

DETERMINATION

Complainant: Mr RS ("Complainant")

Member: A Broker ("Member")

Date: 24 April 2009

I have reached the following Determination in relation to a complaint made by the Complainants about the Member.

DETERMINATION

I find that the Complainant is entitled to be compensated in an amount of \$8,304.13.

Ombudsman's approach

The role of the Ombudsman is to investigate and resolve complaints in accordance with the Rules of the Credit Ombudsman Service Limited ("COSL"). In doing so, the Ombudsman is not bound by any legal rules of evidence and may inform itself about the complaint and all matters relating to it in such manner as he considers appropriate. The Ombudsman relies substantially on, and may draw inferences and conclusions from, available written material, particularly material which was created contemporaneously with events.¹

The approach of the Ombudsman is to consider the available information and determine from that information what is more likely to have happened based on the balance of probabilities.

Relevant considerations

In making a Determination in accordance with Rule 73 of the Rules of the Credit Ombudsman Service Limited, I am required to have regard to:

- (a) relevant legal requirements;
- (b) the Code of Practice prescribed by the Mortgage and Finance Association of Australia ("MFAA");
- (c) good practice in the credit industry; and
- (d) fairness in all the circumstances².

Where relevant, the application of these to the facts of the present case is discussed below.

¹ COSL Guideline 2.4, 2nd Edition

² COSL Rule 49, 3rd Edition

Chronology

In 2003, the Member arranged a loan for the Complainant in the amount of \$240,000 for the purpose of refinancing his existing loan with Aussie Home Loans ('Aussie') and paying out his AMP credit card balance. The loan was settled on 7 October 2003.

Loan details

The \$240,000 loan comprised two components:

1. Standard variable rate loan

Loan amount: \$190,000.00.

Interest rate on settlement date: 6.65% pa, but discounted to 5.99% pa for the first 12 months.

Loan proceeds were used as follows:

| | | |
|-----|---------------------------------|--------------|
| (a) | Refinancing costs: | \$5,059.06 |
| (b) | Partial pay out of Aussie loan: | \$177,190.26 |
| (c) | Pay out credit card balance: | \$7,750.68. |

2. All In One Line of Credit

Credit limit: \$48,000.00

Interest rate on settlement date: 6.90% pa

Only \$30,709.09 was drawn down from the line of credit to pay out the remainder of the Aussie loan (and no interest was payable on the undrawn balance of the line of credit). Included in the line of credit package was a 'nil interest' Visa credit card with a credit limit of \$2,000.

Refinance

On 15 January 2005 (that is, soon after the end of the 12-month interest rate discount period), the Complainant refinanced the loan arranged by the Member with ING, but in doing so, incurred costs associated with the refinance. The ING loan was similar to the loan arranged by the Member and also offered a discounted interest rate for the first 12 months.

Consent Orders

On 27 May 2007, on the application of the Australian Securities and Investments Commission ('ASIC') certain Consent Orders were issued by the Federal Court in relation to the Member. The Consent Orders, agreed to by the Member, declared that the Member engaged in misleading conduct in breach of the ASIC Act during the period April 2003 to August 2006. [The Member's dealings with the Complainant occurred during this period.] The misleading conduct referred to in the Consent Orders relate to representations made by the Member in relation to the loans it was promoting at the relevant time.

Representations referred to in Consent Orders

The representations declared in the Consent Orders to be in breach of the ASIC Act were:

1. Representation that loan would be paid off sooner

The Member contravened sections 12DA(1), 12DB(1)(a), 12DB(1)(c) and 12DB(1)(f) of the ASIC Act by representing that:

- (a) a loan arranged by the Member would be paid off sooner than a standard bank loan and result in substantial savings; and
- (b) it was the type of loans arranged by the Member, rather than any other factor, which would bring substantial savings to a borrower,

in circumstances where such savings and reduced loan term could only be achieved if the borrower was able and prepared to make repayments greater than the scheduled repayments under the loan agreement.

2. Representation that persons mentioned in promotional material were real persons

The Member contravened sections 12DA(1) and 12DB(1)(b) of the ASIC Act by falsely representing that the particular persons mentioned in its promotional material:

- (a) were real people;
- (b) who had obtained a loan arranged by the Member; and
- (c) who had paid off their loan in a shorter period of time and at less overall cost than they would have had if they had not obtained a loan arranged by the Member.

3. Representation that they would search the whole market for the best loan

The Member contravened sections 12DA(1), 12DB(1)(a) and 12DB(1)(c) of the ASIC Act by falsely representing that it would search the whole market for the best possible loan for a borrower.

4. Representation that the borrower's circumstances would be considered

The Member contravened sections 12DA(1), 12DB(1)(a) and 12DB(1)(c) of the ASIC Act by impliedly representing, falsely, that it would consider a borrower's financial circumstances before advising the borrower if they would benefit from changing their lenders.

5. Representation that the Member was independent of lenders

The Member contravened sections 12DA(1), 12DB(1)(a) and 12DB(1)(c) of the ASIC Act by representing it was independent of lenders that may be recommended to borrowers, when the Member was not in fact independent from an associated originator company.

6. Representation as to expertise

The Member contravened sections 12DA(1), 12DB(1)(a) and 12DB(1)(c) of the ASIC Act by falsely representing that it was a multi-faceted organisation with expertise in a range of services, including investment and insurance advice.

Complainant's reliance on the Member's representation

The Complainant alleges that in reliance of the above representations (which he asserts were made orally by the Member's representative), he refinanced his Aussie loan with one arranged by the Member.

As a result of the refinance, the Complainant asserts that he has suffered loss for which he seeks compensation.

COSL's recommendation

COSL considered the Complainant's claim for compensation and made a recommendation to settle the complaint. It recommended that the Member pay an amount of \$8,392.26 to the Complainant in full and final satisfaction of his claim. In recommending this amount, COSL took into consideration both the costs incurred by the Complainant as well as the benefits or savings it considered the Complainant received as a result of the refinance.

While the Member accepted COSL's recommendation, the Complainant declined to do so because he was of the view that:

1. the amount attributed by COSL to the savings he received by paying out his credit card exceeded the amount he claims he actually saved by doing so;
2. the amount recommended by COSL did not include interest on his loss, calculated from the date his complaint was received by COSL; and
3. the amount recommended by COSL did not include compensation for stress and inconvenience that he alleges he suffered as a result of the Member's conduct.

History of the complaint since it was received by COSL

We received the complaint on 4 September 2007. As required by COSL's Rules, the complaint was referred to the Member for their further consideration.

On 22 October 2007, the Complainant again wrote to us enclosing additional information relevant to his complaint.

On 13 November 2007, the Member wrote to us and declined to offer the Complainant any compensation.

On 16 November 2007, the Complainant responded to the Member's initial response and provided further particulars.

On 22 November 2007, the Member wrote to us and offered the Complainant \$1,500 to settle the complaint without admission of liability.

On 23 November 2007, the Complainant rejected the offer and requested us to consider the complaint.

On 18 December 2007 and again on 30 April 2008, the Complainant provided additional information in relation to his complaint.

COSL issued a Case Summary on 4 July 2008, inviting the parties to comment on its initial assessment. The Case Summary estimated that the amount of the loss suffered by the Complainant which was recoverable under the COSL Rules was \$6,226.18.

On 18 July 2008, the Complainant provided his comments on the Case Summary, including:

1. pointing out that COSL had made errors in the calculation of his estimated loss;
2. objecting to COSL's deduction from the amount of the estimated loss, savings he received by paying out his credit card from the proceeds of the loan;
3. disagreeing that the interest on the amount of his loss should be calculated only up until his complaint was received by COSL.

On 5 August 2008 the Member made an offer of \$6,000.00 in full and final settlement of the complaint. The Complainant rejected the offer on 7 August 2008.

On re-examining its initial estimate of the Complainant's loss, COSL re-calculated the loss at \$8,392.26 and issued a correction to both parties on 12 September 2008.

However, the revised loss amount continued:

1. to take into account the fact that the Complainant obtained a monetary benefit (in the form of an interest saving) when he paid out his credit card from the proceeds of the loan; and
2. to disregard any interest on loss that may have accrued after the complaint was received by COSL.

On 15 September 2008 the Complainant provided further comments to COSL. Although generally agreeing with the revised loss amount, the Complainant again objected to the revised loss amount continuing to: (a) reflect interest savings from the pay-out of his credit card debt; and (b) not include interest on the loss amount from the date COSL received his complaint.

On 16 September 2008 the Member made an offer to settle the complaint for \$8,392.26.

On 23 September 2008, the Complainant declined the offer.

On 2 December 2008, COSL issued a Case Assessment in which it recommended that the complaint be settled for \$8,392.26.

On 3 December 2008, the Member again made an offer to settle the complaint for \$8,392.26.

On 8 December 2008, the Complainant communicated his disagreement with COSL's Case Assessment and requested the Credit Ombudsman to issue a Determination.

On 14 January 2009, I invited both parties to make their final submissions prior to my considering the issues raised in this complaint and issuing a Determination.

On 22 January 2009 the Complainant made his final submission which sought the following adjustments to the calculation of the revised loss amount:

1. disregard or reduce the amount of savings he received due to paying out his credit card debt from the proceeds of the loan;
2. include interest on the amount of his loss from the date the complaint was received by COSL; and
3. include an amount of compensation for stress and inconvenience.

Finding

1. Declarations contained in Consent Orders

Other than having been declared in the Consent Orders as being misleading or deceptive or likely to mislead or deceive in contravention of the ASIC Act, I note that the representations the subject of the Consent Orders also contravene the MFAA Code of Practice and what I consider to be good practice in the credit industry.

2. Framework for the resolution of this complaint

I note that the Complainant lodged his complaint with COSL after the Consent Orders were issued in the Federal Court. Consequently, the Complainant had the benefit of framing parts of his complaint in a manner consistent with the declarations made in the Consent Orders.

I am prepared to conclude that the Member, in making the relevant representations to the Complainant, engaged in conduct that was in breach of the ASIC Act to the extent declared in the Consent Orders.

If I was not prepared to make this conclusion, the Complainant would likely fail in his claim for compensation given that his allegations have not been adequately supported by evidence that would otherwise be required to support another cause of action. It follows that my conclusion does not extend to unsupported allegations made by the Complainant that fall outside the declarations contained in the Consent Orders.

Accordingly, although there may be other causes of action relevant to the facts of the complaint, I consider that the settlement of the complaint would be best achieved by considering the Complainant's entitlement for compensation under section 12GF of the ASIC Act.

3. Whether the Member's contravention of the ASIC Act caused the Complainant's loss

As mentioned earlier, the Consent Orders contain declarations that the Member, over a period of time, engaged in conduct that was misleading or deceptive in contravention of the ASIC Act.

However, in order to be compensated for loss, the Complainant needs to show that his loss was caused by the Member's contravention of the ASIC Act. This in turn depends on whether the Complainant relied on the Member's representations when entering into the loan. The Complainant asserts that he relied on Member's representation that he would be able to pay off his home loan earlier than he would otherwise have been able to, thereby making substantial savings.

I am prepared to accept that such a representation is capable of inducing a person with an existing mortgage to refinance their existing loan and consolidate their debts.³ This is so even if the contravention only partly contributed to the Complainant entering into the loan arranged by the Member.⁴

The High Court⁵ addressed the issue of causation thus:

[32] Misrepresentation will rarely be the sole cause of loss. If, in reliance on information, a person acts, or fails to act, in a certain manner, the loss or damage may flow directly from the act or omission, and only indirectly from the making of the representation. Where the reliance involves undertaking a risk, and information is provided for the purpose of inducing such reliance, then if misleading or deceptive conduct takes the form of participating in providing false information, and the very risk against which protection is sought materialises, it is consistent with the purpose of the statute to treat the loss as resulting from the misleading conduct.

Consequently, I am prepared to accept that the Member's representation in contravention of the ASIC Act caused the Complainant's loss.

4. Principles of loss assessment

In assessing the extent to which the Complainant is entitled to be compensated for his loss, the following principles are relevant:

- (a) the general principles of assessment of damages must give way in particular circumstances to solutions best adopted to give the Complainant that amount of damages that will most fairly compensate for the wrong suffered;⁶
- (b) where money is paid as a consequence of misleading conduct, the loss suffered by that conduct includes not only the money paid but also the cost of borrowing that money;⁷
- (c) where there is uncertainty, it will be sufficient to do one's best to quantify the loss,⁸ and estimate the loss regardless of the difficulties encountered;⁹

³ Gould v Vaggelas [1985] HCA 85 per Wilson J at [6]

⁴ Gould v Vaggelas [1985] HCA 85 per Wilson J at [6]

⁵ Travel Compensation Fund v Robert Trambree t/as R Trambree and Associates [2005] HCA 69, Gleeson CJ at [32]

⁶ Johnson v Perez [1988] HCA 64 per Mason CJ at [5]

⁷ Re Sanrod Pty Ltd; Henry John Jago and Beatrice Eleanor Jago v Dainford Ltd [1984] FCA 154; 54 ALR 179 (19 June 1984) per Fitzgerald J at [49]

⁸ This approach is consistent with the one adopted in Re Enzed Holdings Limited and Ors v Wynthea Pty Limited and Ors [1984] FCA 373; 4 FCR 450 (6 December 1984) where the following was stated by Sheppard, Morling and Wilcox JJ at [68]: "If the court finds that damage has occurred it must do its best to quantify the loss even if a degree of speculation and guess work is involved..."

- (d) in relation to contingencies, the assessment of damages is an inexact science which sometimes involves guesswork rather than estimation;¹⁰ and
- (e) the standard of proof is that, on the balance of probabilities, the Complainant has suffered the loss.¹¹

5. *The contentious issues raised by the Complainant*

As noted earlier, COSL recommended in its Case Assessment that the Member compensate the Complainant in an amount of \$8,392.26. Although the Member accepted the recommendation, the Complainant declined to accept it on the basis that COSL's recommendation did not:

- (a) disregard or reduce the amount of savings he received from paying out his credit card debt;
- (b) include interest on the amount of his loss from the date the complaint was received by COSL up to the date of this Determination; and
- (c) include an amount of compensation for stress and inconvenience.

Credit card saving

The information available to me indicates that, at settlement, an amount of \$7,750.68 was paid into the Complainant's credit card account from the proceeds of the standard variable rate loan.

At the time of settlement, the interest rate on the credit card account was 15.65%, while the annual rate of interest on the standard variable rate loan was 5.99% for the first year, then 6.65% thereafter. This is potentially a saving of interest at a rate of 9.66% on an amount of 7,750.68 for the first year and 9.00% thereafter.

The Complainant in his letter to COSL of 22 January 2009 contends that he did not receive any savings by consolidating his credit card debt into the standard variable rate loan.

He asserts that he was "compelled/misled by the [Member's] representative to consolidate the credit card balance into the loan account despite [his] plea that [he had] the requisite funds to pay it separately." The Complainant also asserts that he was incorrectly advised that he should "consolidate the credit card debt into the home loan and pay it off later".

The Complainant goes on to say that "after consolidation, [he] paid this credit card balance in full within the first month through successive internet banking transfers from savings account."

⁹ Commonwealth v Amann Aviation Pty Ltd [1991] HCA 54 per Mason CJ and Dawson J at [31], Dean J at [10] and Toohey J at [4]

¹⁰ Jones v Schiffmann [1971] HCA 52 per Menzies J at [1]

¹¹ Sellars v Adelaide Petroleum NZ [1994] HCA 4 per Mason CJ, Dawson, Toohey and Gaudron JJ at [39], and per Brennan J at [18]

The Complainant therefore contends that any savings taken into account by COSL in determining his loss should be calculated in relation to the first month only, if at all.

Clearly, if the Complainant authorised the payment of the credit card debt from the loan proceeds rather than using his own funds because he was misled, I would have no hesitation in finding that no interest savings ought to be taken into account in calculating the Complainant's loss.

However, on balance, I am not inclined to accept that this is the case.

The information available to me also shows that a number of payments (that were not in the nature of salary credits) were made by the Complainant into the line of credit. The applicable annual rate of interest on that account was 6.90%. The details of these payments are as follows:

| <i>Date</i> | <i>Amount</i> |
|-----------------|---------------|
| 27 October 2003 | \$1,000.00 |
| 27 October 2003 | \$1,000.00 |
| 29 October 2003 | \$1,000.00 |
| 30 October 2003 | \$1,000.00 |
| 3 November 2003 | \$907.34 |
| 3 November 2003 | \$1,000.00 |
| 3 November 2003 | \$1,000.00 |

I note that the sum of these payments do not equal the amount of the credit card debt. They were also paid into the line of credit account, not the standard variable rate loan account from which proceeds the credit card debt was paid out. [This was presumably because the applicable interest rate on the line of credit was higher than that of the standard variable rate loan.]

The Complainant has not provided evidence that he had his own funds with which to pay out the credit card debt. Nor has he explained why he did not use these funds to pay off the credit card debt sooner considering it was accruing interest at a reasonably high rate of 15.65%.

I note that the alleged misleading conduct by the Member's representative, which the Complainant says influenced him to pay out his credit card debt from the loan proceeds rather than using his own funds, is not one of the contraventions covered by the Consent Orders. Consequently, the Complainant is required to make out his case.¹²

In order to establish that the Complainant was misled by the Member's representation, the Complainant needs to show that:

- (a) the representation was made; and
- (b) the representation was capable of leading him into error; and
- (c) he relied on the representation.

¹² COSL Rule 123(d) (Third Edition)

The assessment of whether conduct is misleading or deceptive, or has that tendency, is objective and must be scrutinised in its factual context.¹³

In line with established authority, conduct will be considered to be misleading or deceptive if it induces or is capable of inducing error.¹⁴ Consequently, the relevant question is whether the alleged conduct by the Member's representative is capable of misleading the Complainant into error.

The Complainant has not provided any evidence that would suggest that the Member's representative made the alleged representation. However, even if the representation was made, I find it difficult to accept that it was capable of misleading the Complainant into error.

There was a substantial difference in interest rates between the Complainant's credit card and the standard variable rate loan. The difference amounted to 9.66% for the first year and 9.00% thereafter. There was therefore a real benefit to be gained from paying out the credit card debt.

I consider that it is more likely that a reasonable person would have paid out their credit card debt in these circumstances as soon as they were able to if they had their own funds to do so,¹⁵ or if not, then on settlement of a loan that offered a substantially lower rate of interest. A reasonable person is likely to do so not because they were led into error by a representation of the type described by the Complainant, but rather because it makes good financial sense to do so.¹⁶

Indeed, it has been held in relation to the equivalent section 52 Trade Practices Act that "the heavy burdens which the section creates cannot have been intended to be imposed for the benefit of persons who fail to take reasonable care of their own interests."¹⁷

It follows that I do not consider that the Complainant was misled into error by the alleged representation or that he relied on the alleged representation. Consequently, I am not able to disregard or reduce the amount of savings he received as a result of paying out his credit card debt from the proceeds of the standard variable rate loan.

Compulsion

In the alternative, the Complainant claims that he was compelled to pay out his credit card debt of \$7,750.68 from the proceeds of the standard variable rate loan despite his insistence that he had funds with which he could have paid out the credit card debt.

¹³ Re Taco Company of Australia Inc; Taco Bell v Taco Bell Pty Limited; Denbrad Management Pty Limited; Robert Francis; Eric Baillie Francis [1982] FCA 136 (22 July 1982) per Franki J, Deane and Fitzgerald JJ agreeing.

¹⁴ Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd [1988] HCA 44, per Gibbs CJ at [8]; Johnson Tiles Pty Ltd (CAN 004 576 103) v Esso Australia Pty Ltd [2000] FCA 1572 (8 November 2000) per French J at [63], Beaumont and Finkelstein JJ agreeing.

¹⁵ Rumpe v Camrol Pty Limited [1985] FCA 5 per Morling J at [24]

¹⁶ provided an amount equal to the credit card debt was paid into the loan within a reasonable time rather than over the term of the loan

¹⁷ Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd [1982] HCA 44 per Gibbs CJ at [9]

I note that for such pressure to be illegitimate, it needs to amount to unlawful threats or unconscionable conduct.¹⁸

Clearly, if the Complainant authorised the payment of the credit card debt from the loan proceeds instead of using his own funds because of illegitimate pressure from the Member's representative, I would have no hesitation in finding that no interest savings ought to be taken into account in calculating the Complainant's loss.

However, the Complainant has not provided any information as to the nature or extent of the pressure allegedly applied by the Member's representative which he says compelled him to pay out his credit card debt from the loan proceeds rather than from his own funds. Nor has the Complainant explained how the Member's representative precluded him from paying out the credit card debt from his own funds.

Consequently, I am not in a position to conclude that the Member's representative used illegitimate pressure to compel the Complainant to pay out his credit card debt from the loan proceeds.

Given that the Complainant has not been able to substantiate his allegation of undue pressure,¹⁹ I am not able to disregard or reduce the amount of savings he received as a result of paying out his credit card debt from the proceeds of the loan.

Interest on loss

In his letter of 22 January 2009, the Complainant again asserts that he should be entitled to interest on his loss between the time his complaint was received by COSL and up to the date of this Determination.

I note that the ASIC Act 2001 (Cth) does not contemplate this head of loss²⁰.

I also note that under COSL's Rules, loss suffered is ordinarily calculated up until the time the complaint has been received by COSL.²¹

However, I consider that in having regard to what is fair in all the circumstances, it is open for me to consider whether the Complainant is entitled to interest on his loss between the time his complaint was received by COSL and up to the date of this Determination.

[It is uncontroversial that interest should accrue from the respective times at which the various losses occurred, up until the date the complaint was received by COSL.²² Consequently, such interest will, where applicable, be incorporated into the calculation of the Complainant's loss.]

In deciding whether interest should be payable by the Member on the amount of the Complainant's loss from the date his complaint was received by COSL up to the date of this Determination, I consider it appropriate to have regard to, among other things, whether the

¹⁸ *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40, per McHugh JA at 45-46

¹⁹ COSL Rule 123(d) (Third Edition)

²⁰ however, interest has been awarded in similar cases decided in the Federal Court pursuant to section 51A of the Federal Court of Australia Act 1976 (Cth).

²¹ COSL Rule 31, 3rd Edition

²² COSL Rule 31, 3rd Edition

Member was responsible for any delays in the consideration of the complaint by COSL. Indeed, under COSL's Guidelines compensation may be awarded if the Member's conduct during the COSL process unreasonably delayed the completion of the process.²³

I note the following:

1. Any delays in the consideration of this complaint by COSL are not attributable to the Member.

COSL's dispute resolution process comprises the following stages: Referral of the complaint to the Member seeking a substantive response to the complaint; Investigation and Conciliation (this involves the preparation of a Case Summary and a Case Assessment), and a Determination.

Each of these stages varies in length, given that the time required to investigate and consider a complaint depends on a number of variable factors, such as:

- (a) the particular facts of a complaint, including the evidence required to support each party's assertions;
 - (b) the complexity of the law applying to a complaint;
 - (c) COSL's obligation to allow each party to respond to the other's statements and evidence, as a matter of procedural fairness;
 - (d) the fact that COSL may need, or is requested, to extend the time within which a response is required in the particular circumstances; and
 - (e) the timeliness and willingness of the parties to participate in the process.
2. Although section 12GF of the ASIC Act entitles the Complainant, having suffered loss or damage from a breach of the Act, to claim compensation for the loss incurred, it also sets out defenses which may be relied on by the Member to reduce the amount of compensation that the Complainant may otherwise be entitled to.

I note that the Member has not raised defenses that may have been open to it. Had the Member done so, the time taken for COSL to consider the complaint would have been extended.

3. Throughout COSL's investigation of the complaint, the Member made a series of increasing offers that I consider reflected its own assessment of the merits of the complaint at particular stages.
4. Although the complaint was received by COSL on 4 September 2007, it was only in a position to prepare a Case Summary to both parties after the Complainant provided the necessary information to COSL on 30 April 2008.

When the Case summary was issued on 4 July 2008, it estimated the Complainant's loss at \$6,226.18. On 5 August 2008, the Member offered to settle the complaint for \$6,000.00, which was 96.36% of the estimated loss.

On 12 September 2008, COSL revised its estimate of the Complainant's loss to \$8,392.26, based on further information provided by the Complainant. The Member responded on 16 September 2008 with an offer to settle the complaint for that amount.

²³ COSL Guideline 7.3 – 2nd Edition

Finally, when the Case Assessment was issued on 2 December 2008, the Member responded on 3 December 2008 with an offer to settle the complaint for \$8,392.26, which was the amount recommended by COSL in its Case Assessment.

In view of the above, I do not consider that it would be fair in all the circumstances to require the Member to pay interest on the compensation awarded to the Complainant from the date the complaint was received by COSL to the date of this Determination.

Stress and inconvenience – indirect Loss

COSL may award the Complainant compensation for non-financial loss such as stress and anxiety. However, this form of compensation will be awarded only in limited circumstances and generally would not be a substantial amount.²⁴

Generally, COSL will not award compensation for the time spent by the Complainant in pursuing his complaint. However, compensation may be awarded if the Member's conduct during the COSL process unreasonably delayed the completion of the process. 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.²⁵

This approach is consistent with the approach adopted by the Courts in relation to damages for mental stress in similar cases.²⁶

I note that the extent to which damages can be awarded for this head of loss depends on whether the claim is based on a breach of contract or a breach of a statutory prohibition (such as one prohibiting misleading conduct).²⁷

Given that the complaint has proceeded on the basis of a breach of statutory prohibition, I consider that the recovery for loss based on stress is available to the Complainant, provided the loss was reasonably foreseeable.²⁸ The loss would of course have to be made out at first instance.²⁹

In his letter of 22 January 2009, the Complainant again asserts that he is entitled to compensation for stress and anxiety which he says he suffered during the past five years, because of the level of debt he was exposed to under the loan facilities arranged by the Member and the loss he continued to incur. The Complainant claims these affected his health and personal life.

However, I note that the amount of the standard variable rate loan was only sufficient to partly refinance the Complainant's existing Aussie loan, pay out his credit card debt and

²⁴ COSL Guideline 7.3 – 2nd Edition

²⁵ COSL Guideline 7.3 – 2nd Edition

²⁶ Re Peter Zoneff and Alfred Edward Hollands v Elcom Credit Union Limited [1990] FCA 29 (9 February 1990) affirmed on appeal in Re Peter Zoneff v Elcom Credit Union Limited [1990] FCA 414 (24 October 1990)

²⁷ For breach of contract, see *Baltic Shipping v Dillon* (1993) 176 CLR 344 at 361, per Mason CJ at 380, per Deane and Dawson JJ, and 394 - 395, per McHugh J; and for breach of the equivalent provisions of the Trade Practices Act 1974 (Cth), see Hill J in *Re Peter Zoneff and Alfred Edward Hollands v Elcom Credit Union Limited* [1990] FCA 29 (9 February 1990)

²⁸ Re Peter Zoneff and Alfred Edward Hollands v Elcom Credit Union Limited [1990] FCA 29 (9 February 1990) per Hill J at [116].

²⁹ COSL Rule 123 (d) – Third Edition

meet the costs of refinancing. In other words, other than the refinancing costs of \$5,059.06, the loan was used entirely to refinance the Complainant's existing debts.

I further note that the line of credit facility was only used to pay the Complainant's existing debt (that is, to refinance the remainder of the Aussie loan). No interest was payable on that portion of the line of credit that was not drawn down (an amount of less than \$20,000). As part of the package, the Complainant was issued with a 'nil interest' Visa credit card with a credit limit of \$2,000. Again, no interest was payable on the credit card if it was not used.

I therefore consider that the Complainant's level of debt was, apart from the cost of refinancing, the same as his level of debt before the Member arranged the loans for him.

I also consider that any potential debt exposure under the line of credit and credit card was always within the Complainant's control in that he was not obliged to draw down further amounts and did not incur interest on the undrawn portion of the line of credit or the credit card.

In terms of the Complainant's continuing loss, it was evident by the end of 2007 that the Complainant was likely to receive an amount of compensation which, by July 2008, was estimated to be \$6,226.18 and by September 2008, \$8,392.26. Furthermore, the Member made repeated offers to settle the complaint. I therefore consider that the Complainant's entitlement to compensation was not at risk. It was only a matter of quantum that remained to be determined.

In view of the above, I do not consider that the Complainant has made out his case for compensation for stress and anxiety.³⁰

Assessment of the loss

I have assessed the net loss suffered by the Complainant to be \$8,304.13. The following is a breakdown of the assessment:

Breakdown

| | |
|--|------------------|
| Date processing fee paid to Member: | 22 July 2003 |
| Date loan arranged by Member settled: | 8 October 2003 |
| Date loan arranged by Member discharged: | 14 January 2005 |
| Date COSL complaint: | 4 September 2007 |

Breakdown

1 - Costs incurred prior to entering into loan arranged by Member

| | |
|-----------------------------------|----------|
| Processing and administration fee | \$300.00 |
|-----------------------------------|----------|

| | |
|-------------------|-----------------|
| <i>Subtotal 1</i> | <i>\$300.00</i> |
|-------------------|-----------------|

³⁰ COSL Rule 123 (d) - Third Edition

2 – Interest on cost incurred prior to entering into loan arranged by Member

| | |
|--|------------------|
| Date Processing and administration fee incurred: | 22 July 2003 |
| Date COSL complaint: | 4 September 2007 |
| Number of days: | 1,505 |
| Interest rate applicable on existing loan: | 6.45% p.a |

| | |
|---|---------|
| Calculation | |
| $\$300.00 \times 6.45\% \times 1,505 / 365$ | \$79.78 |

| | |
|-------------------|----------------|
| <i>Subtotal 2</i> | <i>\$79.78</i> |
|-------------------|----------------|

3 – Costs incurred in discharging existing home loan

| | |
|--|----------|
| Discharge settlement fee paid to existing lender | \$650.00 |
|--|----------|

| | |
|-------------------|-----------------|
| <i>Subtotal 3</i> | <i>\$650.00</i> |
|-------------------|-----------------|

4 – Interest on cost incurred when discharging exiting loan

| | |
|--|------------------|
| Date existing loan discharged: | 8 October 2003 |
| Date COSL complaint: | 4 September 2007 |
| Number of days: | 1,428 |
| Interest rate applicable on existing loan: | 6.45% p.a |

| | |
|---|---------|
| Calculation | |
| $\$650.00 \times 6.45\% \times 1,428 / 365$ | \$34.77 |

| | |
|-------------------|-----------------|
| <i>Subtotal 4</i> | <i>\$164.02</i> |
|-------------------|-----------------|

5 – Cost of refinance paid from proceeds of loan arranged by Member

| | |
|-------------------------------|------------|
| Office of State Revenue | \$901.00 |
| Mortgage Processing Centre | \$750.00 |
| Broking fee | \$2,995.00 |
| Makhoul Symond | \$115.50 |
| Land and Property Information | \$128.00 |
| Glinford Pty Ltd | \$124.56 |
| Settlement Fee | \$25.00 |
| Bank Cheque fee | \$20.00 |

| | |
|-------------------|-------------------|
| <i>Subtotal 5</i> | <i>\$5,059.06</i> |
|-------------------|-------------------|

6 – Interest on cost of refinance paid from proceeds of loan arranged by Member

Available information indicates that cost of refinance was disbursed from Discount Variable Rate a/c 22235530

| | |
|---|------------------|
| Date loan arranged by Member settled: | 8 October 2003 |
| Date COSL complaint: | 4 September 2007 |
| Number of days: | 1,428 |
| Interest rate applicable on 1 st year of new loan: | 5.99% p.a |
| Interest rate applicable after 1 st year: | 6.65% p.a |

| | |
|---|----------|
| Calculation | |
| $\$5,059.06 \times 5.99\% \times 366 / 366$ | \$303.04 |
| $\$5,059.06 \times 6.65\% \times (1,428 - 366) / 365$ | \$978.87 |

| | |
|-------------------|-------------------|
| <i>Subtotal 6</i> | <i>\$1,281.91</i> |
|-------------------|-------------------|

7 – Cost incurred in discharging loan arranged by Member

| | |
|----------------------------|------------|
| Deferred Establishment Fee | \$1,520.00 |
| Mortgage Processing Centre | \$295.00 |
| Makhoul Symond | \$55.00 |

| | |
|-------------------|-------------------|
| <i>Subtotal 7</i> | <i>\$1,870.00</i> |
|-------------------|-------------------|

8 – Interest on costs incurred in discharging loan arranged by Member

| | |
|--|------------------|
| Date loan arranged by Member was discharged: | 15 January 2005 |
| Date COSL complaint made: | 4 September 2007 |
| Number of days between the two dates: | 963 days |
| As these amount were paid from new ING loan proceeds - | |
| ING Interest rate applicable – for the first year: | 5.99% |
| ING Interest rate applicable – for the remaining 598 days: | 6.99% |

| | |
|---|----------|
| Calculation | |
| (a) First year: $\$1,870.00 \times 5.99\% \times 365 / 365$: | \$112.01 |
| (b) Remaining 598 days: $\$1,870.00 \times 6.99\% \times 598 / 365$: | \$214.15 |

| | |
|-------------------------------|-----------------|
| <i>Subtotal 8 ((a) + (b))</i> | <i>\$326.16</i> |
|-------------------------------|-----------------|

9 – Costs incurred in arranging for new loan

| | |
|-------------------------|----------|
| ING application fee | \$100.00 |
| Gadens fees | \$298.50 |
| Bank Cheque Fees | \$44.00 |
| Office of State Revenue | \$64.00 |

| | |
|-------------------|-----------------|
| <i>Subtotal 9</i> | <i>\$506.50</i> |
|-------------------|-----------------|

10 – Interest on costs incurred in arranging new loan

| | |
|--|------------------|
| Date loan arranged by Member was discharged: | 15 January 2005 |
| Date COSL complaint made: | 4 September 2007 |
| Number of days between the two dates: | 963 days |
| As these amount were paid from new loan proceed - | |
| Interest rate applicable – for the first year: | 5.99% |
| Interest rate applicable – for the remaining 598 days: | 6.99% |

Calculation

| | |
|---|---------|
| (a) First year: $\$506.50 \times 5.99\% \times 365 / 365$: | \$30.34 |
| (b) For remaining 598 days: $\$506.50 \times 6.99\% \times 598 / 365$: | \$58.00 |

| | |
|--------------------------------|----------------|
| <i>Subtotal 10 ((a) + (b))</i> | <i>\$88.34</i> |
|--------------------------------|----------------|

11 – excess interest

| | |
|---|----------------------------|
| Date loan arranged by Member settled: | 8 October 2003 |
| Date COSL complaint: | 4 September 2007 |
| Number of days: | 1,428 |
| Payout figure of Aussie loan: | \$207,909.35 ³¹ |
| Applicable Aussie interest rate at discharge: | 6.45% |

| | |
|--|--------------|
| Payout figure Aussie loan funded from: | |
| AWLM Discount Variable Rate loan: | \$177,190.26 |
| AWLM All In One Line of Credit: | \$30,709.09 |

| | |
|--|-------|
| Applicable interest rates: | |
| AWLM Discount Variable Rate loan 1 st year: | 5.99% |
| AWLM Discount Variable Rate loan after 1 st year: | 6.65% |
| AWLM All In One Line of Credit: | 6.90% |

³¹ Payout figure of \$207,909.35 obtained from last Aussie statement \$209,931.37 (amount paid in from loan arranged by Member) – \$2,022.02 (credit remaining in Aussie loan but prior to payment of Aussie discharge settlement fee (already accounted for at Subtotal 3))

Calculation

| | |
|--|-------------------|
| (a) AWLM Discount Variable Rate loan 1 st year \$177,190.26 x (5.99% - 6.45%) x 366 / 366: | (\$815.07) saving |
| (b) AWLM Discount Variable Rate loan after 1 st year \$177,190.26 x (6.65% - 6.45%) x (1,428 - 366)/365: | \$1,031.10 |
| (c) AWLM All In One Line of Credit \$30,709.09 x (6.90% - 6.45%) x 1,428 / 365: | \$540.65 |

| | |
|--------------------------------------|-----------------|
| <i>Subtotal 11 ((a) + (b) + (c))</i> | <i>\$756.68</i> |
|--------------------------------------|-----------------|

Less

12 – savings gained from payment into credit card account from loan proceeds

| | |
|--|------------------|
| Date loan arranged by Member settled: | 8 October 2003 |
| Date COSL complaint: | 4 September 2007 |
| Number of days: | 1,428 |
| Amount paid into credit card account from loan proceeds: | \$7,750.68 |

Available information indicates that payment into credit card account was disbursed from Discount Variable Rate a/c 22235530

| | |
|---|-----------|
| Interest rate applicable on credit card account at settlement: | 15.65% |
| Interest rate applicable on 1 st year of Discount Variable Rate: | 5.99% p.a |
| Difference between the two rates: | 9.66% |

| | |
|---|-----------|
| Interest rate applicable on credit card account at settlement: | 15.65% |
| Discount Variable Rate interest rate applicable after 1 st year: | 6.65% p.a |
| Difference between the two rates: | 9.00% |

Calculation

| | |
|--|--------------|
| (i) Savings achieved in first year \$7,750.68 x 9.66% x 366 / 366 | (\$748.71) |
| (ii) Savings achieved after first year \$7,750.68 x 9.00% x (1,428 - 366) / 365 | (\$2,029.61) |

| | |
|---------------------------------|---------------------|
| <i>Subtotal 12 ((i) + (ii))</i> | <i>(\$2,778.32)</i> |
|---------------------------------|---------------------|

| | |
|--|--------------------------|
| <i>Total (sum subtotals 1 – 12)</i> | <i>\$8,304.13</i> |
|--|--------------------------|

In view of the above, I find that the Complainant is entitled to be compensated in an amount of \$8,304.13.

Raj Venga
Credit Ombudsman