Investigation Phase, or if the Member has not responded to COS when required to do so, COS can make a determination about the complaint.

### **How does COS make a determination?**

74. COS will generally make its determination based upon:
- (a) the complaint;
  - (b) the Member's response;
  - (c) the Consumer's reply; and
  - (d) information and documents COS has received during the COS process, including any advice from suitably qualified people.
75. COS will only carry out further investigation of the complaint if it thinks that it is absolutely necessary to do so to enable a determination to be made.

### **What if the Member and the Consumer reach agreement during this phase?**

76. If the Consumer and the Member come to an agreement about resolving the complaint during the Determination Phase, and one of the parties asks for it, COS will prepare a Settlement Agreement.
77. Both the Consumer and the Member must sign the Settlement Agreement for it to be binding on the Member.
78. If COS is satisfied that:
- (a) the Settlement Agreement was validly signed by both the Consumer and the Member;
  - (b) the complaint was one which could be dealt with by COS; and
  - (c) the Member has failed to comply with the Settlement Agreement;
- COS can make an Award in terms of the Settlement Agreement to enforce it.

### **What kind of determination can COS make?**

79. If COS is satisfied that having regard to the principles in Rule 49 it is fair to the Consumer and the Member and otherwise appropriate to do so, COS can make a determination that:
- (a) the Member pay the Consumer compensation for any loss the Consumer has suffered, up to a maximum of \$250,000 (or other limit set by the Board); and/or
  - (b) the Member do some act or refrain from doing some act in relation to the subject matter of the complaint; or
  - (c) no compensation be paid and no orders made;
- otherwise, if COS is not satisfied that the complaint has been made out, COS will declare the complaint closed.
80. The amount of compensation will be what COS believes is sufficient but not more than is required to compensate the Consumer for their loss as a result of the act or omission of the Member.
81. In determining whether to order the Member to do or refrain from doing some act, COS will have regard to what is fair and reasonable to put the Consumer and the Member in the position the Consumer and the Member would have been in were it not for the act or omission of the Member. In doing this, COS will consider what is fair and reasonable for all parties, including someone who is not a party to the complaint but who might be affected by COS' determination, eg. a Lender.

## **What happens once COS makes its determination?**

82. COS sends its determination to the Consumer and the Member.
83. At the same time as sending the Consumer its determination, COS sends the Consumer a Deed of Release. If the Consumer signs their acceptance of COS' determination, the Consumer also needs to sign the Deed of Release. The Deed of Release will have the effect and only the effect of releasing the Member from any further legal liability to the Consumer and precluding commencement of legal proceedings by the Consumer against the Member in relation to the subject matter of the complaint on condition that the Member has fully complied with the determination.
84. If the Consumer signs both the acceptance of the Credit Ombudsman's determination and the Deed of Release within 28 days of the documents being sent to them by COS, the Member will be advised by COS that:
  - (a) the Consumer has signed the acceptance of COS' determination and the Deed of Release;
  - (b) the Member must also sign an acceptance of COS' determination and send that signed acceptance to COS; and
  - (c) the Member may choose to also sign the Deed of Release the Consumer has signed and send a copy of that signed Deed of Release to COS.
85. If COS has not received from the Member its signed acceptance of COS' determination as accepted by the Consumer within 28 days of sending it to the Member, COS can make a binding Award in terms of that determination.
86. If COS does not receive the Consumer's signed acceptance of its determination and the signed Deed of Release within 28 days after COS sends them to the Consumer, COS may declare the complaint closed.
87. If the Consumer and the Member have both signed acceptances of COS' determination but the Member does not fully comply with it, then the Consumer can ask COS to make a binding Award in terms of that determination.
88. Whenever COS makes an Award, the Member must comply with it fully and within the time period specified in the Award. If COS' Award does not specify a particular time period, then the Member must comply with the Award as soon as practicable.

## **COS determinations - publication and publicity**

### **Will COS publish its determination of the complaint?**

89. COS' determination of the complaint will be in writing and include COS' reasons for making the determination. Any Award COS makes will also be in writing. As an Award is based upon COS' determination or upon a Member's failure to comply with a Settlement Agreement, the Award may but does not need to include COS' reasons for making the determination.
90. A copy of the determination and any Award may be given to:
- (a) the Consumer;
  - (b) the Member;
  - (c) the Board; and
  - (d) if the Member is a member of a Recognised Industry Body, (subject to removal from the document of any identification of the Consumer) to that body's Secretariat or public officer, or in the case of a Member who is subject to the rules of a Recognised Disciplinary Process, to that body's proper officer.

### **Publicity**

91. COS may publish a non-identifying copy of COS' determination of the complaint on the Company's web site.

## **Costs of the COS determination**

### **Who pays the costs of COS' determination?**

92. COS may award costs against a Member if a Hearing has been held in relation to the complaint because that Member specifically asked for it. In that case, the Member will be required to meet the Consumer's reasonable costs of attending the Hearing including reasonable travel and accommodation costs. See also Rule 113 about legal and other representation.

## **Giving effect to the resolution of a complaint and enforcement**

### **What else can COS do?**

93. COS can make any order COS thinks appropriate to give full effect to the resolution of a complaint including but not limited to orders about giving effect COS' determination or Award.

### **What COS does if a party doesn't comply with a COS requirement within the period specified**

94. If a party does not comply with a COS requirement within the period specified:
- (a) COS may give the party whatever further period COS thinks appropriate to comply; and
  - (b) if the Member still does not comply, COS may proceed to determine the complaint on the basis of the information and documents then available; or
  - (c) if the Consumer still does not comply, declare the complaint closed.
95. For the purposes of these Rules, the expression “COS requirement” refers to any requirement imposed by COS or these Rules on the Consumer or the Member, including the requirement to respond to COS within a certain time or the requirement to provide COS with such information and documents that may be requested by COS in relation to the complaint.

### **How does COS enforce an Award?**

96. If a Member fails to comply with an Award after COS gives the Member 28 days written notice to comply with it, then COS can take whatever action it thinks is necessary to enforce the Award including but not limited to the following things:
- (a) take action to suspend or cancel the Member’s membership of the Company;
  - (b) give written notice of the fact, if the Member is a member of the MFAA, to the MFAA National Secretariat, or if the Member is a member of a Recognised Industry Body, to that body's Secretariat or public officer, or in the case of a Member who is subject to the rules of a Recognised Disciplinary Process, to that body's proper officer;
  - (c) bring legal proceedings against the Member for recovery of the amount awarded or for the making of Court orders in terms of the Award;
  - (d) bring legal proceedings for specific performance of the Member's agreement to abide by the Company's Constitution and these Rules including but not limited to the Member's obligation to comply with the Award;
  - (e) take such other action as COS thinks appropriate to secure compliance with the Member's obligations under the Company's Constitution and these Rules.

## **Important issues**

### **When might COS not deal with the complaint even if it is covered by COS?**

97. In some circumstances COS will not deal with the complaint even if it otherwise is covered by COS. This can happen if the Member gives an Objection Notice to COS because the Member believes:
  - (a) that the complaint involves or may involve an issue which could have important consequences for the Member's business, or the Credit Industry generally; or
  - (b) that the complaint raises an important or novel point of law.
98. A Member who gives an Objection Notice must give COS written reasons for doing so.
99. COS may refuse to accept an Objection Notice if and only if, having regard to the Member's reasons and all other relevant circumstances, COS is reasonably satisfied that the Member has given the Objection Notice to COS for an improper purpose. COS will give the Member written notice of the refusal and COS will continue to deal with the Consumer's complaint not earlier than 14 days after the date COS gives notice of the refusal to the Member.
100. The Member must commence proceedings in a Court or Tribunal in Australia to have the issue determined within six months of giving the Objection Notice to COS. The Member must also give an undertaking to COS and the Consumer to pay the Consumer's costs and disbursements (on a solicitor and client basis) of the proceedings and any subsequent appeal that may be commenced by the Member.
101. If the Member does not commence these proceedings within six months from giving the Objection Notice to COS, then COS will deal with the complaint as if the Objection Notice had not been given.
102. The Member is not required to pay the Consumer's costs if it is the Consumer that institutes a subsequent appeal.
103. Except as permitted by Rules 97 to 102, once COS records a written complaint from a Consumer as received under Rule 56, a Member cannot commence legal proceedings against the Consumer in relation to the subject matter of the complaint.
104. However, subject to Rule 105 but otherwise despite any other provision of these Rules, the Board may in its absolute discretion direct that a Member may commence legal proceedings against the Consumer in relation to the subject matter of the complaint on or after the date on which the written complaint is received by COS if the Board is satisfied that to not allow this would be unfair to the Member.

105. The direction of the Board under Rule 104 is final and binding on the Consumer and the Member.

## **Miscellaneous matters**

### **Joining other parties**

106. If COS believes that:
- (a) it would not unfairly prejudice the Consumer or the Member; and
  - (b) it would lead to a more efficient and effective resolution of the complaint;
- COS may allow or require another Member (called the Third Party Member) to be joined as a party to the complaint.
107. COS may impose terms and conditions on joining a Third Party Member. For example, COS may require the Member the Consumer has complained about to pay costs or to provide security for future costs.
108. Once a Third Party Member has been joined in the complaint, COS may give directions about how the complaint will be dealt with.
109. A Third Party Member has all the rights and duties under these Rules as if that Third Party Member were the Member as referred to in the Rules.
110. Where a Third Party Member has been joined, these Rules are to be read to include that Third Party Member with appropriate changes being made.

### **Do the parties have to be legally represented?**

111. Neither party has to have legal or other representation (“Representation”) whilst COS deals with the Consumer’s complaint. Either party can choose to have Representation at their own cost. However, if COS convenes a Hearing or a Conciliation Conference the parties need to ask COS to allow Representation at the Hearing or Conciliation Conference. It will be up to COS to decide at its discretion if Representation can or should be allowed and on what basis. COS will consider what is procedurally fair to both the Consumer and the Member. Any party who has Representation will have to pay all their own costs of any Representation COS permits the party to have at a Hearing or Conciliation Conference. See also Rule 92 about costs.

### **Will anything a party does or says prejudice any legal proceedings they might bring later?**

112. All statements the Consumer or Member makes and information or documents they provide to COS are on a “without prejudice” basis. This means that anything said or

done or information as provided to COS during the COS process can not be used in later legal proceedings.

113. Any information obtained by COS during the COS process must not be disclosed by:

- (a) the Consumer;
- (b) the Member;
- (c) the Board; or
- (d) COS;

to anyone else unless disclosure is required by law or required or permitted by these Rules or the Company's Constitution.

### **Confidentiality**

114. Any party to a complaint who believes that disclosure of any information or document to COS will place them in breach of a duty of confidentiality they owe to someone else may tell COS this. The party claiming confidentiality must use their best endeavours to obtain the consent of the person to whom the duty is owed to disclosure of 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 COS that the information or document be provided.

115. If COS receives any information or document from any party to a complaint with a request from that party that it be treated confidentially, COS will not disclose that information or document to any other party or to any other person except:

- (a) with the consent of the person supplying the information or document, or
- (b) as required by law.

116. COS will not use any confidential information or document to make a finding adverse to any party who has not had access to the confidential information or document.

117. COS will return a party's confidential document or information as soon practicable after a complaint is resolved or declared closed.

118. Before COS sends any confidential information or document to another forum as contemplated in Rule 34(q), COS will obtain the consent of the party claiming confidentiality.

119. Except where these Rules, the Company's Constitution or the law prohibits it, COS may at its discretion disclose the Consumer's complaint, the Member's response, the Consumer's reply and any information or document obtained by COS during the COS process to any COS employee, consultant, contractor or agent to the extent that is appropriate to do so to enable the person to fully and effectively carry out their powers, functions or duties.

120. Despite anything else in these Rules, any party to a complaint who receives from COS any document provided to COS by another party:

- (a) must use that document only for the purpose of dispute resolution in accordance with and as contemplated by the COS Rules; and
- (b) must not disclose the document to any person who is not the party who provided the document to COS without the prior written consent of COS which consent may be subject to such conditions as COS may in its absolute discretion consider appropriate;

and for the purposes of this Rule "disclose" includes communicating or divulging by any means whether written, electronic or oral or otherwise including copying by any means the whole or any part of the document.

### **Exemptions from these Rules**

121. COS may of its own volition or on the application of a party at any time and from time to time at its discretion and on whatever conditions it sees fit to impose, exempt a party from any one or more of these Rules. Before COS grants any exemption, it must satisfy itself that doing so:

- (a) is necessary to ensure the efficient and effective resolution of the complaint; and
- (b) would not be unfair to or impose an unreasonable burden or disadvantage on any party.

### **Extensions of time**

122. COS may of its own volition or on the application of a party at its discretion and on whatever conditions it sees fit to impose extend any time for compliance with any matter under these Rules. Before COS grants any extension of time, it must satisfy itself that doing so would not be unfair to or impose an unreasonable burden or disadvantage on any party.

### **Declaring the complaint closed**

123. COS may at any time declare the Consumer's complaint closed in any of the following cases:

- (a) the complaint is or becomes one not covered by COS by reason of Rule 34;
- (b) if the complaint is withdrawn;
- (c) if COS deems the complaint withdrawn by reason of the Consumer's failure to respond to COS communications within the timeframes COS sets;
- (d) COS determines that the complaint has not been made out

- (e) if COS is unable to locate the Member despite its reasonable efforts to do so;
- (f) if the Member is at the time that COS records a complaint as received or becomes during the course of the COS process an insolvent under administration or an externally-administered body corporate as those expressions are defined in the Corporations Act 2001.

### **Board directions**

124. The Board may from time to time issue Board Directions:
- (a) dealing with administrative and procedural matters to ensure that complaints are resolved efficiently and effectively
  - (b) dealing with the Board's reporting obligations
  - (c) dealing with the expulsion, suspension or reinstatement of a Member
  - (d) dealing with other matters raised in relation to the Board's powers and functions under the Company's Constitution
  - (e) to deal with changes to the law, Government regulation, and the Credit Industry generally.
125. All Board Directions are binding on the Consumer, the Member, COS and all other parties to a complaint to COS.
126. To the extent to which a Board Direction applies to the Consumer or the Member or the subject of the complaint, the Board Direction must in the manner determined by the Board be given to the Consumer and the Member.

### **Are previous COS decisions binding on COS?**

127. No COS decision creates or is to be taken as creating a precedent binding on COS in dealing with any other complaint.
128. A COS decision includes but is not limited to a COS determination and an Award.
129. If COS thinks it is appropriate, COS will send the Consumer and the Member a copy of or extract from a COS policy that COS thinks is relevant to their complaint.

### **What COS decisions are final?**

130. Every COS decision and every Board Direction is final and binding on a Member and may be reviewed or reopened only in the circumstances allowed in these Rules.
131. Subject always to these Rules, the Consumer is expected to comply with every COS decision and every Board Direction insofar as applicable to the Consumer.

132. A COS determination in respect of which both the Consumer and the Member have signed an acceptance and a COS Award are each binding on the Consumer and the Member. The Consumer is at liberty at all times to reject any other COS decision or a Board Direction and pursue other remedies in relation to the subject matter of the complaint in the courts or any another forum. If the Consumer does this, COS can declare the complaint closed and no COS decision or Board Direction will have any force or effect against the Member in relation to the Consumer's complaint.
133. A COS decision includes but is not limited to a COS determination.
134. If upon COS' own motion or upon application by a party within 28 days after the date on which a determination or Award was sent to that party, COS is satisfied that in relation to that determination or Award:
- (a) there is a clerical mistake;
  - (b) there is an error from an accidental slip or omission;
  - (c) there is a material miscalculation of figures or a material mistake in the description of any person, thing or matter;
  - (d) there is a defect in form; or
  - (e) the terms of the determination or Award do not reflect COS' actual intentions;
- COS may:
- (f) make whatever amendments to the determination or Award it thinks appropriate;
  - (g) re-issue the determination or Award, and
  - (h) give such directions as it thinks appropriate (including directions about times for compliance) in connection with the determination or Award.
135. A Member who institutes legal proceedings to challenge any COS decision or a Board Direction must comply with all the following requirements:
- (a) the legal proceedings must be instituted within 28 days after COS sends the Member the determination or Award, the other COS decision, or the Board Direction; and
  - (b) as a condition of commencing legal proceedings the Member must pay on a solicitor and client basis the legal costs of, and must pay the disbursements incurred by, each of the Member concerned, the Company and the Consumer in relation to the legal proceedings and any appeal; and
  - (c) if the Company so specifies, the Member must furnish security for costs and disbursements in relation to the legal proceedings and any appeal as the Company reasonably requires.

A Member who fails to institute legal proceedings within 28 days or otherwise fails to satisfy all the requirements of this Rule forever waives its rights to institute legal proceedings to challenge any COS decision or a Board Direction.

### **Giving or sending documents, notices, etc.**

136. For the purposes of these Rules, COS may give or send any information or document (including but not limited to any COS decision, Board Direction, determination, Award, notice, or correspondence) to any person by whatever means and in whatever manner COS regards as appropriate to bring the information or document to the attention of that person.

### **Giving COS documents to certain bodies**

137. Where:

- (a) a Determination or Award has been made; and
- (b) if the Member concerned is a member of a Recognised Industry Body, the Determination or Award has been given to that body's Secretariat or public officer, or if the Member is subject to the rules of a Recognised Disciplinary Process, the Determination or Award has been given to that body's proper officer; and
- (c) that Secretariat, public officer or proper officer (as the case may be) has requested in writing that documents or copies of documents held by COS in relation to the complaint be given to the body concerned;

the Board may cause the whole or part of all or any of the documents requested, or copies of them, to be given to the body concerned.

138. The Board will only give a document under Rule 137 where it is satisfied that the whole or part of the document to be given to the body concerned is not subject to legal professional or other legally recognised head of privilege.

### **Effect of Member's cessation of membership (including by resignation)**

139. If the membership of a Member that is or has been the subject of a complaint ceases in accordance with the Company's Constitution (for the avoidance of doubt, including by way of resignation of membership or suspension from membership), that cessation of membership:
- (a) does not preclude or restrict in any manner whatsoever COS exercising its powers under these Rules to deal with a complaint received by it before the date on which the Member's cessation of membership took effect in accordance with the Company's Constitution and to require the Member to comply fully with the Member's obligations under these Rules in respect of that complaint;

- (b) does not prejudice or diminish in any manner whatsoever the Member's obligations under these Rules in respect of a complaint received by COS before the date on which the Member's cessation of membership took effect in accordance with the Company's Constitution;
- (c) does not preclude or restrict in any manner whatsoever the making of an Award by COS or the due enforcement by the Company of any Award made by COS as regards that Member pursuant to these Rules in respect of a complaint received by COS before the date on which the Member's cessation of membership took effect in accordance with the Company's Constitution.

### **Reporting to ASIC**

140. Subject to the Company's Constitution, in carrying out its functions as an ASIC approved EDR scheme, COS collects and records such information as it thinks necessary for it to report to ASIC in accordance with ASIC's policy requirements. ASIC's policies impose significant reporting obligations on COS.

### **Publicising COS**

141. The Board and all Members must ensure that COS is appropriately and effectively publicised. For example, COS is publicised on the Company's web site. Also, copies of the COS Rules are to be available on request from a Member.

### **Dictionary**

142. Certain words and phrases have the special meanings set out below:

"Act"

the Corporations Act 2001 of the Commonwealth

"Aggregator"

an intermediary who operates as such in the Credit Industry and includes an intermediary who channels applications for credit to Credit Providers with whom it has agency arrangements on behalf of other intermediaries who do not have such arrangements with Credit Providers and who disburses commission received by the Aggregator from Credit Providers to the relevant intermediary in accordance with prior written arrangements

"ASIC"

Australian Securities and Investments Commission

"Award"

the binding determination made by COS

"Board"

the board of directors of the Company

"Board Direction"

a direction issued by the Board under the Company's Constitution

“Borrower”

a person granted Credit

“Company”

Credit Ombudsman Service Limited

"Complaint Summary"

a summary of the Consumer's complaint and the Member's response in whatever manner and form COS thinks appropriate

“Conciliation and Investigation Phase”

the conciliation and investigation phase of the COS process

“Consumer”

any member of the public whether a natural person (ie. an individual) or Small Business but does not include:

- (a) a Member; or
- (b) a natural person that COS determines is not a Consumer for the purposes of COS because of the assets, wealth, or both, that that person has, holds or controls

“Consumer Representative”

a director of the Company appointed to that office under the Company's Constitution

“COS”

the Credit Ombudsman Service and, unless the context indicates the contrary, includes the Credit Ombudsman

"COS process"

COS' process for dealing with a complaint under these Rules

"Company's web site"

the web site maintained by the Company at [www.creditombudsman.com.au](http://www.creditombudsman.com.au)

“Credit”

any form of credit or financial accommodation

“Credit Industry”

the marketplace for Credit generally including the various individuals, firms and corporations dealing with Credit whether as Mortgage Brokers, Mortgage Managers, Aggregators, Credit Providers, Finance Brokers or otherwise

“Credit Ombudsman”

see Rules 19 to 21

“Credit Provider”

a person who provides any form of Credit to another person

"determination"

COS' determination (or decision about the merits) of a complaint

“Determination Phase”

the phase during which the Credit Ombudsman makes a determination and, as required, an Award

“Direct Loss”

direct loss suffered by the complainant including but not limited to costs incurred in having to obtain Credit or alternative Credit

"EDR"

External Dispute Resolution - a process for resolving complaints without resorting to legal proceedings

“Finance Broker”

a person who operates as such in the Credit Industry and includes a person who negotiates or arranges any form of Credit for another person

“Lender”

a Credit Provider

“Loan”

the provision of Credit

“Loan Guarantor”

a person who guarantees a Borrower’s obligations to a Credit Provider

"loss"

see Rules 31 and 32

“Member”

a person, firm or corporation which is a member of the Company

“Member Representative”

a director of the Company appointed to that office under the Company’s Constitution

“Member Services”

the services provided by a Member who is a:

- Mortgage Broker, Finance Broker, Aggregator, or other person who (whether as principal, employee, agent or independent contractor), as an intermediary, negotiates or arranges Credit for or on behalf of a Consumer, or
- Credit Provider or Mortgage Manager,

and includes financial products and financial services (as those expressions are defined in the Act) provided, made available, suggested or proposed by a Member (and whether or not in compliance with the law) or otherwise incidental to the Credit negotiated, arranged, provided or managed by the Member

“MFAA”

the Mortgage and Finance Association of Australia (formerly the Mortgage Industry Association of Australia)

“MFAA Code of Practice”

the Code of Practice promulgated by the MFAA as in force from time to time

“MFAA Disciplinary Rules”

the Disciplinary Rules promulgated by MFAA and in operation from time to time

“MFAA Tribunal”

the tribunal established by MFAA pursuant to the Constitution of MFAA and the MFAA Disciplinary Rules

“Mortgage Broker”

a person who operates as such in the Credit Industry and includes a person who negotiates or arranges any form of Credit for another person

“Mortgage Manager”

a person who manages mortgages on behalf of a Credit Provider

“Objection Notice”

a notice given by a Member under Rule 97

“Recognised Code of Practice”

a code of good practice in the Credit Industry approved as such by the Board

“Recognised Disciplinary Process”

a body, tribunal or process that has the power to discipline its members or other persons subject to the rules of that body, tribunal or process approved as such by the Board

“Recognised Industry Body”

a body whether incorporated or unincorporated that represents or purports to represent persons carrying on Credit related business in the Credit Industry approved as such by the Board

“Rules” or “these Rules”

the COS Rules - and includes as appropriate any Practice Note, By-law or other rule made by the Board under the Company's Constitution

“Settlement Agreement”

the agreement for withdrawing or resolving the Consumer's complaint reached between the Consumer and the Member in whatever form COS regards as appropriate to the circumstances

“Small business”

has the meaning given to that expression in Part 7.1 of the Corporations Act 2001 of the Commonwealth

“State”

includes any territory of the Commonwealth of Australia

“Third Party Member”

a Member joined as a party to the Consumer's complaint by COS under Rules 106 to 110.

143. Unless the context suggests otherwise:
- (a) the singular includes the plural and vice versa
  - (b) any reference to a party to a complaint includes that party's executors, administrators or permitted assigns

- (c) a reference to one gender includes every gender
  - (d) headings are for reference purposes only
  - (e) references to any Act of Parliament or other law include regulations and other instruments made under it and to consolidations, re-enactments, amendments or replacements of it.
144. In calculating compliance with a time period by reference to a number of "days", include weekends but disregard any public holiday.
145. Whenever these Rules refer to information, they include information in any form and from any source.

**Footnote**

Note: Credit Ombudsman Service Rules - Third Edition: 21 February 2007