



Position Statement

February 2018

- **Unjust transactions**

Position Statement

This Position Statement is about how we deal with complaints about unjust transactions. 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 have published a separate Position Statement describing how we deal with complaints about conduct that is unconscionable, and are developing a Position Statement 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.

1. Introduction – what is unjustness?

1.1 Unjust transactions include transactions that are unconscionable, harsh or oppressive.¹

1.2 This Position Statement provides guidance on how we deal with complaints about unjust transactions, with particular emphasis on the:

- (a) factors we take into account when reviewing complaints,
- (b) information we may require from the parties to consider those factors, and
- (c) remedies that may be available if we conclude that a transaction is unjust.

1.3 Although the terminology used in this Position Statement refers to loans and mortgages, CIO's jurisdiction in this area is not limited to loans. We will apply the same general principles to different types of transactions.²

1.4 Whether a transaction is unjust will depend on the particular facts of each case.

1.5 What are the relevant laws?

The provisions which govern unjust transactions are set out in:

- (a) sections 76-77³ and 177F-177G⁴ of the National Credit Code, and
- (b) sections 7-10 of the Contracts Review Act (NSW).

1.6 These provisions are consistent with, and operate alongside:

- (a) the obligation to not act unconscionably, set out in equity and sections 12CA and 12CB of the ASIC Act,
- (b) responsible lending obligations under Chapter 3 of the National Credit Act, and
- (c) the prohibition against unfair contract terms under s 12BF of the ASIC Act.

1.7 This Position Statement gives information about our approach to transactions that are regulated by the National Credit Code or are reviewable under the Contracts Review Act (NSW).

1.8 Industry codes and practices

The legal provisions relating to unjust transactions are also consistent with relevant commitments in industry codes of conduct such as the MFAA Code of Practice, COBA Code of Practice and ABA Code of Banking Practice.

¹ As defined under section 204 of the National Credit Code.

² Such as transactions resulting in guarantees or consumer leases (section 177F(1)(a), National Credit Code), as well as credit provided by pawnbrokers and trustees of estates (sections 6(9) and 6(10), National Credit Code).

³ In the case of credit contracts, mortgages, and guarantees.

⁴ In the case of consumer leases.

1.9 When will we consider unjustness in a complaint?

We will consider whether a transaction is unjust if a consumer complains that it is unjust or if the particular facts of the complaint indicate that it may be unjust.

1.10 For example, where a consumer's complaint is that their circumstances at the time they entered into the loan were such that the loan should have never been provided, including because they could not afford repayments, then even if they have not explicitly complained that it is unjust we are likely to consider unjustness.

1.11 When will CIO be unable to consider unjustness?

1.12 A complaint about unjustness must be made within the later of:

- (a) two years from when the loan is rescinded, discharged or otherwise comes to an end, or
- (b) two years from when the FSP gives the consumer a final response in their internal dispute resolution process.⁵

2. How do we consider unjustness?

2.1 Dealing with a complaint that a transaction is unjust is a two-step process:

- (a) firstly, we will determine whether the contract was unjust at the time it was entered into and, if we do consider the contract unjust,
- (b) we will decide what relief, if any, should be granted in order to cure the unjustness.⁶

2.2 When undertaking this process, we will consider, as much as possible, the same factors that would be considered by a court. Generally speaking, these factors are:

- (a) the public interest, and
- (b) all the circumstances of the case.⁷

2.3 What is the public interest and how do we consider it?

The concept of public interest is not defined in the National Credit Code. In broad terms, it represents the underlying purpose of the National Credit Code, which is the need to protect consumers and prevent unfair agreements.⁸

2.4 However, it has been held that unfairness and poor decision making do not necessarily amount to unjustness, and that it is generally desirable for people to honour their contracts.⁹ Consequently, the public interest also represents the policy which underlies the law of contract, which is upholding agreements that are freely entered into.

2.5 There are therefore two competing public interests to be considered in an unjustness complaint:

⁵ See CIO Rule 6.3(a).

⁶ *Riz v Perpetual Trustee Australia Limited* [2007] NSWSC 1153, per Brereton J at [51].

⁷ Section 76(2), National Credit Code.

⁸ *Knowles v Victorian Mortgage Investments* [2011] VSC 611, per Croft J at [64] and [68].

⁹ *Fisher v Marin* [2007] NSWSC 1411, per Patten AJ at [110], cited with approval in *Provident Capital v Naumovski* [2013] NSWSC 40, per Garling J at [299].

- (a) consumer protection, and
- (b) upholding bargains.

2.6 How do we consider the circumstances of the case?

The concept of unjustness includes both procedural unjustness and substantive unjustness:¹⁰

- (a) procedural unjustness concerns the way the contract was made; for example, the conduct of the parties, while
- (b) substantive unjustness concerns the way the contract operates, that is, the terms of the contract itself and the effect of their performance.

2.7 Therefore, when we consider a complaint about an unjust contract, we will look at both:

- (a) the way the contract was made, and
- (b) the way that the contract operates.

2.8 Are there any particular factors we take into account when considering all the circumstances of the case?

Section 76(2) of the National Credit Code lists a number of factors that a court may consider to determine whether a loan is unjust. We will also take these factors into account. However:

- (a) this list of considerations is not exhaustive, as all the circumstances of the case must be considered, and
- (b) we will not take into account any circumstances that were not reasonably foreseeable at the time the contract was made.¹¹

2.9 Importantly, it does not follow that a loan is unjust simply because it is possible to point to one or more of the factors listed in section 76(2). Rather, they represent a catalogue of prudence,¹² meaning that the establishment of one or more of the matters in section 76(2) increases the chances that the contract is unjust. The task is to consider whether the contract is unjust having regard to those factors.¹³

2.10 We have expanded on some of the factors under Section 6.

2.11 These factors are, in many respects, identical to the matters specified in section 177F(2) of the National Credit Code which applies to consumer leases, and sections 9(1) and (2) of the Contracts Review Act (NSW).

¹⁰ *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610, per McHugh J at 620.

¹¹ Section 76(4), National Credit Code.

¹² *Karamihos v Bendigo and Adelaide Bank Ltd* [2013] NSWSC 172, per Pembroke J at [41]. We note that the finding of unjustness in this decision was overturned in *Bendigo and Adelaide Bank Ltd v Karamihos* [2014] NSWCA 17; however, this interpretation of section 76(2) was not overturned.

¹³ *Perpetual Trustee Company Limited v Bowie* [2015] NSWSC 328, per Ball J at [35].

2.12 *Is any one factor more important than the others?*

We place significant weight on whether the consumer had the ability to reasonably protect their own interests. This is because at the heart of an unjust contract is the “recognition of the inadequacy of one to protect their own interests in the circumstances”.¹⁴

2.13 This does not mean we will reopen a contract that a gullible or impulsive consumer entered into; in fact, the courts have consistently held that ‘something more’ is required to establish unjustness.¹⁵

2.14 Examples of situations where consumers may be unable to reasonably protect their own interests include:

- (a) an elderly retiree who wishes to build an investment portfolio, with no prior experience,
- (b) a couple who do not speak English, but sign documents wherever they are directed,
- (c) an 18-year-old student who has never obtained credit before, and
- (d) a financially desperate single parent who needs a loan quickly to pay bills.

2.15 *Is there a special class for guarantees?*

This class of persons will be relevant when considering complaints about unjust transactions and unconscionable conduct.

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

2.16 Guarantees may be reopened as unjust when:

- (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 credit provider 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 credit provider did not explain the nature of the transaction and the risks involved, or ensure that the wife obtained independent legal or financial advice), and
- (d) the wife did not personally benefit from the transaction.¹⁶

2.17 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.¹⁷ Without limiting the potential application of this rule, this could include parents and children and people in a de facto relationship.

¹⁴ *Provident Capital v Papa* [2013] NSWCA 36, per Allsop P at [7].

¹⁵ *Perpetual Trustee Company v Khoshaba* [2006] NSWCA 41, per Basten JA at [128].

¹⁶ *Yerkey v Jones* (1939) 63 CLR 649 at 683, 686 and *Garcia v National Australia Bank* (1998) 194 CLR 395; [1998] HCA 48.

¹⁷ *Agripay Pty Limited v Byrne* [2011] QCA 085.

2.18 Is the credit provider's conduct or knowledge important?

As we are looking at the way the contract was made and/or the operation of that contract, it is not necessary to find any unfair or unconscionable conduct on the part of the credit provider: it is the loan itself (or its circumstances) that are unjust.

2.19 In other words, there is no need to find the credit provider "guilty" of any conduct. Nor is unjustness to be framed in terms of the "innocence" of the consumer. What we will undertake is an overall evaluation and consider all of the relevant circumstances of the case,¹⁸ including balancing the parties' interests.

2.20 This means that we will consider circumstances that may not have been evident to the credit provider. For example, if a consumer has difficulties with literacy and was therefore unable to have read or understood the terms and conditions of their credit card agreement, we will take this factor into account. This is regardless of the fact that the credit card provider would not have met the consumer in person and could not have known that they were illiterate.

2.21 If such a credit card was found to be unjust, we would then consider any circumstances which would make it unfair to grant relief. We have expanded on this in Section 8.

3. How do we consider asset lending in an unjustness complaint?

3.1 Asset lending involves lending primarily on the basis of the value of the security only, with little or no regard to whether the consumer can afford repayments. This type of lending has become less common since the introduction of responsible lending obligations.

3.2 It is generally accepted that asset lending will increase the likelihood that a loan is unjust. This is particularly the case where:

- (a) inconsistent with responsible lending under the National Credit Act, the credit provider made no enquiries about the consumer's capacity to repay the loan, and only cared that there was adequate security,¹⁹ and/or
- (b) the consumer has demonstrated an inability to reasonably protect their own interests.²⁰

3.3 However, this needs to be considered along with the entirety of the information available in the complaint; asset lending alone will not be enough to render the loan unjust.

4. How do we consider low doc loans in an unjustness complaint?

4.1 Low doc loans are not expressly prohibited by the National Credit Act. However, low doc lending can be risky, as it involves limited verification of the consumer's financial situation and capacity to repay the loan, which is potentially inconsistent with responsible lending.

¹⁸ *Fast Fix Loans Pty Ltd v Samardzic* [2011] NSWCA 260, per Allsop P at [50].

¹⁹ *Fast Fix Loans v Mlendenko Samardzic and Anor* [2011] NSWSC 19, per Hoeben J at [79] and [115].

²⁰ *Perpetual Trustees Co Ltd v Khoshaba* [2006] NSWCA 41, per Basten JA at [128].

4.2 For example, some credit providers ask the applicant to give a full statement of their financial position, and only seek minimal evidence to verify the information given, such as:

- (a) the last 6-12 months of bank statements, and
- (b) the last tax return for a self-employed borrower.

4.3 Unless there was something about the information provided that would give a reasonable credit provider cause to doubt the accuracy of that information, we would not consider these minimal enquiries enough on their own to render the loan unjust, unless the credit provider was required to do more under their responsible lending obligations.²¹

4.4 Therefore, in the absence of any other circumstances, it is unlikely that we will find a loan to be unjust merely by virtue of the fact that it is a low doc loan.

5. How do we consider reverse mortgages in an unjustness complaint?

5.1 A reverse mortgage is a type of equity release product generally offered to consumers aged over 60 years. It allows a consumer to use the equity in their home as security for the loan. The loan principal is often provided to the consumer as a lump sum, while interest on the loan and any fees and charges are compounded during the life of the loan.²²

5.2 With a reverse mortgage, consumers retain title over their property. Repayment of the principal and interest does not occur until the consumer dies or sells their home.²³

5.3 In an unjustness complaint concerning a reverse mortgage, we give significant weight to whether the consumer had access to independent legal or financial advice before obtaining the loan. This is because a reverse mortgage can be a major financial undertaking for an older consumer, especially since, during the term of a reverse mortgage:

- (a) the debt increases, and
- (b) the available equity in the consumer's home may decrease.

5.4 This can have serious consequences for a consumer who later finds they no longer have the ability to meet future needs, such as medical care or the costs of entering into a nursing home or other type of aged care facility.

5.5 We note that the National Credit Act and National Credit Code give a number of protections to consumers who are considering or who have obtained a reverse mortgage, including:

²¹ Andrew Beatty and Andrew Smith, *Annotated National Credit Code* (LexisNexis Butterworths, 5th ed, 2014), 331 [76.40].

²² Australian Government, The Treasury (2010) *National Credit Reform Green Paper*, viewed 25 February 2016, http://archive.treasury.gov.au/documents/1852/PDF/National_Credit_Reform_Green_Paper.pdf, 33.

²³ For example, by moving into an aged care facility.

- (a) section 18A of the National Credit Code lists a number of provisions relating to default events that must not be included in a loan for a reverse mortgage,²⁴
- (b) sections 86A-F of the National Credit Code provide that credit providers who offer reverse mortgages must provide a “no negative equity guarantee”,²⁵ and
- (c) section 133DB of the National Credit Act requires credit providers to supply projections about how the mortgage would operate in relation to the value of the property before granting the reverse mortgage.

5.6 While these protections may assist in reducing the likelihood of a reverse mortgage being considered unjust, we will still consider the broader circumstances of a case even where they have been complied with.

6. What are some of the factors listed under section 76(2)?²⁶

6.1 As stated at paragraph 2.8, the list of considerations under section 76(2) is not exhaustive, and all the circumstances of the case must be considered. However, some of the factors have been explained further below. We have chosen these factors because they are most commonly raised in the complaints we receive about unjustness.

6.2 Section 76(2)(f):²⁷ whether or not the debtor was reasonably able to protect their interests, because of his or her age or physical or mental condition.

We have previously stated that at the heart of an unjust contract is the recognition that one party was unable to reasonably protect their own interests. We therefore give significant weight to this factor if it appears that the consumer was under some sort of disadvantage. This may relate to a particular vulnerability, examples of which include:²⁸

- (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 dependency,²⁹
- (g) infirmity of body or mind, or
- (h) drunkenness.

²⁴ Many of these “wide default clauses” were commonly found in reverse mortgages and could have been challenged as substantively unjust: Janine Pascoe, ‘Reverse mortgages – some regulatory issues and developments’ (2008) 23(9) *Australian Banking & Finance Law Bulletin* 136, 140.

²⁵ This is consistent with clause 3 of the SEQUAL Code of Conduct.

²⁶ For leases, these factors are listed under section 177F(2) of the National Credit Code. When complaints are reviewed under the Contracts Review Act, these factors are listed under section 9(2).

²⁷ Section 177F(2)(f); section 9(2)(d).

²⁸ *Blomley v Ryan* (1956) 99 CLR 362 at 405.

²⁹ *Louth v Diprose* (1992) 175 CLR 621; *Bridgewater v Leahy* (1998) 194 CLR 457.

- 6.3** It is generally accepted that mere age or illness is not sufficient to establish unjustness. There must be a connection between the consumer's disadvantage and their ability to protect their own interests.³⁰
- 6.4** We will therefore look beyond the mere existence of a particular disadvantage and assess its impact, if any, on the ability of the consumer to appreciate and protect their own interests.³¹
- 6.5** **Section 76(2)(h)**:³² *whether or not independent legal or other expert advice was obtained by the debtor.*
- The National Credit Code does not require independent advice to be obtained. If it is obtained, however, this will reduce the likelihood that the contract is unjust.³³
- 6.6** In other words, it is not universally incumbent on a credit provider to ensure that a consumer obtains independent advice; it is merely another factor which needs to be given appropriate weight when considering all the circumstances of the case.³⁴
- 6.7** The purpose of the consumer obtaining legal advice is to obtain assistance in understanding the effect of the loan. Accordingly, if it is plain that a consumer understood the effect of the contract, the fact that a consumer was not required to obtain legal advice cannot be a source of unjustness.³⁵
- 6.8** However, if a consumer is under the kind of disadvantage contemplated in section 76(2)(f), we expect that the credit provider would require the consumer to obtain independent advice.
- 6.9** It is not sufficient for the credit provider to merely recommend that the consumer obtain independent advice. Rather, the credit provider must take steps to ensure that such advice is actually obtained.³⁶
- 6.10** **Section 76(2)(l)**: *whether at the time the contract was entered into, the credit provider knew, or could have ascertained by reasonable inquiry at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship.*
- One of the factors we will consider is whether the credit provider considered the consumer's financial circumstances, income and expenditure when assessing the loan application.³⁷
- 6.11** Where responsible lending obligations apply, we will consider both whether the stand-alone responsible lending obligations have been complied with, and whether affordability was a factor to consider alongside other relevant factors in deciding whether a loan was unjust.

³⁰ Andrew Beatty and Andrew Smith, *Annotated National Credit Code* (LexisNexis Butterworths, 5th ed, 2014), 322 [76.15].

³¹ Nicholas Mirzai, 'Loosening the vice on independent legal advice: Bendigo and Adelaide Bank v Karamihos' (2014) 30(3) *Australian Banking & Finance Law Bulletin* 44, 45.

³² Section 177F(2)(h), section 9(2)(h).

³³ Andrew Beatty and Andrew Smith, *Annotated National Credit Code* (LexisNexis Butterworths, 5th ed, 2014), 323 [76.15].

³⁴ *St George Bank Ltd v Trimarchi & Anor* [2004] NSWCA 120, per Mason P at [79]; *Canty v PaperlinX* [2014] NSWCA 309, per Gleeson JA at [141].

³⁵ *Perpetual Trustee Company Limited v Bowie* [2015] NSWSC 328, per Ball J at [42].

³⁶ Paul Vout, *Unconscionable Conduct – The Laws of Australia* (Lawbook Co., 2006) 440 [35.9:28].

³⁷ A credit provider's business practices in assessing a consumer's capacity to repay will also be affected by the responsible lending provisions under the National Credit Act.

- 6.12** In order to consider this factor, we will generally ask consumers to provide full details of their financial position at the time the contract was entered into, including details about their:
- (a) income,
 - (b) expenditure, and
 - (c) relevant assets.
- 6.13** We will also ask for supporting documents, such as:
- (a) pay slips,
 - (b) bank account statements, and/or
 - (c) Centrelink statements.
- 6.14** From credit providers, we will ask for a copy of the loan application, together with the supporting information the credit provider obtained to assess the consumer's capacity to repay the loan. If responsible lending obligations apply, we will also request the credit provider's final assessment of unsuitability.
- 6.15** We will then use this information to gain an understanding of the consumer's financial position at the time the loan was entered into, to determine whether the loan was reasonably affordable.
- 6.16** For further information about what information we may require in an unjustness complaint, see Section 7.

Facts:

Gary was issued with a credit card in 2000. The limit to his credit card was then increased in 2005, and again in 2012. At the time of those increases, Gary's business was running at a loss, and he was only managing to make his payments by drawing on other debts and loans from his family. According to Gary, if the credit card provider had made sufficient enquiries in either 2005 or 2012, Gary would have informed them that he was running his business at a loss and he could not afford the limit increases.

What we would do:

Gary's claim specifically concerns section 76(2)(l). However, the affordability of the credit card is only one factor to be considered. In Gary's case, other important considerations may include whether:

- Gary was reasonably able to protect his own interests and had the capacity to decide whether to take advantage of the increased limits,
- Gary had managed his credit card debt since 2000 and was aware of his payment obligations, and/or
- the FSP took adequate measures to ensure that Gary understood the nature and implications of the limit increases.

We note that the FSP must also have observed their responsible lending obligations under the National Credit Act. These obligations would only apply to the 2012 limit increase, as the obligations apply to credit contracts entered into or changed on or after 1 July 2010 (or, in the event of a card issuer, 1 January 2011) and do not operate retrospectively.

6.17 Section 76(2)(p):³⁸ any other relevant factor.

Courts have consistently considered a credit provider's failure to comply with internal policies and procedures as a relevant factor for the purposes of section 76(2)(p).³⁹

6.18 There are two reasons why a credit provider's lending guidelines can be relevant:⁴⁰

- (a) following the guidelines confers an indirect benefit on the consumer, as it is likely that the credit provider will not approve a loan that appears to be risky, and
- (b) in circumstances where the credit provider was unaware of the purpose of the loan funds, failure to follow the guidelines may imply that the credit provider was content to lend on the value of the security.

6.19 If a credit provider has departed from the lending guidelines, such departure will not, by itself, be given a significant amount of weight. This is especially the case where the particular departure is not evidence of a departure from acceptable lending practice.⁴¹

³⁸ Section 177F(2)(o); there does not appear to be an equivalent section in the Contracts Review Act.

³⁹ *Perpetual Trustees Co Ltd v Khoshaba* [2006] NSWCA 41, per Spigelman J at [81].

⁴⁰ *Kowalczyk v Accom Finance* [2008] NSWCA 343, per Campbell JA at [102].

⁴¹ *Perpetual Trustees Co Ltd v Khoshaba* [2006] NSWCA 41, per Spigelman J at [42]. See also *Tonto Home Loans Australia Pty Ltd v Tavares & Ors* [2011] NSWCA 389.

6.20 Consumers are unlikely to refer to compliance with internal lending guidelines when making a complaint, but for the reasons outlined above we will generally request this document from the FSP for the purposes of our investigation.

7. What information is required to consider unjustness?

7.1 We will request information from the parties that will enable us to understand, as much as possible, the circumstances at the time of entry into the contract, as well as any reasonably foreseeable circumstances associated with the performance of the contract.

7.2 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) all written correspondence between the FSP and the consumer,
- (d) the FSP's file notes in relation to the consumer's loan account,
- (e) the loan account statements for the life of the loan (which should state the total repayments the consumer made towards the loan, and the interest and fees applied to the loan account),
- (f) relevant policies and procedures and/or training manuals, and
- (g) the FSP's internal lending guidelines applicable to the consumer's loan product.

7.3 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.

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

- (a) documents which reflect the consumer's level of education (or a signed written statement from the consumer to that effect),
- (b) documents which reflect the consumer's work history (or a signed written statement from the consumer to that effect),
- (c) an explanation of the consumer's prior borrowing history,
- (d) copies of the consumer's bank statements to confirm their income and expenses,
- (e) copies of 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.

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

7.6 *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 the following.

(a) Background information about the consumer.

We would ask for information about the consumer's place of birth, education level, work history and other formal training, and whether the consumer ran or owned any businesses.

(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 the events.

We would also ask for the consumer's version of events, with particular emphasis on the consumer's understanding of the relevant documents and 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 also how the loan repayments were made, including when the repayments ceased (if so) and why.

7.7 The consumer is able to ask for someone to be present during the interview, and assist them in understanding the questions. However, the consumer will need to respond to the questions themselves. We can also arrange an interpreter if one is required.

7.8 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 deal with the complaint without it.

Facts:

Kieran has complained that he did not understand and could not afford a credit contract entered into in 2009, and has provided us with his bank statements and ATO notices of assessment to confirm his income and expenses at the time.

What we would do:

As well as reviewing Kieran's financial situation, we would need to investigate Kieran's understanding of the events which took place before and immediately after he obtained the loan. To obtain this information, we would conduct a telephone interview with Kieran, and ask him about:

- *his work history and his business,*
- *what took place when he met with the lender when applying for the loan, and/or*
- *what he understood his obligations to be, and whether anyone suggested that he obtain independent legal advice.*

We would not be able to consider responsible lending in Kieran's complaint, as he obtained his loan before 1 July 2010.

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

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

7.10 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.

8. What relief is available for an unjust contract?

8.1 As noted earlier, dealing with a complaint that a transaction is unjust is a two-step process:

- (a) firstly, determining whether the contract was unjust at the time it was entered into, and
- (b) secondly, deciding whether to grant any relief in order to cure the unjustness.

- 8.2** The second step means that relief will only be granted if it will avoid an unjust consequence resulting from the contract. If there is no unjust consequence, we would not consider it appropriate to grant relief.⁴²
- 8.3** We will only award a remedy that is fair and appropriate in the circumstances if:
- (a) the loan is unjust, and
 - (b) the consumer has suffered a loss resulting from that unjustness, necessitating the award of relief.
- 8.4** This can include:
- (a) orders requiring the FSP to do or refrain from doing something (for example, setting aside or varying the terms of the contract),⁴³ and/or
 - (b) awarding compensation to the consumer for the loss they have suffered.⁴⁴
- 8.5** In the case of a contract that is procedurally unjust, 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.
- 8.6** On paragraph (d) above, if the consumer has already made a number of repayments towards the loan agreement, this will be offset against the outstanding principle loan amount.
- 8.7** *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.
- 8.8** *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.

⁴² Paul Vout, *Unconscionable Conduct – The Laws of Australia* (Lawbook Co., 2006) 511 [35.9:102].

⁴³ CIO Rule 9.10.

⁴⁴ CIO Rule 9.6(a).

Facts:

Samantha's daughter Gail, a young university student with a part-time job, wanted to buy a car. Gail had saved enough for a small deposit, but needed a loan to finance the purchase. They discussed finance at the car dealership, and it was suggested that a loan application would be more likely to be approved if Samantha provided a guarantee. They both signed some documents and a loan was approved. Samantha only realised some time later that she was a co-borrower under the loan.

What we would do:

In this case, the car was bought by Gail for her own use, and Gail intended to and did make payments due under the loan. Samantha was happy to assist Gail to buy a car, but did not benefit from the loan in any other way.

The rights and obligations of a co-borrower are materially different to those of a guarantor, and guarantors are given special protections by law and in industry codes. It would be appropriate in this case to set aside the loan as against Samantha, relieving her from any further liability in relation to it.

8.9 Is liability 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.

- 8.10 Consequently, if CIO finds 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 in the circumstances.

9. 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 Act 2001* (Cth).

ATO means the Australian Taxation Office.

COBA means the Customer Owned Banking Association.

Contracts Review Act means the *Contracts Review Act 1980* (NSW).

CIO means the Credit and Investments Ombudsman.

FSP means financial services provider.

MFAA means the Mortgage and Finance Association of Australia.

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

National Credit Code means the National Credit Code, Schedule 1 to the National Credit Act.

Rule means the Tenth Edition of CIO's Rules.

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.