



Position Statement 8

Unconscionable conduct

Position Statement

This Position Statement describes how we deal with complaints about unconscionable conduct. It sets out what we will consider when investigating such complaints, the information we will require from a consumer or financial services provider (**FSP**) and the remedies that may be available.

We will publish separate Position Statements describing how we deal with complaints about conduct that is unjust, and complaints about irresponsible lending. Some complaints may be about all three types of conduct.

In preparing this Position Statement, we have had regard to the relevant law, applicable industry or regulatory codes of practice, good industry practice and fairness.

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1. Introduction – what is unconscionable conduct?

1.1 Generally speaking, unconscionable conduct refers to conduct that is particularly harsh or oppressive and goes against good conscience or the norms and standards of society.

1.2 Dealings between a consumer and a financial services provider may give rise to unconscionable conduct because the provider is often in a stronger bargaining position than, and has the relative ability to exert influence over, the consumer.

1.3 This Position Statement provides guidance on how we deal with complaints about unconscionable conduct, with particular emphasis on:

- (a) what factors we take into account when dealing with complaints about unconscionable conduct,
- (b) what information we require from the parties to consider those factors, and
- (c) remedies that may be available if we conclude that the FSP has acted unconscionably.

1.4 Although the terminology used in this Position Statement refers to loans and mortgages as they relate to individual consumers, our jurisdiction in this area is not limited to loans secured by real property or to individual consumers. We will apply the same general principles to different types of financial products and also where the borrower is a small business.

1.5 That being said, whether conduct is considered to be unconscionable will depend on the particular facts of each case.

1.6 What are the relevant laws?

The obligation to not act unconscionably is set out in:

- (a) equity, and
- (b) sections 12CA and 12CB of the ASIC Act.

1.7 This Position Statement covers unconscionable conduct both in equity and under the provisions of the ASIC Act.

1.8 What are the applicable industry codes and practices?

In considering whether an FSP's conduct is unconscionable, we also have regard to the requirements of any applicable code of practice, as well as good industry practice.¹

1.9 The obligation to not act unconscionably is consistent with:

- (a) clause 4.7(f) of the MFAA Code of Practice,²
- (b) key promises 1 and 8 of the COBA Code of Practice,³ and

¹ This is consistent with section 12CC(1)(h) of the ASIC Act which states that the requirements of any industry code may be relevant when considering whether the FSP acted unconscionably under section 12CB. See also Rules 12.1 and 12.3 of the 10th Edition CIO Rules which require CIO to consider applicable codes of conduct and good industry practice when dealing with a complaint.

² Version effective 16 October 2015.

³ Version effective 1 January 2014.

(c) clause 3.2 of the ABA Code of Banking Practice.⁴

1.10 When will we consider unconscionable conduct in a complaint?

We will consider whether an FSP has engaged in unconscionable conduct if a consumer makes an allegation to that effect or if the particular facts of the complaint indicate that the FSP may have done so.

1.11 Typically, when we consider a claim that a credit contract was unjust under the National Credit Code,⁵ we will also consider whether the FSP has engaged in unconscionable conduct. This is because both unjustness and unconscionability may involve allegations of undue pressure, unfair tactics, taking advantage of a vulnerability or lack of understanding, fraud or misleading conduct.

1.12 As with all complaints, we first consider whether the complaint is within our jurisdiction. This includes determining whether the complaint and/or relevant cause of action was brought within the relevant time limits.⁶

1.13 A complaint about unconscionable conduct must be made within the earlier of:

- (a) six years from the date the consumer first became aware (or should reasonably have become aware) that they suffered the loss, or
- (b) two years from when the FSP gives the consumer a final response in their internal dispute resolution process.

Facts:

John and Karen are an elderly couple. They were contacted by a finance broker to discuss investment opportunities. The broker was employed by an FSP. With the broker's assistance, they refinanced their home loan and purchased a residential investment property. However, they soon struggled to meet their loan repayments and ended up selling the investment property. They complained to us that they "should never have been given the loan" and claimed that the broker knew that John was a pensioner and couldn't afford the repayments.

What we would do:

As the broker was employed by an FSP, we would record the complaint against the FSP. We would then consider whether or not the broker, as an employee of the FSP, acted with due care and skill (s 12ED(1)(A) ASIC Act) and/or acted unconscionably in the circumstances.

We would consider the circumstances in which the broker made contact with John and Karen and what the broker knew or asked about their personal and financial circumstances. We would also ask John and Karen for information about their circumstances at the time the loan was entered into, and seek to understand why they were unable to afford repayments.

⁴ Version effective 1 February 2014.

⁵ Schedule 1 to the *National Credit Act 2009* (Cth).

⁶ See CIO Rule 6.3(b).

1.14 How do we consider unconscionable conduct?

We consider unconscionability both at equity and unconscionability under the ASIC Act.

1.15 This does not however mean that we combine the two types of unconscionable conduct into one claim. It simply means that we will request information from the parties that will allow for a concurrent consideration of both types of unconscionable conduct.

2. How do we consider complaints about equitable unconscionability?

2.1 Unconscionability at equity generally relates to the formation of a contract or "procedural unconscionability". It occurs when one party (the FSP) knowingly exploits the special disadvantage of the other (the consumer) during the formation of the contract.

2.2 Equitable unconscionability is also prohibited under s 12CA of the ASIC Act which expressly refers to conduct which is "unconscionable within the meaning of the unwritten law...of the States and Territories."

2.3 For equitable unconscionability to be established, we will consider whether:

- (a) the consumer was at a special disadvantage in relation to the FSP which seriously affected their ability to make a judgement as to their own best interests,
- (b) the FSP either had knowledge of the special disadvantage or the special disadvantage was evident, and
- (c) the FSP unfairly or unconscientiously took advantage of the consumer's special disadvantage.⁷

2.4 What is a special disadvantage?

The consumer's special disadvantage must be a "disabling condition or circumstance"⁸ which seriously affected their ability to make a judgement as to their own best interests. This may relate to a particular vulnerability, examples of which include:⁹

- (a) inexperience with financial matters,
- (b) lack of education,
- (c) inability to speak English,
- (d) poverty or need of any kind,
- (e) sickness,
- (f) age or emotional dependency¹⁰,
- (g) infirmity of body or mind, or

⁷ *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 at 474.

⁸ *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 at 462.

⁹ *Blomley v Ryan* (1956) 99 CLR 362 at 405.

¹⁰ *Louth v Diprose* (1992) 175 CLR 621; *Bridgewater v Leahy* (1998) 194 CLR 457.

(h) drunkenness.

2.5 A mere imbalance in bargaining power is not considered to be a special disadvantage because there will inevitably be a disparity in power between the FSP and the consumer, and this will generally not affect the nature of the transaction between them.

2.6 Similarly, a mistake in judgement,¹¹ or the requirement to make a difficult decision,¹² is not sufficient to be considered a special disadvantage.

Facts:

Amanda is an unemployed single mother on Centrelink benefits. She contacted the FSP, who provided debt management services, for help in discharging her credit cards. Amanda provided information to the FSP that showed she was unemployed and receiving payments from Centrelink. She also told the FSP she had no realisable assets and was renting a unit with her two small children. She paid the FSP \$1,500 for its debt negotiation services.

What we would do:

It is likely we would conclude that Amanda was in a vulnerable and financially desperate situation, and therefore under a special disadvantage. We would investigate whether the FSP acted unconscionably by entering into an agreement with Amanda and accepting \$1,500 from her. Given that she was unemployed with very little disposable income, we would consider whether it was possible for her to comply with the arrangements the FSP negotiated (or proposed to negotiate) for her.

If we decided that the FSP's conduct was unconscionable, an appropriate remedy would be for the FSP to refund the \$1,500 paid by Amanda.

2.7 *Is there a separate class of special disadvantage for guarantees by a spouse?*

Under the principle of a "special wife's equity", a lender is taken to know that a wife may repose trust and confidence in her husband in matters of business, and should therefore be aware that the husband may not fully and accurately explain the nature and effect of the transaction to his wife.

2.8 The elements required to establish this special disadvantage are:

- (a) the wife provided a guarantee as security for her husband's debts,
- (b) the wife did not understand the nature and effect of the guarantee,
- (c) the lender did not have reasonable grounds to suppose that the wife had an adequate understanding of the obligation she was undertaking and an understanding of the effect of the transaction (for example, the lender did not explain the nature of the transaction and the risks involved or ensure that the wife obtained independent legal or financial advice), and

¹¹ *Australian Competition and Consumer Commission v Oceana Commercial Pty Ltd* (2004) 139 FCR 316.

¹² *Frederick v State of South Australia* (2006) 94 SA SR 545 at 580.

(d) the wife did not personally benefit from the transaction.¹³

In these circumstances, the lender may be prevented from enforcing the guarantee against the wife.

2.9 The rule is likely to now extend to any person who gives a guarantee for another's debt where the person is in a relationship of trust and confidence, regardless of gender.¹⁴

2.10 What is required to establish knowledge of a special disadvantage?

It is not necessary for the FSP to have had actual knowledge of the special disadvantage. It will be sufficient if the FSP was aware of the facts that would raise the possibility, in the mind of any reasonable person, that the consumer was suffering some special disadvantage.¹⁵

2.11 However, constructive knowledge (or knowledge that the FSP could have gained had it made further enquiries) will not be enough.¹⁶

2.12 How does the FSP unfairly take advantage of the special disadvantage?

At the very least, taking advantage will consist of an FSP proceeding with a transaction even though they:

(a) knew, or

(b) were aware of facts which would give rise to the possibility,

that the consumer's special disadvantage would prevent them from judging what was in their best interests.

2.13 Once established, the burden is on the FSP to show that:

(a) the transaction was fair, just and reasonable, or

(b) the special disadvantage was negated or cured.

2.14 How can the FSP 'cure' the special disadvantage?

The existence of a special disadvantage, and the allegation that the FSP took advantage of the consumer's disadvantage, can be "cured" by an FSP taking appropriate action to ensure that the consumer understands the nature and effect of the transaction. This may also show that the FSP was not taking unfair advantage of the consumer. Examples include:

(a) a lack of understanding of English may be cured by the use of an interpreter,

(b) inexperience with financial matters may be cured by requiring the consumer to obtain independent financial advice about the financial risks involved, or

(c) a lack of understanding of the entire transaction may be cured by requiring the consumer to obtain independent legal advice.

¹³ *Yerkey v Jones* (1939) 63 CLR 649 at 683, 686 and *Garcia v National Australia Bank* (1998) 194 CLR 395; [1998] HCA 48.

¹⁴ *Agripay Pty Limited v Byrne* [2011] QCA 085.

¹⁵ *International Skin Care Suppliers Pty Ltd v Commonwealth Bank of Australia* [2013] NSWSC 1768.

¹⁶ *Kakavas v Crown Melbourne Limited* [2013] HCA 25.

- 2.15** It is not sufficient for the FSP to merely recommend that the consumer obtain independent advice. Rather, the FSP must take steps to ensure that such advice is actually obtained.¹⁷
- 2.16** Furthermore, the nature of the special disadvantage will determine the appropriate action needed to cure it. Consequently, even if independent and adequate advice is obtained, this may not be sufficient to cure all types of special disadvantage, for example, if the consumer is in dire financial circumstances.

Facts:

Ron and Beverley had engaged a broker to arrange a loan with an FSP. They say that they were both under a special disadvantage because of their age and inexperience with financial matters. The information provided by the FSP showed that the broker had required Ron and Beverley to obtain independent legal advice and that she had also requested them to provide her with details of the solicitor who provided them the advice in order to verify this.

What we would do:

Age is not of itself a special disadvantage. We would ask Ron and Beverley why they thought they were both under a special disadvantage and reach our own view based on the information provided. We would also consider whether they understood the nature and effect of the transaction and whether any special disadvantage affected their ability to protect their own interests.

We would also consider whether the requirement that they obtain independent legal advice was sufficient to protect their interests.

3. How do we deal with complaints about statutory unconscionability?

- 3.1** Unconscionability under the ASIC Act extends the concept of unconscionability under the general law. As well as including factors relating to the formation of a contract, statutory unconscionability also takes into account:
- (a) the terms of the contract itself, or
 - (b) events occurring after the contract is entered into (for example, the consequences arising from the contract).

This is known as “substantive unconscionability”.

¹⁷ Vout, P, *Unconscionable Conduct – The Laws of Australia* (Lawbook Co., 2006) 440 [35.9:28].

Facts:

Mary and Joe were struggling to meet home loan repayments, and approached a mortgage broker for assistance. The broker arranged a new home loan, with lower monthly repayments than their existing loan. They didn't realise, however, that the lower payments were the result of an initial interest-only period, and that payments would increase after three years. They say that their broker was aware that they would not be able to afford the higher payments.

What we would do:

Mary and Joe are not able to establish that they were under a special disadvantage for the purposes of equitable unconscionability. However, special disadvantage is not required for statutory unconscionability. Consequently, we would consider whether the broker's conduct was unconscionable under s 12CB of the ASIC Act.

We would need to understand Mary and Joe's financial circumstances at the time of the refinance, and decide whether the new loan was appropriate for them. If the broker had accepted payment (fees or commission) for a loan that was not appropriate or made their situation worse, it is likely we would consider that conduct unconscionable.

In those circumstances, at a minimum we would expect the broker to pay to Mary and Joe any fees or commission received in respect of the loan. If Mary and Joe could obtain a more appropriate loan we would also expect the broker to cover the reasonable costs of doing so.

- 3.2** Section 12CC covers a wide range of circumstances and lists the matters a court may have regard to when considering whether an FSP's conduct was unconscionable under s 12CB. The list is not exhaustive.
- 3.3** In considering statutory unconscionability, we apply the factors listed under s 12CC ASIC Act to the facts of the case. These factors include:
- (a) the relative bargaining strength of the parties,
 - (b) whether the consumer was required to comply with conditions that were not reasonably necessary to protect the FSP's interests,
 - (c) whether the consumer understood the documentation used,
 - (d) whether undue influence, pressure or unfair tactics were used, and
 - (e) the circumstances under which the consumer could have acquired identical or equivalent goods or services from another FSP.¹⁸
- 3.4** We will not consider any circumstances that were not reasonably foreseeable at the time of the alleged contravention.¹⁹
- 3.5 Does the consumer need to have a special disadvantage?**

¹⁸ These considerations are under ss 12CC(a)-(e) of the ASIC Act. The remaining factors under ss 12CC(f)-(k) may also be taken into account.

¹⁹ Section 12CB(3)(a) of the ASIC Act.

Unconscionability under the ASIC Act does not require the consumer to have a special disadvantage. However, it still requires the FSP's conduct to be unconscionable in all the circumstances.

3.6 What will be considered to be unconscionable?

The FSP's conduct must have had no regard for conscience, or was irreconcilable with what is right and reasonable.²⁰ That requires consideration of "accepted and acceptable community values", recognising that these will develop and change over time.²¹

3.7 We therefore consider whether the FSP had acted in a manner that was beyond merely unfair, or was a clear abuse of the disparity in bargaining power between the FSP and the consumer. This will necessarily require an examination of all the circumstances. Some examples of unconscionable conduct are:

- (a) a broker requiring a consumer to apply for a business loan when the broker knows the consumer in fact wants a loan for personal purposes,²²
- (b) a broker fraudulently altering information in a consumer's loan application about, for example, income and expenses, in order to secure loan approval,
- (c) a mortgage manager approving a loan without interviewing the potential borrower in accordance with its lending guidelines or without making enquiries following discrepancies in the borrower's income,²³
- (d) a lender using a trivial event of default (such as a borrower forgetting to update their address) to accelerate the entire loan,²⁴ or
- (e) increasing the interest rate to an exorbitant amount.²⁵

3.8 *Is recklessness considered to be unconscionable?*

Example (c) in paragraph 3.7 is an illustration of recklessness in the form of wilful blindness. We may find that the FSP acted unconscionably if the FSP was alerted to any discrepancies or errors, but failed to make further enquiries.

²⁰ *Perpetual Trustees Victoria v Longobardi* [2009] NSWSC 654; *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389.

²¹ *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90

²² *ASIC v Australian Lending Centre Pty Ltd (No 3)* [2012] FCA 43.

²³ *Violet Homes Loans Pty Ltd v Schmidt & Anor* [2013] VSCA 56.

²⁴ Vout, P, *Unconscionable Conduct – The Laws of Australia* (Lawbook Co., 2006) 468 [35.9:54].

²⁵ Points (d) and (e) are examples of substantive unconscionability. These claims may also be considered as unfair contract terms under ss 12BF-BM of the ASIC Act. These provisions apply to consumer contracts that are standard form contracts. Accordingly, in the event that the loan is a business loan or not a standard form contract, we will consider substantive unconscionability.

Facts:

Tom and Margaret obtained a second loan through their broker, which was secured by a second mortgage over their home. We were informed that Margaret's older and severely disabled sister lived with them in their home.

What we would do:

We would investigate whether the broker knew, or was recklessly indifferent to the fact that, if Tom and Margaret were not able to afford the second loan, they would lose their home possibly their ability to provide a home for Margaret's sister. Ignoring such a significant consequence while knowing of the risk is likely to be unconscionable.

4. Is asset lending inherently unconscionable?

- 4.1** Pure asset lending involves lending only on the basis of the value of the security, without regard to whether the consumer can afford repayments.
- 4.2** Asset lending is not consistent with responsible lending under the National Credit Act, but it is something that could have occurred before responsible lending was introduced or that could occur in an unregulated environment.
- 4.3** Depending on the context, asset lending will significantly increase the likelihood that an FSP has engaged in unconscionable conduct, but it is generally the case that something more would be required before conduct would be considered unconscionable, including that the consumer could in fact not afford the loan.

Facts:

Nathan is a retired builder who receives a pension. He took out a loan to invest \$100,000 in his son's business. Nathan says that he was prepared to mortgage his home because he trusted his son and believed that he would be able to supplement his pension

What we would do:

In determining whether the lender engaged in unconscionable conduct, we would investigate whether the lender had been indifferent to Nathan's ability to make repayments under the loan. In particular, we would consider whether the lender made any enquiries about Nathan's capacity to meet the obligations under the loan, or whether it was merely satisfied that Nathan's home would discharge the loan.

If we decided it was unconscionable to provide this loan, then depending on Nathan's financial circumstances the appropriate remedy might be to release him from any liability for the amount lent to him.

5. What information is required to consider unconscionable conduct?

5.1 As noted in paragraph 1.15, we will request such information from the parties as will enable us to consider both types of unconscionable conduct.

5.2 What information would be required from an FSP?

Typically, we may request the following information from an FSP:

- (a) the loan application and supporting documentation,
- (b) the loan agreement and any applicable terms and conditions,
- (c) information showing where loan funds were paid (disbursed),
- (d) all written correspondence between the FSP and the consumer,
- (e) the FSP's file notes in relation to the consumer's loan account,
- (f) the loan account statements for the life of the loan (which should indicate the total repayments the consumer made towards the loan, and the interest and fees that were applied to the loan account),
- (g) the FSP's internal lending guidelines applicable to the particular loan, and
- (h) other internal business documents such as sales scripts or instructions, policies and procedures and training material.

Facts:

Helen refinanced her home loan and purchased a residential investment property with the assistance of a broker. She struggled to meet her loan repayments and eventually had to sell the investment property at a loss. She says her broker had deliberately lodged a loan application with two different lenders, without informing each lender about the existence of the other.

One of the lenders has provided us with a copy of Helen's loan application. It appears that the broker did not obtain any supporting information from Helen about her financial circumstances. It is also apparent that the broker failed to disclose to each lender the fact that a loan application had also been submitted to the other so as to improve the chances of both loans being approved.

What we would do:

This information is likely to lead us to the view that the broker engaged in unconscionable conduct by exposing Helen to the serious risk of defaulting on her loans and losing both properties.

The broker's failure to obtain supporting documentation or verify Helen's financial information is likely to also constitute a breach of relevant responsible lending obligations under the National Credit Act, as well as a breach of a relevant code of practice or failure to observe good industry practice.

5.3 *What if the FSP is a mortgage broker?*

If the FSP is a mortgage broker, it would be difficult for it to obtain copies of the consumer's loan agreement and loan account statements. In these cases, we would request the information from the credit provider instead.

5.4 Similarly, a mortgage broker would not generally have access to the credit provider's lending guidelines, or information about the total repayments made or interest charged. We would typically obtain this information from the credit provider.

5.5 If, during the course of the complaint, we consider that the consumer may have a claim against the credit provider as well as the mortgage broker, a second complaint may be opened to investigate the credit provider's conduct. This is only done with the consumer's agreement.

5.6 *What if the FSP is the credit provider?*

Similarly, if the complaint concerns the conduct of the credit provider and, during the course of the complaint, we consider that the consumer may have a claim against the mortgage broker, a second complaint may be opened with the consumer's agreement.

5.7 **What information would be required from a consumer?**

Where possible, we will ask the FSP for information we require for our investigation. However, some information can only be provided by the consumer.

5.8 Specifically, we will require information that will enable us to understand whether:

- (a) the consumer received any benefit from the loan funds, and
- (b) the consumer was under a special disadvantage which seriously affected their ability to act in their own best interests at the time they entered into the loan.

5.9 Depending on the particular circumstances, the types of information we would require include:

- (a) information about the consumer's level of education,
- (b) information about the consumer's work history,
- (c) an explanation of the consumer's prior borrowing history,
- (d) copies of the consumer's bank statements to confirm income and expenses,
- (e) copies of payslips and/or the consumer's ATO notices of assessment to confirm taxable income,
- (f) if the consumer was in receipt of a Centrelink pension, evidence of when the consumer commenced receipt of the benefit and confirmation of the entitlements received, and
- (g) documents to confirm where and how the loan funds were applied (disbursed).

5.10 We may also conduct an interview with the consumer in order to ask questions about the consumer's circumstances and level of understanding of the transaction.

5.11 *What would take place during such an interview?*

The purpose of the interview would be to confirm and clarify the information contained in the documentation. The scope of the interview could include:

(a) Background information about the consumer

We would ask information about the consumer's place of birth, educational level, work history and other formal training, and whether the consumer ran or owned any businesses. This would also help us understand whether the consumer was particularly vulnerable or under a special disadvantage.

(b) Financial circumstances of the consumer

We would ask about the consumer's income and expenses, including any business or rental income. We may also ask the consumer about their financial matters and whether the consumer has any other loans, including credit cards.

(c) Consumer's understanding of events

We would also ask for the consumer's version of events, with particular emphasis on what happened in the lead up to the loan being entered into, the consumer's understanding of the relevant documents and the way they were provided or signed, what they were told about the transaction and what they understood about their obligations. We may also ask about the consumer's relationship with any other people involved in the transaction; for example, the broker and/ or family members.

(d) Events after the loan was obtained

We would ask about how the loan funds were used and how the loan repayments were made, including when repayments ceased (if so) and why.

5.12 The consumer can ask for someone to be present during the interview for support or if they need help understanding the questions. However, the consumer will need to respond to the questions themselves. We can also arrange an interpreter for the consumer if one is required.

5.13 If the consumer does not wish to take part in the interview, they should provide us with their reasons. We will then consider whether we can effectively deal with the complaint without the interview.

5.14 *Would we conduct a similar interview with the FSP?*

If an FSP was unable to provide certain relevant information, such as file notes, then we may request an interview with the FSP.

5.15 The purpose of such an interview would be to:

(a) confirm the FSP's version of events,

(b) clarify whether the FSP spoke to the consumer about their obligations under the loan, and

(c) establish what was discussed.

6. What is the remedy for a finding of unconscionable conduct?

6.1 If we find that an FSP has engaged in unconscionable conduct, we will award a remedy that is fair and appropriate in the circumstances. This can include:

- (a) orders requiring the FSP to do or refrain from doing something (for example, setting aside or varying the terms of a loan agreement, guarantee or mortgage),²⁶ and
- (b) awarding compensation to the consumer for the loss they have suffered²⁷.

6.2 Where a loan was obtained to purchase property, we will consider any change in value of that property when considering what benefit the consumer did or did not obtain from the loan. If it is appropriate that the consumer be put back in the position they would have been in had the FSP not engaged in unconscionable conduct, then any reduction in value of the property should not disadvantage the consumer.

6.3 What may be awarded if the FSP is the credit provider?

If the FSP is the credit provider, it may be fair and appropriate in the circumstances for the FSP to set aside the loan agreement. This may involve:

- (a) the FSP releasing their security over the consumer's property,
- (b) the FSP not enforcing the loan,
- (c) the FSP waiving all interest and fees chargeable under the loan (that is, the FSP accounting for profits arising from the loan),
- (d) the consumer repaying any benefit received (e.g. the principal loan amount), and
- (e) compensation for any loss suffered.

6.4 If the consumer has already made a number of repayments towards the loan agreement, this will be offset against the outstanding principal amount.

6.5 Whether or not we order the FSP to set aside the loan will depend on the circumstances of the particular complaint. If we consider that substantive unconscionability has occurred, we may instead order a variation of the loan agreement so that compliance with its terms is no longer unconscionable.

6.6 For example, paragraph 3.7(e) of this Position Statement notes that a loan with an exorbitant interest rate may be considered to be substantively unconscionable. In this instance, the appropriate remedy would be to reduce the interest rate to an amount that would be fair for the consumer to comply with.

6.7 *What if the loan has been discharged?*

If the loan has been discharged, we may order a refund of all the interest and fees paid by the consumer towards the loan. If the consumer was a guarantor and had been called on to pay any amount towards the loan then those amounts might need to be refunded.

²⁶ Rule 9.10, CIO 10th Edition Rules.

²⁷ Rule 9.6(a), CIO 10th Edition Rules.

6.8 *What if the consumer received no benefit under the loan?*

If we find that the consumer did not in fact gain any benefit from the loan, we would require the FSP to set aside the loan agreement and mortgage entirely.

6.9 Whether or not the consumer is entitled to any compensation would also depend on whether the consumer made repayments towards the loan. If the consumer made no repayments, there would be no direct financial loss to compensate, and a refund will not be awarded.

6.10 What may be awarded if the FSP is the mortgage broker?

If the FSP is the mortgage broker, we could not order the broker to rescind the loan agreement or mortgage because the mortgage broker does not have the capacity to do so.

6.11 Generally, the appropriate remedy is for the mortgage broker to compensate the consumer for the loss suffered. Depending on the nature of the complaint, this could include:

- (a) any amounts received by the broker for arranging the loan, whether from the consumer (fees) and/or lender (commission),
- (b) the amount of interest and fees charged under the loan,
- (c) the costs associated with the sale of any security property, and
- (d) compensation for other indirect or non-financial loss.

6.12 What will be awarded if the FSP is the lender's mortgage insurer?

In some cases:

- (a) the original credit provider has sold the security under the loan because the consumer is in default,
- (b) the proceeds from the sale are not enough to repay the loan and there is a shortfall,
- (c) the credit provider makes a claim on their lenders' mortgage insurance policy,
- (d) the lenders' mortgage insurer pays the claim, and
- (e) the credit provider assigns their right to the shortfall debt to the lenders' mortgage insurer.

6.13 In these circumstances, we will investigate the conduct of the original credit provider, although the complaint will be against the lenders' mortgage insurer.

6.14 If we find that the credit provider engaged in unconscionable conduct, the nature and extent of any remedy will depend on whether the loan is regulated by the National Credit Code or not.

6.15 If it is regulated, then the mortgage insurer has all the liabilities of the original credit provider, and we would approach remediation as though the mortgage insurer was the original credit provider.²⁸

²⁸ National Credit Code, s.188.

6.16 If it is not regulated, the extent of the remedy will be limited to the amount being pursued by the lenders' mortgage insurer. This will most likely result in a reduction or waiver of the shortfall debt. However, no further compensation will be awarded. This is because the lender's mortgage insurer is not generally responsible for the credit provider's conduct. The credit provider has only assigned its right to recover the debt and this means that any liabilities remain with the credit provider.

6.17 Is loss ever apportioned between a consumer and an FSP?

The appropriate remedy is what is fair and appropriate in the circumstances. If, for example, a consumer knowingly provided false information to their mortgage broker for the purpose of misleading a potential credit provider, they should not be compensated for the full extent of their loss.

6.18 Consequently, if we find that the consumer's own actions contributed to the loss which is the subject of the complaint, the amount of compensation awarded will be reduced to reflect what is fair and appropriate in the circumstances.

7. Can unconscionable conduct be systemic?

7.1 This Position Statement has focussed on individual consumers complaining that a financial services provider has been unconscionable in its dealings with them. That requires consideration of the specific transaction and the parties to that transaction.

7.2 Unconscionable conduct under the ASIC Act can also occur in a way that we would consider systemic, potentially affecting large numbers of consumers who have entered into separate contracts at different times with a financial services provider. This is described as "applying to a system of conduct or pattern of behaviour".²⁹

7.3 Systemic unconscionable conduct might arise where it is standard practice to pressure consumers to enter into contracts that aren't appropriate for them, or to take advantage of known vulnerabilities of a particular group of consumers. A recent example of conduct found to be unconscionable in this way involved a small amount lender selling insurance policies to its borrowers that it knew would be of little or no benefit to them.

7.4 Where we identify conduct that we think is potentially systemically unconscionable, it will be investigated by our Systemic Issues team. More information about our approach to systemic issues is set out in *Position Statement 7 – Dealing with Systemic Issues and Serious Misconduct*.

²⁹ *Australian Securities and Investments Commission Act (Cth) 2001, section 12CB(4)(b).*

8. Interpretation

In this Position Statement:

ABA means the Australian Bankers' Association.

ASIC means the Australian Securities and Investments Commission.

ASIC Act means the *Australian Securities and Investments Commission 2001* (Cth).

ATO means the Australian Taxation Office.

COBA means the Customer Owned Banking Association.

CIO means the Credit and Investments Ombudsman.

MFAA means the Mortgage and Finance Association of Australia.

National Credit Act means the *National Consumer Credit Protection Act 2009* (Cth).

Rule means the Tenth Edition of CIO's Rules.

Small business has the same definition as CIO Rule 45.1 and s 12BC(2) of the ASIC Act.

Words and phrases which are defined for the purposes of the Rules and used in this Position Statement have the same meaning as they do for the purposes of the Rules.