

**CREDIT OMBUDSMAN SERVICE LIMITED**

**Guidelines to the Rules of the  
Credit Ombudsman Service**

**4th Edition**

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# Guidelines to the Rules of the Credit Ombudsman Service

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# **Guidelines to the Rules of the Credit Ombudsman Service**

## **1. About the Credit Ombudsman Service Limited**

- 1.1 Credit Ombudsman Service Limited (COSL) operates the Credit Ombudsman Service, an external dispute resolution scheme (EDR scheme) approved by the Australian Securities and Investments Commission (ASIC) under its Regulatory Guide 139.
- 1.2 COSL provides Consumers with an alternative to legal proceedings for the resolution of their complaints against members of COSL (Members). COSL's dispute resolution services are free to a Complainant.
- 1.3 COSL deals with complaints against Members under rules called the Credit Ombudsman Service Limited Rules (the Rules or these Rules or COSL Rules). The Rules are published on the COSL web site at [www.cosl.com.au](http://www.cosl.com.au).

## **2. What does the Credit Ombudsman do? - Rule 4**

- 2.1 The Credit Ombudsman is COSL's decision maker and the person who can make:
  - (a) any decision allowed for under the Rules, including a review of whether a complaint is within COSL's jurisdiction;
  - (b) any order allowed for under the Rules;
  - (c) a Determination; and
  - (d) a binding Award.
- 2.2 The Credit Ombudsman:
  - (a) has the powers, functions and duties conferred by COSL's Constitution and the Rules, and as conferred and delegated by the Board from time to time;
  - (b) has overall management responsibility for COSL; and
  - (c) establishes systems and procedures to ensure COSL's efficient and effective operations in accordance with the Rules.

## **3. About these Guidelines**

- 3.1 These Guidelines explain:
  - (a) how the Rules apply to a complaint; and
  - (b) the policies COSL applies in exercising its discretions under the Rules.
- 3.2 The Guidelines need to be read with the Rules and, if there is any inconsistency, the Rules override these Guidelines.
- 3.3 Many words and phrases used in the Rules and in these Guidelines have a special meaning. These are set out in the Dictionary at Rule 45 of the Rules.

## **4. Trying to resolve the complaint directly with the Member – Rule 13**

- 4.1 Before referring their complaint to COSL, the Complainant must first try to resolve their complaint directly with the Member concerned.
- 4.2 Rule 13.2 of the Rules provides:

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*“COSL will only deal with a complaint if the Complainant has first tried to resolve the complaint with the Member using the Member's IDR process, unless:*

- (a) COSL considers that the complaint or any aspect of the complaint should be dealt with urgently; or*
- (b) it does not appear that the complaint or an aspect of the complaint is being addressed or addressed adequately by the Member; or*
- (c) COSL reasonably considers that it is appropriate in the particular circumstances not to require the Complainant to first try to resolve the complaint or an aspect of the complaint with the Member,*

*in which case, COSL will accept and deal with the complaint, whether or not a final response has been provided by the Member in relation to the complaint or an aspect of the complaint.”*

- 4.3 Rule 13.2 imposes an obligation on COSL to satisfy itself that the Complainant has made a genuine attempt to resolve the complaint directly with the Member concerned.
- 4.4 The Rules also require every Member (except a credit representative) to have IDR procedures in place which comply with standards and requirements made or approved by ASIC from time to time (Rule 13.1). The IDR procedures of a Member who is a credit representative may be the IDR procedures of its credit licensee.
- 4.5 However, neither the Rules nor the Member's IDR Procedures require face-to-face dealing between the Complainant and the Member.
- 4.6 The Complainant must make a genuine attempt to resolve their complaint directly with the Member by, for example, providing the Member with all relevant information and documents and written statements that may properly and reasonably be requested by the Member in attempting to resolve the complaint.
- 4.7 If the Complainant wants to make a complaint about two or more Members, the Complainant must first try to resolve their complaint with each of the Members through their respective IDR processes (Rule 14.4).

### **5. How will COSL work out if the Complainant has attempted to resolve their complaint?**

- 5.1 When COSL receives a complaint, it will ask the Complainant to confirm that they have tried to resolve their complaint directly with the Member. COSL will also contact the Member concerned to determine whether or not the Complainant has tried to resolve their complaint directly with that Member.
- 5.2 The complaint will not be dealt with by COSL until:
  - (a) the Complainant has confirmed that they have tried to resolve their complaint directly with the Member; or
  - (b) other circumstances indicate that the Complainant has tried to resolve their complaint directly with the Member.
- 5.3 However, if at any time COSL is satisfied that the Complainant has genuinely attempted to resolve their complaint directly with the Member, but the Member has failed to respond to the Complainant, COSL may:

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- (a) decide that the Complainant has satisfied the requirement for preliminary IDR; and
  - (b) if the Complainant has not already sent a written complaint to COSL, invite the Complainant to do so.
- 5.4 Without limiting the circumstances in which COSL may decide that the Complainant has tried to resolve the matter with the Member, COSL may consider whether:
- (a) the Complainant contacted the Member in relation to their complaint (in person, by telephone or in writing);
  - (b) the Member failed to acknowledge the Complainant's complaint - for example, did the Member return the Complainant's phone calls within a reasonable time?
  - (c) the Member did not respond to the Complainant's complaint;
  - (d) more than 45 days have passed since the Complainant lodged their complaint with the Member (or more than 21 days where the complaint involves a default notice or a financial hardship application); or
  - (e) in all the circumstances, the Complainant's actions were a genuine attempt to tell the Member about the complaint or that the Complainant wanted to make a complaint.
- 5.5 A Complainant is considered to have contacted the Member or lodged a complaint if the complaint is received anywhere within the Member's business.
- 5.6 If COSL receives a written complaint from the Complainant where it would appear that the Complainant has not yet contacted the Member, COSL will normally send the written complaint to the Member to facilitate resolution of the Complainant's complaint through the Member's IDR procedures.
- 6. What if the Member says the Complainant has not attempted to resolve the complaint with the Member?**
- 6.1 In order to avoid delays in dealing with a complaint, any Member who proposes to dispute the fact that the Complainant has tried to resolve the complaint directly with the Member must do so by written notice to COSL within 7 days of the Member being notified of the Complainant's complaint ("IDR Requirement Notice"). Where appropriate, COSL will refer the Member's IDR Requirement Notice to the Complainant for comment and the Complainant's response, if any, must be received by COSL within 7 days.
- 6.2 COSL will make a decision on the IDR Requirement Notice as soon as practicable.
- 6.3 A finding by COSL that the Complainant has tried to resolve their complaint directly with the Member, notwithstanding the Member's IDR Requirement Notice, is without prejudice to the Member's rights under the Rules.
- 6.4 If COSL is satisfied that the Complainant has not tried to resolve their complaint directly with the Member, COSL will:
- (a) tell the Complainant this;
  - (b) invite the Complainant to try to resolve their complaint directly with the Member;
  - (c) if appropriate, tell the Complainant what needs to be done to have their complaint dealt with under the Member's IDR procedures; and

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- (d) defer taking any action in relation to the complaint other than to record the fact of its receipt and to retain on file correspondence and documents received from both the Complainant and the Member in relation to the matter.

### 7. When does the IDR stage end?

7.1 The Complainant may make a complaint to COSL (or the Member may refer the complaint to COSL with the Complainant's consent), if:

- (a) the Member does not give the Complainant a final response to their complaint within 45 days; or
- (b) where a default notice has been issued to the Complainant, the Member does not give the Complainant a final response to their complaint within 21 days;
- (c) where the Complainant is in financial hardship, the Member does not agree to a financial hardship application within 21 days of the application (however, COSL may allow the Member to deal with the complaint within its IDR procedures for a further 14 days); or
- (d) the Member gives a final response but the Complainant considers that the response does not satisfactorily resolve their complaint.

7.2 COSL regards the Member as having given the Complainant a final response if the Member:

- (a) informs the Complainant that the Member is prepared to offer the Complainant redress or partial redress, with or without acknowledging liability; or
- (b) informs the Complainant that the Member rejects the complaint, wholly or partially; or
- (c) otherwise informs the Complainant of the final outcome of their complaint at IDR.

7.3 Where a Member has multi-tiered IDR procedures (that is, IDR procedures that include internal appeals or escalation) the 45 day or 21 day timeframe (as the case may be) begins when the Complainant first contacted the Member about their complaint. A Complainant may ask COSL to deal with the complaint at the end of the 45 or 21 days.

7.4 If the Member wishes to continue trying to resolve the complaint within its IDR procedures even though 45 or 21 days (as the case may be) has passed or they have already provided a final response, COSL may (but is not required to) refrain from commencing the COSL process if:

- (a) the Complainant consents to their complaint remaining with the Member's IDR procedures;
- (b) the Complainant has raised new issues which the Member has not had the opportunity to deal with;
- (c) the Member has reasonably requested appropriate information from the Complainant in their attempt to resolve the complaint, but the Complainant has not made a genuine attempt to provide the Member with the information; or
- (d) where the Member is waiting for relevant information from a third party and COSL considers that the resulting delay is reasonable; or
- (e) where the records the Member needs to respond to the complaint are old and difficult to retrieve.

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- 7.5 COSL may at its discretion by-pass the Member's IDR process and deal with the complaint if the Member:
- (a) ceases to carry on business;
  - (b) ceases to hold a relevant licence; or
  - (c) becomes insolvent under administration.

### **8. COSL Procedures**

- 8.1 The procedures COSL follows in dealing with complaints are detailed in a separate document called "Complaint Procedure Handbook" which is published on COSL's website at [www.cosl.com.au](http://www.cosl.com.au).

### **9. Procedural Fairness**

- 9.1 COSL's procedures are designed to give both the Complainant and the Member (party *or* parties) a reasonable opportunity to present their case before COSL makes any decision.

- 9.2 This means that COSL:

- (a) keeps each party informed of the matters it is considering;
- (b) allows each party a reasonable time to respond to those matters; and
- (c) discloses to each party the substance of the information it relies on in making any decision and gives the party affected the opportunity to respond to that information.

- 9.3 COSL may at its discretion give all relevant information and documents it receives to the other parties to the complaint. However, COSL does not need to give the other parties any information or document that it receives and relies on provided it is identified in COSL's written reasons and is made available to the other parties when requested.

- 9.4 If COSL receives any information or document from any party to a complaint with a request from that party that it be treated confidentially, COSL 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 or required or permitted by these Rules or COSL's Constitution.

- 9.5 COSL will not use or rely on any confidential information or document provided by one party to make a finding adverse to any other party, unless it:

- (a) reasonably considers that the information or document is genuine and credible;
- (b) informs any party against whom an adverse finding may be made that it is in receipt of the confidential information or document;
- (c) identifies the confidential information or document to any party against whom an adverse finding may be made; and
- (d) if appropriate, summarises the confidential information or the relevant contents of the document to any party against whom an adverse finding may be made.

### **10. COSL's approach to dispute resolution**

- 10.1 COSL adopts an investigative approach to dispute resolution. Therefore COSL:

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- (a) actively seeks out relevant information by asking questions of the parties; and
  - (b) requires the parties to provide relevant information to COSL.
- 10.2 COSL expects parties to act in good faith in presenting all information that is relevant to resolving the complaint. A party is required to present all relevant information to COSL even if that information:
- (a) is not; or
  - (b) the party believes or suspects that the information is not, favourable to their case.
- 10.3 Parties are required to comply with all reasonable requests from COSL to provide information. This includes taking reasonable steps to obtain information from a third party if required.

### **Example**

*COSL regards a complaint about the charging of 'break costs' on the early termination of a fixed rate loan as one that requires a rigorous process of information gathering.*

*Often, a complaint against a COSL Member who is a broker (as opposed to a lender) about break costs will not fall within COSL's jurisdiction or will not be proved because:*

- *break costs are determined by the lender, and the broker has no control over that process; and*
- *full disclosure would have been made to the Complainant in the loan contract.*

*Despite this, COSL may deal with an allegation that the broker misrepresented to the Complainant the operation and effect of the break costs formula set out in the loan contract or that the broker had a duty in the particular circumstances to inform the Complainant that break costs may be incurred on the discharge or refinance of the loan.*

*Where COSL receives a complaint about break costs, it will initially seek to establish whether or not the complaint is within its jurisdiction. However, a complaint that initially may appear to be within COSL's jurisdiction may, on closer examination or after receiving further information from the parties, be found to fall outside COSL's jurisdiction. Conversely, a complaint that initially on its face was not within COSL's jurisdiction may, on further investigation, be identified as one coming within COSL's jurisdiction.*

*Therefore, on receipt of a complaint about break costs, COSL will inform the Complainant that their complaint will be accepted until the matter of jurisdiction can be finally determined.*

*COSL may request the following information from each party:*

- *details of the advice, if any, the broker provided to the Complainant about the consequences of early termination of their fixed rate loan;*
- *if the advice was in writing, a copy of the advice;*

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- *if the advice was not in writing, a copy of any written record (e.g. file note) of the discussions about the loan or break costs;*
- *any documents which the broker showed or handed to the Complainant which the broker said related to the consequences of early termination of a fixed rate loan;*
- *whether the Complainant previously had a fixed rate loan and, if so, whether the Complainant previously paid an amount for the early termination of the fixed rate loan;*
- *whether the Complainant had a reasonable opportunity to obtain advice about break costs;*
- *whether the broker referred the Complainant to the lender (the lender is the only person who is able to provide the actual payout figure);*
- *whether the broker recommended that the Complainant seek independent advice on the consequences of an early termination of a fixed rate loan, particularly if the lender did not;*
- *details of the information the Complainant provided the broker about the purpose of the loan and/or the loan features the Complainant wanted; and*
- *details of what, if anything, the Complainant would have done differently had they known about the actual consequences of the early termination of a fixed rate loan given their particular circumstances.*

### 11. What evidence does COSL have regard to? – Rules 45.4

- 11.1 COSL is not bound by any legal rules of evidence. It tries to resolve the complaint with as little formality and technicality as possible but consistent with achieving procedural fairness as regards both the Complainant and the Member.
- 11.2 The procedures followed by COSL are not the same as those of a Court. COSL does not have the power to take any evidence on oath nor to cross-examine any of the parties. Therefore, in practice, COSL deals with *information* rather than formal *evidence* which is supplied by the parties.
- 11.3 COSL is entitled to draw inferences and conclusions based on information supplied by the parties. Information supplied by the parties is assessed on the balance of probabilities.
- 11.4 If a party presents a Statutory Declaration or other document purporting to be sworn testimony, COSL may give some additional weight to the matters set out in that document. However COSL is cautious of such information because it is not in a position to impose any penalty on a person who provides a false Statutory Declaration and cannot test the information provided by examining the person under oath.

#### **Example**

*The Member listed a default on the Complainant's credit reference file. The Complainant claims that the Member did not give him written notice advising him of the overdue payment and requesting payment of the outstanding amount. The Complainant wants the default removed.*

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*In these situations, COSL will require the Member to establish that, on the balance of probabilities, a written notice was sent to the Complainant's last known address.*

*COSL may request that the Member provide the following:*

- *a copy of the notice that was sent to the Complainant;*
- *if the Member has not kept a copy of the notice, a copy of the template and information on how the relevant fields were completed; and*
- *a copy of any records the Member has showing that the notice was actually sent and the date it was sent.*

*If the Complainant claims that the notice was sent to a previous or incorrect address, COSL may request that the Member to provide COSL it with a copy of the Member's records showing the last known address of the Complainant.*

*COSL may also request that the Complainant provide COSL with a copy of any written correspondence the Complainant sent to the Member informing the Member of the Complainant's new address. If the Complainant does not have a copy of any written correspondence, COSL may request that the Complainant provide COSL with details of how he informed the Member of his new address, including:*

- *the date he contacted the Member;*
- *the name of the person he had dealt with;*
- *what information he provided the Member; and*
- *any records he had made.*

### **12. Status of previous COSL decisions - Rule 38.1 and 38.2**

12.1 No COSL decision creates or should be taken as creating a binding precedent when it deals with another complaint. However, COSL aims to be consistent in the way it deals with particular types of complaints.

### **13. Enforcement action – Rule 17**

13.1 Enforcement action is defined in Rule 45 as:

- (a) legal proceedings in a court to recover the alleged debt or take possession of the asset securing the debt; or
- (b) any action (other than legal proceedings) to recover the alleged debt or take possession of the asset securing the debt,

but does not include issuing a statutory notice of default to the Complainant.

13.2 Enforcement action taken on behalf of a Member is treated as enforcement action taken by the Member.

13.3 Under Rule 17.2, once COSL records a complaint and for as long as COSL deals with the complaint:

- (a) the Member must not initiate enforcement action against the Complainant in relation to any aspect of the subject matter of the complaint;
- (b) where the Member commenced such enforcement action before the complaint was recorded by COSL, the Member must not continue the enforcement action and, in particular, must not:

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- (i) seek judgment in the legal proceedings; or
  - (ii) where default judgment has been entered, seek to enforce the default judgment;
- (c) the Member must not sell the debt the subject of the complaint to a debt buy-out business or otherwise assign any right to recover the debt; or
- (d) if it has not already listed a default, the Member must not list a default on the Complainant's credit reference file.
- 13.4 If the Member has commenced enforcement action against the Complainant (relating to an aspect of the subject matter of the complaint) before the complaint was recorded by COSL, in appropriate circumstances, the Member must:
- (a) stay the proceedings;
  - (b) where a hearing date has been set, adjourn the hearing date from time to time until the complaint is closed; or
  - (c) where a stay or adjournment is not possible, discontinue the proceedings, at no cost to the Complainant.
- 13.5 However, the Member is not prevented from complying with an interlocutory order as long as complying with the order does not require further action from the Complainant in the proceedings. For example, a Member is not prevented from complying with an order to file an affidavit.
- 13.6 Where the proceedings are discontinued, the Complainant must not make an application to the Court for payment of the legal costs incurred in the legal proceedings. If the Complainant does not agree to this, the complaint will be closed. This does not prevent the Complainant from claiming the legal costs incurred as part of their complaint.
- 13.7 Where judgment has been entered before the complaint was recorded by COSL, COSL will not ask a Member to:
- (a) withdraw an instruction which has already been given to a sheriff to enforce a judgment; or
  - (b) suspend the sale of the security when the Member has already entered into a contract with a third party for the sale of the security.
- 13.8 If the Member initiates, or continues with, enforcement action despite a complaint being recorded by COSL, COSL may require the Member to:
- (a) withdraw any legal proceedings commenced in a Court;
  - (b) return possession of any assets the Member has taken possession of after the complaint was received by COSL;
  - (c) ask the Court to set aside any judgment entered into after the complaint was received by COSL;
  - (d) re-purchase any debt sold after the complaint was received by COSL;
  - (e) remove any defaults listed on the Complainant's credit reference file after the complaint was received by COSL; or
  - (f) reverse any legal or other enforcement costs charged to the Complainant in relation to the above.

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13.9 If a Member fails to do so, the Credit Ombudsman may report the matter to ASIC as a serious misconduct. The Board may also suspend or cancel the Member's membership of COSL.

13.10 COSL may at its discretion and on such terms as it may require, permit the Member to:

- (a) issue proceedings where the relevant limitation period for the proceedings will shortly expire, and then only to the minimum extent necessary to preserve the Member's legal rights;
- (b) exercise any rights it might have to freeze or otherwise preserve assets the subject of the complaint; or
- (c) continue or resume legal proceedings if the Complainant has taken a step in the legal proceedings beyond lodging a defence or a defence and counterclaim.

13.11 Where COSL permits a Member to issue proceedings:

- (a) COSL will continue to deal with the complaint;
- (b) the Member must not enter default judgment while the complaint is being dealt with by COSL; and
- (c) the Complainant must not be required to take any steps in relation to the proceedings.

13.12 The Complainant will not be considered to have taken a 'step' if they merely attended a directions hearing or agreed to consent orders of a procedural nature being filed in the proceedings.

13.13 If the Complainant has lodged a defence and counterclaim, the Complainant must stay or, if this is not possible, discontinue the counterclaim at the Complainant's own cost.

13.14 Once the complaint has been recorded by COSL, if the Complainant:

- (a) takes a step in the legal proceedings beyond lodging a defence or a defence and counterclaim; or
  - (b) does not stay or discontinue the counterclaim,
- COSL will consider that it is more appropriate that the complaint is dealt with in Court and the complaint will be closed (see Rule 10.1(p)).

13.15 If:

- (a) COSL determines it has no jurisdiction to deal with the complaint;
- (b) COSL considers that the complaint is not made out; or
- (c) the Complainant declines to accept COSL's determination of the complaint,

the Member may initiate or resume enforcement action if they allow the Complainant 21 days in which to file a defence or a defence and counterclaim (if they have not already done so).

### 14. Principles considered by COSL in determining a complaint - Rule 12.1

14.1 In dealing with a complaint, COSL considers these factors or "benchmarks":

- (a) relevant legal requirements or rights provided by law to the Complainant in relation to the subject matter of the complaint;
- (b) applicable codes of practice;

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- (c) good practice in the financial services industry; and
- (d) fairness in all the circumstances.

14.2 These benchmarks apply at all stages of COSL dealing with a complaint. This includes:

- (a) deciding the extent to which the complaint is covered by COSL;
- (b) assessing the merits of the complaint;
- (c) making recommendations to the parties about resolving it;
- (d) making an expedited ruling on the merits of the complaint under Rule 21;
- (e) making a Ruling by the Credit Ombudsman under Rule 6.2;
- (f) making a Determination;
- (g) making an order; and
- (h) making an Award.

### **15. Good Industry Practice – Rule 12.3**

15.1 In considering what is good practice in the financial services industry, COSL:

- (a) may consult within the financial services industry;
- (b) seek, but is not bound by, advice from such persons (including but not limited to those in the financial services industry) COSL regards as suitably qualified to give that advice; or
- (c) has regard to an applicable code of practice or industry or regulatory guideline or protocol which:
  - (i) has application in the industry in which the Member operates; and
  - (ii) COSL reasonably considers reflects good industry practice, even if the Member has not subscribed to it.

15.2 COSL may at its discretion obtain expert advice on matters of a technical nature that arise in relation to any complaint.

15.3 When COSL asks for external advice, COSL doesn't reveal the identity of the parties unless:

- (a) it believes it is necessary to do so to ensure that the complaint can be properly dealt with; and
- (b) each of the parties consent.

### **16. Fairness**

16.1 COSL is also obliged to have regard to fairness in all the circumstances.

16.2 In considering this benchmark, COSL does not disregard the law, applicable codes of practice or established good practice in the financial services industry. The benchmark of fairness in all the circumstances allows COSL to modify the strict application of relevant legal principles with a consideration of principles of equity and good conscience.

16.3 COSL regards the benchmark of fairness in all the circumstances as being equally applicable to both the Complainant and the Member.

## **Guidelines to the Rules of the Credit Ombudsman Service**

### **17. Flexibility**

17.1 In applying the four benchmarks COSL may:

- (a) consider that a Member's conduct should meet a higher standard than that set by strict application of the law because of the requirements relating to:
  - (i) industry codes of practice or industry or regulatory guideline or protocol; and
  - (ii) good practice in the financial services industry; and
- (b) adopt a degree of flexibility in decision making where the true facts may be uncertain - as COSL cannot cross examine people on the statements they have given or the documents they have provided, COSL will draw whatever conclusions as to the facts of the matter it thinks are reasonable having regard to the statements given and all the information available to COSL.

### **18. Who can make a complaint to COSL? – Rule 6.1**

18.1 Rule 6.1 provides:

*"A complaint can be made to the Credit Ombudsman Service about a Member if:*

- (a) the Complainant is a Consumer; and*
- (b) the complaint is about a Financial Service; and*
- (c) the complaint is otherwise one that COSL can deal with under these Rules."*

18.2 COSL can only consider a complaint that is lodged by, or on behalf of, the Complainant who meets the criteria in Rule 6.1. If two or more Complainants want to lodge a complaint about the same subject matter in respect of the same Member, all those Complainants must sign the complaint and all other consents and authorities required by COSL.

18.3 If COSL is uncertain whether or not all Complainants have lodged the complaint, COSL may conduct whatever enquiries it regards as necessary to satisfy itself that:

- (a) the person or persons lodging the complaint is legally entitled to do so; and
- (b) there is no legal impediment (such as current proceedings before a Court) to COSL accepting and dealing with the complaint.

### **19. Who is a Consumer? - Rule 45 definition of "Consumer"**

19.1 A Consumer is any member of the public whether:

- (a) a natural person (ie. an individual); or
- (b) a small business (see Guideline 22).

19.2 For COSL to deal with a complaint, an individual or a small business must have been a Consumer both:

- (a) at the time the events giving rise to the complaint arose; and
- (b) at the time of making the complaint to COSL.

19.3 A Consumer does not include:

## **Guidelines to the Rules of the Credit Ombudsman Service**

- (a) a Member, its director or its employees if, at the time the events complained about occurred, the Member, director or employee had a business relationship with the Member against whom the complaint is made; or
  - (b) a natural person that COSL determines is not a Complainant for the purposes of the COSL Rules or Guidelines because of the assets, wealth, or both, that that person has, holds or controls (see Guideline 20).
- 19.4 Where more than one Complainant has made a complaint, all the Complainants must be Consumers.
- 20. When will COSL regard an individual as not qualifying as a consumer? - Rule 45 definition of "Consumer"**
- 20.1 COSL has a discretion to regard wealthy individuals as not qualifying as Complainants for the purpose of making a complaint to COSL.
- 20.2 COSL will exercise its discretion to exclude individuals if it is reasonably satisfied that:
- (a) the person has net assets of \$2.5 million or more; or
  - (b) the person has a gross income for each of the 2 years prior to the date of making the complaint of \$250,000 or more; or
  - (c) the person is a professional investor.
- 20.3 COSL may require an individual to provide COSL with information and/or documents to enable it to determine whether it should exercise its discretion to exclude the individual. If the individual fails to comply fully with COSL's requirement, COSL may nevertheless exclude the individual.
- 21. What does an individual need to tell and give COSL before it will deal with their complaint?**
- 21.1 Before COSL deals with a complaint from an individual, they need to give COSL a signed consent that the Member may disclose to COSL information and documents relevant to the complaint.
- 21.2 If the individual has approached another EDR scheme (eg. the Financial Ombudsman Service) about the subject matter of their complaint, they need to tell COSL about this and to give COSL a copy of every document they gave to the other EDR scheme.
- 22. What is a small business? - Rule 45 definition of "small business"**
- 22.1 To qualify as a small business, a business, whether it is incorporated (eg. a company) or unincorporated, must be any sort of business (but not an inactive corporation eg. a "shelf company"), that:
- (a) if the business is or includes the manufacture of goods, employs less than 100 people; or
  - (b) otherwise, employs less than 20 people.
- 22.2 COSL counts full time equivalent employees in applying the test.
- 22.3 If there is any dispute about the business's eligibility to lodge the complaint, COSL decides whether or not the business is a small business and may have regard to,

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but is not bound by, any representations made by the business and the Member about eligibility to lodge the complaint.

- 22.4 Before COSL deals with a complaint from a small business or at any time during the COSL process, COSL may ask the small business to give it:
- (a) a payroll report on the number of employees on payroll;
  - (b) if a payroll report is not available, a written certification that the business meets the test of a small business under Rule 45;
  - (c) a payroll report on the number of employees on payroll *at the time of the acts or omissions complained about*;
  - (d) if a payroll report is not available, a written certification that the business met the test of a small business under Rule 45 *at the time of the acts or omissions complained about*; and
  - (e) a notice about who is the individual in the business who is authorised to resolve the complaint on behalf of the business.

- 22.5 If the small business fails to comply fully with COSL's requirement, COSL may close the complaint without investigating it further.

### **23. What does a small business need to tell and give COSL before COSL will deal with their complaint?**

- 23.1 If the complaint is being lodged by a small business that is a corporation (ie. an incorporated company), the complaint form and all other consents and authorities required by COSL must be signed by:

- (a) a director and a company secretary;
- (b) two directors; or
- (c) for a proprietary company that has a sole director who is also the sole company secretary – that director.

- 23.2 If the small business is not a corporation, all proprietors must sign the complaint form and all other consents and authorities required by COSL. However, COSL will not require all the proprietors to sign if it is satisfied that where only one proprietor has signed, all proprietors have authorised that proprietor to sign and have consented to COSL conducting the COSL process in relation to the complaint and agreed to be bound by any decision made by COSL.

- 23.3 If COSL is uncertain whether or not all directors (where a corporation) or all proprietors (where not a corporation) have authorised the lodging of the complaint and consented to COSL dealing with the complaint and agreeing to be bound by a COSL decision, or if a director or proprietor refuses or fails to lodge the complaint, COSL will conduct whatever enquiries it regards as necessary to satisfy itself that:

- (a) the person lodging the complaint is legally entitled to do so; and
- (b) there is no legal impediment (such as current proceedings before a Court) to COSL accepting and dealing with the complaint.

- 23.4 If the small business has approached another EDR scheme (eg. the Financial Ombudsman Service) about the subject matter of its complaint, it needs to tell COSL all about the approach and give COSL a copy of every document it gave to the other EDR scheme.

## **Guidelines to the Rules of the Credit Ombudsman Service**

### **24. What if the Complainant is a trustee?**

- 24.1 Each individual trustee needs to qualify as an individual and each corporate trustee needs to qualify as a small business.
- 24.2 Further, COSL will exercise its discretion to exclude a trust if it is reasonably satisfied that:
- (a) the trust has net assets exceeding \$2.5 million or more; or
  - (b) the trust has a gross income for each of the two years prior to the date of making the complaint of \$250,000 or more.
- 24.3 COSL may require a trustee to provide COSL with information and/or documents to enable it to determine whether it should exercise its discretion to exclude the trustee. If the trustee fails to comply fully with COSL's requirement, COSL may exclude the trustee.

### **25. Persons representing the Complainant**

- 25.1 COSL accepts and will deal with a complaint lodged by another person on behalf of the Complainant if and only if:
- (a) the Complainant in writing signed by the Complainant:
    - (i) authorises the person to lodge the complaint on the Complainant's behalf and to act on the Complainant's behalf in dealing with the complaint; and
    - (ii) consents to COSL conducting the COSL process in relation to the Complainant's complaint; or
  - (b) that other person is the duly appointed legal representative of the Complainant.
- 25.2 The Complainant may, for example, ask their spouse, partner, relative or friend to lodge the complaint on their behalf.
- 25.3 Specific situations where other persons can lodge a complaint on behalf of a Complainant are as follows:

#### *Parent / Child*

- 25.4 If the Complainant is a child under 18 years, COSL accepts that child's complaint if the complaint is lodged by his or her parent or legal guardian. If the child has two living parents or two or more living legal guardians, then both these parents, or all those guardians, must lodge the complaint.
- 25.5 If COSL is uncertain whether or not all parents and legal guardians have lodged the complaint, or if a parent or legal guardian refuses or fails to lodge the complaint, COSL will conduct whatever enquiries it regards as necessary to satisfy itself that:
- (a) the person or persons lodging the complaint are legally entitled to do so; and
  - (b) there is no legal impediment (such as pending or current proceedings before a court or tribunal or other legally qualified body) to COSL accepting and dealing with the complaint.

## Guidelines to the Rules of the Credit Ombudsman Service

### Professional persons

- 25.6 COSL accepts a complaint lodged by a legal practitioner acting on the instructions of the Complainant, or if the Complainant is a child, on the instructions of his or her parents or legal guardians. The same guidelines as discussed above apply in this situation as if the complaint were lodged by a parent or legal guardian.
- 25.7 Provided COSL receives the authority and consent discussed above, COSL will accept and deal with a complaint lodged by an accountant, financial adviser, Member of Parliament or other advocate.

### Trusts

- 25.8 A complaint by a trust has to be made by the trustee (if a corporation) or by all trustees (if natural persons).
- 25.9 If COSL is uncertain whether or not all trustees have lodged the complaint, or if a trustee refuses or fails to lodge the complaint, COSL will conduct whatever enquiries it regards as necessary to satisfy itself that:
- (a) the person lodging the complaint is legally entitled to do so; and
  - (b) there is no legal impediment to COSL accepting and dealing with the complaint (such as pending or current proceedings before a Court or Tribunal or other legally qualified body).
- 25.10 COSL will only accept and deal with a complaint made by a beneficiary if COSL is satisfied that the Member could be liable to the beneficiary in that capacity, eg. because of a breach of the Trust Deed. Any such complaint still has to be within COSL's jurisdiction.

### Bankrupts

- 25.11 COSL accepts a bankrupt's complaint if and only if:
- (a) the bankrupt gives COSL a written authority signed by the bankrupt's trustee in bankruptcy:
    - (i) authorising the bankrupt to lodge the complaint; and
    - (ii) consenting to COSL conducting the COSL process in relation to the bankrupt's complaint; and
  - (b) COSL is satisfied that the amount of compensation, if any, sought from the Member would exceed the total of debts owed in the bankruptcy such that if compensation were awarded, there would be an amount due to the bankrupt personally over and above the amount owed by the bankrupt to creditors.
- 25.12 If the bankrupt cannot demonstrate to COSL that an award of compensation would result in a net financial personal benefit to the bankrupt, COSL may nevertheless accept and deal with the complaint if it is satisfied that payment of compensation would result in some other specific benefit to the bankrupt personally.
- 25.13 A claim by a bankrupt for non-financial loss may be made to COSL without the need for the Trustee's consent and authorisation. This flows from section 116(2)(g) of the Bankruptcy Act 1966, which excludes claims for personal injury or wrong from forming part of the bankrupt's estate.

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25.14 The above guidelines also equally apply to a person who is subject to a Personal Insolvency Agreement under Part X of the Bankruptcy Act 1966.

### Persons suffering from mental incapacity or disability

25.15 Persons suffering from mental incapacity or disability may be represented by a legally appointed guardian or administrator, or other person holding a valid Power of Attorney. COSL will require a true copy of the instrument appointing the guardian or administrator, or the Power of Attorney, before COSL accepts the complaint.

25.16 If COSL is uncertain whether or not all legally appointed guardians or administrators or all attorneys have lodged the complaint, or if a guardian, administrator or attorney refuses or fails to lodge the complaint, COSL may conduct whatever enquiries it regards as necessary to satisfy itself that:

- (a) the person lodging the complaint is legally entitled to do so; and
- (b) there is no legal impediment (such as current proceedings before a Court) to COSL accepting and dealing with the complaint.

25.17 COSL may also contact the Office of Protective Commissioner or Public Advocate (or equivalent official) in a State or Territory to ascertain whether or not some order needs to be made in respect of the incapacitated person's complaint.

### Deceased estates

25.18 A complaint by a deceased estate has to be made by all duly appointed executors or administrators. COSL requires a true copy of the Probate or Letters of Administration before it accepts the complaint. If Probate of the Will has not been granted, COSL requires a true copy of the Will before accepting the complaint.

25.19 If COSL is uncertain whether or not all legally appointed executors or administrators have lodged the complaint, or if an executor or administrator refuses or fails to lodge the complaint, COSL may conduct whatever enquiries it regards as necessary to satisfy itself that:

- (a) the person lodging the complaint is legally entitled to do so; and
- (b) there is no legal impediment (such as current proceedings before a Court) to COSL accepting and dealing with the complaint.

25.20 COSL accepts and will deal with a complaint lodged by a beneficiary of a deceased estate if and only if all executors or administrators in writing signed by all such persons:

- (a) authorise the beneficiary to lodge the complaint on behalf of the deceased estate and to act on the Complainant's behalf in dealing with the complaint; and
- (b) consent to COSL conducting the COSL process in relation to the complaint.

## **26. Obstruction, delay or abuse of COSL process by representative**

26.1 If COSL is satisfied that any person representing the Complainant is:

- (a) obstructing;
- (b) unreasonably delaying; or

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(c) abusing,

the COSL process, COSL may warn the representative that if:

(a) the conduct of concern to COSL continues, or

(b) the representative engages in other conduct that has or might have a similar effect,

then COSL will cease dealing with the complaint.

26.2 If COSL warns the representative, COSL will at the same time tell the Complainant what has happened and invite the Complainant to arrange for another person to represent the Complainant and to give COSL the required authority and consent.

26.3 If the Complainant fails within the period specified by COSL to assume direct responsibility for the carriage of the complaint through the COSL process, or to appoint another representative, COSL will declare the complaint closed.

26.4 If the Complainant having assumed direct responsibility for the carriage of the complaint, or a new representative having been appointed the conduct of concern to COSL still continues, or if the Complainant or the new representative engages in other conduct that has or might have a similar effect, COSL will cease dealing with the complaint and declare the complaint closed.

### **27. When COSL will deal with a complaint not lodged by all eligible Complainants**

27.1 COSL may accept and deal with a complaint that is not lodged by all eligible Complainants in the following cases:

(a) mental or physical incapacity of an eligible Complainant - COSL will require an authority and consent from the eligible Complainant's legally appointed guardian, administrator or attorney (under Power of Attorney); or

(b) the eligible Complainant cannot with the exercise of reasonable diligence be located by all other eligible Complainants - COSL will require evidence to satisfy itself about this.

### **28. Dealing with a complaint once and for all**

28.1 COSL expects to deal with a complaint about a particular set of circumstances (the same subject matter and the same Member) once and for all. Therefore, if COSL is satisfied that a complaint has not been lodged by all possible Complainants in relation to the same subject matter and the same Member (whether individuals, small businesses or other persons approved by the Board or a combination of these), COSL will regard a later complaint by a potential Complainant who has not lodged a complaint as excluded from COSL jurisdiction under Rule 10.1(m) and (t) (ie. complaint that is being pursued for an improper purpose).

28.2 COSL may allow a complaint to proceed in these circumstances if it is satisfied that there are exceptional circumstances. COSL would regard the following as exceptional circumstances:

(a) the Complainant:

(i) reasonably was uncertain whether they were legally entitled to lodge a complaint; and

(ii) was not, and was not made, aware of the intention to lodge the complaint or the lodging of it and the Complainant could not have

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become aware of each situation with the exercise of a reasonable degree of diligence; or

- (b) the Complainant was subject to legal impediment or potential legal impediment (such as pending or current proceedings before a court or tribunal or other legally qualified body) to COSL accepting and dealing with the Complainant's complaint.

### 29. What complaints does COSL cover? - Rule 7

29.1 Rule 7 provides:

*"COSL will deal with a complaint if, in relation to a Financial Service, the Member:*

- (a) breached relevant laws (or duties imposed by law) or did not give effect to a right provided by law to the Complainant in relation to the subject matter of the complaint;*
- (b) breached an applicable code of practice;*
- (c) did not meet standards of good practice in the Financial Services Industry; or*
- (d) acted unfairly towards the Complainant."*

As to what are Financial Services, see Guideline 33.1.

29.2 A Complainant may make a complaint to COSL if he or she believes that an act or omission of the Member falls within one or more of the grounds in Rule 7. COSL will then decide whether or not it can deal with the complaint; i.e. whether or not it is within COSL's "jurisdiction". See Guideline 32.

29.3 If the complaint is within COSL's jurisdiction, COSL will, if it is appropriate, assist the Complainant in presenting the complaint so that it is comprehensive; i.e. covers all the relevant issues. But COSL will not do anything to impair its impartiality in the COSL process (Rule 14.3).

### 30. Breach of relevant laws

30.1 Under Rule 7.1, COSL can deal with a complaint if the Member has "breached relevant laws".

30.2 COSL will not consider any complaint that a Member has been involved in criminal activity - see Guideline 48.3. If the complaint is that the Member did some act or failed to do some act (e.g. an allegation that the Member committed fraud) for which that Member could face a conviction for a criminal offence (whether punishable by fine or imprisonment or both), COSL will not consider the complaint.

30.3 This is because the relevant standard of proof for criminal activities requires guilt to be proved beyond reasonable doubt, not on the balance of probabilities. A Court is the only appropriate forum for an allegation of criminal activity to be tested.

30.4 Furthermore, COSL does not have the forensic capacity to investigate criminal activity such as fraud. It cannot subpoena documents or verify discovery by affidavit. It cannot summon witnesses or administer oaths. It cannot cross-

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examine witnesses on the statements they have given or the documents they have provided.

- 30.5 If, however, the complaint covers matters other than criminal activity, COSL will consider that part of the complaint. COSL will deal with the complaint only to the extent that it is not called upon to make any finding about criminal activity.
- 30.6 Accordingly, the kinds of breaches of the law that COSL will consider as coming within its jurisdiction are essentially only those that involve civil outcomes, eg. damages or non-recoverability of a Member's commission.
- 30.7 Also, any complaint that a Member has breached a law must be a law that is "relevant". A relevant law is one that relates to Financial Services (see Guideline 33.1) or relates in some significant way to the conduct being complained about.
- 30.8 COSL regards the National Consumer Credit Protection Act 2009, National Credit Code 2009, Corporations Act 2001, Uniform Consumer Credit Code, Australian Securities and Investments Commission Act and laws regulating the conduct of financial service providers as "relevant laws". This list is not exhaustive.

### 31. Raising a new ground of complaint

31.1 Rules 8.1, 8.2 and 8.3 provide:

*“8.1 Once the Conciliation and Investigation Phase of the Credit Ombudsman Service process commences but before the start of the Determination Phase, the Complainant may only raise new grounds of complaint with COSL’s approval.*

*8.2 COSL will generally give its approval unless it considers that the Complainant 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.*

*8.3 Once the Determination Phase of the Credit Ombudsman Service process commences, the Complainant may not raise any new ground of complaint unless:*

- (a) COSL is satisfied that exceptional circumstances exist that justify the Complainant raising a new ground of complaint; and*
- (b) the Member consents in writing; and*
- (c) COSL consents in writing on such terms and conditions as it regards as appropriate.”*

31.2 COSL will exercise its discretion to allow a new matter to be included in the complaint if it is satisfied that:

- (a) the Complainant took all reasonable steps to raise all the relevant matters in the original complaint;
- (b) the Complainant did not fail to disclose the matter because the matter:
  - (i) was not; or
  - (ii) the Complainant believed or suspected, that the matter was not,

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favourable to his or her case;

- (c) to do so would not be unfair on the Member; and
- (d) to do so would not impose an unreasonable burden or disadvantage on the Member.

31.3 COSL will generally not grant approval if doing so would expose the Member to a risk or disadvantage towards a third party (eg. a lender) that the Member is not otherwise exposed to under the complaint as originally made to COSL.

31.4 In exercising its discretion, COSL may:

- (a) ask for and have regard to submissions by the Member and/or from third parties who have or might have an interest in the matter (eg. a lender) - but COSL will not be bound by any submissions by the Member or the third party;
- (b) if it is minded to grant approval, do so on such conditions as COSL thinks will be fair to all parties COSL identifies as having an interest in the matter (this may include a third party such as a lender).

### 32. What complaints doesn't COSL cover? - Rule 10

32.1 Rule 10 sets out the type of complaints which are outside COSL's jurisdiction and are not dealt with by COSL.

### 33. Rule 10(a) – Not a financial service

*"the complaint is about a Member's acts or omissions that do not comprise or otherwise are not directly related to the Financial Service"*

33.1 "Financial Services" is defined in Rule 45 to mean:

- (a) *any financial service within the meaning of section 766A of the Corporations Act 2001 or 12BAB of the ASIC Act; or*
- (b) *any credit activity, credit service or credit assistance within the meaning of the National Consumer Credit Protection Act 2009; or*
- (c) *the taking of, or the conduct of the Member in relation to, a guarantee or security for financial accommodation provided by the Member; or*
- (d) *the exercise of rights under a loan agreement or guarantee by, or the conduct of, a Member who is a debt collection agency, invoice discounter, factor or debt agreement administrator; or*
- (e) *where the Member is a mutual, the provision of, or the conduct of the Member in relation to, a financial product issued or provided by a third party through the agency of the mutual; or*
- (f) *the provision of, or the conduct of the Member in relation to budget monitoring, mortgage minimisation services, credit management and debt recovery."*

33.2 Under section 766A of the Corporations Act 2001 and 12BAB of the ASIC Act 2001, a person provides a financial service if they provide financial product advice,

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deal in a financial product, operate a registered scheme, provide a custodial or depository service or engage in conduct prescribed by regulation.

- 33.3 The expression "financial product" is defined in section 763A of the Corporations Act 2001 and section 12BAA of the ASIC Act 2001, and generally includes things such as a credit facility, a security, an interest in a managed investment scheme, a contract of insurance (except health insurance), a life policy, a beneficial interest in a superannuation fund, a retirement savings account, and a deposit-taking facility.
- 33.4 For the purposes of considering whether a complaint is within COSL's jurisdiction, COSL disregards the question of whether the Member complied with the law in providing, making available, suggesting or proposing the financial product. COSL will deal with a complaint about a Member's conduct in relation to a financial product even if:
- (a) the particular financial product did not comply with legal requirements; or
  - (b) the Member breached or may have breached the law in any way in connection with:
    - (i) the particular financial product; or
    - (ii) the Member's dealings with the Complainant in relation to that particular financial product.

### **Example**

*Complainant and broker are discussing a new home loan application at the Complainant's home. The broker tells the Complainant about a property trust investment product he/she knows about. The Complainant signs an application for the new home loan. The Complainant is persuaded by what the broker says about the investment's return potential and signs a contract to invest in the property trust and pays over \$10,000 to the broker. The property trust investment does not comply with the law and it was illegal for the broker to suggest the investment to the Complainant. The credit provider (who has no connection with the property investment) refuses the Complainant's loan application.*

*The Complainant complains to COSL that they were not given all relevant information by the broker about the property trust investment and that they would not have gone into the investment and paid the money if they had been given all relevant information.*

*In this situation, COSL will deal with the complaint because, in suggesting the property trust investment to the Complainant at the time of discussing the loan application, the broker:*

- *provided Financial Services to the Complainant; and*
- *in providing those Financial Services, breached a "relevant law" (namely, the Corporations Act 2001)*

### **34. Rule 10.1(b) – Not a Member**

*"the complaint is about someone who is not a Member at the time the complaint is made"*

- 34.1 COSL can deal with the complaint even if the Member:

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- (a) was not a Member at the time the events related to the complaint took place; or
- (b) the Member ceases to be a Member while COSL is dealing with the complaint.

### 35. Rule 10.1(c) – Exceeds monetary compensation limit

*"the Complainant is seeking compensation in an amount in excess of COSL's monetary compensation limit in respect of the complaint"*

- 35.1 COSL can deal with a complaint if the Complainant's loss resulting from the Member's conduct does not exceed or appear to COSL to exceed \$500,000 (Rule 9.1).
- 35.2 However, COSL can only award compensation up to its monetary compensation limit for loss suffered by the Complainant in respect of the complaint.
- 35.3 The monetary compensation limit is:
  - (a) \$250,000;
  - (b) increasing to \$280,000 on and from 1 January 2012; and
  - (c) thereafter, adjusted every three years using the higher of the increase in the Consumer Price Index (CPI) or Male Total Average Weekly Earnings (MTAWE), with rounding to the nearest \$500.
- 35.4 COSL may also award interest or earnings in addition to any compensation awarded, even if the interest or earnings, when added to the compensation awarded, exceeds the monetary compensation limit.
- 35.5 COSL's monetary compensation limit is not affected by the value of a Credit Contract or amount of compensation sought for complaints involving the types of matters listed in section 199 of the National Credit Act.
- 35.6 In considering whether a complaint exceeds the monetary compensation limit, COSL assesses the information the Complainant has provided to it.
- 35.7 COSL will not combine separate or unrelated claims in working out whether the complaint exceeds this monetary compensation limit.

#### **Example 1**

*The Complainant complains that a Member failed to properly explain the effect of the Complainant "breaking term" in a fixed term/fixed rate loan for an investment property. The Complainant claims \$12,000 in "break costs" incurred by them. The Complainant also makes a complaint that the same Member in a home purchase they make (a separate and unrelated transaction) failed to deliver required financial information to the lender with the result that the Complainant misses settlement date. The Complainant claims \$1,500 in interest they had to pay the vendor.*

*COSL regards these as separate complaints and does not aggregate the compensation sought. Accordingly COSL would deal with each of these complaints.*

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### **Example 2**

*The Complainant arranges a home loan re-finance with a lender and at the same time, and as part of the overall "deal", arranges through the same lender a fixed term/fixed rate loan for an investment property.*

*The Complainant defaults on the mortgage and the security property is sold by way of "mortgagee sale". The Complainant complains that the lender significantly undersold the security property and claims \$240,000 compensation.*

*The Complainant is also forced to pay an early discharge of the fixed term/fixed rate loan. The Complainant also complains that the lender failed to properly explain the effect of the Complainant "breaking term" in the fixed term/fixed rate loan for the investment property. The Complainant claims \$12,000 in "break costs" incurred by them.*

*Even though both loans were arranged as the one "deal" (eg. a debt consolidation and restructure), COSL will not aggregate the compensation amounts sought. This is because separate claims by the same Complainant are not aggregated for the purpose of determining COSL's monetary compensation limit.*

*Accordingly COSL would deal with each of these complaints.*

- 35.8 COSL's aim is to ensure that where a complaint is made and compensation determined to be payable by the Member, that payment is accepted by the Complainant in full and final discharge of all claims the Complainant has against the Member in relation to the subject matter of the complaint.
- 35.9 If the Complainant accepts the compensation awarded by COSL, the Complainant must, at the Member's request, provide the Member with a binding release from liability in respect of the matters resolved by the award of compensation. The release must be for the full value of the claim the subject of the complaint, even if this amount exceeds the amount of the remedy decided upon by COSL.
- 35.10 The result is that once the Complainant signs the Deed of Release, they cannot later make a complaint to COSL or initiate legal proceedings to recover any amount in excess of the compensation awarded by COSL in respect of the matters the subject of the complaint.

**COSL strongly suggests that before the Complainant signs the Deed of Release, they get independent legal and financial advice.**

- 35.11 If the Complainant declines to sign the Deed of Release, COSL will discontinue dealing with the complaint and will declare the complaint closed. The Complainant will then be at liberty to pursue other remedies in relation to the subject matter of the complaint in the Courts or any another forum.

## Guidelines to the Rules of the Credit Ombudsman Service

### 36. Rule 10.1(d) – Fees, charges, commissions and interest rates

*“the complaint relates to a fee, charge, commission or interest rate, unless:*

- (i) the complaint concerns the non-disclosure, misrepresentation, miscalculation or incorrect application of the fee, charge, commission or interest rate; or*
- (ii) the charging of the fee, charge, commission or interest rate is in breach of the law or is unconscionable”*

36.1 COSL generally regards the level of a fee, charge, commission or interest rate as a matter involving "commercial judgment" which the Complainant has accepted as a term of the contract between the Complainant and the Member.

36.2 However, COSL may deal with such a complaint if, for example, the Complainant complains that the Member has charged a fee, charge, commission or interest which is:

- (a) not disclosed in the contract between the Complainant and the Member,
- (b) in excess of the amount that was represented to the Complainant,
- (c) in excess of that allowed for in the contract between the Complainant and the Member;
- (d) applied in circumstances not allowed for in the contract between the Complainant and the Member, or before all the required conditions have been satisfied, or
- (e) which is excessive and considered to be a penalty at law, or which is unconscionable.

### 37. Rule 10.1(e) – Related to someone other than the Member

*“the complaint is about something done or not done by, or the policies or commercial judgment of, someone other than the Member the Complainant is complaining about, examples of which are:*

- (i) a lender’s assessment of lending risk, or of financial or commercial criteria, or of character; or*
- (ii) a lender’s decision to refuse the Complainant’s loan application or the release of part of the security for the loan or to approve either of them subject to conditions; or*
- (iii) the loan interest rates and fees charged by a lender; or*
- (iv) a lender’s policy to require mortgage insurance”*

37.1 What COSL does cover, however, is a complaint that the Member was involved in some act or omission that was contrary to some legal or contractual obligation owed by the Member to the Complainant.

### 38. Rule 10.1(f) – Commercial judgement

*“(except where the Complainant is making a financial hardship application) the Member has done no more than exercise its commercial judgement, including but not limited to its commercial judgement about interest rates, product design or (in relation to credit matters) lending or the security for a loan, examples of which are:*

## Guidelines to the Rules of the Credit Ombudsman Service

- (i) *the Member's assessment of the credit risk or security; or*
- (ii) *the Member's lending criteria or valuation of the security; or*
- (iii) *the Member's decision to refuse the Complainant's loan application or the release of part of the security for the loan or to approve either of them subject to conditions; or*
- (iv) *the Member's loan interest rates; or*
- (v) *the Member's policy to require mortgage insurance or additional security"*

38.1 COSL will not deal with a complaint where the Member has done no more than exercise its "commercial judgement". However, there may be circumstances where COSL will nonetheless deal with such a complaint; for example, where:

- (a) the Member (lender) has declined a Complainant's financial hardship application;
- (b) the Member (lender) has failed to undertake an assessment as to suitability of the credit contract relative to the borrower; or
- (c) the Member (lender) refused to approve a loan in circumstances where there may have been some pre-existing obligation on the Member to provide the loan.

### **39. Rule 10.1(g) – Australian law does not apply**

*"the complaint relates to a contract or obligation not arising under Australian law"*

39.1 If a complaint relates to a number of issues, COSL will only deal with those issues which relate to a contract or obligation arising under Australian law.

### **40. Rule 10.1(h) – Security not related to Australia**

*"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"*

40.1 COSL will only deal with complaints that concern a security (eg. a mortgage) over property if:

- (a) the property secured is in Australia;
- (b) legal registration of the security (eg. mortgage) takes place in Australia; and
- (c) the security transaction is governed by Australian law.

### **41. Rule 10.1(i) – Not seeking compensation or orders**

*"the Complainant is not seeking compensation or Orders (see Rule 9) against a Member"*

41.1 If the Complainant is not claiming compensation or is not seeking orders against a Member, they cannot make a complaint to COSL.

41.2 COSL will not deal with complaints that are really "disciplinary" in nature, ie. all the Complainant wants is for the Member to be disciplined for the acts or omissions complained about. If what the Complainant wants is some disciplinary action against the Member and the Member is a member of the Mortgage and

## Guidelines to the Rules of the Credit Ombudsman Service

Finance Association of Australia (MFAA) or another industry body or is otherwise subject to disciplinary action by a disciplinary process, then the Complainant should send their complaint to the MFAA, the industry body or the disciplinary process, as the case may be.

- 41.3 COSL does not monitor the actions of a Member to ensure they observe relevant laws. Concerns about a Member not observing the law should be raised with the appropriate body, such as the Australian Securities and Investments Commission (ASIC).

### 42. Rule 10.1(j) – Compensation for loss

*"the Complainant is seeking redress other than compensation for loss (see Rule 9)"*

See Guideline 53.

### 43. Rule 10.1(k) – Financial service not provided to Complainant

*"the Complainant is not the person to whom the Financial Services directly relates"*

- 43.1 The financial services which the complaint is about must have been provided directly by the Member to the Complainant.

#### **Example:**

*A Member arranges a loan for an adult borrower who is not suffering from any disability. After the loan is advanced, the borrower's parents make a complaint to COSL that the loan was not appropriate to the borrower's circumstances. COSL will not accept or deal with that complaint as the parents have not dealt directly with the Member.*

*If, for example, the Member arranged for the parents to act as guarantors for the borrower, they could make a complaint to COSL about so much of the transaction as related to the Member arranging for them to become guarantors for the borrower.*

### 44. Rule 10.1(l) – Time limits

*"the time within which a Complainant must make a complaint to COSL, as prescribed by Rule 10.2, has elapsed"*

- 44.1 Where a complaint relates to financial hardship applications, unjust transactions or unconscionable interest and other charges under the National Credit Code, the times within which the complaint must be made to COSL is the later of either:
- (a) two years from when the credit contract is rescinded, discharged or otherwise comes to an end; or
  - (b) two years from when a 'final response' (defined in Rule 45.1) is given by the Member.
- 44.2 For all other complaints, the time within which the complaint must be made to COSL is six years from the date that the Complainant first became aware (or should reasonably have become aware) that they suffered the loss.

## Guidelines to the Rules of the Credit Ombudsman Service

- 44.3 COSL will nonetheless deal with a complaint that is out-of-time if the Member agrees to it.
- 44.4 If a Complainant makes a complaint about a Member and it turns out that the conduct complained about is that of a different Member, the time limit for making a complaint will apply from when the complaint is first made with COSL. Similarly, if a Complainant makes a complaint to another ASIC-approved EDR scheme and it turns out that the conduct complained about is that of a COSL Member, the time limit for making a complaint will apply from when the complaint is first made with the other ASIC-approved EDR scheme.

### 45. Rule 10.1(m) – Previous complaint

*"(except where the Complainant is making a financial hardship application) the Complainant has previously made a complaint about the same Member in relation to the same subject matter which has been considered by the Credit Ombudsman Service and there is insufficient relevant new information to warrant COSL's consideration of the new complaint"*

- 45.1 COSL will regard a complaint as excluded on this ground if it considers that a second or subsequent complaint by the Complainant against the same Member essentially involves the "same subject matter". [However, a Complainant is permitted to make a second and subsequent financial hardship application during the life of the loan and each such application is treated as a new complaint (Rule 18.8).]
- 45.2 COSL regards the "subject matter" of a complaint as any or all aspects of, but not limited to, the financial services provided to the Complainant by the Member.
- 45.3 A complaint will be regarded as involving the "same subject matter" as another complaint by the Complainant if all or part of the subject matter of one complaint by the Complainant is the same as all or part of another complaint by that Complainant.
- 45.4 Where a complaint relates to a loan, often the complaint is made against either the lender, the servicer or the mortgage manager ("loan participant"). Where the Complainant has previously made a complaint about a loan participant and then subsequently makes a complaint about another loan participant, COSL regards the complaints as being made "about the same Member".
- 45.5 However, if COSL closed the previous complaint because:
- (a) the loan participant against whom the previous complaint was made was not the appropriate respondent; and
  - (b) we directed the Complainant to make a complaint about another loan participant,

COSL will not exclude the complaint on this ground.

- 45.6 A second or subsequent complaint against the same Member may, however, be considered by COSL if it is satisfied that the Complainant is presenting "relevant new information" having regard to the information contained in their original complaint.
- 45.7 If the information presented by the Complainant in their later complaint:

## Guidelines to the Rules of the Credit Ombudsman Service

- (a) was available to the Complainant and could have been presented by the Complainant in their original complaint; or
- (b) if COSL requested this information and the Complainant failed to produce it at the time of the original complaint,

COSL will not regard the information presented by the Complainant in their later complaint as being “new”.

- 45.8 Even if the Complainant presents new information in their later complaint, this information must be “relevant”. COSL regards the Complainant's new information as “relevant” if it goes to prove an assertion by the Complainant or relates in a material way to the subject matter of their later complaint.

### **Example**

*The initial complaint is that the Member failed to deliver financial information to the Complainant's prospective lender in time for settlement of their loan. The Complainant claims compensation for interest paid by them until the date of settlement. The Member says that the information was delivered to the lender well before settlement date and denies the Complainant's claim for compensation. COSL is unable to make an adverse finding against the Member and no award of compensation is made in the Complainant's favour.*

*After the Complainant's initial complaint is closed, a third party provides the Complainant with a letter that clearly establishes that the financial information was not presented to the lender in sufficient time.*

*COSL would regard this letter as both “new” and “relevant” and would proceed to consider this later complaint.*

## **46. 10.1(n) – Alternative proceedings**

*“the complaint has been dealt with by a court, tribunal, arbitrator or another ASIC-approved EDR scheme, unless:*

- (i) a decision about the merits of the complaint has not been made; or*
- (ii) both the Complainant and the Member consent in writing to the complaint being considered by COSL”*

- 46.1 COSL may in particular circumstances deal with a complaint even though the complaint has already been dealt with by a Court.

- 46.2 COSL will only do this if the Court has not made a decision about the merits of the complaint (e.g. default judgment), and then only if:

- (a) in the case of a financial hardship application:
  - (i) the Complainant wishes to sell the security property and has available a contract for sale for this purpose and has appointed an agent; or
  - (ii) the Complainant is able to demonstrate that there is at least a reasonable prospect of refinancing the loan; or

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- (iii) the immediate execution of the writ of possession will cause physical hardship (e.g. single mother with three kids will be out on the street); and
  - (b) in other cases, the Complainant indicates that they want to set aside the default judgment on the basis of a substantive defence, such as unconscionability, duress, unjustness or undue influence, in which case COSL will, in the appropriate circumstances, direct the Member not to enforce a default judgment.
- 46.3 COSL will not otherwise deal with a complaint where a Member has obtained judgment against a Complainant for repayment of a debt or possession of a security property.
- 46.4 COSL may require a Member to provide it with information about the proceedings and any judgment that may have been entered. This may include a copy of the Statement of Claim and judgment.
- 46.5 COSL is not prevented from dealing with a complaint if the Complainant has commenced proceedings in another forum against the Member in respect of the subject matter of the complaint, but the proceedings have not been finalised. Although, strictly, the Complainant may continue with the alternative proceedings, COSL may consider that it is not the appropriate forum in which to deal with the complaint in the circumstances and it may close the complaint accordingly.
- 46.6 COSL expects the Member to tell COSL immediately when it becomes aware of these other proceedings.

### 47. 10.1(o) – Objection Notice

*"the subject of the complaint becomes the subject of proceedings brought by the Member before a court, but only if this occurred as a result of the Member having commenced legal proceedings in accordance with the Objection Notice procedure outlined in Rule 29"*

- 47.1 COSL cannot deal with a complaint if the Member gives it a valid "Objection Notice" under Rule 29 and commences proceedings on that basis.
- 47.2 An "Objection Notice" is a written notice by the Member to COSL that the Member believes that the complaint:
  - (a) involves or may involve an issue which could have important consequences for:
    - (i) the Member's business; or
    - (ii) the financial services industry generally; or
  - (b) raises an important or novel point of law.
- 47.3 If COSL accepts the Member's Objection Notice, the effect of an Objection Notice is to put the complaint "on hold" for 14 days pending the Member commencing legal proceedings (Rule 29.4). If the Member does not commence legal proceedings within 14 days from the date of the Objection Notice, then COSL can deal with the complaint as if the Objection Notice had not been given (Rule 29.5).

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47.4 The Member must also give an undertaking to COSL and the Complainant to pay the Complainant's legal costs and disbursements of the proceedings and any subsequent appeal that may be commenced by the Member (Rule 29.4 and 29.6).

### 48. Rule 10.1(p) – More appropriate forum

*"it is more appropriate that the complaint is dealt with in another forum such as a Court, tribunal or other ASIC-approved EDR scheme"*

48.1 COSL considers whether or not this ground applies to the complaint having regard to the matters raised in it and to matters which come to light in the course of COSL dealing with it. Even if the complaint appears to be within COSL's jurisdiction when the complaint is first considered, further information may come to light (eg. from the Member in providing a response to the complaint) that indicates that this particular ground excludes COSL from dealing with the complaint.

48.2 COSL will determine whether this ground is made out in any particular complaint on a case by case basis having regard to the information available to it.

#### Complaints involving allegations of criminal activity

48.3 If the Complainant's complaint is that the Member concerned has been involved in criminal activity, COSL takes the view that this is a matter that should be referred to the Courts or the Police Service. COSL either will not deal the complaint at all, or will stop dealing with it and suggest to the Complainant that they pursue their complaint through the Courts or take it to the police.

48.4 This is because the relevant standard of proof for criminal activities requires guilt to be proved beyond reasonable doubt, not on the balance of probabilities. A Court is the only appropriate forum for an allegation of criminal activity to be tested.

48.5 Furthermore, COSL does not have the forensic capacity to investigate criminal activity such as fraud. It cannot subpoena documents or verify discovery by affidavit. It cannot summon witnesses or administer oaths. It cannot cross-examine witnesses on the statements they have given or the documents they have provided.

48.6 If an allegation that the Member concerned has been involved in criminal activity is just one aspect of the Complainant's complaint, and if COSL can make a decision on those other aspects without being called upon to make any finding about criminal activity, then COSL will deal with or continue to deal with the complaint.

#### Other more appropriate EDR scheme

48.7 A Member may be a member of more than one EDR scheme depending on the particular business they conduct.

48.8 If COSL considers that it is more appropriate for the complaint to be referred to another EDR scheme, it will refer the complaint and the supporting documentation to the other EDR scheme. COSL will take this step if:

- (a) it believes that it is in the Complainant's best interest to have the complaint dealt with by another EDR scheme;

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- (b) it is satisfied that the Member is a member of the other more appropriate EDR scheme; and
- (c) the Complainant has consented to the transfer of the complaint and the supporting documents to the other EDR scheme.

48.9 If COSL receives a complaint about a credit representative (who is a Member of COSL) in relation to credit activities that have been authorised by an Australian Credit Licensee which is a member of another external dispute resolution scheme, COSL will, with the consent of the Complainant, refer the complaint to the other scheme, unless the licensee has ceased to carry on business and the other scheme does not exercise its discretion to continue to handle the complaint, in which case COSL will deal with the complaint against the credit representative.

### 49. Rule 10.1(q) – Objection notice

*"the complaint involves an issue which may have important consequences for the business of the Member or the Financial Services Industry generally, or raises an important or novel point of law, and is dealt with under the special procedures set out in Rule 29"*

See Guideline 47 concerning "Objection Notices".

### 50. Rule 10.1(r) – No breach

*"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 (or duties imposed by law) by the Member, or a failure by the Member to give effect to a right provided by law to the Complainant in relation to the subject matter of the complaint;*
- (ii) *a breach of the applicable code of practice by the Member;*
- (iii) *a failure by the Member to meet standards of good practice in the Financial Services Industry; or*
- (iv) *the Member acting unfairly towards the Complainant"*

50.1 This rule allows COSL to refuse to deal with, or to continue dealing with, a complaint that is without merit or otherwise doomed to failure. COSL will make such a decision only after the most careful consideration of the matter.

### 51. Rule 10.1(s) – Investment performance

*"the complaint relates to the investment performance of an investment product, unless the complaint concerns non-disclosure or misrepresentation or misleading conduct"*

51.1 This rule does not prevent COSL from considering other complaints about an investment product which does not directly relate to the investment performance. For example, if a complaint relates to an allegation that the Member failed to follow the Complainant's instructions and invested the Complainant's money into the wrong investment product which is performing poorly, COSL may be able to consider the complaint.

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### 52. Rule 10.1(t) – Lacking in substance or improper purpose

*"the complaint is lacking in substance or is being pursued by the Complainant for an improper purpose"*

52.1 COSL may decide that the Complainant's complaint is lacking in substance or is being pursued for an improper purpose if it is satisfied that the complaint, among other things:

- (a) is trifling or characterised by lack of seriousness or sense;
- (b) lacks sufficient grounds or is clearly untenable;
- (c) serves only to cause annoyance or embarrassment to the Member; or
- (d) has been made for a collateral purpose and not solely for the purpose of resolving the Complainant's complaint through the COSL process.

Example: Unreasonable Delay

52.2 The Complainant fails without reasonable cause, or repeatedly, to respond substantively to COSL's requests for information or proposals for resolution of the Complainant's complaint within the time limit specified for a response.

Example: Misleading or deceptive communications

52.3 A communication by the Complainant to COSL is misleading or deceptive or causes enquiry into matters that the Complainant knew or ought reasonably to have known were irrelevant.

Example: Offensive and defamatory communications

52.4 Having been requested by COSL to do so, the Complainant fails to retract any form of communication to COSL that COSL regards as offensive or defamatory of COSL or a Member or any other person.

Example: Unreasonable behaviour

52.5 The Complainant fails to accept the Member's offer of compensation in resolution of the Complainant's complaint and COSL is satisfied that:

- (a) the Member's offer of compensation was reasonable; and
- (b) the Complainant's failure to accept the Member's offer of compensation offends ordinary minimum standards of fair dealing between Complainants and Members subject to a complaint or otherwise is for a collateral purpose.

Example: Unfair conduct

52.6 The Complainant has been offered compensation in resolution of their complaint and COSL is satisfied that:

- (a) the Member's offer of compensation was reasonable; and
- (b) in failing to accept the Member's offer of compensation, the Complainant was exerting or using or attempting to exert or use unfair pressure or undue influence or unfair tactics on the Member ("Unfair Conduct"); and
- (c) the Complainant failed to accept the Member's offer of compensation solely or in part with a view to securing from the Member an offer of

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compensation higher than would be the case without the Complainant engaging in the Unfair Conduct or otherwise for a collateral purpose.

### 53. What compensation can the Complainant seek? - Rule 9

- 53.1 A Complainant can seek compensation up to COSL's monetary compensation limit for any loss they have suffered in respect of the complaint (see Guideline 35).
- 53.2 The Complainant can claim compensation for loss that is:
- (a) direct loss, or
  - (b) other indirect or non-financial loss.
- 53.3 COSL can only award compensation that:
- (a) is fair;
  - (b) is appropriate to the circumstances;
  - (c) compensates the Complainant (but not other persons) for the loss the Complainant (but not other persons) has suffered; and
  - (d) is not an unexpected "windfall" for the Complainant.
- 53.4 In their complaint, the Complainant should tell COSL how much compensation they are seeking. However, if the Complainant cannot precisely quantify their loss, they must tell COSL:
- (a) the nature of their loss; and
  - (b) how the loss was caused.
- 53.5 When COSL receives the complaint, and during the COSL process, COSL will assess the amount of the Complainant's loss. COSL needs to do this to make sure that the complaint is within COSL's jurisdiction - see the jurisdiction exclusion in Rule 10.1(c).
- 53.6 Punitive, exemplary or aggravated damages may not be awarded. By their very nature, these damages are in excess of actual loss suffered.

**Complainants need to guard against having unrealistic expectations about compensation. As appears from what follows, COSL has special rules and policies about what and how much is recoverable.**

### 54. What is "direct loss"?

- 54.1 Direct loss:
- (a) is the loss that flows in the usual course of things from; or
  - (b) is the loss that was in the contemplation of both the Complainant and the Member, or that might reasonably be supposed to have been in the contemplation of both the Complainant and the Member, as a probable result of,  
the Member having:
    - (i) breached relevant laws (or duties imposed by law) or not giving effect to a right provided by law to the Complainants;

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- (ii) breached an applicable code of practice;
- (iii) not met standards of good practice in the financial services industry; or
- (iv) acted unfairly towards the Complainant.

### **Example 1**

*The Complainant enters into a 5 year fixed rate loan with a lender who is not a Member of COSL. During the course of negotiating the loan, a Member who is a mortgage broker tells the Complainant about the financial effect of an early discharge of their fixed rate loan (commonly referred to as "break costs").*

*COSL finds that the Member properly warned the Complainant that the lender could select a benchmark interest rate from a range of rates for the purposes of the break costs calculation, but improperly represented to the Complainant that break costs would not exceed \$2,000. The Complainant complains that the lender applied an interest rate in the break costs calculation that gave rise to a higher Break Cost than would otherwise have been the case if another permissible rate had been applied by the lender. Break costs amount to \$6,000. The Member has no control over the lender's calculation of break costs.*

*In this example, the higher break costs are not regarded as a direct loss flowing from the conduct of the Member. Compensation could be awarded however in relation to the direct loss flowing from the Member's misrepresentation to the Complainant that break costs would not exceed \$2,000. COSL could determine the Complainant's direct loss to be an amount equal to the difference between:*

- *the amount represented by the Member as the maximum break costs; and*
- *the amount of break costs actually payable the Complainant.*

*This calculation would reflect the loss that might reasonably be supposed to have been in the contemplation of both the Consumer and the Member, as a probable result of the Member's "misconduct".*

### **Example 2**

*Settlement of the Complainant's loan is delayed because the Member (broker) fails to notify the lender of a change in borrower details. The Complainant incurs a penalty fee and additional rental costs.*

*A Member has an overriding responsibility to ensure there is no barrier to settlement, including ensuring that the Member gives the lender the correct borrower details in a timely fashion.*

*COSL could determine that the Complainant be compensated by the Member in an amount equal to:*

- *the penalty charged due to the delayed settlement; and*
- *additional rent paid due to delayed settlement.*

### Interest, fees and charges accrual

54.2 Complainants need to be aware that even though a complaint has been made to COSL, interest, fees and charges may continue to accrue because of default on a

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loan or mortgage. If the complaint is unsuccessful and COSL finds in favour of the Member, the Complainant may still be liable for accrued interest, fees and charges.

**A Complainant who is uncertain about their liability for accrued interest, fees and charges should immediately obtain independent legal advice.**

### Legal Fees

- 54.3 A Complainant's direct loss does not include any legal or other costs or expenses incurred by the Complainant in relation to legal or other representation permitted by COSL.
- 54.4 Legal or other professional fees may be recovered in limited circumstances as an "indirect loss" - see Guideline 55.
- 54.5 There must be direct causal link to be "direct loss".
- 54.6 The loss claimed by a Complainant will only be regarded as "direct loss" if there is a direct causal link between the conduct of the Member who is the subject of the complaint and the loss claimed to have been suffered by the Complainant.

### **Example 1**

*COSL finds that the Complainant's purchase contract fell through because of the misconduct of the Member. The vendor later sells the property for an amount greater than the amount specified in the Complainant's purchase contract.*

*The difference between the amount specified in the Complainant's purchase contract and the amount for which the property is later sold by the vendor is not recoverable as "direct loss" under the Rules. The necessary direct causal link between the conduct of the Member and the Complainant's claimed loss is missing. The vendor may have achieved a "windfall". The Complainant may not have sold the property for some considerable period of time or may have on-sold immediately for an amount less than the amount of the original purchase contract. The sale price achieved by the vendor is achieved by the vendor's efforts, not the conduct of the Member.*

### **Example 2**

*COSL finds that the Complainant's purchase contract fell through because of the misconduct of the Member. The vendor later sells the property for an amount less than the amount specified in the Complainant's purchase contract and recovers the difference from the Complainant as damages for breach of contract.*

*The amount of damages paid or payable by the Complainant to the vendor is recoverable as "direct loss" under the Rules. In this case the loss suffered by the Complainant is directly causally linked to the conduct of the Member.*

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### Other losses not regarded as "direct loss"

- 54.7 COSL would generally regard the following claims as not involving direct loss:
- (a) overpayment of stamp duty;
  - (b) interest accrued on unreleased loan funds and not forwarded to the Complainant;
  - (c) interest on the "loss"; or
  - (d) fees relating to the establishment of a loan (including legal fees) in the circumstances where the Complainant had relied on the Member's representations and entered into an inappropriate loan product if, in the circumstances, the Complainant would have paid these costs regardless of which loan product the Complainant entered into.
- 54.8 Some of these items may be recovered in limited circumstances as an "indirect loss" - see Guideline 55.

## **55. What other loss is recoverable?**

### "Opportunity cost"

- 55.1 In some circumstances, COSL may award compensation that is or includes an "opportunity cost".
- 55.2 An opportunity cost is essentially the loss suffered because the Complainant has foregone an opportunity for profit because of the conduct of the Member, eg. the Complainant has as a result of the Member's conduct paid more interest on a loan than they should have under the terms of the credit contract. The amount of that overpayment could have been invested for a financial return to the Complainant. The profit the Complainant could reasonably have made on the amount overpaid can be regarded as an opportunity cost.
- 55.3 COSL may entertain a claim for opportunity cost if COSL is satisfied that because of the conduct of the Member and in breach of some contractual or legal obligation:
- (a) money due to the Complainant has been withheld;
  - (b) a person has caused the Complainant to be deprived of money; or
  - (c) the Complainant has been deprived of money which otherwise would have been paid to the Complainant.
- 55.4 In deciding whether to award interest or earnings, COSL will have regard to, but not limited to, the extent to which the conduct of either party contributed to any delay.
- 55.5 COSL will only order opportunity cost compensation if the loss was:
- (a) reasonably foreseeable by the parties to the complaint; or
  - (b) in the reasonable contemplation of the parties to the complaint, when the loss occurred and the Complainant actually suffered the loss.
- 55.6 In assessing the amount of compensation for opportunity cost, COSL may:
- (a) assess the amount as interest on the money;
  - (b) have regard to the loss incurred in not having access to the money; or

## Guidelines to the Rules of the Credit Ombudsman Service

- (c) have regard to expenditure incurred by the Complainant in not having access to the money.

55.7 If interest or earnings is awarded, it will be calculated from the date of the cause of action or matter giving rise to the Complainant's claim, but COSL will have regard to any factors it considers relevant, including but not limited to, the extent to which the conduct of either party contributed to any delay.

55.8 The interest rate usually applied by COSL is the bank term deposit rate for the amount of money the Complainant has not had access to because of the conduct of the Member.

55.9 COSL may award interest or earnings in addition to any compensation awarded, even if the interest or earnings, when added to the compensation awarded, exceeds the monetary compensation limit.

### Legal or other professional costs

55.10 The COSL process is free to the Complainant. In most cases, it is not necessary for the Complainant to be legally represented or to have other professional advice eg. a financial adviser or accountant. If a Complainant chooses to have legal or other professional representation, they are expected to bear the cost of that representation themselves. This applies equally to a Complainant who chooses to have legal or other professional representation in their dealings directly with the Member before the complaint is made to COSL.

55.11 If a Complainant's complaint is unsuccessful and COSL finds in favour of the Member, COSL will not under any circumstances make any order that the Member reimburse the Complainant for their legal or other professional costs. Lawyers representing Complainants who want to make, or have made, a complaint to COSL should tell their client this.

55.12 COSL may in very limited cases allow the costs of legal or other professional representation as an indirect loss if the Complainant's complaint is successful. In deciding whether or not to allow these costs, COSL will consider the complexity of the issues raised by the complaint, including:

- (a) whether there were complex legal issues that reasonably required legal advice to the Complainant;
- (b) whether there were complex financial or accounting issues that reasonably required financial or accounting advice to the Complainant; and
- (c) whether the costs were incurred in good faith in reasonable anticipation that the complaint raised complex legal, financial or accounting issues.

55.13 The amount of professional costs will:

- (a) not exceed an amount that is reasonable; and
- (b) be paid directly to the professional person concerned and not to the Complainant.

55.14 COSL may have regard to, but is not bound by, any applicable scale of costs or fees issued by a professional body.

### Non-financial loss or disadvantage

55.15 COSL may award a Complainant compensation for non-financial loss such as:

- (a) personal inconvenience;

## **Guidelines to the Rules of the Credit Ombudsman Service**

- (b) stress; and/or
  - (c) anxiety.
- 55.16 This form of compensation will be awarded only in limited circumstances and generally would not be a substantial amount.
- 55.17 In considering whether non-financial compensation is to be awarded, and if so, how much, COSL takes into account:
- (a) the nature and amount of the Complainant's personal inconvenience;
  - (b) the amount of time taken to remedy the Complainant's situation; and
  - (c) the extent to which the Member's conduct and its consequences have interfered with the Complainant's legitimate expectations of enjoyment and peace of mind.
- 55.18 However, in every case the Complainant is expected to:
- (a) minimise their own inconvenience; and
  - (b) be able to accept a reasonable level of inconvenience flowing from the member's conduct and its consequences.
- 55.19 COSL will consider how a person of reasonable sensibilities would have acted in the particular circumstances.
- 55.20 COSL will not entertain a claim for compensation for consequential medical loss. This is because the medical evidence required to prove such a claim cannot be tested by examination on oath during the COSL process. Any such claim is properly one for a Court and is regarded by COSL as being excluded from COSL's jurisdiction under Rule 10.1(p) - see Guideline 48.
- 55.21 If the Complainant had a pre-existing medical condition of which the Member was or should have been aware, COSL may consider that pre-existing medical condition, so far as COSL may regard it as relevant, in assessing a claim for compensation for stress resulting from the Member's conduct and its consequences.
- 55.22 Generally, COSL will not award compensation for the time spent by the Complainant in pursuing their complaint. However, COSL may award compensation if the Member's conduct during the COSL process unreasonably delayed the completion of the process.
- 55.23 Any amount of compensation so awarded would not be greater than the amount that COSL assesses to fairly reflect the inconvenience suffered by the Complainant as a result of the Member's conduct during the COSL process.

### **56. What kinds of orders can the Complainant ask COSL to make?**

- 56.1 Under Rule 9.9, alternatively or in addition to claiming monetary compensation, the Complainant can ask COSL to order the Member to do or to refrain from doing some act in relation to the subject matter of the Complainant's complaint.
- 56.2 COSL may, where appropriate, decide that the Member undertake a course of action to resolve the complaint, including, but not limited to:
- (a) the variation of a debt;
  - (b) the release of security for debt;

## **Guidelines to the Rules of the Credit Ombudsman Service**

- (c) the repayment, waiver or variation of a fee or other amount paid to or owing to the Member or its representative or agent, including the variation in the applicable interest rate on a loan;
- (d) the discontinuation of enforcement action against the Complainant;
- (e) in relation to a default judgment, not enforcing the default judgment;
- (f) the release of the Complainant from a contract; and
- (g) the variation of the terms of a Credit Contract in cases of financial hardship.

56.3 COSL will only make an order that:

- (a) as far as reasonably possible, returns the parties to the position they would have been in were it not for the acts or omissions of the Member in breach of one or more of the Rule 7.1 benchmarks; and
- (b) the Member has the contractual or legal capacity to give effect to; and
- (c) is fair in the circumstances.

56.4 COSL would generally not make an order that would expose the Member to a risk or disadvantage towards a third party (eg. a lender) that the Member is not otherwise exposed to under the complaint as originally made to COSL.

56.5 In exercising its discretion, COSL may:

- (a) ask for and have regard to submissions by the Member and/or from third parties who have or might have an interest in the matter eg. a lender - but COSL will not be bound by any submissions by the Member or the third party;
- (b) if it is minded to make an order, do so on such conditions as COSL thinks will be fair to all parties COSL identifies as having an interest in the matter (this may include a third party such as a lender).

### **57. Complaints can only be made about the Member's conduct**

57.1 A Member who is the subject of a complaint to COSL can only be the subject of a COSL Determination if COSL is satisfied that the Member has, in providing financial services to the Complainant:

- (a) breached relevant laws (or duties imposed by law) or did not effect to rights provided by law to Complainants;
- (b) breached an applicable code of practice;
- (c) not met standards of good practice in the financial services industry; or
- (d) acted unfairly towards the Complainant.

### **58. Conduct complained about must be that of Member's**

58.1 A Member will not be held liable to compensate the Complainant for any loss they claim to have suffered unless COSL has "jurisdiction" which is attracted by the conduct (ie. an act or omission) of the Member. If the conduct the Complainant is complaining about is the conduct of someone who is not a Member, then COSL will not deal with a complaint about that conduct.

### **59. Financial Hardship**

59.1 It is likely that a borrower will encounter a significant change in their financial circumstances at least once during the term of their loan. A borrower may experience financial hardship even during a short-term loan.

## Guidelines to the Rules of the Credit Ombudsman Service

- 59.2 Financial hardship may be due to reasons like successive increases in interest rates or a significant change in a borrower's financial circumstances (family break-up, death of spouse, workplace injury, unemployment or illness).
- 59.3 In these circumstances, a borrower may ask their lender to vary their payment obligations so that they can avoid defaulting (or avoid defaulting further) on their loan while they are experiencing financial difficulties.

### What is required of Members under COSL's Rules?

- 59.4 COSL Rule 18 (7th Edition) applies to our Members, whether or not a credit contract is regulated under the Consumer Credit Code or the National Credit Code.<sup>1</sup>
- 59.5 Under Rule 18, if the lender becomes aware or is informed by the borrower that the borrower is or may be in financial difficulties, the lender must consider in good faith and within a reasonable time whether it is reasonably appropriate to vary the payment terms, having regard to the borrower's financial circumstances.
- 59.6 The lender is only required to do so if the borrower provides the lender with the financial information and documents the lender reasonably needs to assess the borrower's financial situation.

### Good faith consideration of requests for financial hardship assistance

- 59.7 The lender must act reasonably and in good faith in assessing a borrower's request for financial hardship assistance and must not impose unreasonable or burdensome conditions on the borrower before agreeing to consider whether to, or agreeing to, vary the payment terms.
- 59.8 The following are examples of unreasonable or burdensome conditions:
- (a) a requirement that the borrower obtain money from family or friends before a request for financial hardship assistance is considered; or
  - (b) a requirement that the borrower access superannuation funds before the lender will consider a request for financial hardship assistance.
- 59.9 We consider that to act in good faith the lender should:
- (a) participate in the process of negotiation, mediation or conciliation;
  - (b) demonstrate:
    - (i) a willingness to consider the options proposed by the other party for resolution of the complaint; and
    - (ii) a willingness to put forward options for the resolution of the complaint;
  - (c) allow the borrower sufficient time to provide information about their financial circumstances;
  - (d) consider the borrower's financial circumstances;
  - (e) consider whether it is reasonably appropriate to vary the payment terms, having regard to the borrower's financial circumstances;
  - (f) consider any reasonable proposal to vary the payment terms of the contract;
  - (g) consider only matters relevant to the hardship application. For example, the following are generally not relevant considerations:

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<sup>1</sup> The credit contract will be regulated if, among other things, more than 50% of the loan was for personal, domestic or household purposes.

## Guidelines to the Rules of the Credit Ombudsman Service

- (i) a borrower's poor payment history;
  - (ii) the LVR of the loan;
  - (iii) a borrower's delay in making a financial hardship application; and
  - (iv) whether a borrower has been granted a financial hardship variation previously;
- (h) not impose an unreasonable or burdensome alternative payment arrangement; and
- (i) give adequate reasons for declining a financial hardship application.

59.10 However, good faith consideration does not impose an obligation on the lender to act for or on behalf of the borrower.

### Variation of regulated credit contracts

59.11 When a borrower makes a financial hardship application under the Consumer Credit Code or the National Credit Code, a credit contract may be varied in any of the following ways:

- (a) extending the term of the credit contract and reducing payments; or
- (b) postponing payments during a specified period (without extending the term of the loan); or
- (c) extending the term of the credit contract and postponing payments during a specified period.

59.12 It is implicit that when payments are postponed under section 66 Consumer Credit Code or section 72 National Credit Code, they can be 'caught up' by:

- (a) making a lump sum payment after the postponement; or
- (b) making extra payments over a period of time; or
- (c) capitalising the arrears.

59.13 The test under section 66 Consumer Credit Code and section 72 National Credit Code of whether a hardship variation is appropriate is whether the borrower reasonably expects to meet their obligations under the credit contract if the contract was changed in a particular way. If capitalising the postponed payments enables the borrower to meet their obligations under the loan, then we consider that it is appropriate for the lender to agree to this. The lender is not generally disadvantaged as the borrower will still pay interest on the capitalised amount.

59.14 Any capitalisation could increase the loan's loan to value ratio ("LVR") beyond that covered by a lender's mortgage insurance policy with respect to the loan ('LMI'). However, case law suggests that LMI may not be a relevant consideration for a lender to take into account when considering a financial hardship application in good faith.

59.15 Although section 66 Consumer Credit Code and section 72 National Credit Code refer to three types of variations, we consider that a lender should also consider other types of variations, in appropriate circumstances. Without limitation, a lender may agree to:

- (a) reduce the interest rate for a specified period;
- (b) reverse default fees, default interest and enforcement costs;
- (c) waive default fees and default interest for a specified period;
- (d) waive part of the arrears or principal;

## Guidelines to the Rules of the Credit Ombudsman Service

- (e) extend periods of reduced or nil repayments;
- (f) capitalise all, or a portion of, the arrears; and
- (g) allow the borrower time to sell the property, during which the lender will not require payments or will require reduced payments.

### Allowing the borrower time to clear the arrears or discharge the loan

#### *Sale of the security property*

- 59.16 A lender should allow a borrower reasonable time to sell the security property if the sale of the property is likely to discharge the loan. This is consistent with section 66 Consumer Credit Code and section 72 National Credit Code in that the sale will enable the borrower to meet their obligations under the loan. In this case, payments may be reduced or postponed during the sale period.
- 59.17 Even if the sale may not discharge the loan, a lender should consider whether it is appropriate to allow a borrower time to sell the security property, noting that:
- (a) borrowers generally prefer to “sell with dignity” rather than by mortgagee sale; and
  - (b) this saves on enforcement costs that would otherwise be borne by the borrower.
- 59.18 Where a lender agrees to allow time to sell the security property, it may be appropriate in the particular circumstances for the lender to require the borrower to agree to some or all of the following:
- (a) the security property being put up for sale within a certain period;
  - (b) unconditional contracts of sale to be exchanged by a certain date (this must be reasonable);
  - (c) the borrower agrees in writing that if contracts of sale are not exchanged by a certain date, the borrower will give possession of the property to the lender;
  - (d) The contract for sale provide that settlement will take place within a certain period (we consider six weeks would be reasonable in most circumstances);
  - (e) The borrower agrees to make whatever payments they can during the sale period (the borrower should provide financial information so that a reasonable payment amount may be established); or
  - (f) the borrower signs an authority to allow the lender to obtain updates from time to time on the progress of the sale from the real estate agent.

#### *Sale of another asset, not securing the loan*

- 59.19 Where the borrower is seeking to sell another asset, in order to clear the arrears on the loan or to discharge the loan, the lender should allow the borrower a reasonable time to sell the asset.

#### *Refinance*

- 59.20 If the lender has declined a financial hardship application, we consider that a lender should generally allow a borrower reasonable time to refinance where there is a realistic prospect of this or where the financial position of the lender is fully protected because the value of the security property significantly exceeds the outstanding balance of the loan.

#### *Accessing superannuation funds*

## **Guidelines to the Rules of the Credit Ombudsman Service**

59.21 A borrower can apply to APRA for the partial release of their superannuation benefits. Consequently, if the borrower requests the lender to do so, we expect that the lender will provide, as soon as practicable, the borrower with a letter containing the information required by APRA.

### Where a Member approves a request for financial hardship assistance

59.22 We consider that a lender should only approve a financial hardship application if the borrower is reasonably able to meet the proposed variation.

59.23 If the lender decides to vary the payment terms, it must promptly give to the borrower and any guarantor of the credit facility a written notice setting out particulars of the varied payment terms. If the payments are reduced or suspended for a period of time, the written notice should also indicate how the shortfall in scheduled payments are to be managed (for example and without limitation, by debt waiver, capitalisation, increased payments over a period or a lump sum payment).

### Where a Member declines a request for financial hardship assistance

59.24 If the lender decides not to vary the payment terms, it must promptly inform the Borrower in writing of:

- (a) its decision and the reasons for its decision;
- (b) the Borrower's right to make a complaint to COSL; and
- (c) COSL's contact particulars.

### If it appears that a Member has not given good faith consideration to a financial hardship application

59.25 Whether or not the credit contract is regulated, the borrower may submit a complaint to COSL if the lender has declined their financial hardship application.

59.26 If we find that the lender has not considered the financial hardship application in good faith, we:

- (a) will require the lender to re-consider their decision to decline the application;  
or
- (b) in the case of a regulated credit contract, will consider if the credit contract should be varied in the manner described in section 66 Consumer Credit Code or section 72 National Credit Code.

59.27 If the lender has not given good faith consideration to the request for financial hardship assistance, it will generally not be entitled to:

- (a) charge the borrower default fees, default interest and enforcement costs; and/or
- (b) charge the borrower the costs of staying legal proceedings,

if the enforcement action could have been avoided had the lender considered the financial hardship request in good faith and, if appropriate, granted a variation of payment terms at the time.

### Direction by COSL to vary a credit contract

## Guidelines to the Rules of the Credit Ombudsman Service

59.28 If we determine that a regulated credit contract should be varied, we will direct the lender to vary the payment terms of the credit contract, even where the credit limit exceeds the hardship threshold under the Consumer Credit Code or the National Credit Code.

59.29 The lender must:

- (a) not treat the variation of the credit contract as a default (and, accordingly, should not charge default fees or default interest while the variation is in place and for as long as the borrower is complying with the arrangement);
- (b) if the lender previously listed the borrower as being in default but the listing could have been avoided if the lender had acted in good faith, request the credit reference body to remove the default listing, and provide the credit reference body with all necessary information to facilitate the removal; and
- (c) while the borrower is complying with the variation, not do anything that is inconsistent with the variation, like:
  - commencing or resuming enforcement action;
  - seeking judgement for the debt or taking possession of an asset securing the debt;
  - assigning any right to recover the debt; or
  - listing a default on the borrower's credit reference file.

### Enforcement action

59.30 If a Member commences or continues enforcement action contrary to COSL Rules (eg, Rule 17 - 7th Edition), COSL may require the lender to reverse the action taken and bear the costs of the action and the reversal of the action.

59.31 The costs of suspending or discontinuing enforcement action while a complaint is being considered by COSL should be borne by the Member.

59.32 In relation to complaints where default judgment has been entered, refer to Guideline 46.2.

### What we expect from Members

59.33 COSL Rule 18 (7th Edition) makes it clear that the Member should consider whether it is appropriate to vary a borrower's payment obligations even where the borrower has not directly advised the Member that they are having financial difficulties.

### Where only one co-borrower makes a request for hardship assistance

59.34 Ideally, a financial hardship application should be made by all co-borrowers. However, we consider that a lender should consider in good faith a financial hardship application even if it is from only one of the co-borrowers.

59.35 We also consider that the lender should not insist that the assets or income of the absent co-borrower be provided before it will consider the financial hardship application, if the absent co-borrower is not in fact willing or able to contribute the loan payments. We consider that the assets and income of the absent co-borrower are irrelevant in these circumstances. The remaining co-borrower will, however, still need to demonstrate that they would be able to meet the payment terms (on their own) if the loan contract was varied.

## Guidelines to the Rules of the Credit Ombudsman Service

- 59.36 If the lender considers that the payment arrangement proposed by the borrower is appropriate, it should inform the other co-borrower of the proposed arrangement, invite them to indicate whether they are prepared to agree to the terms of the proposed arrangement or, if not, why the lender should not give effect to the arrangement. Where the other co-borrower is not able to provide a persuasive reason to decline the arrangement, we consider that it is appropriate for the lender to give effect to the arrangement.
- 59.37 Where there has been a breakdown in the relationship between co-borrowers, one co-borrower may elect not to make payments, preferring instead for the loan to go into default and the security property sold by the lender. In such a case, the co-borrower will not be prepared to support a financial hardship application by the other co-borrower or agree to a payment arrangement. In these circumstances, we consider that the lender should nonetheless consider in good faith whether a temporary payment arrangement would be appropriate to allow time for the co-borrowers to settle the issue in the Family Court or in another appropriate forum.

### Bankruptcy

- 59.38 We consider that a bankrupt borrower can make a financial hardship application in their own name where the bankrupt is able to meet the loan payments from the income the bankrupt is permitted to retain. In these circumstances, the outcome of the financial hardship application will not normally concern the trustee because it would not adversely affect the interests of the bankrupt's creditors.
- 59.39 Accordingly, a lender should consider a hardship application even where a borrower (or one co-borrower) is bankrupt. Obviously, the borrower/s will need to demonstrate that they would be able to meet the payment terms if the loan contract was varied.
- 59.40 If a trustee in bankruptcy makes it clear that they object to a variation of the loan then it is not likely that a variation will be appropriate.

## **60. Joining a Third Party Member – Rule 30**

- 60.1 If a Complainant makes a complaint about a Member and it turns out that the conduct complained about is that of a different Member, then there is a procedure for dealing with this situation. If COSL believes that:
- (a) it would not unfairly prejudice the Complainant or the Member; and
  - (b) it would lead to a more efficient and effective resolution of the complaint,
- COSL may allow or require another Member to be joined as a party to the complaint.
- 60.2 This Member who is joined is called the 'Third Party Member'.
- 60.3 A Third Party Member may be joined in a complaint:
- (a) by COSL deciding it is appropriate to do so; or
  - (b) on the Member's application to COSL and subject to COSL's approval.
- 60.4 COSL will exercise its discretion to join a Third Party Member if COSL is satisfied that:
- (a) the Complainant took all reasonable steps to raise all the relevant matters in the complaint so that the correct "respondent" could be identified;

## Guidelines to the Rules of the Credit Ombudsman Service

- (b) the Complainant did not fail to disclose any matter because that matter was not (or the Complainant believed or suspected that the matter was not) favourable to his or her case;
  - (c) to do so would not be unfair on the Member or the Third Party Member; and
  - (d) to do so would not impose an unreasonable burden or disadvantage on the Member or the Third party Member.
- 60.5 COSL would generally not grant approval to joining a Third Party Member if doing so would expose the Member to a risk or disadvantage towards another party (eg. a lender) that the Member is not otherwise exposed to under the complaint as made to COSL.
- 60.6 In exercising its discretion, COSL may:
- (a) ask for and have regard to submissions by the Member, the Third Party Member and/or from other parties who have or might have an interest in the matter eg. a lender - but COSL will not be bound by any submissions by the Member, the Third Party Member or the other party;
  - (b) if it is minded to grant approval, do so:
    - (i) on such terms and conditions; and
    - (ii) giving such directions about how the complaint is to be dealt with, as COSL thinks will be fair to all parties COSL identifies as having an interest in the matter (this may include another party such as a lender).
- 60.7 COSL may require the Complainant, the Member, and/or the Third Party Member to pay costs as a condition of granting approval. COSL would only make such an order to pay costs if:
- (a) those costs were incurred in joining or having to join the Third Party Member; and
  - (b) exceptional circumstances existed.
- 60.8 COSL would regard exceptional circumstances as existing if:
- (a) the Complainant's;
  - (b) the Member's; or
  - (c) the Third Party Member's,
- conduct was deliberately misleading or deceptive and that conduct directly led to the incurring or throwing away of those costs. Any order for costs would only be made against a party who was so in default.
- 60.9 A Third Party Member is bound to the Rules in the same way the Complainant and the Member are.

### **Example 1**

*The Complainant enters into a 5 year fixed rate loan with a lender who is not a Member of COSL. During the course of negotiating the loan, a Member who is a mortgage broker tells the Complainant about the financial effect of early discharge of the fixed rate loan (commonly referred to as "break costs"). The Member correctly points out to the Complainant the possible financial consequences of early discharge of the fixed rate loan. Twelve months later, the Complainant discharges the fixed rate*

## Guidelines to the Rules of the Credit Ombudsman Service

*loan. Because of a reduction of overall interest rates and because the "Break Cost" rate applied by the lender results in a significant cost to the Complainant, the Complainant makes a complaint against the Member.*

*As a broker, the Member has no control over the rates applied by the lender by way of "break costs" on the discharge of a fixed rate loan.*

*Provided that the Member has not been found to be "at fault" under the Rules, COSL has no jurisdiction to make any Determination in the Complainant's favour against that Member.*

*In this example, the Complainant will be invited to consider whether any other external dispute resolution scheme (eg Financial Ombudsman Service) has jurisdiction to deal with the complaint.*

### **Example 2**

*The Complainant enters into a 5 year fixed rate loan with a lender who is a Member of COSL. During the course of negotiating the loan, a Member who is a mortgage broker tells the Complainant about the financial effect of early discharge of the fixed rate loan (commonly referred to as "break costs"). The broker correctly points out the possible financial consequences of early discharge of the fixed rate loan. Twelve months later, the Complainant discharges the fixed rate loan. Because of a reduction of overall interest rates and because the "break cost" rate applied by the lender results in a significant cost to the Complainant, the Complainant makes a complaint against the broker.*

*As a broker, the broker Member has no control over the rates applied by the lender by way of "break costs" on the discharge of the fixed rate loan.*

*Provided that the broker has not been found to be "at fault" under the Rules, COSL has no jurisdiction to make any Determination in the Complainant's favour against that broker.*

*However, in this example the broker may apply to COSL to join the lender as a party to the complaint. If COSL decides to allow the lender to be joined as a Third Party Member, COSL decides what terms and conditions to impose and what directions to give the parties.*

*COSL then tells the parties:*

- *that it has decided to join the Third Party Member;*
- *about any terms and conditions; and*
- *about the directions.*

*Alternatively, COSL may of its own volition decide to join the lender as a Third Party Member. COSL would consider joining the lender as a Third Party Member if the facts indicated that the lender's conduct fell within COSL's jurisdiction*

### **61. An important checklist for Members about the correct "respondent"**

- 61.1 The checklist on the following page has been designed to assist identification of the correct party. COSL may ask the Member to complete the checklist when they respond to COSL about the Complainant's complaint.

# Guidelines to the Rules of the Credit Ombudsman Service

FOR MEMBERS ONLY

## CREDIT OMBUDSMAN SERVICE LIMITED

### Complaint Checklist

It is important for us to clearly understand the role of each party to the transaction.

Please complete the checklist below and return this with your acknowledgement or response to the complaint.

Mortgagee/lender on record:

Originator company which dealt with the Complainant:

Loan writer's name:

Who do you consider is the person appropriate to respond to the complaint:

Was the lender acting as principal or as trustee of a securitised program?

If a program, please advise the program name:

Name of program manager:

Name of mortgage manager:

Aggregator name:

Any other information you consider will assist COSL understand the legal or commercial context of this transaction:

## **Guidelines to the Rules of the Credit Ombudsman Service**

### **62. What happens when the parties come to an agreement**

62.1 If at any stage of the matter the Complainant and the Member come to an agreement about the resolution of the complaint, COSL may prepare a Settlement Agreement if one of the parties requests it or on its own volition.

### **63. What is a Settlement Agreement?**

63.1 A Settlement Agreement:

- (a) includes a statement that the complaint is settled on the terms set out in the Settlement Agreement in full and final settlement of all matters referred to in the Settlement Agreement;
- (b) includes a form of "Release and Indemnity" in favour of the Member conditional on the Member complying in full with the terms of the Settlement Agreement;
- (c) includes a note informing the parties that if the Member fails to comply with the Settlement Agreement, the Complainant can tell COSL of the Member's failure to comply with it;
- (d) includes a statement that the parties agree to keep confidential and not disclose any documents, information or correspondence relating to the complaint, including COSL's views or findings;
- (e) includes a note informing the parties that if COSL is satisfied:
  - (i) that both Complainant and Member validly signed the Settlement Agreement;
  - (ii) that the complaint was one that was within COSL jurisdiction, and
  - (iii) that the Member has failed to comply with the Settlement Agreement;then the Credit Ombudsman may make an Award in the terms of the Settlement Agreement to enforce it;
- (f) includes a note suggesting to the parties that they obtain their own independent professional advice (eg legal, accounting, tax, financial planning) before signing the Settlement Agreement; and
- (g) is signed and dated by both the Complainant and the Member, a copy of the signed Settlement Agreement being retained on file by COSL and a copy given to each party.

63.2 COSL tells both parties that they should obtain their own independent advice before accepting any settlement of the complaint.

63.3 A model Settlement Agreement appears in the next 2 pages.

**COSL strongly suggests that before the Complainant signs a Settlement Agreement, they get independent professional advice.**

### **64. If the Member makes a reasonable offer – Rule 20**

## **Guidelines to the Rules of the Credit Ombudsman Service**

- 64.1 If at any stage of the matter the Member makes an offer to a Complainant to resolve a complaint that COSL considers is reasonable on the information before COSL, COSL may recommend to the Complainant that they accept the Member's offer in full and final settlement of the complaint.
- 64.2 If the Complainant does not accept the offer, COSL may close the complaint in the absence of further information from the Complainant that would justify the complaint remaining open. COSL will advise the Complainant and Member that it has done so.
- 64.3 Complainants do not have to accept any recommendation COSL makes. They can pursue their complaint in another forum, such as a court or tribunal. But if they accept the recommendation, it is binding on the Member and the Complainant.

**Guidelines to the Rules of the Credit Ombudsman Service**

This Settlement Agreement dated

2010

Between:

.....

"The Complainant"

and

.....

"The Member"

**SCHEDULE**

The Complainant and the Member have agreed to settle the complaint in terms of the schedule below:

- (a) In their complaint dated xxx and subsequent correspondence to the Credit Ombudsman Service (collectively, "the complaint"), the Complainant sought compensation from the Member because the Member allegedly, among other things:
  - (i) xxx; and
  - (ii) did or did not do such other things as are referred to in the complaint.
- (b) The Member agrees to pay the Complainant on an ex-gratia basis and without admission of liability, an amount of \$xxx (xxx dollars).
- (c) The Complainant accepts this payment in full and final settlement of the complaint.
- (d) The Member agrees to send a bank cheque made payable to xxx, care of:  
Credit Ombudsman Service Limited  
PO Box A252 SYDNEY SOUTH NSW 1234

## Guidelines to the Rules of the Credit Ombudsman Service

### Settlement Agreement

1. The Complainant and the Member agree to settle the complaint on the terms set out in the Schedule.
2. This Settlement Agreement is in full and final settlement of all matters referred to in the complaint.
3. The Complainant and the Member agree to keep confidential and not disclose to any person any documents, information or correspondence relating to the complaint (such as letters, emails and facsimile transmissions) prepared, sighted, received or sent by the Member, the Complainant or the Credit Ombudsman Service Limited ('COSL').
4. The Complainant and the Member further agree not to:
  - (a) disclose to any person COSL's views or findings in relation to the complaint; and
  - (b) make any statements (whether orally or in writing) or do any acts which may cause any damage to the reputation of the Complainant/Complainants or the Member or its employees and contractors.
5. Provided that the Member complies in full with the terms of this Settlement Agreement, and in consideration of the Member complying with its obligations under the terms of this Settlement Agreement, the Complainant hereby fully and forever releases the Member from, and indemnifies the Member against, any action, claim demand, cost, expense or liability whatsoever arising out of or in connection with the matters referred to in the complaint.
6. If the Member fails to fully comply with the terms of this Settlement Agreement, the Complainant may ask COSL to inform the Credit Ombudsman of the terms of this Settlement Agreement and of the Member's failure to comply.
7. If the Credit Ombudsman is satisfied that the Member has failed to fully comply with the terms of this Settlement Agreement, the Credit Ombudsman may make an Award pursuant to the Rules of the Credit Ombudsman Service against the Member in the terms set out in the Schedule.
8. COSL has prepared this Settlement Agreement at the request of the parties who each acknowledge that:
  - (a) COSL is not responsible for any errors or omissions in it;
  - (b) COSL does not and has not purported to give legal or other professional advice in relation to this Settlement Agreement;
  - (c) this Settlement Agreement is not and does not purport to be legal or other professional advice;
  - (d) they have sought and relied on their own legal and/or other professional advice in relation to this Settlement Agreement before signing it, or have decided of their own volition not to seek and/or rely on such advice before signing it;

## Guidelines to the Rules of the Credit Ombudsman Service

- (e) that this Settlement Agreement is made without admission of liability by or on behalf of either party; and
  - (f) they are responsible for their own costs and expenses of and incidental to this Settlement Agreement and are jointly and severally liable for any duties, imposts or taxes arising out of or in connection with this Settlement Agreement.
9. This Settlement Agreement will be signed by the parties in triplicate - one signed copy for each party and one copy for COSL.
  10. The Member warrants that the person signing this Settlement Agreement for or on behalf of the Member has full legal power to do so.
  11. This Settlement Agreement comes into effect on the date it is last signed by the parties.

**The parties to this agreement should obtain their own independent professional advice about its effect before signing it.**

<b>Member to Sign</b>		
Signed by	.....	
	.....	
	<i>Signature of Member or representative</i>	<i>Date</i>
In the presence of: -	.....	
.....	.....	.....
<i>Print name of Witness</i>	<i>Signature of Witness</i>	<i>Date</i>
<b>Complainant/s to Sign</b>		
Signed by	.....	
	.....	
	<i>Signature of Complainant/s</i>	<i>Date</i>
In the presence of: -	.....	
.....	.....	.....
<i>Print name of Witness</i>	<i>Signature of Witness</i>	<i>Date</i>

## **Guidelines to the Rules of the Credit Ombudsman Service**

### **65. How COSL communicates with the parties**

65.1 COSL communicates with the parties to the complaint by face-to-face meeting, telephone, e-mail, fax or by letter. If COSL considers it appropriate, any communication by personal attendance or by telephone is confirmed to the Complainant and/or the Member by another means. COSL makes file notes of personal and telephone attendances on Complainants and/or Members.

### **66. Offensive and defamatory material**

66.1 If at any stage of a complaint COSL considers that any complaint, communication, information or document given to COSL by any party (material) is offensive to, or contains a defamatory imputation of, any other person (including COSL), COSL may refuse to:

- (a) receive that material; or
- (b) convey that material to any other person.

66.2 COSL may require the material to be amended by having all offensive or defamatory elements removed before accepting, considering or conveying that material to any other person.

66.3 If the party concerned does not resubmit the amended material with all offensive and defamatory elements removed within 7 days after COSL requires it to do so, COSL:

- (a) in the case of information submitted by a Complainant, regards the complaint as withdrawn and COSL takes no further action in relation to it other than to record appropriate COSL internal codes for reporting purposes and to notify the Complainant of this outcome; and
- (b) in the case of a Member or any other party, proceeds to deal with the complaint without regard to the information.

### **67. Timeframes for Members' responses to complaints to COSL**

67.1 Under Rule 16.3, Members must provide a response to the Complainant's complaint within 21 days after receiving it from COSL. The aim of this and similar rules is to ensure that COSL complaints are dealt with within a reasonable amount of time. ASIC Regulatory Guide 139 promotes timely and efficient management of complaints.

67.2 COSL recognises that in some cases, it may not be practicable or reasonable for a Member to reply within the 21 day period. Rule 35 allows COSL, at its discretion, to grant an extension of time. In considering a request by a Member for an extension of time to submit a response to the Complainant's complaint, COSL has to balance:

- (a) the Complainant's need to have their complaint dealt with in a timely and efficient manner; and
- (b) the legitimate operational issues that may confront Members in dealing with the Complainant's complaint.

67.3 Where a Member is unable to complete its written response to the Complainant's complaint within 21 days from receipt of it, the Member may make a written request to COSL for an extension of time to respond.

67.4 When requesting an extension of time, the Member must transmit a written request to COSL stating:

## Guidelines to the Rules of the Credit Ombudsman Service

- (a) the reasons why the Member is unable to respond to the complaint within 21 days; and
  - (b) the date on which the Member will give its response to COSL.
- 67.5 A decision whether to grant an extension of time will be at the absolute discretion of COSL but an extension in excess of an additional 21 days from the date the response would otherwise be due will only be granted in extraordinary circumstances.
- 67.6 Before COSL 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.
- 67.7 When making its decision, COSL will take into account:
- (a) the reasonableness of the explanation;
  - (b) the length of the extension requested; and
  - (c) the impact a refusal to grant the extension may have on the capacity of the Member to provide a satisfactory response to the Complainant and the possibility of resolution.
- 67.8 In particular, COSL will consider whether the Member is unable reasonably to respond substantively to the Complainant's complaint within time because:
- (a) all relevant documents have not been provided by the Complainant;
  - (b) the Complainant has misstated material facts;
  - (c) the subject matter of the complaint involves complex issues that require technical or expert review and report; or
  - (d) the subject matter of the complaint requires information and documents to be provided by third parties who have failed within time to respond to the Member's reasonable efforts to be provided with relevant information and/or documents.
- 67.9 The Complainant and the Member will be advised of any grant of an extension of time and the reasons.
- 67.10 If a Member fails to respond within the 21 day period without requesting an extension of time, COSL will warn the Member that if it does not:
- (a) respond to the Complainant's complaint within 7 days from the date of the letter; or
  - (b) does not apply for an extension of time within that 7 day period,
- COSL will proceed to the Conciliation and Investigation Phase or the Determination Phase of the COSL process.
- 67.11 COSL requires a Member seeking an extension of time to provide to COSL a written application supported by relevant documents and statements as to material facts signed by persons authorised by the Member.
- 67.12 At any other stage of the COSL process, if COSL requests a response, further information or further documents and the Member fails to provide this within the set time, COSL will warn the Member that if it does not:
- (a) provide this within 7 days from the date of the letter; or
  - (b) does not apply for an extension of time within that 7 day period,

## **Guidelines to the Rules of the Credit Ombudsman Service**

COSL will proceed with considering the complaint on the basis of the information available to COSL at the time.

### **68. Timeframes for Complainant's responses to COSL**

- 68.1 Under Rule 16.5, if the Complainant is not satisfied with the Member's response and had provided COSL with reasons for this, the Complainant may, within 21 days of COSL sending the Complainant the Member's response, request COSL to deal with the complaint.
- 68.2 Rule 35.1 allows COSL, at its discretion, to grant an extension of time.
- 68.3 Where a Complainant is unable to provide COSL with reasons for their dissatisfaction with the Member's response within 21 days from receipt of it, the Complainant may make a written request to the COSL for an extension of time to respond.
- 68.4 When requesting an extension of time, the Complainant must transmit a written request to COSL stating:
- (a) the reasons why the Complainant is unable to respond to the Member's response within 21 days; and
  - (b) the date on which the Complainant will give its response to COSL.
- 68.5 A decision whether to grant an extension of time will be at the absolute discretion of COSL, but an extension in excess of an additional 21 days from the date the response would otherwise be due will only be granted in extraordinary circumstances.
- 68.6 Before COSL 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.
- 68.7 When making its decision, COSL will take into account:
- (a) the reasonableness of the explanation;
  - (b) the length of the extension requested; and
  - (c) the impact a refusal to grant the extension may have on the Member and the possibility of resolution.
- 68.8 The Complainant and the Member will be advised of any grant of an extension of time and the reasons.
- 68.9 If a Complainant fails to respond within the 21 day period without requesting an extension of time, COSL will warn the Complainant that if they do not:
- (a) respond within 7 days from the date of the letter; or
  - (b) does not apply for an extension of time within that 7 day period,
- COSL will close the complaint.
- 68.10 At any other stage of the COSL process, if COSL requests a response, further information or further documents and the Complainant fails to provide this within the set time, COSL will warn the Complainant that if it does not:
- (a) provide this within 7 days from the date of the letter; or
  - (b) does not apply for an extension of time within that 7 day period,
- COSL will close the complaint.

## **Guidelines to the Rules of the Credit Ombudsman Service**

Except in exceptional circumstances, once COSL closes the complaint, COSL will not later consider the complaint even if the Complainant subsequently provides COSL with the requested response, information or documents (Rule 10.1(m)). See Guideline 45.

### **69. Advice about "good practice" in the financial services industry**

- 69.1 In certain cases, COSL may seek the advice of an industry advisor during the COSL process.
- 69.2 The industry advisor is a highly experienced and qualified operative in their industry.
- 69.3 The function of the industry advisor is to provide advice to COSL on what is regarded as good practice in the industry they operate in, having regard to the particular circumstances of a particular complaint. However, COSL is not bound by the advice of the industry advisor.
- 69.4 In seeking the advice, COSL will only identify the parties to a complaint if it thinks that it is necessary to do so:
- (a) enable the advice to be obtained, or
  - (b) avoid an actual or perceived conflict of interest.
- 69.5 Before a particular complaint identifying the Complainant is referred to the industry advisor, COSL obtains the specific written consent of the Complainant to do so.
- 69.6 If the Complainant:
- (a) refuses to give consent; or
  - (b) fails to give consent within 14 days of COSL's request for it,
- COSL may regard the complaint as withdrawn and COSL will take no further action in relation to it other than to notify:
- (v) the Complainant; and
  - (vi) (if the complaint has been referred by COSL to the Member) the Member, of this outcome.

### **70. Legal representation – Rule 31.3**

- 70.1 Only in exceptional circumstance and on such terms and conditions as COSL may impose for the purpose will COSL allow a Member to be legally represented at a Hearing or Conciliation Conference without the Complainant also being legally represented.
- 70.2 Exceptional circumstances would be regarded as existing if:
- (a) COSL was of the view that the complaint raised an important question of law; and
  - (b) the Complainant indicated, and COSL was satisfied, that the Complainant was capable of properly responding to legal issues arising in relation to the complaint.

### **71. "Service" of correspondence and/or documents**

- 71.1 The Rules do not contain any specific provision requiring that correspondence and/or documents be formally "served" on any party to the complaint and, in

## Guidelines to the Rules of the Credit Ombudsman Service

particular, do not require "service" at the registered office of a corporate member. This is consistent with the broad objective of COSL to have complaints dealt with under the Rules with as little formality and technicality as possible.

- 71.2 COSL's Constitution makes provision for formal "service" of documents where that is required by COSL's Constitution, the Corporations Act 2001 or by any other legislation. However, these provisions do not apply to the procedures under the Rules.
- 71.3 For the purpose of the Rules, correspondence and/or documents will be sufficiently served, given, sent or despatched ("sent") to any party to the dispute if:
- (a) in the case of correspondence and/or documents sent to a Complainant, the correspondence or document is:
    - (i) posted to the mailing address given by the Complainant to COSL;
    - (ii) faxed to the facsimile number given by the Complainant to COSL;
    - (iii) emailed to the email address given by the Complainant to COSL; and
  - (b) in the case of a Member, the correspondence or document is:
    - (i) posted to the postal address of the Member as shown in the Register of Members of COSL;
    - (ii) faxed to the Member at the Member's facsimile number shown in the Register of Members of COSL;
    - (iii) emailed to the Member's email address shown in the Register of Members of COSL.
- 71.4 A letter or document notice will be deemed to have been sent:
- (a) in the case of posting:
    - (i) on the next business day to the recipient's address where that address is within the State/Territory of posting; or
    - (ii) on the third business day after posting in respect of the recipient's address where that address is outside the State/Territory of posting;
  - (b) in the case of facsimile transmission, at the time of transmission; or
  - (c) in the case of email, at the time of sending of the email.
- 71.5 Postage may, but need not, be by way of ordinary mail.