



Australian
Competition &
Consumer
Commission

Determination

Application for Minor Variation of Authorisation

lodged by

Mortgage Industry Association of Australia

in relation to authorisation of the MIAA Disciplinary Rules

Date: 21 September 2005

Commissioners:

Samuel
King
Martin
McNeill
Smith
Willett

Authorisation no. A90880

Public register no. C2005/408

1. The Application

- 1.1 On 3 March 2005, the Mortgage Industry Association of Australia (the MIAA) lodged an application under s 91A of the *Trade Practices Act 1974* (TPA) for minor variation to authorisation A90880, which was granted to MIAA for its Disciplinary Rules, on 18 February 2004.
- 1.2 Authorisation A90880 relates to the making and giving effect to a contract, arrangement or understanding where a provision is, or may be, an exclusionary provision within the meaning of section 45 of the TPA. The authorisation was granted for a five-year period that came into effect on 11 March 2004.
- 1.3 Authorisation was granted for the MIAA's Disciplinary Rules, which are a part of the regime covering the conduct of its members. The MIAA has lodged this application for a minor variation to cover changes made to the Disciplinary Rules.

The MIAA¹

- 1.4 The MIAA states that it provides service and representation to mortgage brokers, mortgage managers, mortgage lenders (bank and non-bank) and originators to assist them develop, foster and promote the mortgage industry. It states that it has over 8000 members nationally.
- 1.5 The membership application process involves requisites of experience, education, industry sponsorship and probity checks. All members must join the independent dispute resolution service, the Credit Ombudsman Service Limited (COSL) or a recognised Australian Securities and Investments Commission (ASIC) approved equivalent.

The Disciplinary Rules

- 1.6 The Disciplinary Rules outline the processes for investigation of complaints, expulsion of members and refused applications for membership or accreditation. They provide for the Board to appoint Investigation Officers and for the establishment and the rules of the MIAA Tribunal. A copy of these rules is at Attachment A.

Changes to the Disciplinary Rules

- 1.7 The MIAA Board amended the Disciplinary Rules on 26 November 2004. The main changes are outlined as follows.

General

- 1.8 In July 2003, the Mortgage Industry Ombudsman Scheme (MIOS) changed its name to the Credit Ombudsman Service Limited (COSL). All references in the Rules to MIOS have been replaced with COSL. Similarly, all references to the National Council have been replaced with 'the Board'.

¹ Information under this heading was taken from the MIAA's website, viewed 17 August 2005, <www.miaa.com.au/about.htm>.

Definitions and interpretation

- 1.9 A definition of 'misconduct' has been included in the rules. The previous rules referred to the definition of misconduct in the MIAA Constitution; that definition has now been included in the Disciplinary Rules.
- 1.10 Documents will now be deemed to be served on a person if they are delivered personally or they are dispatched by post, contractor agent or electronic means to the address of the place of residence, the business of the person, or to the address of the Member entered in the Register.²

Investigations, including of complaints

- 1.11 The Rules now expressly define the role of the Investigation Officer. Their role is to investigate complaints and suspected breaches of the Constitution and the MIAA Code of Practice and to investigate referrals and applications concerning membership in accordance with the Rules and where required, to assist the Tribunal as an impartial friend of the Tribunal.³
- 1.12 The Investigating Officer must now consult with the Chair of the Tribunal before deciding not to investigate a complaint on the grounds that it is frivolous or vexatious.⁴
- 1.13 The Investigating Officer must investigate a complaint if it is referred by COSL, the MIAA Board or an MIAA State Council, or ASIC or another regulatory body.⁵
- 1.14 The Investigating Officer may conduct an investigation or refer a matter to the Tribunal where there has been no complaint, but the Investigating Officer believes a member may have committed misconduct.⁶
- 1.15 The Investigating Officer no longer has the power to suspend members. If the Investigating Officer suspects that a member has been involved in fraud or dishonesty they may set out, in writing, the reasons to the Chairperson or Deputy Chairperson of the Tribunal.⁷
- 1.16 The Chairperson or Deputy Chairperson may then make an order suspending a member from membership of the MIAA.⁸ Another member of the Tribunal, other than the Chairperson or Deputy Chairperson, must sign an endorsement of the suspension order for the suspension to take effect.⁹
- 1.17 If a Member requests that the matter be referred to the Tribunal, the Tribunal must be convened by whichever of the Chairperson or Deputy Chairperson did not make the order to suspend the member.¹⁰

² Rule 1.2 (e)

³ Rules 2.1.1A and 4.2.7A

⁴ Rule 2.1.3 (f)

⁵ Rule 2.1.3A

⁶ Rule 2.1.4B

⁷ Rule 2.3.1

⁸ Rule 2.3.1.1

⁹ Rule 2.3.8 (b)

¹⁰ Rule 2.3.4.1. The ACCC notes that this rule mistakenly refers to rule 4.3.3 instead of 2.3.3.

- 1.18 The Tribunal may direct the Investigating Officer to prepare a fresh notice of alleged misconduct if it considers that a Member may have engaged in a different form of misconduct.¹¹

Cancellation of membership or accreditation and refused applications for membership or accreditation

- 1.19 The Board may deem it appropriate to hear an appeal regarding refused membership pursuant to the Constitution rather than the appeal proceeding to the Tribunal.¹²

The MIAA Tribunal

- 1.20 The Tribunal may hear and determine any complaints of allegations of misconduct against any member relating to any breach of the terms of the Constitution, the MIAA Code of Practice, the COSL Rules or the Disciplinary Rules by any Member.¹³
- 1.21 The Tribunal Panel, previously a list of at least 20 persons, must now consist of at least 50 persons.¹⁴
- 1.22 Where the Chairperson considers it appropriate, due to the importance of the matter, the Tribunal may be made up of the Chairperson, the Deputy Chairperson and three persons from the Tribunal Panel.¹⁵ In normal circumstances, the panel is made up of either the Chairperson or the Deputy Chairperson and two persons from the Tribunal panel.
- 1.23 The Tribunal may only take into account previous matters dealt with by the Tribunal against a Member for the purpose of considering orders to be made against the Member, unless the facts are relevant to establishing that the Member has previously had an opportunity to correct the issue.¹⁶
- 1.24 The Tribunal is now required to issue written reasons for any determination it makes, and these reasons must be provided to all parties to the proceeding within one month.¹⁷
- 1.25 Under the proposed variations, the Board or State Council may act under the Constitution to suspend, censure or expel any Member, irrespective of any determination or other action that has been, is being or may be taken pursuant to the Disciplinary Rules by the Tribunal or at law.¹⁸
- 1.26 If the Tribunal determines that a Member has engaged in misconduct, it shall make a determination of misconduct against the member. Previously, the Tribunal was able to impose penalties in the form of censure, suspension, education or compliance programs and expulsion. The range of penalties that the Tribunal can impose now includes the following new options: dismiss the matter or dismiss subject to conditions; counsel the Member; require the Member to correct the effects of the

¹¹ Rule 2.4.5

¹² Rule 3.2.1. The ACCC notes that the MIAA Board has always had this power under its Constitution.

¹³ Rule 4.1.1 (a)

¹⁴ Rule 4.1.5

¹⁵ Rule 4.1.7 (d)

¹⁶ Rule 4.6.1.1

¹⁷ Rule 4.6.10

¹⁸ Rule 4.7.1A. The ACCC notes that the MIAA Board has always had this power under its Constitution.

misconduct; pay a financial contribution to the MIAA; or adjourn the proceedings subject to compliance with conditions.¹⁹ The MIAA does not set out the range of financial contributions that may be ordered, the nature of conditions that may be imposed or the type of corrections that could be required.

- 1.27 The variations also provide that where the Tribunal determines that a Member has engaged in misconduct, but considers that there are mitigating factors, the Tribunal may: suspend its determination of misconduct; admonish the Member without any determination of misconduct; require the member to correct the effects of the misconduct; pay a financial contribution to the MIAA; or require the Member to undertake an education or compliance program.²⁰
- 1.28 Under the variations, the Tribunal may reconsider, vary or overrule any decision or order it made with respect to penalties imposed by the Tribunal prior to 26 November 2004.²¹

Changes to the MIAA Code of Practice

- 1.29 The MIAA has added Advertising Guidelines and a Code on Alternative Forms of Remuneration to its Code of Practice. Also, members are now vicariously liable for any acts or omissions of employees that discredit the MIAA or breach the Code of Practice.²² The MIAA has not sought or been granted authorisation for its Code of Practice. Consequently, changes to the Code are not considered in the Minor Variation process.

2. Statutory provisions

- 2.1 Section 91A of the TPA provides that on receipt of an application for a minor variation of an authorisation the ACCC must, if it is satisfied that the variation sought is a minor variation, invite submissions from interested parties.
- 2.2 A minor variation in relation to an authorisation is defined (under section 87ZD of the TPA) as a single variation that does not involve a material change in the effect of the authorisation. A person may apply for two or more minor variations at the same time, and the ACCC may deal with all the variations together, if it is satisfied that the combined effect of those variations, if all were granted, would not involve a material change in the effect of the authorisation.
- 2.3 After consideration of the application and any submissions received, the ACCC may make a determination varying the authorisation or dismissing the application. The relevant test for varying the authorisation is in sub-section 91A(5) of the TPA.
- 2.4 In respect of exclusionary provisions, the ACCC must be satisfied that the variation would not result, or would be likely not to result, in a reduction in the benefit to the public that arose from the original authorisation.

¹⁹ Rule 4.7.3

²⁰ Rule 4.7.4

²¹ Rule 4.8.3

²² MIAA Code of Practice, Rule 54A.

3 Submissions

The MIAA's supporting submission

- 3.1 The MIAA submits that the changes to the Disciplinary Rules were made to make the rules more flexible, transparent and more responsive. It is submitted that the changes were suggested by the Tribunal members based on the first year's operation of the Tribunal. The MIAA submits that any governance regime must be dynamic and will be regularly updated to meet changing conditions and changes dictated by experience.
- 3.2 The MIAA submits that while it does not consider that the changes alter the balance of the authorisation test, if anything, they strengthen the public benefit resulting from the conduct.

Submissions from interested parties

- 3.3 The ACCC sought submissions in respect of the MIAA's application for minor variation from a range of interested parties, including all parties who provided submissions in respect of the MIAA's original applications for authorisation.
- 3.4 The ACCC received one submission supporting the application, from Mortgage Choice Limited (Mortgage Choice). Mortgage Choice submits that the changes that are the subject of the application for minor variation strengthen the professional requirements of MIAA members and provide borrowers with a higher level of assurance and confidence in their dealings with MIAA members.

4. ACCC's evaluation

Past determination

- 4.1 In its determination dated 18 February 2004, the ACCC concluded that it was satisfied that the public benefit flowing from the proposed arrangements would be likely to outweigh any anti-competitive detriment and granted authorisation for five years.

Anti-competitive detriment

- 4.2 The ACCC noted that MIAA membership is not mandatory for mortgage brokers and that there is a competing professional association, the Finance Brokers' Association of Australia (the FBAA) which includes mortgage brokers among its membership. Given this, the ACCC considered that it was unlikely that loss of MIAA membership would significantly impede mortgage brokers' ability to compete.
- 4.3 The ACCC noted that it was possible that the MIAA governance regime could be used for anti-competitive purposes. For example, the MIAA Constitution defined misconduct subjectively, including 'conduct prejudicial to the reputation and interests of the MIAA'. The ACCC also noted that there was no provision for an appeals process contained in the Disciplinary Rules.
- 4.4 Notwithstanding this, the ACCC was of the view that in practice, if the MIAA attempted to expel a significant number of mortgage brokers solely for anti-competitive reasons, these brokers would be likely to join the FBAA or form a new

association. The ACCC considered that the MIAA's Disciplinary Rules were likely to generate only minimal anti-competitive detriment.

Public benefit

- 4.5 The ACCC considered that the MIAA's Disciplinary Rules were likely to result in a benefit to the public that was more than minimal. The ACCC noted interested party submissions highlighting the potential for unethical conduct in the mortgage broking industry. The ACCC also noted that the MIAA's rules appeared to be adequate and that no interested party had suggested that the Rules had not been effectively enforced. The ACCC was satisfied that the Rules would generate a public benefit by assisting members to act ethically and professionally within the mortgage broking industry.

Minor variation

- 4.6 As noted above, a minor variation in relation to an authorisation is defined as a single variation that does not involve a material change in the effect of the authorisation. It includes changes to the conduct upon which immunity has been conferred or changes to the nature of the immunity that has been conferred in a way that is not substantial or significant.
- 4.7 In the context of the variations sought by the MIAA, the ACCC considers the majority of the changes as being clearly minor in nature. There are however a number of variations that are more substantial in nature namely:
- The introduction of the Board's discretion to hear appeals under the Constitution in relation to refused membership, at Rule 3.2.1.
 - The ability of the Board or State Council to act under the Constitution to suspend, censure or expel any Member regardless of the status or decision of an appeal to the Tribunal as provided under Rule 4.7.1A.
 - The introduction of new penalties at Rule 4.7.3.
 - The introduction of the Tribunal's ability to make retrospective decisions with respect to penalties at Rule 4.8.3.
- 4.8 With respect to each of these proposed variations, the ACCC considers that on balance, they are of sufficient substance and impact sufficiently upon affected parties so as to go beyond a minor variation.
- 4.9 In any event, the ACCC has serious concerns about the procedural fairness of these amendments to the Disciplinary Rules, given that Members could face penalties, including financial contributions to the MIAA, which were not in place at the time of their misconduct. Also, the ACCC is concerned about the power of the Board to hear membership appeals and the power of the Board or State Council to impose significant penalties on Members irrespective of any decision pending, or already made, by the Tribunal under the Disciplinary Rules.
- 4.10 The ACCC requested the MIAA's comments on these issues. The MIAA stated that consideration would be given to deleting the variation to Rule 3.2.1 and deleting Rule 4.7.1A. The MIAA submits that Rule 4.7.3, regarding penalties, is important for the effective operation of the Tribunal and noted that no financial penalties have been imposed by the Tribunal to date. In relation to Rule 4.8.3, regarding retrospective penalties, the MIAA submits that the Tribunal was previously required to make a

finding of misconduct in order to impose penalties. This requirement was changed in late 2004. The MIAA submits that it became evident that in a few cases the Tribunal had found misconduct but would not have done so if the amended rules were in place. Rule 4.8.3 was added to give the Tribunal the power to revisit the sanction in such a situation. This Rule has been used once to date. The MIAA did not comment in respect of the ACCC's concern that these proposed changes go beyond being minor variations.

- 4.11 Notwithstanding the MIAA's submission, the ACCC continues to be of the view that these changes do not constitute minor variations.

Assessment of minor variations

- 4.12 As stated in its 2004 determination (and noted at paragraph 4.3), the ACCC considers that there remains some potential for the Disciplinary Rules to be used for anti-competitive purposes. In this respect, the ACCC notes that the definition of misconduct still includes the subjective provision relating to 'conduct prejudicial to the reputation and interests of the MIAA' and also, that there is still no independent appeals process.
- 4.13 The ACCC also notes that while the Tribunal is now required to issue written reasons for any determination (Rule 4.6.10), the MIAA is still not required to make them publicly available.
- 4.14 However, as discussed in the 2004 determination, MIAA membership is not mandatory for mortgage brokers and there is a competing professional association, the Finance Brokers' Association of Australia (FBAA) which includes mortgage brokers among its membership. Given this, the ACCC continues to consider that it is unlikely that loss of MIAA membership would significantly impede mortgage brokers' ability to compete.
- 4.15 The ACCC still considers that in practice, if the MIAA attempted to use its Disciplinary Rules for anti-competitive reasons, brokers would be likely to join the FBAA or form a new association. The ACCC considers that the MIAA's Disciplinary Rules are likely to generate minimal anti-competitive detriment.
- 4.16 The ACCC notes the submission from Mortgage Choice that the changes that are the subject of the application for minor variation strengthen the professional requirements of MIAA members and provide borrowers with a higher level of assurance and confidence in their dealings with MIAA members.
- 4.17 The ACCC also notes that it has not received any submissions from interested parties opposed to the application for minor variation, or raising any concerns about the amendments to the Disciplinary Rules.
- 4.18 The ACCC's assessment of the anti-competitive detriment and public benefit of the amendments to the MIAA's Disciplinary Rules in this determination is limited to those amendments which it considers do constitute a minor variation as defined in section 87ZD of the TPA.
- 4.19 With respect to these amendments, the ACCC considers that they do not increase the anti-competitive detriment and do not decrease the public benefit resulting from the MIAA's Disciplinary Rules.

4.20 Therefore, ACCC is of the view that that these amendments to the Disciplinary Rules would not be likely to result in a reduction in the benefit that arose from the original authorisation.

5 Determination

5.1 With the exception of Rules 3.2.1, 4.7.1A, 4.7.3 and 4.8.3, the ACCC is satisfied that the variation to authorisation A90880 is minor, and it does not involve a material change in the effect of the authorisations.

5.2 The ACCC is satisfied that, with the exception of the rules noted at paragraph 5.1, the variation to authorisation A90880 which is the subject of this application would be likely not to result in a reduction in the benefit to the public that arose from the original authorisations.

5.3 The ACCC therefore varies authorisations A90880 to cover the amended Disciplinary Rules, provided at Attachment A, with the exception of those rules noted at paragraph 5.1.

5.4 The authorisations remain in force until 11 March 2009, five years from the day on which the determination came into effect.

5.5 This determination is made on 21 September 2005. If no application for a review of the determination is made to the Australian Competition Tribunal, it will come into force on 13 October 2005. If an application for review is made to the Tribunal, the determination will come into effect:

- where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review
- where the application is withdrawn – on the day on which the application is withdrawn.



DISCIPLINARY RULES

Made by Decision of the Board: 27.05.2003
Amended by the Board: 26.11.2004

PO Box 664
Neutral Bay NSW 2060
T: 1300 654 817
F: 02 8867 2396
www.miaa.com.au

SECTION 1 – DEFINITIONS AND INTERPRETATION

1.1 Definitions

In these Rules, unless the contrary intention appears:

- "AMC" means an Accredited Mortgage Consultant as defined in the Constitution;
- "Applicant" means a person who has lodged an application with the Association to be accepted as a Member;
- "Association" means Mortgage Industry Association of Australia ABN 62 006 085 552;
- "Board" means the Board of the Association as defined in the Constitution;
- "Business Day" means any day not being a Saturday, Sunday or a day which is a public holiday or a bank holiday in the place in which the thing is to be or may be done under these Rules;
- "Chairperson" means the Chairperson of the Tribunal as constituted in respect of a particular proceeding;
- "Constitution" means the Constitution of the Association as amended from time to time;
- "Complainant" means the person or organisation making a complaint against a Member.
- "Corporation" means corporation as defined in the Corporations Act 2001 of the Commonwealth;
- "COS Limited" means Credit Ombudsman Service Limited or its successor in title;
- "COSL Referral" means a complaint referred to the Association pursuant to the Credit Ombudsman Service Rules in connection with a complaint made by a consumer about the conduct of a Member and which complaint specifically calls for the suspension of a Member's membership or the expulsion from membership of a Member or other disciplinary action permitted under the Rules;
- "COSL Rules" means the Credit Ombudsman Service Rules made by COS Limited;
- "Credit Ombudsman" means the Credit Ombudsman appointed pursuant to the Constitution of COS Limited and the COSL Rules;
- "COS" means the service for complaint and dispute handling established by COS Limited;
- "Deputy Chairperson" means the Deputy Chairperson of the Tribunal as constituted in respect of a particular proceeding;
- "Investigating Officer" means a person appointed pursuant to sub-rule 2.1.1;
- "Member" means a Member of the Association as defined in the Constitution;
- "Membership Secretary" means the person appointed to that position by the Association from time to time;

MIAA Disciplinary Rules

MIAA MIAA Code of Practice means any MIAA Code of Practice promulgated by the Board from time to time pursuant to the Constitution;

"Misconduct" means:

- (a) conduct involving fraud or dishonesty;
- (b) refusal or failure to comply with a provision of the Constitution, the MIAA Code of Practice, the COSL Rules, or the Disciplinary Rules;
- (c) misrepresentation of material facts in relation to an application for membership of the Association;
- (d) misrepresentation of material facts in relation to accreditation as an Accredited Mortgage Consultant;
- (e) misrepresentation of material facts concerning continuing professional development points earned or to be earned as a Member;
- (f) misrepresentation of material facts in relation to any borrower, guarantor, proposed borrower or proposed guarantor;
- (g) conduct involving a breach of any legislation or delegated legislation governing or relating to conduct by participants in the Mortgage Industry including but not limited to the Uniform Consumer Credit Code, Financial Transactions Reports Act 1988 of the Commonwealth, Corporations Act 2001 of the Commonwealth, (NSW) Consumer Credit Administration Act 1995 and corresponding legislation in other States and Territories, Trade Practices Act 1974 of the Commonwealth and corresponding fair trading legislation in the States and Territories, Australian Securities and Investments Commission Act 2001 of the Commonwealth, Privacy Act 1988 of the Commonwealth, and the criminal Statutes of the Commonwealth and of the States and of the Territories;
- (h) whether or not any conduct referred to in paragraphs (a) to (g) is involved, conduct:
 - (i) which indicates a failure to understand or practice the principles of honesty and fair dealing in relation to other participants in the Mortgage Industry, to Regulatory Authorities, to the Association, to Customers, or to the public;
 - (ii) which indicates a substantial or consistent failure to reach reasonable standards of efficiency and competence in the conduct of business in the Mortgage Industry; or
 - (iii) conduct prejudicial to the reputation or interests of the Association being conduct prescribed by the Board which is substantially prejudicial to that reputation or those interests ;

(i) such other conduct (whether by way of act or omission) as the Board may from time to time prescribe as Misconduct under the Constitution for the purposes of these Rules .

"Non-active AMC" means a person whose membership of the Association has been suspended pursuant to Rule 5.1.1 or 5.1.2;

"Officer" means officer as defined in the Corporations Act 2001 of the Commonwealth;

MIAA Disciplinary Rules

"Respondent" means the person or organisation against which an allegation of Misconduct has been made;

"Rules" means these Disciplinary Rules as amended from time to time;

"State Council" means a State Council of the Association as defined in the Constitution;

"Tribunal" means the MIAA Tribunal established pursuant to Rule 4.1.1;

"Tribunal Secretary" means the person appointed to that position from time to time by the Association.

1.2 Interpretation

In the interpretation of the Rules:

- (a) headings are disregarded;
- (b) words importing persons include partnerships, associations, corporations, companies unincorporated and incorporated whether by Act of Parliament or otherwise, as well as individuals;
- (c) singular includes plural and vice versa and words importing any gender include all other genders;
- (d) all references to statutory provisions are construed as references to any statutory modification or re-enactment for the time being in force;
- (e) where the Rules require or permit any document to be served on, given, sent or dispatched to any person, where any such expression or any other expression is used (in this Rule referred to as "served"), irrespective of whether any such document is actually received by the person the document is deemed as having been duly served by delivering such document to the person personally or by dispatching it whether by post, contractor, agent, electronic means or otherwise to:
 - (i) the address of the place of residence; or
 - (ii) the business of the person last known to the person serving the document; or
 - (iii) in the case of a Member, to the address of the Member entered in the Register.
- (f) where in these Rules any period of time is designated in Business Days, dating from a given day, act, or event, the time shall, unless the contrary intention appears, be reckoned exclusive of such day or of the day of such act or event;
- (g) where a time period is designated in Business Days, that period terminates at 12.00 pm on the last Business Day of the period;
- (h) if there is an inconsistency between the provisions of the Rules and the Constitution then the provisions of the Constitution are to prevail

SECTION 2 -

INVESTIGATIONS, INCLUDING OF COMPLAINTS

2.1 Receipt of complaints

- 2.1.1 The Board must appoint one or more persons to the position of Investigating Officer, but the persons so appointed may be individuals or a company or partnership. Each individual person appointed to the position of Investigating Officer, or if the Investigation Officer is not a natural person, each individual appointed or engaged to assist the Investigation Officer must have legal, accounting or auditing qualifications or experience

MIAA Disciplinary Rules

to the satisfaction of the Board and shall not be a Full Member of MIAA or an AMC. The powers of an Investigating Officer may be exercised by each person so appointed.

- 2.1.1A The role of the Investigation Officer is to investigate complaints and suspected breaches of the Constitution, the MIAA Code of Practice, and to investigate referrals and applications concerning membership in accordance with these Rules, and where required, to assist the Tribunal, as an impartial friend of the Tribunal, in proceedings coming before or before the Tribunal.
- 2.1.2 A complaint received by the Association from any person, including but not limited to any Member or COS Limited, or to a State Council or the Board, in relation to conduct of a Member, must be referred directly to an Investigating Officer. A complaint may be received and acted upon regardless of its origin or form, and regardless of whether the complainant is identified in the complaint.
- 2.1.3 Subject to Rule 2.1.3A, the Investigating Officer must not decide to conduct an investigation, including an investigation in his or her own discretion, whether the investigation will arise from a complaint or at the motion of the Investigation Officer:
- (a) unless he or she suspects on a bona fide basis that a Member may have committed Misconduct;
 - (b) if he or she is of the opinion that it is more appropriate that the complaint be dealt with by a Court or another independent complaints, disciplinary, conciliation, or arbitration body or procedure;
 - (c) if the complainant seeks any compensation or reimbursement whatsoever and the complainant is not alleging that a Member has committed Misconduct;
 - (d) if the act or omission giving rise to the complaint occurred before the date of commencement of the Rules;
 - (e) if the subject matter of the particular complaint was comprised in a complaint by the same person (or any one or more of them) previously considered by the Investigating Officer or the Disciplinary Tribunal unless the Investigating Officer is of the opinion that relevant new evidence is available;
 - (f) if the Investigating Officer is of the opinion, following consultation with the Chair of the Disciplinary Tribunal, that the complaint is frivolous or vexatious or is being pursued by the complainant in a frivolous or vexatious manner or for an improper purpose.
- 2.1.3A If a complaint is referred to the Investigating Officer by COS, or by the MIAA through a State Council or the Board, ASIC or by another regulatory body, the Investigating Officer must conduct an investigation into the complaint.
- 2.1.4 Subject to Rule 2.1.4B, the Investigating Officer may, before deciding to conduct an investigation, require that the complainant provide a complaint in written form and particulars of the complainant's identity and where in the Investigating Officer's opinion it is necessary so to do to afford procedural fairness to the Member the subject of the complaint, the complainant's written consent to the disclosure of his, her or its identity.
- 2.1.4A In all cases, the Investigating Officer will keep the identity of the complainant confidential except where the complainant has consented in writing to the disclosure of his, her or its identity.
- 2.1.4B Rule 2.1.4 does not prevent the Investigation Officer from conducting an investigation or from referring a matter to the Tribunal on the initiative of the Investigation Officer where

there has been no complaint but the Investigation Officer suspects on a bona fide basis that a Member may have committed Misconduct.

- 2.1.5 Where the Investigating Officer is of the opinion that disclosure of the identity of the complainant is necessary to afford procedural fairness to the Member the subject of the complaint, but the complainant refuses to provide such written consent, and Investigating Officer is not able to substantiate the subject matter of the complaint by independent means, without reference to the identity of the complainant, the Investigating Officer must not take any further action in relation to the complaint other than to advise the complainant that no further action will be taken in relation to the complaint.

2.2 Powers of Investigating Officer

- 2.2.1 The Investigating Officer may use all lawful means to conduct the investigation of a complaint and may conduct the investigation in any manner, using commonly accepted investigative techniques that the Investigating Officer considers fit.
- 2.2.2 The Investigating Officer may inspect the Association's membership and other records.
- 2.2.3 The Investigating Officer may require a Member to produce to the Investigating Officer documents (including records kept in electronic form) within the possession, custody or control of the Member, by way of notice in writing to the Member specifying particular documents or categories of documents, provided that the documents or categories so required to be produced must in the Investigating Officer's reasonable opinion be potentially relevant to the subject matter of a current investigation being conducted by the Investigating Officer. A Member who receives such a notice must produce the documents required to the Investigating Officer within the shortest time that is practicable.
- 2.2.4 The Investigating Officer may require a Member who is a natural person to attend on him or her for the purpose of being interviewed, by way of written notice in writing to the Member specifying the date, time and place of the interview and notifying the Member that he or she may have a legal representative present at the interview. A Member who receives such a notice must attend the interview and must answer all questions asked of him or her in the interview.
- 2.2.5 The Investigating Officer may issue a notice in writing to a Member that is a Corporation requiring that the Member make available for interview any Officer of the Member, or requesting that the Member make available for interview any employee of the Member as specified in the notice. The Member must upon receiving such a notice cause the Officer specified to attend the interview, and must use its best efforts to ensure that each employee specified attends the interview. Any such notice issued by the Investigating Officer in relation to an employee must include a notification to the Member that:
- (a) the Investigating Officer does not have the power to compel the employee specified in the notice to be interviewed; and
 - (b) any employee who agrees to be interviewed may have a legal representative present at the interview.
- 2.2.6 An interview conducted by the Investigating Officer must be recorded on tape or computer disc, and a copy made available to the Member and any other person interviewed upon request.
- 2.3 Power to suspend**
- 2.3.1 If at any time in the course of an investigation the Investigating Officer suspects on reasonable grounds that a Member has committed, or been directly or indirectly involved in the commission of, an act involving fraud or dishonesty, the Investigating Officer may, by notice in writing setting out the reasons, refer the matter to the Chairperson or Deputy Chairperson of the Tribunal with a copy to be forwarded to the Member.

WIAA Disciplinary Rules

- 2.3.1.1 The Chairperson or Deputy Chairperson may upon receipt of a notice pursuant to Rule 2.3.1 from the Investigating Officer make an order suspending the Member from membership of the Association, and subject to Rule 2.3.8 such notice has effect from the date determined or, if a date is not specified, immediately from the date on which the order is made.
- 2.3.2 An order for suspension made by the Chairperson or Deputy Chairperson pursuant to Rule 2.3.1.1 will remain in effect until revoked by that person or the Tribunal.
- 2.3.3 A Member who is the subject of an order for suspension made pursuant to Rule 2.3.1.1 may, by notice in writing to the Investigating Officer or to the Secretary to the Tribunal, require that the subject matter of the order be referred to the Tribunal.
- 2.3.4 Where the Investigating Officer has received a notice in writing pursuant to Rule 2.3.3, the Investigating Officer must forward the notice together with the notice containing the order for suspension and such supporting information as the Investigating Officer thinks fit, to the Tribunal Secretary within two Business Days.
- 2.3.4.1 Where the Secretary to the Tribunal has received a notice from a Member pursuant to Rule 4.3.3, the Secretary must within two Business Days notify the Chairperson or the Deputy Chairperson, as the case may be, being the person who did not make the Order under Rule 2.3.1.1 to suspend the Member and the person receiving the notice must arrange for the Secretary to convene the Tribunal as soon as practicable to consider the continuation of or lifting of the suspension.
- 2.3.5 Where the Chairperson or Deputy Chairperson of the Tribunal has made an order for suspension of a Member pursuant to Rule 2.3.1, that person must refer the subject matter of the order to the Tribunal within five Business Days and the notice containing the order for suspension and such supporting information as the Chairperson or Deputy Chairperson thinks fit must be provided to the Tribunal Secretary. At the same time Chairperson or Deputy Chairperson must notify the Member who is the subject of the order that they have done so.
- 2.3.6 Where the Chairperson or Deputy Chairperson has made an order for suspension of a Member pursuant to Rule 2.3.1.1, if the person making the order subsequently forms the opinion that he or she no longer has reasonable grounds to suspect that the Member has committed, or been directly or indirectly involved in the commission of, an act involving fraud or dishonesty, and the subject matter of the order has not been referred to the Tribunal pursuant to Rule 2.3.4 or 2.3.5, the Chairperson or Deputy Chairperson may by notice in writing to the Member revoke the order for suspension and that revocation will have immediate effect.
- 2.3.7 Where an order for suspension pursuant to Rule 2.3.1.1 has been made in respect of a Member, whether or not the subject matter of the order has been referred to the Tribunal pursuant to Rule 2.3.4 or 2.3.5, the Investigating Officer who gave the notice pursuant to Rule 2.3.1 must within five Business Days after making the order for suspension prepare a Notice of Alleged Misconduct against that Member pursuant to Rule 2.4.1 and serve it within a further five Business Days on the Member personally or by registered mail or by post.
- 2.3.8 Notwithstanding any other provision of these Rules, no order for suspension of a Member shall take effect unless and until:
- (a) the Member concerned has been given an opportunity within the period of two Business Days prior to the date upon which the suspension order is to take effect to make such representations and to provide such information to the Chairperson or Deputy Chairperson presiding in relation to the suspension order and the Chairperson or Deputy Chairperson must consider, but is not bound by, any representations made by the Member; and

- (b) another member of the Tribunal, not being either the Chairperson or Deputy Chairperson must sign an endorsement to the suspension order approving the making of it.
- 2.3.9 The Chairperson or Deputy Chairperson, as the case may be, must in each particular case maintain a record of those Tribunal members who are contacted by them for the purpose of signing the endorsement aforesaid, and of those Tribunal members who so sign.
- 2.4 **Notice of Alleged Misconduct and Investigation Report**
- 2.4.1 Where, upon investigation of a complaint, the Investigating Officer considers that a Member may have engaged in Misconduct, the Investigating Officer must prepare a written Notice of Alleged Misconduct which must include particulars of the allegations of any of breach of the Constitution or of the MIAA Code of Practice, as the case may be, that is being made. The Investigating Officer must at the same time prepare a written Investigation Report, containing a detailed report in support of the Notice of Alleged Misconduct.
- 2.4.2 The Investigating Officer must provide copies of the Notice of Alleged Misconduct and Investigation Report at the same time to:
 - (a) the Member who is the subject of the Notice of Alleged Misconduct, and
 - (b) the Chairperson of the Tribunal
- 2.4.3 The Investigating Officer must include with the Investigation Report copies of any correspondence received by the Investigating Officer from the Member who is the subject of the Notice of Alleged Misconduct, or any legal or other representative of the Member, and from the complainant except in a case where the written consent of the complainant under Rule 2.1.5 is not required or is not necessary.
- 2.4.4 Where pursuant to this Rule 2.4 the Investigating Officer may issue a Notice of Alleged Misconduct, the Investigating Officer may:
 - (a) prepare and provide an amended Notice or Notices of Alleged Misconduct; or
 - (b) a further Notice or Notices of Alleged Misconduct; or
 - (c) with the leave of the Tribunal, withdraw a Notice of Alleged Misconduct as the case may require, from time to time.
- 2.4.5 Where the MIAA Tribunal is considering an Allegation of Misconduct and it appears to the Tribunal, on the basis of the material before it, that the Member may have engaged in a form of Misconduct that is not alleged or that may be alleged in a different and more appropriate manner in order to reflect the nature of the conduct the Tribunal may direct the Investigation officer to prepare a fresh Notice of Alleged Misconduct or an additional or amended Notice of Alleged Misconduct and serve it on the Member. The Tribunal may then proceed to deal with the matter in accordance with these Rules.

SECTION 3 – CANCELLATION OF MEMBERSHIP OR ACCREDITATION AND REFUSED APPLICATIONS FOR MEMBERSHIP OR ACCREDITATION

- 3.1 **Proceedings for cancellation of membership or accreditation**
- 3.1.1 The Membership Secretary may, in his or her absolute discretion, at any time refer to an Investigating Officer or the Tribunal a Member who, in the Membership Secretary's opinion:
 - (a) does not meet or no longer meets the requirements of membership in the Association; or

- (b) has made a material misrepresentation (whether by way of statement or omission) on an application form or other document provided to the Association.
- 3.1.3 A referral to an Investigating Officer pursuant to Rule 3.1.1 must be made by notice in writing to the Investigating Officer, and the Membership Secretary must provide a copy of the notice to the affected Member.
- 3.1.4 A referral to the Tribunal pursuant to Rule 3.1.1 must be made by notice in writing to the Tribunal Secretary, and the Membership Secretary must provide a copy of the notice to the affected Member.
- 3.2 **Refused applications for membership or accreditation**
- 3.2.1 In any case where an application for membership in the Association has been received from an Applicant but refused by the Association, and the Applicant has notified the Association that he, she or it wishes to appeal from the decision to refuse the application, except where the Board has deemed it appropriate in the circumstances for the Board to hear and determine the appeal pursuant to the Constitution, the Membership Secretary must refer the application to either an Investigating Officer or the Tribunal.
- 3.2.2 The decision whether to refer an application to an Investigating Officer or the Tribunal pursuant to Rule 3.2.1 is a matter within the absolute discretion of the Membership Secretary, however the Membership Secretary must refer the application to one or the other within five Business Days after the Association has been notified that the Applicant wishes to appeal from the decision to refuse the application.
- 3.2.3 A referral pursuant to Rule 3.2.1 must be made by notice in writing to the Investigating Officer or the Tribunal Secretary as the case may be, and the Membership Secretary must provide a copy of the notice to the Applicant.
- 3.3 **Referrals to Investigating Officer**
- 3.3.1 Where an Investigating Officer has received a referral pursuant to Rule 3.1.1 or 3.2.1, the Investigating Officer must conduct an investigation of the relevant circumstances, in pursuance of which investigation the Investigating Officer is invested with the powers set out in Rule 2.2.
- 3.3.2 The Investigating Officer must complete his or her investigation pursuant to Rule 3.3.1 and prepare a written Investigation Report of his or her findings, within 15 Business Days after receiving the referral.
- 3.3.3 The Investigating Officer must provide copies of the Investigation Report at the same time to:
 - (a) the Member or Applicant who is the subject of the Investigation Report; and
 - (b) the Tribunal Secretary.
- 3.3.4 The Investigating Officer must include with the Investigation Report copies of any correspondence received by the Investigating Officer from the Member or Applicant who is the subject of the Investigation Report, or any legal or other representative of the Member or Applicant.

SECTION 4 – MIAA TRIBUNAL

- 4.1 **Composition of the Tribunal**
- 4.1.1 There will be a Tribunal for the purposes of:
 - (a) carrying out the functions of the Tribunal pursuant to these Rules and the Tribunal under these Rules may hear and determine any complaints of allegations of Misconduct against any Member relating to any breach of the terms of the Constitution, the MIAA Code of Practice, the COSL Rules or the Disciplinary Rules by any Member; and

- (b) carrying out such other functions as are delegated to it by the Board.
- 4.1.2 The Tribunal will be referred to as the MIAA Tribunal.
- 4.1.3 The Board must appoint a Chairperson and a Deputy Chairperson of the Tribunal, each of whom is a legal practitioner of at least five years' standing and has the right to practise law within a State or Territory of Australia. Both persons must be appointed for such period or periods and on such terms of remuneration as are determined by the Board.
- 4.1.4 The Chairperson and Deputy Chairperson may but need not be Life Members but may not be Full Members or AMCs.
- 4.1.5 The Tribunal Secretary must maintain a Tribunal Panel, consisting of a list of at least 50 persons selected by the Board, each of whom is in the majority opinion of the Board a person of good character and of good standing and experience in the mortgage industry. Persons selected to be on the Tribunal Panel may, but need not, be members of the Board or a State Council, Members or Officers or employees of Members.
- 4.1.6 The Board will endeavour to ensure that the Tribunal Panel includes persons resident in each State of Australia.
- 4.1.7 For the purposes of a hearing, the Tribunal must be comprised by:
 - (a) the Chairperson or, in the absence of the Chairperson, the Deputy Chairperson; and
 - (b) two persons from the Tribunal Panel, selected by the Tribunal Secretary in consultation with the presiding Chairperson;or
 - (c) where both the Chairperson and Deputy Chairperson are unable or not prepared to sit on a particular hearing, three persons from the Tribunal Panel, selected by the Tribunal Secretary, one of whom will be designated by the Tribunal Secretary as chairperson for the purposes of that particular hearing; or
 - (d) where the Chairperson determines, in his or her discretion, that it is appropriate to do so having regard to the importance of the matter, the Tribunal may be constituted, by the Chairperson, the Deputy Chairperson and three persons from the Tribunal Panel.
- 4.1.8 In the absence of the Chairperson and the Deputy Chairperson, the person designated by the Tribunal Secretary as chairperson for the purposes of a particular hearing must be a legal practitioner of at least five years standing and who has the right to practice law within a State or Territory of Australia.
- 4.1.9 In selecting the composition of the Tribunal for any particular matter, the Tribunal Secretary will endeavour so far as possible to appoint persons who are resident in the same State as the Member who is the subject of the relevant Notice of Alleged Misconduct.
- 4.2 **Proceedings of the Tribunal**
 - 4.2.1 Upon receiving a Notice of Alleged Misconduct pursuant to Rule 2.4.2 or a notice pursuant to Rule 2.3.4 or 2.3.5, the Tribunal Secretary must assist the presiding Chairperson to appoint the Tribunal to deal with that particular proceeding, and provide to each member of the Tribunal all of the documents provided to the Tribunal Secretary by the Investigating Officer in connection with the proceeding.
 - 4.2.2 The Chairperson of the Tribunal must convene the Tribunal as quickly as is practicable, which may be done in person or by telephone or audiovisual link as the chairperson considers fit, and:

- (a) where an order for suspension pursuant to Rule 2.3.1 is in effect, and whether or not a notice pursuant to Rule 2.3.4 or 2.3.5 has been received, the Tribunal may make an order that the order for suspension be continued until further order of the Tribunal, or an order that the order for suspension be revoked, without conducting a hearing or receiving evidence or submissions from any party to the proceeding;
 - (b) in any proceeding, if the Tribunal has reason to suspect that a Member has committed, or been directly or indirectly involved in the commission of, an act involving fraud or dishonesty, the Tribunal may make an order suspending the Member or Affiliate from membership of the Association;
 - (c) in any proceeding, determine whether the proceeding will be dealt with and determined in the absence of the parties, or whether a hearing will be convened.
- 4.2.3 Where the Tribunal has made an order pursuant to Rule 4.2.2(a) or (b), the Tribunal may at any time in the proceeding, prior to issuing its final determination, on the motion of a party or on its own motion make an order revoking or varying its original order pursuant to Rule 4.2.2(a) or (b).
- 4.2.4 Where the Tribunal has made an order pursuant to Rule 4.2.2(a) or (b) in respect of a Member, the Tribunal must immediately notify the Investigating Officer of the order and Rule 2.3.7 will then apply as if the order had been made by the Investigating Officer.
- 4.2.5 Where the Tribunal has determined pursuant to Rule 4.2.2(c) that a proceeding will be conducted in the absence of the parties, the chairperson may notify the Investigating Officer and must notify the Member who is the subject of the proceeding of that determination.
- 4.2.5A Where the Tribunal proposes to deal finally with a matter with a matter before it, the Tribunal may do so without notice to the Investigation Officer or to the parties but the Tribunal must not proceed in this manner unless it proposes to determine a Notice of Alleged Misconduct by dismissing it.
- 4.2.5B Where the Tribunal proposes to deal finally with a matter in the absence of the parties, the Chairperson must notify the party under review and that party may provide submissions and evidence in writing to the chairperson within such period as the chairperson designates.
- 4.2.6 Where the Tribunal is proceeding pursuant to Rule 4.2.5 OR 4.2.5B, the Tribunal must not proceed to determine the Notice of Alleged Misconduct until the period designated by the chairperson for the provision of submissions and evidence has expired and the Tribunal has considered all such material provided to it.
- 4.2.7 Where the Tribunal has determined pursuant to Rule 4.2.2(c) that a hearing will be convened in respect of a proceeding, the chairperson must appoint a date, time and place for the hearing and may give notice in writing of these particulars to the Investigating Officer and must give notice to the Member who is the subject of the Notice of Alleged Misconduct. The period of notice must be not less than five Business Days prior to the date of the hearing.
- 4.2.7A Where the Tribunal has determined that a hearing will be convened, the role of the Investigation Officer, if invited to do so by the Tribunal, is to be present at the hearing to support the allegations it has made in the Notice of Allegations as an impartial friend of the Tribunal, including by making recommendations to the Tribunal, where invited by the Tribunal to do so.
- 4.2.8 The Tribunal may adjourn, postpone or reconvene a hearing as it thinks fit, provided that reasonable notice is given to the parties of any change to the hearing date.

4.3 Proceedings for cancellation of membership or accreditation

- 4.3.1 Upon receiving a notice pursuant to Rule 3.1.1, or an Investigation Report pursuant to Rule 3.3.3 relating to proceedings against a Member, the Tribunal Secretary must appoint the Tribunal to deal with that particular proceeding, and provide to each member of the Tribunal all of the documents provided to the Tribunal Secretary by the Association in connection with the proceeding.
- 4.3.2 The Tribunal must provide to the Member who is the subject of the notice or Investigation Report a reasonable opportunity to make written submissions to the Tribunal as to the reasons why the membership of the Member should not be cancelled. The Tribunal must not hold a hearing in respect of the proceeding and the Member is not entitled to require that a hearing be held unless the Tribunal is satisfied that special circumstances exist justifying the holding of a hearing.
- 4.3.3 If, having considered any submissions received by it, the Tribunal is of the opinion that the Member:
- (i) does not meet the requirements of membership in the Association; or
 - (ii) has made a material misrepresentation (whether by way of statement or omission) on an application form or other document provided to the Association;

the Tribunal may cancel the membership of the Member.

4.4 Proceedings in relation to refused applications

- 4.4.1 Upon receiving a notice pursuant to Rule 3.2.1, or an Investigation Report pursuant to Rule 3.3.3 relating to a refused application by an Applicant, the Tribunal Secretary must assist the presiding chairperson to appoint the Tribunal to deal with that particular matter, and provide to each member of the Tribunal all of the documents provided to the Tribunal Secretary by the Membership Secretary or the Investigating Officer in connection with the proceeding.
- 4.4.2 The Tribunal must provide to the Applicant who is the subject of the notice or Investigation Report a reasonable opportunity to make written submissions to the Tribunal as to the reasons why the application by the Applicant for membership in the Association should be allowed. The Tribunal must not hold a hearing in respect of the proceeding and the Applicant is not entitled to require that a hearing be held.
- 4.4.3 After considering any submissions received by it, the Tribunal may affirm the decision to refuse the application by the Applicant for membership in the Association, or revoke that decision and direct the Association to allow the application for membership as the case may be.

4.5 Conduct of hearings

- 4.5.1 A hearing of the Tribunal must be held in private except that:
- (a) the Investigating Officer, subject to the approval of the presiding Chairperson, and the Member as of right (if the hearing relates to a Member who is a natural person), or two representatives of the Member (if the hearing relates to a Member that is a Corporation) are entitled to attend;
 - (b) the Tribunal may allow other representatives of the Association and the Member to attend and make submissions.
- 4.5.2 A party may be legally represented before the Tribunal provided that:
- (a) the presiding Chairperson is advised not less than two Business Days prior to the date set down for the Tribunal hearing of the intention of the particular party to

have legal representation, and the name and contact details of each such legal representative, and

- (b) the Tribunal may, if it is satisfied that legal representation has served or may continue to serve to delay the hearing of the matter, terminate the right of the party to have legal representation in which event the legal representative or representatives must depart the hearing and take no further part in it and the hearing must proceed in the absence of that legal representation.

- 4.5.3 No party may be compelled to appear at a hearing of the Tribunal, but any party to a hearing may provide written submissions and evidence to the chairperson at least three Business Days before the hearing or at the hearing with the leave of the Tribunal.
- 4.5.4 The Tribunal may make such procedural arrangements as it thinks fit, including directions for the provision of written submissions and evidence and the taking of a transcript of the hearing.
- 4.5.5 The Tribunal must conduct hearings with as little formality and technicality as possible and otherwise may conduct hearings as it considers fit, having regard to the necessity that adequate consideration be given to matters before it.
- 4.6 **General Rules governing the Tribunal**
- 4.6.1 The laws and rules of evidence do not apply to proceedings before the Tribunal.
- 4.6.1.1 In considering a matter before it, the Tribunal may take into account details entered into the Register of the Tribunal concerning matters previously dealt with by the Tribunal against a Member, but only for the purposes of considering the orders that the Tribunal may make against a Member, unless the Tribunal determines that the entry in the Register and the facts to which it refers are relevant to establishing whether the Member has engaged in Misconduct and has given the Member an opportunity to address it on that issue.
- 4.6.2 The Tribunal must act expeditiously in hearing and determining all proceedings before it.
- 4.6.3 The Tribunal must act without bias and treat all parties with fairness and in accordance with the rules of natural justice.
- 4.6.4 The Tribunal may obtain legal advice and have legal advisers in attendance at a hearing.
- 4.6.5 The Tribunal may conduct hearings or other meetings of the Tribunal in person or by other means provided that all members of the Tribunal are able to hear and speak to each other.
- 4.6.6 All determinations and decisions of the Tribunal must be made by simple majority vote of the members of the Tribunal.
- 4.6.7 All correspondence between a party and the Tribunal must be dealt with on the Tribunal's behalf by the Chairperson or, in the Chairperson's absence, by another member of the Tribunal with the consent of the chairperson.
- 4.6.8 Where the Tribunal has made a determination pursuant to Rule 4.3.3 or 4.7.2, the Chairperson must notify in writing the Investigating Officer and the Member who is the subject of the proceeding before the Tribunal of the determination, including any finding of Misconduct and any penalty.
- 4.6.9 Where the Tribunal has made a determination pursuant to Rule 4.4.3, the chairperson must notify in writing the Membership Secretary and the Applicant who is the subject of the proceeding before the Tribunal of the determination.
- 4.6.10 The Tribunal is required to issue written reasons for any determination made by it. Any such written reasons must be issued by the Tribunal to all parties to the proceeding within one month after the date on which the determination is made.

- 4.6.11** The Tribunal may proceed to determine any matter before it notwithstanding the failure by the Member who is the subject of the Notice of Alleged Misconduct to make submissions or provide documents or information or to appear at a hearing within the period specified for the purpose by the Tribunal.
- 4.7 Powers of the Tribunal**
- 4.7.1** Any act or omission by an Officer, employee or contractor of a Member is deemed for the purposes of these Rules to be an act or omission by the Member.
- 4.7.1A** The Board or State Council may act under the Constitution to suspend, censure or expel any Member irrespective of any determination or other action that has been, is being or may be taken pursuant to these Disciplinary Rules by the Tribunal or at law.
- 4.7.2** If the Tribunal considers that the Notice of Allegation has been substantiated but does not propose to determine that a Member has engaged in Misconduct, following submissions from the Member or the Investigation Officer or both that there are exceptional circumstances justifying it doing so, the Tribunal may without proceeding to determine that there has been Misconduct, adjourn the matter to a date to be fixed or dismiss it absolutely or subject to such conditions as the Tribunal may impose in accordance with these Rules.
- 4.7.3** Subject to Rule 4.7.2 and Rule 4.7.4 if the Tribunal determines that a Member has engaged in Misconduct, the Tribunal shall make a determination of Misconduct against the Member and may impose one or more of the following penalties:
- (a) dismiss the matter absolutely or subject to any conditions the Tribunal may impose
 - (b) counsel the Member
 - (c) censure the Member;
 - (d) suspend the Member from membership of the Association, for such period and on such terms or conditions as the Tribunal thinks fit;
 - (e) where the Member is already the subject of an order for suspension, continue that suspension for such period and on such terms or conditions as the Tribunal thinks fit;
 - (f) require the Member to take such steps as the Tribunal may determine to correct the effects of any Misconduct found to have been engaged in;
 - (g) pay a financial contribution to the Association to be used as the Tribunal recommends, or in the absence of a recommendation, as the Association determines;
 - (h) require the Member to undertake such education or compliance program as the Tribunal thinks fit, provided that the purpose of such program is to reduce the likelihood of future acts of Misconduct by the Member;
 - (i) expel the Member from membership of the Association;
 - (j) adjourn the proceeding subject to compliance with such conditions as to sanctions as the Tribunal may otherwise impose in accordance with this Rule.
- 4.7.4** Where the Tribunal has determined the Member has engaged in Misconduct but there are in the opinion of the Tribunal mitigating factors amounting to special circumstances in the opinion of the Tribunal the Tribunal may not make any determination of Misconduct against the Member and impose any one or more of the following penalties upon the Member:
- (a) a suspended determination of Misconduct whereby the determination of Misconduct by the Tribunal against the Member is to be suspended for any period of time up to

2 years as the Tribunal deems fit from the date of the imposition of the suspended determination of Misconduct and the suspended determination of Misconduct will be of no effect after any such period of suspension imposed expires. However where the Member within the period of any suspended determination is guilty of further engaging in Misconduct the suspended determination of Misconduct penalty shall be of no effect and is to be reconsidered afresh by the Tribunal as to an appropriate penalty at the same time as any further Misconduct engaged in by the Member is being considered by the Tribunal in relation to penalty;

- (b) an admonishment of the Member without any determination of Misconduct by the Tribunal against the Member;
- (c) require the Member to take such steps as the Tribunal may determine to correct the effects of any Misconduct found to have been engaged in;
- (d) pay a financial contribution to the Association to be used as the Tribunal recommends, or in the absence of a recommendation, as the Association determines;
- (e) require the Member to undertake such education or compliance program as the Tribunal thinks fit, provided that the purpose of such program is to reduce the likelihood of future acts of Misconduct by the Member;

4.7.5 Prior to taking any action under Rule 4.7.2, Rule 4.7.3 or Rule 4.7.4 the Tribunal must provide such reasonable time as the Tribunal determines for the Member to make such representations and to provide such information to the Tribunal as the Member thinks fit in relation to the action proposed to be taken by the Tribunal.

4.8 Effect of Tribunal determinations

4.8.1 A determination, decision or order made by the Tribunal pursuant to the Rules has effect from the date on which the Tribunal determines that it will have effect or, if the Tribunal does not specify such a date, immediately from the date on which the order is made.

4.8.2 A determination, decision or order made by the Tribunal is final and binding on all parties to the proceeding. Neither the Association, nor any constituent body of the Association other than the Tribunal, has power to vary or overrule a determination, decision or order made by the Tribunal.

4.8.3 The Tribunal may of its own motion and in its absolute discretion reconsider and vary or overrule any decision or order made by the Tribunal in respect of any penalty imposed by the Tribunal upon a Member under these Rules prior to the 26th day of November 2004.

4.9 Notification to persons affected by determination

4.9.1 Where the Tribunal makes a determination, decision or order pursuant to the Rules (whether or not that determination, decision or order is then in effect) and the effect of that determination, decision or order is to cause the membership of the Member concerned to be suspended or for the Member to be expelled from membership of the Association, the Tribunal:

- (a) may in any such determination, decision or order make such ancillary orders concerning AMCs who are employed by, or contracted to, the Member concerned as the Tribunal thinks fit and every such ancillary order shall bind every such AMC; and
- (b) must as soon as practicable in such form and manner as it thinks fit notify each such AMC of the effect of the determination, decision or order and the terms of any ancillary order.

4.10 Publication of determinations

- 4.10.1 The Tribunal Secretary must maintain a register of all determinations made by the Tribunal or by the Board pursuant to Rule 4.3.3 or 4.7.2, and make the register available for inspection by Members. The register must, with respect to each determination, include the name of the Member to whom the determination relates, any findings of Misconduct by the Tribunal and any orders made by the Tribunal including any penalties. The register must also include a copy of the reasons for determination issued by the Tribunal.
- 4.10.2 The Tribunal Secretary must maintain a separate register of all determinations made by the Tribunal pursuant to Rule 4.4.3. The register must, with respect to each determination, include the name of the Applicant to whom the determination relates and the determination made by the Tribunal. The register must also include a copy of the reasons for determination issued by the Tribunal.
- 4.10.3 The Association shall, as it sees fit, publish or otherwise make available to Members, any other persons or the public generally the content of, or an extract from or precis of, any determinations by the Tribunal (other than determinations pursuant to Rule 4.4.3) and the register maintained pursuant to Rule 4.10.1 and of any reasons issued by the Tribunal. All Members by this Rule provide their express consent to the publication of material encompassed within this Rule and waive and release forever any rights they may otherwise have to bring action with respect to such publication, whether by suit in defamation or other cause of action.
- 4.10.4 Except as provided below, the Association must not publish or otherwise make available to Members, or other persons or the public generally the content of any determinations by the Tribunal pursuant to Rule 4.4.3 or the register maintained pursuant to Rule 4.10.2 (collectively the "Application Records"). The Association must provide access to the Application Records only as follows:
- (a) an Applicant must be given access upon request to that part of the Application Records that relates to the Applicant, but not to any other part of the Application Records;
 - (b) the Membership Secretary, the Tribunal Secretary, the Tribunal, an Investigating Officer and the Board must be given access upon request to the Application Records.

4.11 Keeping Complainant Informed

- 4.11.1 The Investigating Officer and/or the Tribunal Secretary may keep a complainant informed of progress in handling the complainant's complaint provided always that the Investigating Officer or the Tribunal Secretary as the case may be must not provide any information to a complainant in relation to the progress and outcome of the complaint where in the opinion of the Investigating Officer or the Tribunal Secretary as the case may be:

- (a) to do so would expose the Investigating Officer, the Tribunal Secretary, the Association or any Officer of the Association or members of the Tribunal to liability for civil damages;
- (b) to do so would or could prejudice, impede or in any other manner adversely affect the investigation of the complaint and the proceedings of the Tribunal; or
- (c) to do so would deny procedural fairness to the Member, the subject of the complaint.

4.12 Legal proceedings

- 4.12.1 A Member, including a Member whose membership has been suspended or cancelled, may not bring any legal action or proceeding against the Association, any member of the Tribunal or any employee or agent of the Association (including without limitation Councillors of the Association or an Investigating Officer), with respect to the publication or giving of access to any person pursuant to Rules 4.10.1 or 4.10.2, and this Rule may be pleaded as a complete bar to the commencement or continuation of any such proceedings in any jurisdiction.
- 4.12.2 The Association will indemnify each member of the Tribunal and employee, contractor and agent of the Association against any claim, action or proceeding brought against that person by any other person arising out of or in connection with the conduct of an investigation by an Investigating Officer, a proceeding before the Tribunal or any order, determination or decision made by an Investigating Officer or the Tribunal, and this indemnity will extend to the conduct of the defence of any proceedings and the payment of any costs thereof.
- 4.12.3 The indemnity provided pursuant to Rule 4.12.2 does not extend to actions brought by the Association against any person.

SECTION 5 – NON-ACTIVE AMCs

5.1 Automatic suspension of membership of the Association

- 5.1.1 Where an AMC is not, or has ceased for any reason to be, an Officer, employee or contractor of a Member, then the membership of the Association of the AMC is automatically suspended with effect from the date on which the AMC ceased to be an Officer, employee or contractor of a Member.
- 5.1.2 Where the Tribunal has made an order suspending or cancelling the membership of a Member, then the membership of the Association of any AMC who is an Officer, employee or contractor of that Member, and who is not also an Officer, employee or contractor of another Member, is automatically suspended with effect from the date on which the suspension or cancellation of the membership of the Member takes effect.
- 5.1.3 Where an AMC's membership of the Association has been suspended pursuant to Rule 5.1.1 or 5.1.2, the Membership Secretary must record the AMC's name in the membership records of the Association as a Non-active AMC.
- 5.1.4 A Non-active AMC is not entitled to any of the rights or privileges of an AMC, and may not hold himself or herself out to any person or to the public generally as an AMC or as a Member of the Association.
- 5.1.5 A Member may not deal with a Non-active AMC as if the Non-active AMC was an AMC or a Member, and must not hold out a Non-active AMC to any person or to the public generally as an AMC or a Member of the Association.
- 5.1.6 A Non-active AMC may apply for re-accréditation upon obtaining employment with, or being retained as a contractor by, a Member. If no application for re-accréditation has been received from the Non-active AMC within one year after the date on which his or

her membership of the Association was suspended, then his or her membership of the Association will be deemed to have been cancelled with effect from the date on which that one year period expires.

SECTION 6 – MATTERS REFERRED TO TRIBUNAL BY CREDIT OMBUDSMAN SERVICE LIMITED

6.1 Referral of matters by Credit Ombudsman

- 6.1.1 The Tribunal Secretary must accept and act upon a COSL Referral in the manner following.
- 6.1.2 The Tribunal Secretary must as soon as practicable after its receipt, refer any COSL Referral to the Investigating Officer and every such COSL Referral shall be dealt with in all respects as if the COSL Referral were a complaint made under the Rules.
- 6.1.3 Upon receipt of a COSL Referral the Tribunal Secretary must as soon as practicable acknowledge to the Scheme Manager receipt of the COSL Referral and advise the complainant referred to in the COSL Referral of the referral of the COSL Referral to the Tribunal Secretary and of the procedure to be followed in dealing with the complainant's complaint.
- 6.1.4 A complainant who is the subject of a COSL Referral may not seek any compensation or other reimbursement whatsoever under the Rules irrespective of whether or not the complainant has received compensation pursuant to an Award by the Credit Ombudsman.

SECTION 7 – MATTERS REFERRED TO TRIBUNAL BY COS LIMITED

7.1 Referral of matters by COS Limited

- 7.1.1 Notwithstanding any other provision of these Rules, COS Limited may of its own volition and irrespective of whether or not a complaint has been made to it under the COSL Rules in respect of a Member, make a complaint in relation to a Member to the Association to be dealt with in accordance with these Rules.
- 7.1.2 COS Limited may make a complaint to the Association under these Rules irrespective of whether or not the subject matter of the complaint by COS Limited has been the subject of a complaint by any particular consumer or consumers to COS Limited.
- 7.1.3 COS Limited may make a complaint in relation to specific conduct or a course of conduct engaged in by the Member who is the subject of the complaint.