

13 December 2013

By email: cosl.rules@cosl.com.au

Credit Ombudsman Service
PO Box A252
Sydney South NSW 1235

Dear Sir or Madam

Submission to proposed 9th Edition of the COSL Rules.

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Credit Ombudsman Service's proposed changes to COSL Rules: 9th Edition.

We commend the Credit Ombudsman Service (**COSL**) on its drafting of the proposed changes, most of which we endorse as providing sensible powers and rules for COSL in determining disputes before it. Consumer Action addresses eight of the rule changes below.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Submission

Debt waiver

We strongly endorse the proposed amendment to rule 9.6(b), which extends COSL's ability to resolve a complaint by directing a Financial Service Provider (**FSP**) to waive a debt. This reflects the orders a court may make, for example in *Tonto Home Loans Australia Pty Ltd v Tavares*; *First Mac Ltd v Di Benedetto* [2011] NSWCA 38 and *Kent v Rebin Pty Ltd*¹ and *Steven Moujalli t/as Artek Investments* [2008] NSWCTTT 1168².

¹ In *Tonto Home Loans* one pair of consumers were relieved from liability for not receiving a benefit under a credit contract.

² In *Kent v Rebin* the consumer was released from liability under a loan despite benefit being received. In doing so, the tribunal took specific regard to the breadth of powers provided by section 71 of the Consumer Credit Code and the egregious conduct of the creditor including breaches of key requirements.

Consumer Action Law Centre

Level 7, 459 Little Collins Street Telephone 03 9670 5088
Melbourne Victoria 3000 Facsimile 03 9629 6898

info@consumeraction.org.au
www.consumeraction.org.au

Consumer Action considers debt waiver to be a logical and appropriate determination for COSL to make in other circumstances, including where a consumer is a pensioner or suffering long-term financial hardship, and it is unlikely that their financial circumstances will change in the foreseeable future.

Extension of time limits to make a complaint

The amendment to Rule 6.3(b)(ii) appears to allow a complaint to be made to COSL up to two years after an IDR complaint is resolved. However some clarification may be needed, in the case of 6.3(b)(ii), to ensure consumers are not misled to understand this would reduce any limitation period otherwise available at law . In particular, where a consumer is unsophisticated or otherwise unaware of their legal rights and the two years following an IDR response ends before another time limit may expire, such as the 6 years provided under the National Consumer Credit Protection Act 2009 (Cth).

Removal of barriers to complain against linked credit providers

We welcome the amendment to rule 10.1(e) that would allow a complaint to be made against an FSP that is a linked credit provider or agent/assignee, without the requirement that the complaint is also made against the third party with whom the FSP is linked.

If adopted, we understand this would remove the existing barrier to making a complaint against an FSP that involves the conduct of a linked third party, where the third party is not itself subject to COSL jurisdiction. Given the policy decision pursuant to national credit laws that EDR schemes are to be the preferred forum for dispute resolution for all consumer disputes with credit providers, the FSP should not be quarantined from COSL oversight for reason of the third party's non-membership.

This amendment offers significant and valuable COSL oversight in cases such as educational software or car contract disputes.

Privacy and credit reporting disputes

We welcome COSL being recognised as an alternative EDR scheme to OAIC, and that it could hear credit reporting disputes. It recognises COSL's expertise, and would remove the requirement of carving out the privacy element of a credit reporting complaint or debt collection dispute.

Investigation phase and limit on raising "new grounds"

Amendments to rule 8.1 to 8.3 appear to limit a consumer raising "new grounds" when COSL begins investigating a complaint. We are concerned that this may narrow COSL's role to assist a consumer articulate the grounds for their complaint. We would encourage COSL to take a more active, rather than limiting, approach in this regard.

Additionally, new grounds might only become obvious to a complainant after lodging a complaint and the exchange of information and documents.

This amendment also fails to remedy the imbalance in sophistication between and FSP and an unrepresented consumer. We fail to see what mischief this amendment addresses, and submit any abuse of process or fairness concerns could be addressed with more discretionary language.

Finally, we consider the rule would be hard to interpret or apply, given the uncertainty (or lack of transparency) regarding the commencement of the investigation phase. Consumers, in particular, are provided little guidance, and are unlikely to understand, when the investigation commences, and how long a matter will take before determination. The issue is not only that they might miss the investigation cut-off point, but also that they might not be aware that they would have some time after first making the complaint in which to raise new grounds (the investigation point being some time off).

Provisions relating to non financial loss (proposed rule 9.8)

While we welcome the new rule 9.8 in relation to COSL ordering compensation for non-financial loss, we recommend that it not limit the potential remedies available to a consumer at law. For example, pursuant to section 46 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) a consumer can apply for compensation if a course of conduct is in breach of prohibited debt collection practices and results in the consumer experiencing "humiliation or distress".

We welcome that no monetary limit is imposed.

Confidential information

An amendment to Rule 33.2 inserts the words "commercial-in-confidence". We are concerned this clause is open to abuse or exploitation by FSPs, and may in any event allow an FSP to claim confidentiality over materials central to the issues in dispute. For example, FSPs already claim confidentiality to lending guidelines where a claim of maladministration or responsible lending is made, frustrating the consumer's ability to properly address the facts.

For COSL to deny the consumer access to this material is potentially contrary to the notion of procedural fairness, most Court Rules and ASIC RG 139.113-139.114, (which provides a limited basis for withholding documents). We consider the "harm" this amendment apparently seeks to balance may be overstated. The consumer will not likely be a commercial competitor, and could be bound by confidentiality as in court hearings (the rule in *Home Office v Harman* [1983] 1 AC 280).

At the least, we recommend requiring the FSP to provide its reasoning for claiming commercial-in-confidence to COSL and the consumer, and allowing the consumer or their representative to make submissions as to why these documents, or the sections of them, may be relevant and should be made available.

Settlement agreements

Rule 9.3 provides that in certain circumstances a consumer must provide a settlement agreement. We submit it would be inappropriate to require unsophisticated consumers to draft

complex terms of settlement. We query whether COSL could provide pro forma or precedent settlements, and assist in the preparation of draft terms of settlement.

Conclusion

We would be pleased to discuss the submission above, or any other parts of the proposed 9th Edition Rules.

Please contact us on 03 9670 5088 or via email to info@consumeraction.org.au if you have any questions about this submission.

Yours faithfully

CONSUMER ACTION LAW CENTRE

Gerard Brody
Chief Executive Officer

Lachlan Edwards
Solicitor