



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HĪKINA WHAKATUTUKI

**LABOUR AND
COMMERCIAL
ENVIRONMENT**



Draft Responsible Lending Code

**Explanatory Material for Draft Code and
Draft Code for Consultation**

Request for submissions

The Credit Contracts and Consumer Finance Amendment Act 2014 requires the Minister of Commerce and Consumer Affairs (as the Minister responsible for the Credit Contracts and Consumer Finance Act 2003) to issue a Responsible Lending Code.

The Responsible Lending Code elaborates on and offers guidance on the new lender responsibility principles included in the Credit Contracts and Consumer Finance Amendment Act 2014.

The Minister has released the Draft Responsible Lending Code (Draft Code) with questions for lenders and consumers to consider or answer.

Commenting on the Draft Code in your submission

The Draft Code includes questions you may like to answer in your submission. Your submission does not have to answer all of these questions. You can also include other comments you feel may be helpful.

Send us your submission by 5pm Tuesday 23 December 2014

Email your submission, attached as either a Microsoft Word (.doc) or Acrobat (.pdf) document to consumer@mbie.govt.nz.

Or you can post it to:

Responsible Lending Code
Competition and Consumer Policy Team
Ministry of Business, Innovation and Employment
PO Box 1473
Wellington 6140

Publication and release of your submission

All submissions will be subject to the Official Information Act 1982 and may be released in part or full, subject to the withholding grounds contained in the Act. The Ministry intends to publish submissions on its website, unless the submitter requests otherwise. Please let us know, giving your reason under the Act, if you do not want us to publish all or part of your submission

Timeframe for developing the Responsible Lending Code

The lender responsibility principles must come into force by 6 June 2015. The Minister intends to issue the Responsible Lending Code (Code) by March 2015 to give lenders time to adapt their processes as necessary to comply with the principles.

The final Code will be prepared after considering the comments received on the Draft Code.

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Reform to the CCCFA and the introduction of responsible lending obligations

There have been a number of changes to the laws that cover consumer credit. The main changes are to the Credit Contracts and Consumer Finance Act 2003 (the **CCCFA**), which is the primary law that regulates the provision of consumer credit and sets out ongoing obligations of those who provide credit. The CCCFA will also be expanded to include provisions from the Credit (Repossession) Act 1997, which is being repealed.¹

The changes are being made through the Credit Contracts and Consumer Finance Amendment Act (Amendment Act), which was passed into law on 6 June 2014. Most of the changes have not yet taken effect, but will do so by 6 June 2015. Read the [Credit Contracts and Consumer Finance Amendment Act 2014](#) on the New Zealand Legislation website

Responsible lending obligations

A key feature of the reforms is the introduction of new lender responsibility principles and lender responsibilities under the CCCFA, which will come into force by 6 June 2015.

The objective of the responsible lending obligations is to reinforce and set good lending practices in order to protect consumers, and to promote informed choice and effective competition in consumer credit markets.

The lender responsibility principles require lenders to exercise the care, diligence, and skill of a responsible lender when advertising credit, and before and after providing consumer credit. The principles also require lenders to comply with specific lender responsibilities. (A full list of the responsibilities is set out in Part B of the appendix to the Draft Code).

The Responsible Lending Code

The purpose of the Responsible Lending Code is to elaborate on the lender responsibility principles (including the more detailed lender responsibilities) and offer guidance on how those principles may be implemented by lenders (see new section 9E of the CCCFA).

The Code may set out certain processes, practices or procedures that a lender should follow to comply with the lender responsibility principles (a full list of the matters that the Code may address is set out in Part C of the appendix to the Draft Code).

The Code is not binding (nor is it a safe harbour). However, evidence of a lender's compliance with the provisions of the Code is to be treated as evidence of compliance with the lender responsibility principles, including the specific lender responsibilities (see new section 9E of the CCCFA).

Approach taken in the Draft Code

The guidance in the Code needs to meet the purposes of the CCCFA (as updated by the Amendment Act) and should work for both lenders and consumers. Consumers should have access to information to make well-informed decisions about credit, and have confidence that they will be protected from irresponsible and oppressive lending practices. Lenders must also have greater certainty in what they need to do to comply with their obligations and not be subject to unnecessary compliance costs.

¹ The Private Security Personnel and Private Investigators Act 2010 and the Personal Property Securities Act 1999 are also being amended.

The following criteria provide the framework for the guidance in the Draft Code:

- a. giving effect to the purpose of the updated CCCFA, in particular
 - i. to protect the interests of consumers;
 - ii. to promote the confident and informed participation in credit markets by consumers; and
 - iii. to promote and facilitate fair, efficient and transparent credit markets;
- b. promoting certainty for lenders (and the enforcement agency) as to how the responsible lending obligations can be complied with;
- c. minimising compliance costs; and
- d. not unnecessarily restricting consumer access to credit.

The guidance in the Draft Code has been informed by the submissions received on the [Discussion Document](#) issued by the Ministry in July 2014.

Balancing certainty and flexibility

The Code will apply to all lenders under consumer credit contracts.² The guidance in the Code will therefore cover:

- a variety of lenders (for example, large and small lenders);
- a wide range of credit products (for example, personal loans, credit card facilities, credit sales and mortgages);
- different methods of providing credit (for example, face-to-face and online); and
- lending to different kinds of consumers (for example, vulnerable as well as experienced).

Given its wide ambit, the intent of the Draft Code is to provide sufficient certainty, so that it leads to the intended consumer benefits and gives lenders greater clarity about how to comply with their new obligations. At the same time, it seeks to provide sufficient flexibility, so that it sensibly applies to different circumstances and does not impose unnecessary compliance costs on lenders who are already lending responsibly.

To balance the need for both certainty and flexibility, the guidance in the Draft Code is risk-based. It sets out guidance that is of general application that can apply to different circumstances (including for a wide range of credit products and different methods of providing credit), and more detailed guidance for higher-risk areas (such as high-cost short-term credit agreements).

For the guidance of general application, the Draft Code provides the ability for lenders to exercise judgment when complying with certain of the lending responsibilities. For example, to satisfy the requirement to make reasonable inquiries into and assessment of the borrower's requirements and objectives, the lender may determine how many inquiries they should make and the extent of the information they should seek. The Draft Code requires the lender to exercise their judgment based on specified factors in the Code (such as whether it is in relation to a complex or uncommon credit product, or alternatively, whether it is a simple credit agreement that is widely understood), and be able to demonstrate compliance with the relevant responsible lending obligation.

² "Consumer credit contract" is defined in section 11 of the CCCFA. The Code will also apply to creditors under credit contracts that provide for the repossession of consumer goods, as well as buy-back transactions of land.

Consultation Draft

Draft Responsible Lending Code

Draft Code for Consultation

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1. Introduction

Commentary

Lender responsibility principles

The Credit Contracts and Consumer Finance Amendment Act 2014 passed into law on 6 June 2014. It makes a number of changes to the Credit Contracts and Consumer Finance Act 2003 (the Act), including the introduction of lender responsibility principles. The lender responsibility principles apply to every lender, as defined as:

- a. a creditor under the consumer credit contract; and
- b. a creditor under the credit contract to which Part 3A of the Act applies (i.e. a credit contract which provides for the repossession of consumer goods); and
- c. a transferee under a buy back transaction of land.

The key definitions are set out in the appendix.

The lender responsibility principles require lenders to:

- a. exercise the care, diligence, and skill of a responsible lender when advertising credit or finance, and before and after providing consumer credit or finance³ and taking a relevant guarantee; and
- b. comply with specific lender responsibilities.

The lender responsibilities are set out in section 9C(3) to 9C(5) of the Act and are set out in full in the appendix.

Purpose of the Code

The purpose of the Responsible Lending Code (the Code) is to elaborate on and offer guidance on how the lender responsibility principles (including the more detailed lender responsibilities) may be implemented by lenders (see section 9E(1) of the Act).

The legislation (see section 9F(1)(b) of the Act) provides that the Code may set out certain processes, practices or procedures that a lender should follow to comply with the lender responsibility principles. The list of matters that may be set out in the Code are set out in section 9F(1) and (2) and are set out in full in the appendix.

³ Unless the context indicates otherwise, references to “credit” in this Code are intended to be read as references to credit provided under a consumer credit contract or a credit contract to which Part 3A applies, or finance provided under a buy-back transaction.

Status of the Code

The legislation provides that the Code is not binding. Lenders are able to comply with the lender responsibility principles in other ways.

The Code is also not a “safe harbour”. The guidance provided in the Code is not (and cannot be) an exhaustive statement of what a lender should or should not do in order to be a responsible lender. However, evidence of compliance with the provisions of the Code will be treated as evidence of compliance with the lender responsibility principles, including the specific lender responsibilities (see section 9E(3) of the Act). This document contains the following:

- a. *Statements* of lender responsibility principles and lender responsibilities from the Act.
- b. *Guidance* – The numbered provisions of the Code (which are issued under the authority of various provisions in section 9F of the Act) sets out processes, practices and procedures which a lender should follow to comply with the lender responsibility principles and also “elaborates on” certain of the lender responsibility principles (see section 9E(1)(a) of the Act).
- c. *Commentary and Examples* – The commentary provides information, context, and explanation, including references to various other relevant legislative provisions. The examples are for illustrative purposes only.

Evidence of compliance with the guidance provisions of the Code is to be treated as evidence of compliance with the lender responsibility principles. The commentary and examples do not purport to set out additional processes, practices, or procedures for lenders to follow and they are not provisions of the Code against which compliance is to be determined.

Structure of the Code

The structure of the Code is based around the lender responsibility principles broadly in the order that they would apply throughout the life cycle of a credit agreement. The Code is divided into the following sections:

- a. Obligations that apply before and throughout the agreement
- b. Advertising
- c. Inquiries into and assessment of borrowers’ requirements and objectives
- d. Inquiries into and assessment of substantial hardship
- e. Assisting borrowers to make an informed decision
- f. Assisting guarantors to make an informed decision
- g. Credit related insurance and repayment waivers
- h. Fees
- i. Subsequent dealings
- j. Default and other problems
- k. Repossession
- l. Oppression

Different products and circumstances

In relation to:

- a. reasonable inquiries into and assessment of borrowers' requirements and objectives; and
- b. reasonable inquiries into and assessment of substantial hardship; and
- c. assisting borrowers to make an informed decision; and
- d. assisting guarantors to make an informed decision; and
- e. assisting informed decisions for credit related insurance, -

the Code provides that:

- I. the number of inquiries a lender should make and the extent of information a lender should seek; and
- II. the extent of assistance a lender should provide,

may differ depending on factors relating to the credit agreement or the borrower (as set out in the relevant sections of the Code).

For instance, to assess whether a borrower can make repayments without substantial hardship, the lender should make a greater number of inquiries and see more extensive information for products where consequences of default are higher.

The lender can make a judgment as to the number of inquiries and the extent of information sought, as well as the extent of assistance that should be provided for any given transaction based on the factors set out in the relevant section of the Code. However, the lender must be able to demonstrate compliance with the lender responsibility principles.

The Code also specifically identifies the number of inquiries or extent of assistance for particular classes of credit agreements such as high-cost-short-term credit agreements. Lenders providing those classes of credit agreements should follow the guidance in the Code rather than make a judgment as to the number and extent of inquiries or extent of assistance.

Whether credit is provided online or in-person is not one of the factors which affects the number or extent of inquiries or extent of assistance. The guidance in the Code is intended to be technology neutral in the sense that:

- a. A lender should be able to comply with the guidance in the Code when lending online or in-person.
- b. The level of responsibility on lenders (and level of consumer protection) should not be lower for any particular lending channel, although the steps that lenders take to achieve compliance with the guidance in the Code may differ depending on the lending channel.

Disclaimer

The Code does not constitute legal advice. Lenders are encouraged to seek their own professional advice on how the credit contracts and consumer finance laws in New Zealand apply.

1. Questions for submitters

- 1.1. Please provide any comments you may have on the explanatory material in this chapter.

Different products and circumstances

- 1.2. Please provide any comments you may have on the ability for the lender to make a judgment about the number of inquiries and the extent of information sought, as well as the extent of the assistance that should be provided based on specified factors in the Code. Does this approach strike the right balance between consumer protection, providing certainty for lenders, and minimising unnecessary compliance costs?
- 1.3. Please provide any comments you may have in relation to the aim that the Code be technology neutral, and whether the guidance in the Code allows for technology neutrality (including by reference to specific aspects of the guidance).
-

2. Obligations that apply before and throughout the agreement⁴

Principle

Every lender must, at all times, exercise the care, diligence, and skill of a responsible lender:

- i. in any advertisement for providing credit or finance under an agreement; and*
- ii. before entering into an agreement to provide credit or finance and before taking a relevant guarantee; and*
- iii. in all subsequent dealings with a borrower in relation to an agreement or a guarantor in relation to a relevant guarantee (see s 9C(2)(a) of the Act).*

Every lender must comply with all the lender responsibilities specified in section 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).

Commentary

Lender responsibility principles (and their associated lender responsibilities) are the core provisions of the new Part 1A of the Act. They are important statements for a lender to consider and embed in their lending processes, practices and procedures.

To comply with these principles, a lender should comply with all of the specific lender responsibilities and the elaboration and guidance contained in the Code. If the lender breaches any of the lender responsibilities, it is likely that they will have breached the lender responsibility principle to act with care, diligence and skill.

The principle that lenders must at all times exercise care, diligence and skill is a standalone responsibility which, depending on the circumstances of lending, will require a lender to adopt processes additional to those prescribed as lender responsibilities.

Guidance

Compliance policies

- 2.1. To comply with the lender responsibility principle to exercise care, diligence, and skill, a lender should implement and maintain policies to meet the lender responsibility principles and the lender's legal obligations. A responsible lender will implement and maintain policies on:
- a. approving advertising material;
 - b. how to decide whether to approve or decline a credit application;
 - c. when to contact and how to communicate with borrowers and guarantors, particularly borrowers in financial difficulty or in breach of their credit agreement;

⁴ The Guidance set out in this section is issued under subsections 9F(1)(b)(vi) and (e) of the Act.

- d. dealing with unforeseen hardship applications;
 - e. debt recovery and enforcement, including, if relevant, repossession; and
 - f. handling complaints.
- 2.2. A lender should ensure that before staff and agents acting on behalf of the lender come into contact with borrowers, those staff and agents understand how to comply with legal obligations that are relevant to their role as well as the lender's policies for complying with those legal obligations. In particular:
- a. relevant sales staff should receive training on the Act, the Fair Trading Act 1986, the Guidance in this Code in relation to advertising, and the lender's advertising approval processes; and
 - b. staff who communicate with borrowers in relation to breaches of a credit agreement should receive training on the lender's policies for dealing with borrowers and guarantors reasonably and in an ethical manner, including in communications with the borrower.
- 2.3. A lender should require staff to comply with the relevant legal obligations and policies, monitor their compliance, and address any breaches of those obligations and policies.
- 2.4. A lender should require agents to comply with the relevant legal obligations and policies, and check that they have appropriate processes in place to ensure that the agent and its staff understand and will comply with those relevant obligations and policies.
- 2.5. A lender should also monitor and periodically review policies so they continue to meet the lender responsibility principles. This should include considering complaints received through the lender's internal complaints process or external dispute resolution scheme to assess whether they indicate problems with the lender's policies which should be addressed.

Commentary

Agents and other lenders

Under the Act, lenders are responsible for the conduct of their agents acting within the scope of their authority. Agents of a lender can include third party debt collection or repossession businesses, or brokers, or retailers or motor vehicle dealers that facilitate access to credit at the point of sale.

In some circumstances, dealers or retailers may be a lender, such as when they enter into a consumer credit contract with a customer and then assign their rights under the agreement to a finance company. A person who has the rights of a creditor transferred to them (by assignment, or operation of law) may also be a lender. All of those businesses or persons who are lenders will be subject to the lender responsibility principles. Those businesses or persons may contract with another person (such as the actual party providing the credit) to allocate the risk of any non-compliance as between those parties.

Guidance

Contacting borrowers and guarantors

- 2.6. When making oral contact with the borrower or guarantor, a lender should:
- a. take steps to verify they are dealing with the borrower (or guarantor), a person who is authorised to act on their behalf, or a contact provided by them; and
 - b. having established that they are dealing with one of the persons in 2.6.a, identify themselves, the name of the lender, and the purpose of the contact; and
 - c. comply with its obligations to not disclose information about the borrower and guarantor to third parties under the Privacy Act 1993, and also avoid indirectly revealing the borrower or guarantor's private information to others (such as by leaving messages with a workmate that reveal that the inquirer is a lender); and
 - d. co-operate with the borrower's or guarantor's advisors, including by giving those advisors the information they need to advise a borrower or guarantor.
- 2.7. If the borrower or guarantor indicates a preferred channel of communication, then the lender should first attempt to contact the borrower or guarantor using that channel.
- 2.8. Where possible, a lender should contact a borrower or guarantor at reasonable hours (i.e. between 6am and 9pm), taking into account their circumstances and reasonable wishes.

Record-keeping

- 2.9. A lender should make and keep a record of how the lender applies the Guidance in the Code. The record may be in the form of:
- a. records of actions taken by the lender in each individual transaction; or
 - b. compliance policies which requires employees and agents to:
 - i follow those policies; and
 - ii keep a record where there have been departures from those policies (unless the policy provides for such departure).
- 2.10. The fact that a lender complies with the record keeping Guidance set out at 2.9 above does not mean that a Court will accept those records as sufficient proof of the actions a lender took in any individual transaction.

Legal obligations

Principle

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).

Lender responsibilities

A lender must, in relation to an agreement with a borrower, meet all the lender's legal obligations to the borrower, including under the Act, the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Financial Service Providers (Registration and Dispute Resolution) Act 2008, and the Financial Advisers Act 2008 (see s 9C(3)(f) of the Act).

A lender must, in relation to a relevant guarantee that is taken by the lender, meet all the lender's legal obligations to the guarantor (see s 9C(4)(e) of the Act).

Guidance

- 2.11. To promote or facilitate compliance with their legal obligations, a lender should put in place, monitor and review policies for complying with legal obligations as referred to at 2.1-2.3.

Commentary

Where relevant, this Code sign-posts specific legal obligations that are likely to be particularly relevant at various points during the life cycle of a credit agreement, although it does not provide an exhaustive list. For instance, see section 3 in relation to processes for compliance with the Fair Trading Act 1986 and section 13 in relation to parts of the repossession obligations under the Act.

The Code does not offer guidance on how lenders can comply with all legal obligations. Compliance with the guidance in the Code is not evidence that lenders will be complying with any legal obligations other than the lender responsibility principles set out in section 9C of the Act.

The Fair Trading Act 1986 imposes obligations independently of this Code. Case law under the Fair Trading Act 1986 may be useful in ascertaining whether a lender has complied with the Act and the provisions of the Code relating to advertising that is, or is likely to be misleading, deceptive or confusing to borrowers. Neither the Act or Code limits the application of the Fair Trading Act.

2. Questions for submitters

- 2.1. Please provide any comments you may have on the guidance in this chapter, including any suggested revisions or additions.
- 2.2. In your view, will this guidance: (1) protect the interests of consumers; (2) promote the confident and informed participation in credit markets by consumers; and (3) promote and facilitate fair, efficient, and transparent credit markets? Please provide reasons as to how it may or may not do this.
- 2.3. Does the guidance in this area provide sufficient certainty for lenders as to how to comply with the relevant principles and responsibilities? Please provide any comments you may have on whether the guidance (and which aspects) should be more prescriptive, or more flexible, and the reasons for that.
- 2.4. For lenders, please provide an estimate of cost (both one-off costs and ongoing costs), over and above costs you incur in these areas today:
- a. that you may incur if you had to comply with the relevant principles and responsibilities without any guidance in these areas;
 - b. that you may incur if you comply with the guidance in this chapter.
-

3. Advertising⁵

Principle

Every lender must, at all times, exercise the care, diligence, and skill of a responsible lender in any advertisement for providing credit or finance under an agreement (see s 9C(2)(a)(i) of the Act).

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).

Lender responsibilities

A lender must, in relation to an agreement with a borrower, assist the borrower to reach an informed decision as to whether or not to enter into the agreement and to be reasonably aware of the full implications of entering into the agreement, including by ensuring that:

- i. any advertising is not, or is not likely to be, misleading, deceptive, or confusing to borrowers [...](see s 9C(3)(b)(i) of the Act)*

A lender must, in relation to an agreement with a borrower, meet all the lender's legal obligations to the borrower, including under this Act, the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Financial Service Providers (Registration and Dispute Resolution) Act 2008, and the Financial Advisers Act 2008 (see s 9(3)(f) of the Act).

Guidance

"Advertising"

- 3.1. A lender should apply the Guidance below to advertising of agreements of all kinds across all media, including television, radio, online and print advertising, and including websites, emails, SMS (short message service) messages, social media, pamphlets, billboards, addressed or unaddressed mail.

Content of advertising

- 3.2. A lender should comply with the following general practices to ensure that advertising is not and is not likely to be misleading or deceptive:
 - a. Have reasonable grounds for making any claim (other than puffery (i.e. obvious exaggeration)).
 - b. Only use fine print to elaborate on the main selling message, not to contradict it.
 - c. Disclose any conditions that are unusual, inconsistent with, or modify, in an unexpected manner, the main message of the advertisement.
 - d. Only make comparisons between sufficiently like products.

⁵ The Guidance set out in this section is issued under subsections 9F(1)(b)(i), and (e) of the Act.

“Confusing”

- 3.3. A lender should comply with the following general practices to ensure that advertising is not confusing:⁶
- a. Set out advertisements in a way that allows them to be readily understood by the intended audience.
 - b. Make sure key information is legible or audible, or both, and take care to disclose information in a level of detail that is commensurate with its importance.
 - c. Use technical language and statistics only where they are relevant and in a way that can be readily understood by consumers without specialist knowledge.

Commentary

A lender should (for more certainty and precision) refer to the Commerce Commission’s Fair Trading Act fact sheets and other guidance for general practices to ensure that advertising is not misleading or deceptive. Note that test under the lender responsibility differs from the set out in the Fair Trading Act. Lenders can also refer to relevant industry codes including the Advertising Standards Authority’s Code for Financial Advertising.

Note that the guidance in 3.3 is based, in part, on the Advertising Standards Authority’s Code for Financial Advertising.

Guidance

Specific practices

- 3.4. A lender should comply with the following specific practices for advertisements about credit products:
- a. When referring to fees or costs, give a realistic impression of the overall levels of fees and costs.
 - b. When referring to an interest rate or an amount of interest:
 - i display with equal prominence an **annual percentage interest rate**, and note if that rate is **variable**;
 - ii state whether fees apply, and, if so, provide details about the specific upfront fees.

Example

An advertisement states that a loan is interest free. The advert should also state whether an establishment fee applies.

⁶ The Courts have stated (in a different context) that “mislead” or “deceive” implies the creation of an incorrect belief, whereas “confusing” may go no further than perplexing or mixing up the minds of the public. See *New Zealand Breweries Ltd v Heineken’s Bier Browerij Maatschappij N.V* [1964] NZLR 115, 142.

- c. When referring to the amount of regular repayments for a particular term loan, include **the total amount payable under the agreement** (assuming that repayments are made on time and no other changes are made to the loan term or to interest rates).

Example

An advertisement states that a borrower can purchase an appliance worth \$400 on credit and pay only \$10 per week. It should also state the amount of total repayments will be \$520 (where the borrower will pay \$10 per week for a year).

- d. When advertising goods to buy on credit, make it clear that the advertising is promoting a credit agreement.
- e. When including details of interest rates or fees that apply for an initial promotional period, state the period for which the discount applies and:
 - i. where ascertainable, what the interest rate or fees will change to after that initial promotional period; or
 - ii. where the subsequent interest rate is not ascertainable, the fact that a higher interest rate will apply and an indication of what the range will be.

Example

An advertisement states “8% interest only for a limited period” it should also add “the 8% interest applies only for the first 3 months of the loan”.

The interest rate payable after the end of that period will be [specify percentage] or [where the subsequent interest rate is not ascertainable “between 8% and [x]%”].

- 3.5. A lender should **not** undertake the following advertising practices:
 - a. Making claims along the lines of “\$500 credit available in your account” without making it clear that the \$500 is the amount the lender is prepared to lend to the borrower rather than that the borrower has a \$500 credit balance.
 - b. Making claims that suggest that the lender will not inquire into the borrower’s circumstances in making a lending decision in advertisements addressed to the public or a section of the public, such as using claims along the lines of “**no credit checks**”, “**pre-approved**”, “**instant approval**”, “**guaranteed acceptance**”.

Commentary

Claims along the lines of 3.5(b) above are likely to be either misleading or reflect practices that may not comply with the lender responsibilities (in particular, the responsibility to make reasonable inquiries before entering into the agreement to be satisfied that it is likely that the borrower will make the repayments without suffering substantial hardship (refer to section 5)).

Note that making pre-approved offers of credit to existing customers of the lender is discussed in paragraphs 4.8, 5.9 and 7.16.

Guidance

- 3.6. A lender should **not** imply that the lender will not take into account a borrower's circumstances in making a lending decisions, such as claims along the lines of “bankrupt – ok”, “bad credit history – ok”.

Commentary

While the lender responsibility principles do not necessarily preclude lending to bankrupt persons or those with bad credit history, advertising that implies such circumstances will not be taken into account is likely to be either misleading or reflect practices that may not comply with the lender responsibilities (in particular, the responsibility to make reasonable inquiries before entering into the agreement to be satisfied that it is likely that the borrower will make the repayments without suffering substantial hardship (refer to section 5)).

Guidance

High-cost short-term credit agreements⁷

- 3.7. To comply with the above lender responsibility principles and lender responsibilities, a lender should:
- when advertising **high-cost short-term credit agreements**, include a **prominent risk warning** that makes it clear a high-cost short-term credit agreement **should not be used for long-term borrowing** and is suitable only to improve short-term cash flows; and
 - when using a celebrity to advertise high-cost short-term credit, include the above risk warning as part of the message conveyed by the celebrity.

Processes

- 3.8. To comply with the above lender responsibility principle and lender responsibilities, a lender should have processes in place to ensure that advertising complies with legal obligations and is not misleading, deceptive, or confusing. Such processes can also include complying with relevant industry codes.
- 3.9. At a minimum, those processes should aim to ensure that:
- relevant sales staff and agents understand how to comply with the Act, Fair Trading Act 1986 and the Guidance in this Code; and
 - relevant sales staff and agents are informed of current promotions and representations about credit products; and
 - all advertising material is subject to an approval process; and
 - advertising is checked by a staff member with necessary product knowledge to ensure that the description is accurate; and

⁷ See definition in **glossary**.

- e. the need for legal advice is considered when advertisements are being developed.

Commentary

A lender should refer to the Commerce Commission's Fair Trading sample compliance policy for further guidance on an appropriate compliance process.

3. Questions for submitters

- 3.1. Please provide any comments you may have on the guidance provided in this chapter, including any suggested revisions or additions.
- 3.2. In your view, will this guidance: (1) protect the interests of consumers; (2) promote the confident and informed participation in credit markets by consumers; and (3) promote and facilitate fair, efficient, and transparent credit markets? Please provide reasons as to how it may or may not do this.
- 3.3. Does the guidance in this area provide sufficient certainty for lenders as to how to comply with the relevant principles and responsibilities? Please provide any comments you may have on whether the guidance (and which aspects) should be more prescriptive, or more flexible, and the reasons for that.
- 3.4. For lenders, please provide an estimate of cost (both one-off costs and ongoing costs), over and above costs you incur for advertising today:
- that you may incur if you had to comply with the relevant principles and responsibilities without any guidance in these areas;
 - that you may incur if you comply with the guidance in this chapter.

Specific practices

- 3.5. Do you think the specific practices set out in the guidance will lead to consumer benefits in the form of greater transparency of credit products and key features of the product? Please consider both the value of the information to the consumer balanced against the potential risk of providing consumers with too much information.

High-cost short-term agreements

- 3.6. Do you agree that it is appropriate for all advertising of high-cost short-term credit agreements to carry a risk warning? Why or why not?
- 3.7. Do you have any comments in relation to the specific wording of the warning?
-

4. Inquiries into and assessment of borrower's requirements and objectives⁸

Principle

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).

Lender responsibility

A lender must, in relation to an agreement with a borrower, make reasonable inquiries, before entering into the agreement, so as to be satisfied that it is likely that the credit or finance provided under the agreement will meet the borrower's requirements and objectives (see s 9C(3)(a)(i) of the Act).

Guidance

Inquiries

- 4.1. In assessing whether it is likely that the credit provided under the agreement will meet the borrower's requirements and objectives, a lender should inquire into and have regard to the following matters, where relevant:
 - a. the amount of credit sought or the maximum amount of credit sought by the borrower (such as the credit limit for a credit card):
 - b. whether the credit is required on a one-off basis for a specific need at that time, or over a longer timeframe for expenditure on an ongoing basis:
 - c. the timeframe for which the credit is sought (i.e. the term of agreement that the borrower is seeking if any particular term is sought):
 - d. whether the borrower seeks particular product features or flexibility, the relative importance of different features to the borrower, and whether the borrower is prepared to accept any additional costs or risks associated with these features:
 - e. whether the borrower requires any additional expenses, such as premiums for insurance related to the credit or payment for extended warranties or repayment waivers, to be included in the amount financed, and whether the borrower is aware of the additional costs of these expenses being financed.
- 4.2. Whether the lender should make all of the above inquiries and the extent of the information they should seek under this lender responsibility may differ depending on a number of factors. A greater number of inquiries should be made and more extensive information should be sought for:
 - a. a complex or uncommon credit product, such as a buy-back transaction or reverse equity mortgage:

⁸ The Guidance set out in this section is issued under subsections 9F(1)(a), (b)(ii) and (e) of the Act.

- b. a credit agreement where the consequences of missing a repayment or defaulting are high, such as potential loss of an asset, or where default interest plus default fees are high relative to the amount of the loan or the credit limit:
 - c. a credit agreement where the loan amount is large relative to the borrower's ability to repay:
 - d. a borrower with characteristics that may make them vulnerable, such as a borrower for whom English is a second language or who appears to lack basic knowledge about financial matters.
- 4.3. The number of inquiries a lender should make may be fewer and the amount of information sought may be less for:
- a. a simple credit agreement that is widely understood, such as a credit card or overdraft:
 - b. an existing customer of the lender who has had the same or a similar credit agreement before:
 - c. an experienced user of credit⁹.
- 4.4. The lender can make a judgment as to the number and extent of inquiries that should be made for any given transaction based on the matters set out at 4.2 and 4.3. However, the lender should be able to demonstrate that the number and extent of inquiries was reasonable and provided a sufficient basis for the lender to assess whether it is likely that the credit agreement would meet the borrower's requirements and objectives.

Example

Lender A wishes to provide personal loans online. One way that Lender A could inquire into the timeframe for which credit is sought is by including a question in its application form asking the term of the loan that the borrower is seeking, along with multiple choice options.

- 4.5. Despite 4.3 and 4.4 above, for **high-cost short-term credit agreements**, the inquiries listed at 4.1 a-d above should always be made. Particularly important are the inquiries about the timeframe for which the credit is sought, as providing short-term credit to meet a long-term need would be unlikely to meet the requirements and objectives of the borrower.
- 4.6. For **reverse equity mortgages**, a lender's inquiries should include (as part of the inquiry into product features or flexibility) whether the borrower wishes to leave some equity in the home for the borrower's estate or whether the borrower may wish to sell the home prior to their death.
- 4.7. For **buy-back transactions**, a lender's inquiries should include (as part of the inquiry into product features or flexibility) whether the borrower wishes to transfer ownership of their home to the lender.

⁹ See definition in **glossary**.

- 4.8. If a lender wishes to make pre-approved offers of credit, then to comply with the lender responsibility, before the credit agreement is entered into, the lender should make the same reasonable inquiries under 4.1 to 4.7 which they ought to have made if that same borrower had approached the lender seeking the same credit agreement.

Commentary

Note that making pre-approved offers of credit to existing customers of the lender is also discussed in 5.9 and 7.16.

Guidance

Assessment

- 4.9. After making the above inquiries, a lender should have regard to the information they have received to satisfy themselves whether it is likely the credit provided under the agreement will meet the borrower's requirements and objectives.

Example

Consumer B wishes to buy a couch on credit from a furniture store but does not intend to buy any other furniture items in the short to medium term. That information may be an indicator that a store card for ongoing use only in the furniture store may not meet the requirements and objectives of the borrower because it provides Consumer B with ongoing access to credit which Consumer B does not seek.

Processes

- 4.10. A lender should ensure that they have adequate processes in place to make reasonable inquiries into a borrower's requirements and objectives and assess whether it is likely that the agreement will meet the borrower's requirements and objectives. Such processes should include:
- a. policies or checklists for staff and agents setting out suggested relevant inquiries that should be made or how to assess what inquiries should be made in specific circumstances; and
 - b. policies or guidance for staff and agents on how to assess whether it is likely that an agreement will meet the borrower's requirements and objectives; and
 - c. policies for making and keeping of records of how the lender applied the Guidance in this section of the Code. The records may be in the form of:
 - i. records of the inquiries undertaken and assessment made for each individual transaction; or
 - ii. compliance policies referred to at 4.10.a and 4.10.b and the keeping of records where there have been departures from those policies (unless the policy provides for such departure).

The fact that a lender complies with the record keeping Guidance set out at 4.10.c above does not mean that a Court will accept those records as sufficient proof of the actions a lender took in any individual transaction.

4. Questions for submitters

- 4.1. Please provide any comments you may have on the guidance provided in this chapter, including any suggested revisions or additions.
- 4.2. In your view, will this guidance: (1) protect the interests of consumers; (2) promote the confident and informed participation in credit markets by consumers; and (3) promote and facilitate fair, efficient, and transparent credit markets? Please provide reasons as to how it may or may not do this.
- 4.3. Does the guidance in this area provide sufficient certainty for lenders as to how to comply with the relevant principles and responsibilities? Please provide any comments you may have on whether the guidance (and which aspects) should be more prescriptive, or more flexible, and the reasons for that.
- 4.4. For lenders, please provide an estimate of cost (both one-off costs and ongoing costs), over and above costs you incur in inquiring into a borrower's requirements and objectives today:
 - a. that you may incur if you had to comply with the relevant principles and responsibilities without any guidance in these areas;
 - b. that you may incur if you comply with the guidance in this chapter.

Inquiries

- 4.5. Do you think that any of the inquiries set out at paragraph 4.1 should be mandatory in all cases? Why or why not?
 - 4.6. If you are a lender, and based on your current experience, do you consider the guidance in this chapter will in practice require you to provide "personalised financial advice" under the Financial Advisers Act 2008, and if so how?
 - 4.7. Please provide any comments you may have in relation to the specific guidance for high-cost short-term credit agreements, reverse mortgages, buy-back transactions, and pre-approved offers of credit.
-

5. Inquiries into and assessment of substantial hardship (borrowers)¹⁰

Principle

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).

Lender responsibility

A lender must, in relation to an agreement with a borrower, make reasonable inquiries, before entering into the agreement, so as to be satisfied that it is likely that the borrower will make the payments under the agreement without suffering substantial hardship (see s 9C(3)(a)(ii) of the Act).

Guidance

Substantial hardship

[Alternatives for feedback]

Option 1

- 5.1. In assessing “substantial hardship”, a lender should consider whether it is likely that the borrower will make the repayments under the agreement as well as meet fundamental necessities (such as basic accommodation, food, power, telephone, clothing, required medical expenses, and any known financial commitments declared by the borrower (or otherwise known to the lender) at the time of the application).

Option 2

In assessing “substantial hardship”, a lender should consider whether it is likely that the borrower will make the repayments under the agreement without undue difficulty while meeting other reasonable commitments and without having to borrow, and do so out of income and savings without having to realise security or assets which the borrower does not intend to dispose of.

Inquiries

- 5.2. In assessing whether it is likely that a borrower will make the repayments without suffering substantial hardship, a lender should inquire into and consider the following matters, where relevant:
- a. the borrower’s current level and source of income (direct and indirect):
 - b. the likely stability of that income (so far as that can reasonably be predicted):
 - c. the extent of the borrower’s non-discretionary expenses (such as food, rent, travel costs, repayment of existing debts, electricity, and telephone bills):
 - d. other regular expenditure that the borrower intends to make (such as child care, tithing, insurance premiums etc). This should include the amount of any premiums for credit-related insurance or payments for repayment waivers or

¹⁰ The Guidance set out in this section is issued under subsections 9F(1)(a), (b)(ii) and (e) of the Act.

extended warranties that the borrower intends to obtain regardless of whether or not they are arranged by the lender or financed under the credit agreement:

- e. the borrower's credit history (which may be obtained through the results of credit checks undertaken by or on behalf of the lender):
- f. the borrower's existing debts and the extent to which any existing debts are to be repaid from the credit advanced:
- g. the borrower's circumstances (for instance, the number of dependents):
- h. the borrower's assets (such as savings), including any returns on those assets:
- i. reasonably foreseeable changes in the borrower's income or expenditure over the term of the loan (such as approaching retirement or expecting a child) where there is only a small buffer between the borrower's:
 - income; and
 - expenditure and repayments on the proposed loan.

5.3. The lender may make the inquiries above:

- a. directly with the borrower; or
- b. by using the information it holds about the borrower, provided the lender is satisfied that the information is current; or
- c. by using information from reliable third parties such as government departments, credit reference agencies or valuers.

However, a lender should be satisfied that the method of inquiry is reasonable and that the nature of the information received will provide a sufficient basis for the lender to assess whether it is likely that the borrower can make repayments without suffering substantial hardship.

5.4. Whether the lender should make all of the inquiries set out at 5.2 and the extent of the information they should seek under this lender responsibility may differ depending on a number of factors.

5.5. A lender should make a greater number of inquiries and seek more extensive information for:

- a. a credit agreement where the consequences of missing a repayment or defaulting are high, such as potential loss of an asset or where default interest plus default fees are high relative to the amount of the loan or the credit limit:
- b. a credit agreement where the size of the loan is large relative to the borrower's ability to repay:
- c. a borrower who would be a new customer of the lender:
- d. a borrower with characteristics that may make them vulnerable, such as a borrower for whom English is a second language or who appears to lack basic knowledge about financial matters.

- 5.6. The number of direct inquiries of the borrower may be fewer and the amount of information sought directly from the borrower may be less where the borrower is an existing customer of the lender.
- 5.7. The lender can make a judgment as to the number and extent of inquiries that should be made for any given transaction based on the matters set out at 5.5 and 5.6. However, the lender should be able to demonstrate that the number and extent of inquiries was reasonable and provided a sufficient basis for the lender to assess whether it is likely that the borrower can make the repayments under the credit agreement without suffering substantial hardship.
- 5.8. Despite 5.4 to 5.7 above, for **high-cost short-term credit** agreements, a lender should always inquire into all of the matters referred to at 5.2 above.
- 5.9. If a lender wishes to make pre-approved offers of credit, then to comply with the lender responsibility:
- a. such pre-approved offers should only be made to existing customers of the lender; and
 - b. before a credit agreement is entered into, the lender should make the same reasonable inquiries under 5.2 to 5.7 which they ought to have made if that same borrower had approached the lender seeking the same credit agreement.
- 5.10. A lender should never make a pre-approved offer of **high-cost short term credit**.

Commentary

Verification

Section 9C(7) of the Act provides that lenders may rely on the information provided by the borrower unless the lender has reasonable grounds to believe the information is not reliable.

Guidance

Verification

- 5.11. It will usually be reasonable for a lender to rely on the information provided to them by the borrower where this information is:
- a. consistent with information the lender already holds about the borrower (for instance, because the borrower is an existing customer); or
 - b. within the usual range of information for that type of borrower (for instance, if a borrower with two children provides information about their rent that is within the standard range for the rental of a three bedroom house in the borrower's area); or

Example

Lender C, when assessing whether information borrower A has given them is accurate and complete, may be aware of information available from reliable sources like the Household Economic Survey or published by consumer organisations on usual utilities and insurance costs, etc. The lender identifies that the expenses identified by borrower A appear quite low and asks for more information before making a lending decision.

- c. supported by evidence provided by the borrower about the individual borrower's circumstances from a Government source such as the Inland Revenue or a reliable third-party source.
- 5.12. Where the lender has reasonable grounds to believe the information is not reliable, the lender should take reasonable steps to verify the information provided by the borrower. For instance, a lender may verify information by requesting 3 months of bank statements, payslips, and other information relevant to the reliability of the information.
- 5.13. Lenders may ask for or receive information from intermediaries, such as brokers acting on behalf of the borrower. Where that is the case:
- a. a lender should require that those intermediaries implement and maintain appropriate processes for the collection and verification of information consistent with the Guidance set out in this Code; and
 - b. a lender should:
 - i. either be satisfied that the intermediary's practices do in fact comply with such processes; or
 - ii. verify the information provided by the intermediary.

Assessment

- 5.14. After making the above inquiries, a lender should have regard to the information they have received to satisfy themselves whether it is likely that the borrower will make the payments under the agreement without suffering substantial hardship applying the Guidance about what is substantial hardship set out at 5.1.
- 5.15. In making their assessment, a lender should take into consideration:
- a. where the interest rate can be varied or is variable, whether it is likely the borrower can continue to meet the repayment obligations should interest rates change and the maximum amount of any increase in interest rates that would likely be manageable to the borrower; and
 - b. whether there is a reasonable buffer between the borrower's:
 - i. income: and
 - ii. expenditure and repayments on the proposed loan.

Processes

- 5.16. A lender should ensure that they have adequate processes in place to inquire into and assess whether a borrower can make repayments without suffering substantial hardship. Such processes should include:
- a. policies or checklists for staff and agents setting out suggested relevant inquiries that should be made or how the lender will assess what inquiries should be made in specific circumstances:
 - b. policies or guidance for staff and agents on how to assess whether it is likely that a borrower can make the payments under the agreement without substantial hardship:
 - c. policies on making and keeping of records of how the lender applied the Guidance in the Code. The records may be in the form of:
 - i. records of each individual transaction; or
 - ii. compliance policies referred to at 5.16.a and 5.16.b and the keeping of records where there have been departures from those policies (unless the policy provides for such departure):
 - d. steps necessary for establishing the borrower's identity, and his or her aliases (if any), in accordance with all legal requirements relating to the prevention of money laundering:
 - e. explaining the purpose of making the inquiries to the borrower, and the importance of the borrower providing complete and accurate information:
 - f. checking that there have been no significant changes to the borrower's circumstances if a significant amount of time has passed between the making of inquiries and the lender's decision to approve credit (which decision may be made before the lender advances credit).
- 5.17. The fact that a lender complies with the record keeping Guidance set out at 5.16.c above does not mean that a Court will accept those records as sufficient proof of the actions a lender took in any individual transaction.

5. Questions for submitters

- 5.1. Please provide any comments you may have on the guidance provided in this chapter, including any suggested revisions or additions.
- 5.2. In your view, will this guidance: (1) protect the interests of consumers; (2) promote the confident and informed participation in credit markets by consumers; and (3) promote and facilitate fair, efficient, and transparent credit markets? Please provide reasons as to how it may or may not do this.
- 5.3. Does the guidance in this area provide sufficient certainty for lenders as to how to
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comply with the relevant principles and responsibilities? Please provide any comments you may have on whether the guidance (and which aspects) should be more prescriptive, or more flexible, and the reasons for that.

- 5.4. For lenders, please provide an estimate of cost (both one-off costs and ongoing costs), over and above costs you incur for looking into a borrower's ability to repay today:
- a. that you may incur if you had to comply with the relevant principles and responsibilities without any guidance in these areas;
 - b. that you may incur if you comply with the guidance in this chapter.

Substantial hardship

- 5.5. Please indicate whether you have a preference for option 1 or 2, and the reasons for that. Do you have any suggested alternative definitions?
- 5.6. Is the level of hardship or the threshold set out in the definitions appropriate?
- 5.7. In some circumstances, a borrower may be able to make repayments without substantial hardship by selling certain non-essential assets. Should the definition of substantial hardship reflect this? If so, how?

Inquiries

- 5.8. For pawnbroking transactions where the only consequence of an inability to pay the redemption price is the loss of the pledged good, should the reasonable inquiries that should be made or the assessment of whether borrowers can repay without substantial hardship be any different? If so, how?
- 5.9. Do you think that any of the inquiries set out at paragraph 5.2 should be mandatory in all cases? Why or why not?
- 5.10. For lenders, please provide any comments you may have in relation to the specific guidance for high-cost short-term credit agreements, and pre-approved offers of credit.
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6. Inquiries into and assessment of substantial hardship (guarantors)¹¹

Principle

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).

Lender responsibility

A lender must, in relation to a relevant guarantee that is taken by a lender, make reasonable inquiries, before the guarantee is given, so as to be satisfied that it is likely that the guarantor will be able to comply with the guarantee without suffering substantial hardship (see s 9C(4)(a) of the Act).

Guidance

General

- 6.1. The Guidance below cross-references Guidance under section 5. When applying the Guidance in section 5 to a guarantor, lenders should read the references in those provisions to a “borrower” as if they were references to a “guarantor”.

Inquiries

- 6.2. In assessing whether it is likely that a guarantor will be able to comply with the guarantee without suffering substantial hardship, a lender should inquire into and consider the matters set out at 5.2.
- 6.3. The lender may make the inquiries:
- a. directly with the guarantor; or
 - b. by using the information it holds about the guarantor (who may be an existing customer of the lender), if satisfied that the information is current; or
 - c. by using information from reliable third parties such as government departments, credit reference agencies or valuers.

However, a lender should be satisfied that the method of inquiry was reasonable and that the nature of the information received will provide a sufficient basis for the lender to assess whether it is likely that the borrower can make repayments without suffering substantial hardship.

- 6.4. Whether the lender should make all of the above inquiries and the extent of the information they should seek under this lender responsibility may differ depending on a number of factors.
- 6.5. A greater number of inquiries should be made and more extensive information should be sought for:

¹¹ The Guidance set out in this section is issued under subsections 9F(1)(a), (b)(ii) and (e) of the Act.

- a. a guarantee where the consequences for the guarantor of not being able to make payment when the guarantee is called on are serious, such as potential loss of a significant asset of the guarantor:
 - b. a guarantee where the size of the loan is large relative to the guarantor's ability to repay:
 - c. a guarantor with characteristics that may make them vulnerable, such as a guarantor for whom English is a second language or who appears to lack basic knowledge about financial matters.
- 6.6. The number of direct inquiries of the guarantor may be fewer and the amount of information sought directly from the guarantor may be less where the guarantor is an existing customer of the lender.
- 6.7. The number of inquiries may be fewer and the amount of information sought may be less where the lender has agreed to limit the liability of the guarantor under the guarantee to specific assets (other than a home or vehicle).
- 6.8. The lender can make a judgment as to the number and extent of inquiries that should be made for any given transaction based on the factors set out at 6.5 to 6.7. However, the lender should be able to demonstrate that the number and extent of inquiries was reasonable and provided a sufficient basis for the lender to assess whether it is likely that the guarantor can make the repayments under the credit agreement without suffering substantial hardship.
- 6.9. Despite 6.5 to 6.8 above, if a guarantee is provided for a **high-cost short-term credit** agreements, a lender should always inquire into all of the matters referred to at 5.2 above.

Commentary

Verification

Section 9C(7) of the Act provides that lenders may rely on the information provided by the guarantor unless the lender has reasonable grounds to believe the information is not reliable.

Guidance

Verification

- 6.10. A lender should follow the Guidance set out at 5.11 to 5.13 in relation to verification of information provided by the guarantor.

Assessment

- 6.11. A lender should follow the Guidance set out at 5.14 to 5.15 in assessing whether it is likely that the guarantor will be able to comply with the guarantee without suffering substantial hardship.

Processes

- 6.12. A lender should follow the Guidance set out in 5.16 in terms of processes for assessing whether it is likely that the guarantor will be able to comply with the guarantee without suffering substantial hardship.

6. Questions for submitters

- 6.1. Please provide any comments you may have on the guidance provided in this chapter, including any suggested revisions or additions.
- 6.2. In your view, will this guidance: (1) protect the interests of guarantors; (2) promote the confident and informed participation in credit markets by guarantors; and (3) promote and facilitate fair, efficient, and transparent credit markets? Please provide reasons as to how it may or may not do this.
- 6.3. Does the guidance in this area provide sufficient certainty for lenders as to how to comply with the relevant principles and responsibilities? Please provide any comments you may have on whether the guidance (and which aspects) should be more prescriptive, or more flexible, and the reasons for that.
- 6.4. For lenders, please provide an estimate of cost (both one-off costs and ongoing costs), over and above costs you incur for looking into a guarantor's ability to meet the guarantee today:
- a. that you may incur if you had to comply with the relevant principles and responsibilities without any guidance in these areas;
 - b. that you may incur if you comply with the guidance in this chapter.

Inquiries

- 6.5. Are the inquiries that should be made of the borrower to assess whether it is likely that the borrower will be able to make the payments under the agreement without suffering substantial hardship also relevant for the guarantor. Why or why not?
- 6.6. Do you think that any of the inquiries set out at paragraph 5.2 should be mandatory in all cases for guarantors? Why or why not?
- 6.7. For lenders, please provide any comments you may have in relation to the specific guidance for high-cost short-term credit agreements.
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7. Assisting borrowers to make an informed decision¹²

Principle

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).

Lender responsibilities

A lender must, in relation to an agreement with a borrower, assist the borrower to reach an informed decision as to whether or not to enter into the agreement and to be reasonably aware of the full implications of entering into the agreement, including by ensuring that:

- (i) any advertising is not, or is not likely to be, misleading, deceptive, or confusing to borrowers; and*
- (ii) the terms of the agreement are expressed in plain language in a clear, concise, and intelligible manner; and*
- (iii) any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing (see s 9C(3)(b) of the Act).*

Commentary

The lender responsibility to assist informed decisions is separate from, and additional to, the lender's obligation under the Act to:

- publish standard form credit agreements and cost of borrowing information; and
- make initial disclosure of key information set out in Schedule 1 of the Act and of all terms of the contract.

Guidance

Advertising

7.1. See the earlier Guidance in section 3.

Communicating key features

7.2. Before a borrower makes a decision as to whether or not to enter into a credit agreement, a lender should inform the borrower of the key features of the agreement, by clearly highlighting those features in a way that draws the borrower's attention to that information and at a time that assists the borrower to make an informed decision. At a minimum, those key features should include:

- a. Key risks and characteristics of the specific product. For instance, where applicable:
 - i. that secured property is at risk if the borrower defaults or does not make the repayments, including in the context of a pawn broking transaction:

¹² The Guidance set out in this section is issued under subsections 9F(1)(b)(iii), (b)(vi), (c), and (e) of the Act.

- ii. the fact that the interest rate is variable or that the lender has the power to unilaterally change the interest rate:
 - iii. the fact that an early prepayment fee may be payable under a fixed-term agreement if the borrower repays the credit earlier than the terms of the agreement sets out:
 - iv. where repayments are to be made by direct debit payment authority, that the borrower can cancel the authority and whether the borrower or the lender is responsible for doing this once the debt has been repaid:
 - v. for **high-cost short-term credit**, that a borrower should not use this form of credit for long-term borrowing or ongoing financial difficulties, as it is unlikely to be suitable for that purpose, and that it is likely to be more expensive than other forms of credit:
 - vi. for **reverse equity mortgages**, a lender should explain:
 - how the reverse equity mortgage agreement works:
 - how the amount of any loan being considered, changes in the value of the home, and life expectancy can affect the borrower's net equity in the home (including through a home equity release calculator):
 - whether the borrower has a right to occupy the home for the rest of their life:
 - whether the borrower's liability under the agreement is or is not limited to the net realisable sale price for the home: and
 - the borrower's obligations to maintain the home.
 - vii. for **buy-back transactions**, a lender should explain:
 - how the buy-back transaction works:
 - whether the borrower has a right to occupy the home for the rest of their life:
 - the amount and frequency of rental payments:
 - the terms of the borrower's right to repurchase, including the purchase price or how and when it will be calculated: and
 - the borrower's obligations to maintain the home:
 - b. the term of the agreement, if any:
 - c. the amount of the relevant upfront fees, and whether other fees, including periodical or event-based fees, may be charged over the loan term:
 - d. interest rates (expressed as annual rates):
 - e. where relevant, repayments (periodically and in total):
 - f. the cancellation period under the Act and any other cancellation rights.
- 7.3. A lender should respond promptly to a borrower's requests for further information about the features of the agreement. Where a lender allows borrowers to arrange credit online or remotely, a lender should ensure borrowers are provided with a simple, clear and timely way to seek further information from the lender.

Example

Lender B allows credit to be arranged via its website. Lender B provides a free call number or local rate telephone number or live web chat system for borrowers who wish to seek further explanation.

- 7.4. A lender should recommend that borrowers seek independent legal advice when:
- a. more than one party will be the borrower under a credit agreement, but the lender has reason to believe that only one of those parties will receive the direct benefit of any money lent; or
 - b. the lender has reason to believe that any borrower may be under undue influence from any other party, including another borrower or any third party who will receive the direct benefit of any money lent.

The lender should recommend that the independent legal advice be sought from a lawyer that is not also advising another borrower, guarantor or a third party who may be exerting undue influence over the borrower.

- 7.5. A lender should require borrowers to seek independent legal advice when entering into reverse equity mortgages or buy-back transactions. The lender should require that the independent legal advice be sought from a lawyer that is not also advising the lender in the proposed transaction.

Commentary

Lenders providing reverse mortgages and buy-back transactions may also refer to the Ministry of Social Development's Home Equity Release Schemes Code of Standards.

Guidance

Means and level of communications

- 7.6. A lender should highlight the key features identified at 7.2 to the borrower in a way that draws the information to the attention of the borrower and assists an informed decision, regardless of the channel through which credit is provided.

Example

Borrower B is seeking credit from Lender C at Lender C's premises. One way that Lender C can draw the information about key features to the attention of Borrower B is by providing Borrower B with a credit agreement and explaining the key features of the agreement while at the same time circling the parts of the agreement relating to those key features.

- 7.7. The level of explanation and assistance provided when informing the borrower of the key features will differ depending on a number of factors. Greater or further assistance should be provided when informing the borrower of the key features for:
- a. a complex or uncommon credit product, such as a buy-back transaction or reverse equity mortgage:

- b. a credit agreement where the consequences of missing a repayment or defaulting are high, such as potential loss of an asset, or where default interest plus default fees are high relative to the amount of the loan or the credit limit:
 - c. a credit agreement where the size of the loan is large relative to the borrower's ability to repay:
 - d. a borrower who would be a new customer of the lender:
 - e. a borrower with characteristics that may make them vulnerable, such as a borrower for whom English is a second language or who appears to lack basic knowledge about financial matters:
 - f. a borrower who does not appear to have understood the information being provided.
- 7.8. The lender may not need to provide the same level of assistance when informing the borrower of the key features for:
- a. a simple credit agreement that is widely understood, such as a credit card or overdraft:
 - b. an existing customer of the lender that has had the same or similar credit agreement before:
 - c. a borrower who will receive legal advice before entering into the agreement:
 - d. an experienced user of credit.¹³
- 7.9. The lender can make a judgment as to the level of assistance provided to the borrower when informing the borrower of the key features and the extent of any additional assistance provided (referred to below), based on the matters set out at 7.7 and 7.8. However, the lender should be able to demonstrate that the level of assistance provided was sufficient to assist the borrower to reach an informed decision and to be reasonably aware of the full implications of entering into the agreement.
- 7.10. For borrowers that should be provided with a greater level of assistance based on the factors set out at 7.7 and 7.8, lenders should provide a level of assistance such that a person with no experience in credit agreements of that type can readily understand the implications of the agreement.
- 7.11. In some circumstances, a lender has a limited ability to find out whether the borrower appears to understand the information provided; for instance, where the credit application is undertaken online or by postal mail without any oral interaction between the lender and the borrower. In these circumstances, the lender should ensure that the information is presented in a way that a person with no experience in credit agreements of that type can readily understand it.

¹³ See definition in the **glossary**.

Example

Lender A makes credit available online. One way in which the lender could ensure that it draws the key features of the agreement to the attention of borrowers in a way that is readily understandable is by consulting a focus group. The focus group could be made up of a representative group of consumers (including individuals with no experience in credit agreements) and a budget advisor. The lender could ask the focus group to review how the internet pages will work, ask them questions to test the general understanding of a user of the key features, and take into account the group's feedback to refine the internet pages.

- 7.12. A lender should allow borrowers sufficient opportunity to fully consider an offer of credit, including by:
- a. giving the borrower the opportunity to take information about the key features off-site (or save and print if online):
 - b. giving the borrower the opportunity to seek the advice of others:
 - c. making clear that the offer of credit is available for a reasonable period specified by the lender (subject to the closing dates of special promotional offers that are open for a reasonable period of time).

The amount of time the lender should provide to the borrower will differ based on the factors set out at 7.6 to 7.9.

- 7.13. Where a lender reasonably suspects that the borrower does not have a good understanding of the English language, a lender should provide, or refer the borrower to people who can provide, alternative methods of receiving the relevant information. This could involve the lender providing access to, or referring the borrower to, an interpreter or a member of staff who is fluent in the relevant language, or providing access to the information in that particular language. A lender should not rely on children under 18 or those with a potential conflict of interest to act as interpreters; for instance, where a parent is obtaining a loan for an adult child's benefit, the child should not be an interpreter.
- 7.14. Where a lender advertises its credit product(s) in a language other than English and a borrower who speaks that language but who does not have a good understanding of the English language applies for credit from that lender, the lender should communicate the information about key features referred to in 7.2 in that language or refer the borrower to an interpreter who can translate English into that language, at the lender's cost.
- 7.15. Where the lender has explained the key features of the agreement in detail but the lender is aware that the borrower has not understood the key features of the agreement as explained by the lender, a lender should take further steps to assist the borrower's understanding. One way of doing this is by recommending that the borrower seeks legal advice or consumer information advice to obtain a better understanding of the implications of the agreement.

- 7.16. Where a lender makes a pre-approved offer of credit, the lender should ensure that the offer contains sufficient information to assist the borrower to reach an informed decision as to whether to accept the offer.

Plain language agreement

- 7.17. To comply with the lender responsibility to ensure that the terms of the agreement are expressed in plain language in a clear, concise, and intelligible manner, a lender should:
- a. set out agreements using a layout and font size that can be easily read; and
 - b. set out the terms in a logical order that is easy for borrowers to follow; and
 - c. highlight important information; and
 - d. explain complex information in plain language and include a clear explanation of any necessary jargon.
- 7.18. “Concise” refers to the presentation of specific information rather than the overall length of the communication or document. A longer but clearly written document, may take less time to read and understand than a shorter, but poorly written one.
- 7.19. “Intelligible” involves an overall assessment of whether the terms are understandable and comprehensible.

Example

Lender A is putting together terms for a new credit product. One step they could take to ensure that the agreement is in plain language in a clear, concise, and intelligible manner is by consulting a focus group. The focus group could be made up of a representative group of consumers (including individuals with no experience in credit agreements) and a budget advisor. The lender could ask the focus group to review whether the terms are clear, concise and intelligible, and take into account the focus group’s feedback to refine the agreement.

Commentary

Lenders should refer to the FMA’s Guidance note on “Client Communications and Record-keeping”, which elaborates on the meaning of ‘clearly, concisely and effectively’ when communicating with clients under the Financial Advisers Act 2008.

Guidance

Manner of presenting information

- 7.20. To ensure that any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing, a lender should apply the following Guidance to all information provided to the borrower in relation to the agreement before it is entered into, regardless of the form and time at which information is given.
- 7.21. A lender should comply with the following practices to ensure that information provided to the borrower is not misleading, deceptive or confusing:

- a. have reasonable grounds for making any claim (other than puffery (i.e. obvious exaggeration)):
- b. only use fine print to elaborate on the main messages conveyed about the product, but not to contradict it:
- c. disclose any conditions that are unusual, inconsistent with, or modify, in an unexpected manner, the main messages conveyed about the product;
- d. make sure important information is legible or audible, or both, and take care to disclose information in a level of detail that is commensurate with the importance of it:
- e. use technical language and statistics only where they are relevant and in a way that can be readily understood by consumers without specialist knowledge;
- f. where referring to fees or costs, give a realistic impression of the overall levels of fees and costs:
- g. where referring to an interest rate or an amount of interest:
 - i. convey with equal importance an **annual percentage interest rate**, and advise if that rate is **variable**; and
 - ii. advise if fees will apply, and, if so, details of the fees that will apply:
- h. where referring to the amount of regular repayments for a particular term loan, include **the total amount payable under the agreement** (and note that the amount assumes that repayments are made on time and no other changes are made to the loan term or the rate of interest); and
- i. when providing details of interest rates or fees that apply for an initial promotional period, state the period for which the discount applies and:
 - i. where ascertainable, what the interest rate or fees will change to after that initial promotional period; or
 - ii. where the subsequent interest rate is not ascertainable, how the subsequent interest rate will be calculated.

Commentary

A lender should (for more certainty and precision) refer to the Commerce Commission's Fair Trading fact sheets and other guidance for general practices to ensure that information is not provided in a manner that is misleading or deceptive. Note that the test under the lender responsibility differs from that set out in the Fair Trading Act.

Guidance

Processes

- 7.22. To comply with the above lender responsibility principle and lender responsibilities, a lender should have processes in place to ensure that advertising complies with legal obligations and is not misleading, deceptive, or confusing. Such processes may also include complying with relevant industry codes.

- 7.23. At a minimum, those processes should aim to ensure that:
- a. relevant staff and agents who have customer contact are familiar with the Act, Fair Trading Act 1986 and the Guidance in this Code; and
 - b. relevant staff and agents who have customer contact are familiar with the features of credit products which they deal in, as well as current promotions and representations; and
 - c. all online and print material are subject to an approval process, including checking by a staff member with necessary product knowledge to ensure that the description is accurate.

Commentary

Extended warranties

Section 9B(4) of the Act provides that *“if an agreement involves a repayment waiver or an extended warranty [provided by the lender], the repayment waiver or extended warranty is to be treated as forming part of the [credit] agreement for the purposes of this Part [relating to the lender responsibilities]”*.

Guidance in relation to assisting informed decisions for extended warranties is set out below. Guidance in relation to assisting informed decisions for repayment waivers is set out in section 9 of this Code, together with Guidance relating to credit-related insurance.

Guidance

Extended warranties

- 7.24. The Fair Trading Act 1986 includes provisions that assist consumer understanding of extended warranties, and a lender should refer to Commerce Commission guidance on those obligations when providing extended warranties.

7. Questions for submitters

- 7.1. Please provide any comments you may have on the guidance provided in this chapter, including any suggested revisions or additions.
 - 7.2. In your view, will this guidance: (1) protect the interests of consumers; (2) promote the confident and informed participation in credit markets by consumers; and (3) promote and facilitate fair, efficient, and transparent credit markets? Please provide reasons as to how it may or may not do this.
 - 7.3. Does the guidance in this area provide sufficient certainty for lenders as to how to comply with the relevant principles and responsibilities? Please provide any comments you may have on whether the guidance (and which aspects) should be more prescriptive, or more flexible, and the reasons for that.
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7.4. For lenders, please provide an estimate of cost (both one-off costs and ongoing costs), over and above costs you incur for assisting borrower's to make informed decisions today:

- a. that you may incur if you had to comply with the relevant principles and responsibilities without any guidance in these areas;
- b. that you may incur if you comply with the guidance in this chapter.

Communicating key features

7.5. Do the key features of a credit agreement listed at 7.2 capture the key information borrowers should have to make an informed decision as to whether to enter into a credit agreement?

8. Assisting guarantors to make an informed decision¹⁴

Principle

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).

Lender responsibilities

A lender must, in relation to a relevant guarantee that is taken by a lender, assist the guarantor to reach an informed decision as to whether or not to give the guarantee and to be reasonably aware of the full implications of giving the guarantee, including by ensuring that:

- (i) the terms of the guarantee are expressed in plain language in a clear, concise, and intelligible manner; and*
- (ii) any information provided by the lender to the guarantor is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing (see s 9C(4)(b) of the Act).*

Guidance

Communication of information

- 8.1. Before a guarantor makes a decision as to whether or not to give a guarantee, a lender should inform the guarantor of the key features of the guarantee, by clearly highlighting those features in a way that draws the guarantor's attention to that information at a time that assists the guarantor to make an informed decision. At a minimum, those key features that should be highlighted include:
- a. that by giving a guarantee, the guarantor will become liable as well as, or instead of, the borrower:
 - b. that the guarantor will be liable for the full amount of the borrower's liabilities under the credit agreement and other costs unless the lender has agreed to limit the guarantor's liability:
 - c. that the guarantor may ask that their liability under the guarantee be limited (but a lender may not always agree to that):
 - d. the key features relating to the credit agreement as set out at 7.2 to the extent that they are relevant to the guarantor's liability. Where the guarantor guarantees all of the borrower's obligations under the agreement, a lender should clearly highlight to the guarantor **all** of the key features relating to the credit agreement as set out at 7.2 above.
- 8.2. A lender should respond promptly to guarantors' requests for further information about the features of the agreement.
- 8.3. A lender should not provide information to the guarantor indirectly through the borrower.

¹⁴ The Guidance set out in this section is issued under subsections 9F(1)(b)(iii), (b)(vi), (c), and (e) of the Act.

- 8.4. A lender may, instead of providing the information set out at 8.1 above directly to the guarantor, ask the guarantor's lawyer to explain that information, if the lender has processes that enable the lender to find out whether the guarantor's lawyer has highlighted that information to them.
- 8.5. A lender should always **recommend** that guarantors seek **legal advice or consumer information advice** before giving the guarantee, and allow them sufficient time to do so before they provide a guarantee.
- 8.6. A lender should always **require legal advice** where the guarantor's own home will be available as security under a mortgage to the lender for lending to a borrower, except where the guarantor is effectively the same party as the borrower (such as where the guarantor is a trust, and the borrower(s) are individual(s) who are also trustee(s) of the trust).
- 8.7. A lender should always **require independent legal advice** where it has reason to believe that a guarantor may be under undue influence from any other party, including another guarantor, borrower, or any third party who will receive the direct benefit of any money lent. The lender should require that the independent legal advice be sought from a lawyer that is not also advising the borrower, another guarantor or any third party who may be exerting undue influence over the borrower.
- 8.8. A lender should inform the guarantor whether or not the guarantor will be informed of repayment difficulties with the loan, and if so, the point at which they will be informed.

Means and level of communication

- 8.9. A lender should highlight the key features identified at 8.1 to the guarantor in a way that draws the information to the attention of the guarantor and assists them to reach an informed decision, regardless of the channel through which credit is provided.

Example

One way a lender may highlight some of the above information is by providing a link to a video explaining the implications of giving a guarantee.

- 8.10. The level of explanation and assistance provided when informing the borrower of the key features will differ depending on a number of factors. Greater or further assistance should be provided when informing the guarantor of the key features for:
- a guarantee where the consequences for the guarantor of not being able to make payment when the guarantee is called on are serious, such as potential loss of a significant asset of the guarantor:
 - a guarantee where the size of the loan is large relative to the guarantor's ability to repay:

- c. a guarantor with characteristics that may make them vulnerable, such as a guarantor for whom English is a second language or who appears to lack a basic understanding of financial matters:
 - d. a guarantor who does not appear to have understood the information being provided.
- 8.11. The lender may not need to provide the same level of assistance when informing the guarantor of the key features for:
- a. a guarantor who is a professional trustee whose liability is limited to the assets of a trust;
 - b. a guarantor who has previously had a relationship with the lender and has given a similar guarantee before;
 - c. a guarantor who will receive legal advice before entering into the agreement;
 - d. a guarantor who is an experienced user of credit.
- 8.12. The lender can make a judgment as to the level of assistance provided to the borrower when informing the borrower of the key features and the extent of any additional assistance provided to the borrower (referred to below), based on the factors set out at 8.10 and 8.11. However, the lender should be able to demonstrate that the level of assistance provided was sufficient to assist the guarantor to reach an informed decision and to be reasonably aware of the full implications of giving a guarantee.
- 8.13. A lender should also apply the Guidance set out in paragraphs 7.10 to 7.15 to guarantors, as if the references in those paragraphs to “borrowers” were references to “guarantors”.
- 8.14. The lender should ensure that it gives a guarantor the opportunity to ask questions of the lender without the borrower present.

Plain language guarantee

- 8.15. The lender should, in drafting the terms of the guarantee, apply the Guidance on how to provide information in a clear, concise, and intelligible manner set out in 7.17 to 7.20.

8. Questions for submitters

- 8.1. Please provide any comments you may have on the guidance provided in this chapter, including any suggested revisions or additions.
 - 8.2. In your view, will this guidance: (1) protect the interests of guarantors; (2) promote the confident and informed participation in credit markets by guarantors; and (3) promote and facilitate fair, efficient, and transparent credit markets? Please provide reasons as to how it may or may not do this.
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- 8.3. Does the guidance in this area provide sufficient certainty for lenders as to how to comply with the relevant principles and responsibilities? Please provide any comments you may have on whether the guidance (and which aspects) should be more prescriptive, or more flexible, and the reasons for that.
- 8.4. For lenders, please provide an estimate of cost (both one-off costs and ongoing costs), over and above costs you incur for assisting guarantor's to make informed decisions today:
- a. that you may incur if you had to comply with the relevant principles and responsibilities without any guidance in these areas;
 - b. that you may incur if you comply with the guidance in this chapter.

Communication of information

- 8.5. Please provide any comments you may have on the guidance in paragraphs 8.5 - 8.7 about when a lender should recommend that guarantors seek legal or consumer information advice, when they should require legal advice, and when they should require independent legal advice.
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9. Credit-related insurance and repayment waivers¹⁵

Principle

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).

Lender responsibilities

A lender must, in relation to a relevant insurance contract,

- (a) make reasonable inquiries, before the contract is entered into so as to be satisfied that it is likely that:

 - (i) the insurance provided under the contract will meet the borrower’s requirements and objectives; and*
 - (ii) the borrower will make the payments under the contract without suffering substantial hardship. (see s 9C(5)(a) of the Act).**
- (b) assist the borrower to reach an informed decision as to whether or not to enter into the contract and to be reasonably aware of the full implications of entering into the contract, including by ensuring that—

 - (i) any advertising distributed by the lender is not, or is not likely to be, misleading, deceptive, or confusing to borrowers; and*
 - (ii) any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing (see s 9C(5)(b) of the Act).**

Commentary

Relevant insurance contracts

The above lender responsibilities apply to “relevant insurance contracts”, which are credit-related insurance contracts entered into, or to be entered into, by a borrower if:

- the borrower has also entered into, or is seeking to enter into, a credit agreement with the lender; and
- the insurance is arranged by the lender (see section 9B(1)).

The circumstances in which insurance is “arranged” by the lender are set out in section 9B(2) of the Act which is set out in full in the **Appendix**, along with the definition of “credit-related insurance” and “consumer credit-insurance”.

Note that a lender can in some circumstances require borrowers to take out credit-related insurance – for instance to protect a secured asset. However, section 69 of the Act provides that a lender must not make any unreasonable requirement as to the terms on which the borrower is to take out or obtain credit-related insurance. Section 69 provides that a requirement is unreasonable if it is not reasonably necessary for the protection of the legitimate interests of the lender or is not reasonably justifiable in light of the risks undertaken by the parties to the arrangement.

¹⁵ The Guidance set out in this section is issued under subsections 9F(1)(b)(ii) and (iii), and (e) of the Act.

Repayment waivers

A repayment waiver is an agreement between a lender and a borrower under which the lender, for an additional consideration, agrees to waive the lender's right to any amount payable under the credit contract in the event of the unemployment of, sickness of, injury to, or the disability or death of the borrower. The substance of a repayment waiver is the same as consumer-credit insurance from the borrower's point of view and should therefore be treated in the same way as consumer-credit insurance. Section 9B(4) of the Act provides for this as it states that *"if an agreement involves a repayment waiver [...], the repayment waiver [...] is to be treated as forming part of the [credit] agreement for the purposes of this Part [relating to the lender responsibilities]"*.

Guidance

Repayments waivers

- 9.1. The practices and processes set out below in relation to entering into a credit related insurance agreement should also be followed by lenders in relation to repayment waivers, in order to comply with the lender responsibilities set out in sections 9C(3)(a) and 9C(3)(b) of the Act.

Borrower's requirements and objectives

- 9.2. In assessing whether it is likely that the borrower's requirements and objectives will be met by the relevant insurance contract, a lender should inquire into and consider the following matters, where relevant:
- a. The risks that the borrower wishes to obtain cover against (or where the lender requires the borrower to obtain cover (subject to section 69 of the Act), the risks which the lender is seeking cover against):
 - b. If relevant, the length of time that the borrower wishes to obtain cover for (or where the lender requires the borrower to obtain cover (subject to section 69 of the Act), the lender should consider the length of time which the lender is seeking cover against). For consumer credit insurance or a repayment waiver this should usually match any term of the credit agreement unless the borrower has a reason for seeking cover for a different length of time:
 - c. For asset protection insurance, whether the borrower has existing cover which may protect against some or all of the risks that the borrower is seeking cover for such as general contents or other insurance or whether the insurance is intended to cover any potential shortfall in that existing insurance:
 - d. For consumer credit insurance, whether the borrower's employment status may make them ineligible to claim most of the benefits under the proposed policy:
 - e. Whether the premium (including interest where the premium is financed under the credit agreement) for any policy is excessive in comparison to the amount of the credit advanced or available.
- 9.3. Where a borrower already has insurance cover, the lender is entitled to rely on the information provided by the borrower in respect of that cover. The lender is not

expected to review the terms of borrowers' existing insurance policies to establish whether they already provide some or all of the protection sought by the borrower. However, the lender should provide the borrower with an opportunity to check or seek advice on the borrower's existing insurance policies.

- 9.4. After making the inquiries in 9.2, a lender should have regard to the information they have received in order to satisfy themselves that it is likely that the insurance will meet the borrower's requirements and objectives.
- 9.5. For **high-cost short-term credit agreements**, a lender should consider whether the short time period and likely low value of any cover relative to the cost of the premium means the insurance may be unlikely to meet the borrower's requirements and objectives.

Example

Borrower A is currently unemployed. The consumer credit insurance contract that lender B can arrange provides cover primarily for loss of employment. That may be an indication (without other relevant factors, such as that the borrower will shortly be starting a new job) that the consumer credit insurance is unlikely to meet the borrower's requirements and objectives.

Example

Where a loan is for \$500 to be repaid over 2 weeks, the period and value of the insurance cover may be unlikely to meet the borrower's requirements and objectives as the cover may be too low and too short to be useful to the borrower given the low likelihood or amount of a claim during the short period of the loan.

Guidance

Substantial hardship

- 9.6. When financing the premium for a relevant insurance contract in the credit agreement, the lender should factor in the amount of the premium into the repayments in its assessment under section 5 of this Code on whether it is likely that the borrower will make the payments under the agreement without suffering substantial hardship.
- 9.7. When the premium for a relevant insurance contract is not financed in the credit agreement, the lender should include the amount of the premiums as part of the borrower's expenditure in assessing whether it is likely that the borrower will make the payments under the agreement without substantial hardship under section 5 of this Code.

Assisting informed decisions

- 9.8. A lender should not mislead borrowers about whether borrowers have a **choice** as to whether to enter into a relevant insurance contract and from which providers. In particular:

- a. unless the lender requires the borrower to obtain credit-related insurance (in compliance with section 69 of the Act), a lender should explain that credit-related insurance is optional; and
- b. unless the lender requires the borrower to obtain credit-related insurance from a particular insurer or insurers (in compliance with section 69 of the Act) or an insurance policy is the only one that effectively relates to the credit agreement, a lender should not represent to the borrower that they cannot obtain insurance from other providers.

Communicating key features

- 9.9. A lender should apply the Guidance set out at 9.10 to 9.16 to all relevant insurance contracts, unless the relevant insurance contract is one that is financed by the lender but which is arranged independently by the borrower through an insurer that does not have a relationship with the lender.
- 9.10. Before a borrower makes a decision as to whether or not to enter into a relevant insurance contract, a lender should inform the borrower of the key features of the contract, by clearly highlighting those features in a way that draws the borrower's attention to that information, or by requiring the insurer to do so, and at a time that assists the borrower to make an informed decision. At a minimum, those key features should include:
- a. the amount of the premium, or the method by which the premium will be calculated; and
 - b. where the premium is funded by the loan, the amount of interest payable, or the method by which the interest will be calculated; and
 - c. the cover provided (including the risks insured against and the amount of the cover); and
 - d. the key exclusions from cover; and
 - e. the duration of the cover, if the period of cover is limited; and
 - f. any cooling-off period.
- 9.11. A lender should respond promptly to borrowers' requests for further information about the key features of the contract. Where a lender allows borrowers to arrange credit and the relevant insurance contract online or remotely, the lender should ensure borrowers are provided with a simple, clear and timely way to seek further information from the lender.
- 9.12. A lender should highlight the key features identified at 9.2 to the borrower in a way that draws the information to the attention of the borrower, regardless of the channel through which credit is provided.
- 9.13. The level of explanation and assistance provided by the lender (or insurer) when informing the borrower of the key features of the contract will differ depending on a

number of factors. Greater or further assistance should be provided when informing the borrower of the key features for:

- a. a borrower who would be a new customer of the lender;
- b. a borrower with characteristics that may make them vulnerable, such as a borrower for whom English is a second language or who appears to lack a basic understanding of financial information;
- c. a borrower who does not appear to have understood the information being provided.

- 9.14. The lender may not need to provide the same level of assistance when informing the borrower of the key features for an existing customer of the lender who has had the same or similar insurance contract before.
- 9.15. The lender can make a judgment as to the level of assistance provided to the borrower and the extent of any additional assistance provided based on the factors set out at 9.13 and 9.14. However, the lender should be able to demonstrate that the level of information provided, together with any further assistance referred to below, was sufficient to assist the borrower to reach an informed decision and to be reasonably aware of the full implications of entering into the contract.
- 9.16. There are circumstances where a lender has a limited ability to ascertain whether the borrower appears to understand the information provided; for instance, where the credit application is undertaken online or by postal mail without any oral interaction between the lender and the borrower. The lender should ensure that the information is presented in a way that a person with no experience in insurance of that type can readily understand.
- 9.17. A lender should also follow the guidance at 7.12 to 7.15 in relation to:
- a. giving borrowers a sufficient opportunity to consider the terms of the relevant insurance contract; and
 - b. dealings with borrowers who do not appear to have a good understanding of English or who do not appear to have understood the explanations provided.

Advertising

- 9.18. A lender should ensure that advertising or marketing material promoting credit-related insurance distributed by the lender is —
- a. developed in conjunction with the insurer; or
 - b. based on guidance from the insurer; or
 - c. checked by the insurer to ensure that the description of the insurance product is accurate.

- 9.19. If the lender uses advertising material supplied to the lender by the insurer, the lender should require that the advertising material complies with all legal obligations. The lender should also apply the general advertising Guidance at section 3.

9. Questions for submitters

- 9.1. Please provide any comments you may have on the guidance provided in this chapter, including any suggested revisions or additions.
- 9.2. In your view, will this guidance: (1) protect the interests of consumers; (2) promote the confident and informed participation in credit markets by consumers; and (3) promote and facilitate fair, efficient, and transparent credit markets? Please provide reasons as to how it may or may not do this.
- 9.3. Does the guidance in this area provide sufficient certainty for lenders as to how to comply with the relevant principles and responsibilities? Please provide any comments you may have on whether the guidance (and which aspects) should be more prescriptive, or more flexible, and the reasons for that.
- 9.4. For lenders, please provide an estimate of cost (both one-off costs and ongoing costs), over and above costs you incur for credit-related insurance and repayment waivers today:
- a. that you may incur if you had to comply with the relevant principles and responsibilities without any guidance in these areas;
 - b. that you may incur if you comply with the guidance in this chapter.

Communicating key features

- 9.5. Do the key features of a credit-related insurance agreement listed at 9.9 capture the main information borrowers require to make an informed decision as to whether to purchase credit-related insurance? Should the Code provide further guidance on which “key exclusions” borrowers should be informed of? If so, how?
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10. Fees¹⁶

Principle

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).

Lender responsibility

A lender must, in relation to an agreement, meet all the lender's legal obligations to the borrower, including under this Act... which include obligations in relation to... credit fees (see s 9C(3)(f) of the Act).

Commentary

The lender responsibilities require lenders to meet all legal obligations to the borrower and section 9F(1)(b)(vii) of the Act provides that the Code may set out the processes, practices, or procedures that a lender should follow to ensure that fees are not unreasonable in terms of section 41, 80 or 82.

The processes and practices that a lender should follow to ensure that fees under consumer credit contracts are not unreasonable were the subject of the recent High Court judgment in *Commerce Commission v Sportzone/MTF* [2013] NZHC 2531. The case has been appealed to the Court of Appeal and a judgment is not expected to be delivered until 2015. As the final outcome of the *Sportzone* case is yet to be decided, this Code does not address the matters at the centre of the *Sportzone* case. Once the application of the law in the *Sportzone* case has been settled, this section of the Code will be reviewed to consider what changes are necessary to reflect the outcome of that case. A lender should in the meantime refer to the judgment in *Sportzone* for current case law interpreting the relevant provisions together with the Commerce Commission's draft guidelines for credit fees.

Note that while some of the relevant provisions have been amended by the Credit Contracts and Consumer Finance Amendment Act 2014, the *Sportzone* case remains relevant as some of the legislative wording in relation to the costs which lenders can recover through fees remains unchanged.

Establishment fees are defined as fees or charges that relate to the costs incurred by the creditor in connection with the application for credit, processing and considering that application, documenting the contract, and advancing the credit; but does not include any fee or charge to the extent that it is a charge for an optional service. The relevant legislative provisions (see section 42 of the Act) provide that in determining whether an establishment fee is unreasonable, the Court must have regard to whether the amount of the fee is equal to or less than the creditor's reasonable costs (or average reasonable costs for the class of consumer credit contract) in connection with the application for credit, processing and considering that application, documenting the contract, and advancing the credit.

¹⁶ The Guidance set out in this section is issued under subsections 9F(1)(b)(vii), and (e) of the Act

Prepayment fees are defined as fees that relates only to prepayment in part or in full in respect of a fixed-rate contract and only for that part of the creditor's loss that arises from the prepayment as a result of differences in interest rates. The legislation (*see* section 43 of the Act) provides that a prepayment fee is unreasonable if, and only if, it exceeds a reasonable estimate of the creditor's loss arising from the part or full repayment. Section 54 of the Act provides that a fee payable for full prepayment must be calculated in accordance with the procedure provided in the regulation or through an appropriate procedure set out in the consumer credit contract. Lenders may also impose a credit fee relating to administrative costs associated with prepayment, which is subject to the credit fees provisions in section 44 of the Act.

Credit fees are defined as fees or charges payable by the debtor under a credit contract, or payable by the debtor to, or for the benefit of, the creditor in connection with a credit contract. In determining whether a credit fee (other than establishment fees and prepayment fees) is unreasonable, the legislation (*see* section 44 of the Act) provides that the Court must have regard to, in relation to the matter giving rise to the fee, whether the fee reasonably compensates the creditor for any cost incurred by the creditor. This includes the cost of providing a service to the borrower if the fee relates to the provision of a service. In determining whether the fee reasonably compensates the creditor for that cost or the provision of that service, the Court must have regard to reasonable standards of commercial practice.

Default fees are fees or charges payable on a breach of a credit contract by a debtor or on the enforcement of a credit contract by a creditor; but does not include default interest charges. For default fees, the legislation (*see* section 44A of the Act) provides that the Court must have regard to, in relation to the matter giving rise to the fee, whether the fee reasonably compensates the creditor for any cost incurred by the creditor and for a reasonable estimate of any loss incurred by the creditor as a result of the borrower's acts or omissions. In determining whether the fee reasonably compensates the creditor for that cost or loss, the court must have regard to reasonable standards of commercial practice.

For **buy-back transactions** of land, the legislation (*see* section 80(1) of the Act) provides that a buy-back transaction must not provide for a buy-back fee or buy-back default fee that is unreasonable.

Guidance

Establishment fees

10.1. In setting an **establishment fee**, a lender should -

- a. Assess the reasonable costs likely to be incurred by the lender in connection with the application for credit, processing and considering that application, documenting the contract, and advancing the credit. The assessment should take into account past experience in relation to the reasonable costs incurred for those activities for that class of consumer credit contracts but apply that experience on a forward looking basis to assess the reasonable costs that are likely to be incurred in the future:
- b. Ensure that establishment fees only seek to recover those likely reasonable costs.

Prepayment fees

10.2. In setting a **prepayment fee**, a lender should:

- a. use the formula set out in regulations 8 to 11 of the Credit Contracts and Consumer Finance Regulations 2004 to calculate fees; or
- b. estimate losses likely to occur in the event of prepayment where such losses result from differences in interest rates and ensure that any procedure it uses to calculate prepayment fees only seeks to recover those estimated losses.

Credit fees

10.3. In setting a credit fee (**other than an establishment fee or prepayment fee**), a lender should:

- a. assess the costs likely to be incurred in relation to the matter giving rise to the fee. The assessment should take into account past experience in relation to the costs incurred for those activities for the same or similar credit products but apply that experience on a forward looking basis to assess costs that are likely to be incurred in the future:
- b. ensure that the credit fee only seeks to compensate the lender for those likely costs:
- c. have regard to any reasonable standards of commercial practice in relation to whether a proposed credit fee “reasonably compensates” the lender for the costs incurred. A lender should note that a common commercial practice is not necessarily a reasonable standard of commercial practice:
 - i. If the proposed fees are materially higher than similar fees charged by lenders of a similar size with a similar lending profile, the lender should inquire further into whether its proposed fees over-compensate for costs incurred or whether some of the costs are not costs which the lender should reasonably be compensated for.
 - ii. The reasonable standard consideration should be subordinate to the principle that credit fees should only reasonably compensate the lender. Reasonable standards of commercial practice should not be used by lenders as a basis to increase its credit fees.

10.4. For those credit fees which are insurance premiums payable for credit-related insurance provided by the lender or an associated person of the lender, the lender may also recover the costs that reflect the risks insured against.

Default fees

10.5. In setting a **default fee**, a lender should:

- a. assess the losses likely to be incurred as a result of the borrower’s default. The losses must -
 - i. be caused by the borrower’s default; and
 - ii. not be too remote (i.e. the losses must have been caused directly by the borrower’s default); and

- b. take steps to mitigate those losses; and
 - c. assess costs likely to be incurred as a result of the borrower's default. The assessment should take into account past experience in relation to the costs incurred as a result of the borrower's default for the same or similar credit products but apply that experience on a forward looking basis to assess costs that are likely to be incurred in the future.
- 10.6. The default fee should only seek to compensate the lender for the above costs and losses.
- 10.7. The lender should have regard to any reasonable standards of commercial practice in relation to whether a proposed default fee "reasonably compensates" the lender for the costs incurred. A lender should note that a common commercial practice is not necessarily a reasonable standard of commercial practice. Lenders should apply the following:
- a. If the proposed fees are materially higher than similar fees charged by lenders of a similar size with a similar lending profile, the lender should inquire further into whether its proposed fees over-compensate for costs and losses incurred or whether some of the costs or losses incurred are not costs which the lender should reasonably be compensated for.
 - b. The reasonable standard consideration should be subordinate to the principle that default fees should only reasonably compensate the lender. Reasonable standards of commercial practice should not be used by lenders as a basis to increase its default fees.

Buy-back fees

- 10.8. In setting buy-back fees and buy-back default fees, a lender should follow the Guidance in 10.3 to 10.7 in relation to credit fees and default fees.

Fees generally

- 10.9. In setting any of the above fees, lenders may average costs across a class of credit contracts.
- 10.10. A lender should consider reviewing fees to ensure they are not unreasonable:
- a. **prior to or as soon as practicable following any significant changes to the lender's costs** in providing the product due to changes to the product itself or to the way the lender provides that credit product or because of changes to the lender's business or cost structure; and
 - b. **as soon as practicable after** becoming aware that the lender generated a profit through fees in the previous financial year; and
 - c. **as soon as practicable following any relevant changes to case law** on what costs can be recovered through fees.
- 10.11. A lender should make and keep records of how they calculated the fees payable.

10. Questions for submitters

- 10.1. Please provide any comments you may have on the guidance provided in this chapter, including any suggested revisions or additions.
- 10.2. In your view, will this guidance: (1) protect the interests of consumers; (2) promote the confident and informed participation in credit markets by consumers; and (3) promote and facilitate fair, efficient, and transparent credit markets? Please provide reasons as to how it may or may not do this.
- 10.3. Does the guidance in this area provide sufficient certainty for lenders as to how to comply with the relevant principles and responsibilities? Please provide any comments you may have on whether the guidance (and which aspects) should be more prescriptive, or more flexible, and the reasons for that.
- 10.4. For lenders, please provide an estimate of cost (both one-off costs and ongoing costs), over and above costs you incur for setting fees today:
- a. that you would incur for compliance with the unreasonable fees provisions as amended;
 - b. that you may incur if you comply with the guidance in this chapter.

Reasonable standards of commercial practice

- 10.5. Do you agree with the guidance in relation to how lenders should have regard to reasonable standards of commercial practice when setting credit fees and default fees?
-

11. Subsequent dealings¹⁷

Principle

Every lender must, at all times, exercise the care, diligence, and skill of a responsible lender

[...]

- (i) in all subsequent dealings with a borrower in relation to an agreement or a guarantor in relation to a relevant guarantee (see s 9C(2)(iii) of the Act).*

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).

Lender responsibilities

A lender must, in relation to an agreement with a borrower, assist the borrower to reach informed decisions in all subsequent dealings in relation to the agreement, including by ensuring that—

- (i) any variation to the agreement is expressed in plain language in a clear, concise, and intelligible manner; and*
- (ii) any information provided by the lender to the borrower after the agreement has been entered into is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing. (see s 9C(3)(c) of the Act)*

Guidance

Information provided

11.1. To ensure that any information provided after the agreement has been entered into is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing, a lender should follow the Guidance in 7.20-7.23 in relation to all information provided to borrowers in relation to the agreement, throughout the life of the agreement.

General communications subsequent to entering into the agreement

11.2. A lender should make certain information generally accessible (including on its website, at its premises, or by providing it promptly on request) throughout the life of the agreement. That information should include:

- a. what to do if the borrower changes address; and
- b. details of the lender's internal complaints processes; and
- c. details of the lender's dispute resolution schemes; and
- d. information about the availability of relief for unforeseen hardship, and application processes for seeking changes to the credit agreement on the grounds of unforeseen hardship; and
- e. the consequences of default, including, if relevant, repossession.

¹⁷ The Guidance set out in this section is issued under subsections 9F(1)(b)(iii) and (e) of the Act.

- 11.3. A lender should be generally available for contact by borrowers. In particular, a lender should:
- a. ensure that borrowers can access up-to-date information about the lender's contact details and the hours during which the lender is generally available for contact (if they differ from normal business hours); and
 - b. acknowledge and respond to queries from borrowers within a reasonable time.
- 11.4. A lender should contact the borrower where relevant, including:
- a. to notify the borrower when it refunds any credit balance or uses that credit balance to repay another amount the borrower owes;
 - b. to notify a borrower when they are close to making their final repayment or as soon as practicably possible after the loan has been fully repaid to inform them that they can cancel any automatic payments or direct debits (or when they can do so). (Note that this Guidance does not apply to a credit agreement that is a revolving credit agreement or where the lender themselves will cancel automatic payments or direct debits); and
 - c. to provide information in relation to the borrower's rights and potential consequences in relation to default (see 12.2 to 12.7); and
 - d. to remind a borrower that wishes to prepay an agreement if they are required to pay a prepayment fee or prepayment administration fee; and
 - e. to remind a borrower of the borrower's right to use the lender's internal complaints process, and use the lender's external dispute resolution scheme if they have concerns about how the lender is dealing with the borrower.
- 11.5. A lender should follow the Guidance set out at 2.6 to 2.7 in relation to the appropriate method of contacting the borrower.

Variations

- 11.6. A lender should not increase a borrower's credit limits without the borrower's consent.
- 11.7. A lender should apply the following Guidance to variations to be agreed between a lender and a borrower under which the lender will advance further credit to the borrower or increase the borrower's credit limit.
- 11.8. Before agreeing to a variation referred to at 11.7 above, a responsible lender exercising care, diligence, and skill should consider whether the lender's assessment before the beginning of the agreement that it is likely the borrower can make the payments under the agreement without substantial hardship, will remain the case under the agreement (as varied).

Commentary

Informed decisions

Lenders must comply with both the variation disclosure requirements of the Act and the lender responsibility to assist informed decisions.

Guidance

Informed decisions

- 11.9. A lender should apply the following Guidance in relation to variations which are agreed between the lender and borrower (as opposed to variations made by the lender exercising a power under the agreement).
- 11.10. To comply with the lender responsibility to assist informed decisions in all subsequent dealings, a lender should, before a borrower makes a decision as to whether or not to enter into a variation to an agreement that is to be agreed between the lender and the borrower:
- a. inform the borrower of the details of the proposed variation; and
 - b. make it clear that the borrower is not under an obligation to agree to the variation; and
 - c. clearly inform the borrower of any changes to the key features referred to at paragraph 7.2; and
 - d. where relevant, inform the borrower if they may have more to repay over the term of the agreement, including more interest; and
 - e. respond promptly to any borrower requests for further information.
- 11.11. A lender should also follow the Guidance set out at 7.6 to 7.16. In relation to paragraphs 7.6-7.9, the lender may not need to provide the same level of assistance for simple variations that do not affect the key features of the agreement.

Example

Borrower A wants to top up their home loan by \$100,000 to help them pay for some renovations. The top up can be done by the lender as a variation to their current home loan. The lender should highlight to Borrower A that the change will increase the amount of each repayment and the total amount the customer needs to repay, including the total interest over the remaining loan term and give the borrower a projected figure for each of these amounts with a note on the assumptions underlying those figures.

Example

Lender A offers to increase an existing borrower's credit card limit from \$5000 to \$10,000. Lender A should highlight to the borrower that accepting the higher limit is voluntary, and that if they use all of the new credit limit they'll have more to repay, including more interest.

Plain language variation

- 11.12. A lender should follow the Guidance set out at 7.17 to 7.19 to ensure that any variation to the agreement is expressed in plain language in a clear, concise and intelligible manner.

11. Questions for submitters

- 11.1. Please provide any comments you may have on the guidance provided in this chapter, including any suggested revisions or additions.
- 11.2. In your view, will this guidance: (1) protect the interests of consumers; (2) promote the confident and informed participation in credit markets by consumers; and (3) promote and facilitate fair, efficient, and transparent credit markets? Please provide reasons as to how it may or may not do this.
- 11.3. Does the guidance in this area provide sufficient certainty for lenders as to how to comply with the relevant principles and responsibilities? Please provide any comments you may have on whether the guidance (and which aspects) should be more prescriptive, or more flexible, and the reasons for that.
- 11.4. For lenders, please provide an estimate of cost (both one-off costs and ongoing costs), over and above costs you incur for working with borrowers during the contract today:
- a. that you may incur if you had to comply with the relevant principles and responsibilities without any guidance in these areas;
 - b. that you may incur if you comply with the guidance in this chapter.
-

12. Default and other problems¹⁸

Principle

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).

Lender responsibilities

A lender must, in relation to an agreement with a borrower, treat the borrower, and their property (or property in their possession), reasonably and in an ethical manner, including--

- (i) when breaches of the agreement have occurred or may occur or when other problems arise; and*
- (ii) when a debtor under a consumer credit contract suffers unforeseen hardship (see s 9C(3)(d)(i) and (ii) of the Act).*

A lender must, in relation to a relevant guarantee that is taken by the lender, treat the guarantor reasonably and in an ethical manner, including when breaches of a credit contract to which the guarantee applies have occurred or may occur or when other problems arise.

Guidance

Specific practices

12.1. A lender should not:

- a. hold multiple direct debit forms signed by the borrower and lodge another form without the borrower's consent if the borrower cancels one:
- b. tell or imply to the borrower that the borrower cannot cancel a direct debit:
- c. continue to receive money from the borrower by direct debit after the lender should have reasonably realised that the borrower is still making payments on a loan that has been fully paid. A lender should put in place systems that identify when a borrower makes payments on accounts that have been fully paid:
- d. let a borrower exceed their credit limit and charge a fee when this occurs without first telling the borrower that they may be able to exceed the limit:
- e. take a new guarantee or vary an existing guarantee after a borrower has defaulted under a credit agreement without informing the guarantor that the guarantee or variation is necessary because of the default:
- f. hold a borrower's or guarantor's passports, ATM cards, driver's licences or other critical personal documents.

¹⁸ The Guidance set out in this section is issued under subsections 9F(1)(b)(iv) and (e) of the Act.

Commentary

Repayment Difficulties

A lender is entitled to exercise its rights to ensure that the borrower repays the loan, including exercising its right to the security given by the borrower or guarantor. However, the lender should exercise its rights against the borrower or guarantor, or both, reasonably and in an ethical manner.

A lender must comply with its obligations in the Act in respect of unforeseen hardship applications.

Lenders must also comply with requirements of the Act which provide that a lender cannot take repossession enforcement action while in the process of deciding on an unforeseen hardship application.

Guidance

Informing the borrower

- 12.2. A lender should implement and have documented policies which set out when and how it contacts borrowers if the borrower misses repayments and how it manages the loans of borrowers who notify the lender that they are having, or are likely to have, difficulties repaying the loan. The policies should provide for the lender to:
- a. notify the borrower of the missed payment(s):
 - b. inform the borrower of the risk of escalating debt as a result of missed payments, and any additional interest or charges:
 - c. find out the reason for the missed payment(s):
 - d. remind the borrower of the borrower's right, if relevant:
 - i. to seek changes to the credit agreement on grounds of unforeseen hardship; and
 - ii. to make a claim under a consumer credit insurance policy or repayment waiver:
 - e. remind the borrower of the borrower's ability to obtain legal advice, consumer information advice, or advice from free and independent budgeting services.
- 12.3. However, despite anything in a lender's policy, for **high-cost short-term** credit agreements, a lender should always contact the borrower after one missed payment to notify the borrower of the missed payment and the risk of escalating debt (This can be done by text message where the borrower has agreed to that method of contact). If the borrower misses further repayments, the lender should contact the borrower again to discuss the other matters set out above.
- 12.4. A lender should make genuine attempts to work with the borrower to prevent the effects of a default from escalating.

- 12.5. When a borrower is facing repayment difficulties, a lender should take into account the borrower's preferred means of repaying the debt. (In some cases the borrower may prefer that the lender realise any gain from selling the loan security before taking further steps, and the lender should do so if that is commercially reasonable).
- 12.6. A lender should follow the Guidance set out at 2.6-2.8 (as well as the Guidance in 12.3 above) in relation to the appropriate method of contacting the borrower when the borrower defaults.
- 12.7. If the lender holds an assignment of wages and intends to forward this to the borrower's employer to obtain repayment of a loan, the lender should inform the borrower of its intent to contact the employer to give the borrower an opportunity to explain the situation to their employer.

Example

Borrower H calls their lender (Lender G) to tell them that they have unexpectedly lost their job and are struggling to meet their home loan repayments. Lender G reminds them that they can apply for changes to the credit agreement on grounds of unforeseen hardship and what information the lender will need. Lender G also recommends that the borrower speak with a local budget advisor who may be able to help them budget for their reduced income.

Example

Borrower I with a car loan calls their lender (Lender J) to tell them they are in financial difficulties and have no way of repaying their loan. Borrower I tells Lender J that they have found someone who is willing to buy their car for an amount that is sufficient to repay the car loan in full. Lender J concludes that the assets are not currently at risk and there is only a low risk that the proceeds of sale will not be paid to the lender. Lender J then decides to allow Borrower I to voluntarily sell the car themselves.

Communications as issues escalate

- 12.8. A lender should encourage early, open, and honest communication when a borrower is experiencing financial difficulties. However, a lender should only contact the borrower to the extent necessary and not for the purpose of harassing or embarrassing the borrower.

Example

A lender publicly shames borrowers into payment by publishing their photo in local newspapers. This may be an indication that the lender is not treating the borrower reasonably and in an ethical manner.

- 12.9. A lender should follow the Guidance set out in 2.6-2.8 in relation to the appropriate method of contacting the borrower when issues escalate.

Consideration of proposed repayment plans

- 12.10. When a borrower is preparing an unforeseen hardship application, a lender should:
 - a. inform the borrower of the lender's process for assessing the hardship application; and

- b. tell the borrower there are free and independent budgeting services that may be able to help them develop a repayment plan; and
 - c. consider suspending the active pursuit of recovery of a debt for a reasonable period where the borrower, or someone acting on their behalf, is developing a reasonable repayment plan.
- 12.11. When a lender is considering a proposed repayment plan as part of an unforeseen hardship application, the lender should have regard to:
- a. the likely duration of the unforeseen hardship and what steps, if any, the borrower is taking to address it; and
 - b. the borrower's credit history and any of the other matters relevant to an assessment of whether the borrower can make repayments without substantial hardship; and
 - c. whether the repayment plan will allow the borrower to meet its obligations during the period of unforeseen hardship and over the remaining life of the credit agreement; and
 - d. whether the repayment plan would fail to enable the borrower to meet their obligations during the period of unforeseen hardship, would unnecessarily prolong the period of difficulty, or would be likely to result in the borrower experiencing financial difficulties over the remaining life of the credit agreement.
- 12.12. A lender should not decline unforeseen hardship applications for technical or spurious reasons.
- 12.13. Where a borrower does not meet the criteria for unforeseen hardship in the Act but is willing to work through repayment difficulties to find a way to meet their obligations under the agreement, a lender should consider:
- a. agreeing to a repayment plan:
 - b. accepting reduced payments for a reasonable period of time in order to allow a borrower to recover from the repayment difficulty, if the borrower can demonstrate that meeting their existing debts would mean not being able to meet their essential living expenses:
 - c. suspending, reducing, waiving, or cancelling any further default interest or default fees.
- 12.14. In considering the above, the lender should take into account:
- a. the likely duration of the borrower's financial difficulties and what steps, if any, the borrower is taking to address them:
 - b. the borrower's credit history and any of the other matters relevant under an assessment of whether the borrower can make repayments without substantial hardship:

- c. whether a repayment plan will allow the borrower to meet their obligations during the period of financial difficulties and over the remaining life of the credit agreement:
- d. whether a repayment plan would still fail to enable the borrower to meet their obligations during the period of financial difficulties, would unnecessarily prolong the period of difficulty, or would likely result in the borrower experiencing other financial difficulties over the remaining life of the credit agreement.

Lenders exercising enforcement rights

12.15. Where the lender has attempted to work with the borrower to meet their obligations, but is at the point of exercising its enforcement rights:

- a. the lender’s decision about which enforcement response to take should be based on what the lender considers to be the most effective way of obtaining repayment of the loan:
- b. the lender may take into account whether a particular enforcement response is necessary to prevent the borrower obtaining more credit (and thus more debt) elsewhere, such as by bankrupting a borrower:
- c. the lender should not take an enforcement response simply for the purpose of punishing the borrower for the borrower’s default.

12.16. A lender should:

- a. require that debt collection agents it uses will comply with relevant legal obligations, including those under the Act; and
- b. be satisfied that the debt collection agency has processes to ensure that its staff understand and have agreed to comply with their legal obligations and act in accordance with the terms of the agreement between the lender and borrower.

Resolution of complaints

12.17. A lender should have a documented internal complaints process that is straightforward for borrowers and guarantors to follow and use. The complaints process should describe how complaints can be made, how they will be dealt with and by whom (if by a specific team or person), and the timeframes for dealing with complaints.

12.18. The internal complaints process should be consistent with any requirements of the lenders’ external dispute resolution schemes.

12. Questions for submitters

12.1. Please provide any comments you may have on the guidance provided in this chapter, including any suggested revisions or additions.

12.2. In your view, will this guidance: (1) protect the interests of consumers; (2) promote the confident and informed participation in credit markets by

consumers; and (3) promote and facilitate fair, efficient, and transparent credit markets? Please provide reasons as to how it may or may not do this.

12.3. Does the guidance in this area provide sufficient certainty for lenders as to how to comply with the relevant principles and responsibilities? Please provide any comments you may have on whether the guidance (and which aspects) should be more prescriptive, or more flexible, and the reasons for that.

12.4. For lenders, please provide an estimate of cost (both one-off costs and ongoing costs), over and above costs you incur in relation to dealing with default today:

- a. that you may incur if you had to comply with the relevant principles and responsibilities without any guidance in these areas;
 - b. that you may incur if you comply with the guidance in this chapter.
-

13. Repossession¹⁹

Principle

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).

Lender responsibilities

A lender must, in relation to an agreement with a borrower, treat the borrower and their property (or property in their possession) reasonably and in an ethical manner, including—

[...]

- (i) during a repossession process (including by taking all reasonable steps to ensure that goods and property are not damaged during the process, that repossessed goods are adequately stored and protected, and that the right to enter premises is not exercised in an unreasonable manner)(see s 9C(3)(d)(iii) of the Act).*

A lender must, in relation to an agreement with a borrower, meet all the lender's legal obligations to the borrower, including under this Act... which include obligations in relation to... credit repossession(see s 9C(3)(f)(i) of the Act).

A lender must, in relation to a relevant guarantee that is taken by the lender, treat the guarantor reasonably and in an ethical manner, including when breaches of a credit contract to which the guarantee applies have occurred or may occur or when other problems arise

Commentary

Part 3A of the Act regulates credit repossession. This section of the Code does not purport to give Guidance on how lenders can comply with all legal obligations set out in Part 3A and compliance with the Guidance in the Code is not evidence that lenders will be complying with Part 3A of the Act. The Guidance set out in this section of the Code aims to provide Guidance on processes, practices and procedures that a lender should have in place to facilitate compliance with the legal obligations in Part 3A.

Guidance

Decisions to repossess

- 13.1. To comply with the above lender responsibilities, a lender should ensure that a decision to repossess is reasonable. In particular:
- a. unless the secured goods are at risk (see below), a lender should consider all other less intrusive means of enforcing the agreement before starting repossession:
 - b. despite a. above, a lender should also consider agreeing to repossession where reasonably requested by the borrower.

¹⁹ The Guidance set out in this section is issued under subsections 9F(b)(iv), (vi), (d), and (e) of the Act.

Example

Borrower M who bought their TV on credit calls the lender (lender N) to tell them they are in financial difficulties and have no way of repaying their loan. Borrower M tells lender N it should repossess the TV. After discussions about Borrower M's specific circumstances and other options to repay the lending, Lender N discusses what steps it will now take, including repossessing the TV as preferred by Borrower M.

Example

Borrower O with a car loan calls the lender (lender P) to say they are in financial difficulties and have no way of repaying their loan. Borrower O tells lender P that they have found someone who is willing to buy their car for an amount that is sufficient to repay the car loan in full. Lender P concludes that the assets are not currently at risk and there is only a low risk that the proceeds of sale will not be paid to lender P. Lender P decides to allow Borrower O to voluntarily sell the car themselves.

- 13.2. A lender's decision to repossess should be based on the objective of obtaining repayment of the loan and should not be undertaken simply for the purpose of punishing the borrower where repossession would not be economic given the costs involved.

Example

Lender Q considers repossessing items (children's toys and old hand tools) which it has security over for debts owed by Borrower R. Lender Q decides that the likely sale value of the items is less than the likely cost of repossession and sale, and the items are of little or no economic value. In deciding not to repossess in that situation, Lender Q is acting responsibly.

- 13.3. A lender should not threaten repossession only for the purpose of intimidating borrowers into repayment where a decision to repossess would not be reasonable (as above). However, in the course of discussing the borrower's default, lenders may (and should) inform the borrower that repossession is one of the possible enforcement responses if the default is not remedied and that there may be costs incurred that the borrower will have to meet.

Commentary

Under new section 83E of the Act, repossession cannot take place unless the borrower is in default under the credit agreement or the goods are "at risk". The Act provides that goods are at risk if the lender believes, on reasonable grounds, that those goods have been, or will be, destroyed, damaged, endangered, disassembled, removed, concealed, sold, or otherwise disposed of contrary to the provisions of the relevant credit agreement.

Guidance

- 13.4. To comply with the lender responsibilities, lenders who rely on the "at risk" ground to repossess goods should make and retain a record of the reasonable grounds for their belief that goods were at risk.

13.5. The fact that:

- a. the borrower is in default under the agreement; or
- b. the borrower has changed address without notifying the lender; or
- c. insurance over the goods has lapsed,--

should not on its own give the lender reasonable grounds for a belief that the goods are at risk.

Use of repossession agents

13.6. To comply with the above lender responsibilities, a lender should require that the repossession agents and repossession employees who they engage, will comply with the credit repossession obligations set out in Part 3A of the Act and the Guidance in this Code in relation to repossession.

13.7. Before engaging repossession agents to carry out any repossessions, a lender should be satisfied that:

- a. the repossession agent holds a licence or certificate as required under the Private Security Personnel and Private Investigators Act 2010 (PSPPIA); and
- b. any individuals who carry out repossessions on behalf of the repossession agent hold a certificate of approval as a repossession employee as required under the PSPPIA; and
- c. the repossession agent has processes to ensure that its repossession employees understand and have agreed to comply with their obligations under Part 3A.

13.8. Before engaging any individual to carry out any repossessions, a lender should:

- a. be satisfied that the individual holds a certificate of approval as a repossession employee as required under the PSPPIA; and
- b. require the repossession employee understands and has agreed to comply with their obligations under Part 3A.

Commentary

During the repossession process

Under section 9C(d)(iii) and Part 3A of the Act:

- a borrower may voluntarily deliver goods identified in a repossession warning notice and the lender must specify a reasonable place to which the borrower may deliver the goods;
- a lender must, in exercising the right to enter premises, act in accordance with the lender responsibility principles;
- the lender responsibilities provide that the lender must take all reasonable steps to ensure that goods and property are not damaged during the repossession process and that repossessed goods are adequately stored and protected;

- the lender must take steps that are reasonably practicable to ensure that the premises are not left obviously open.

Guidance

During the repossession process

13.9. To comply with the lender responsibilities, a lender should specify the place that the borrower attended to obtain the loan as the place to which the borrower may deliver the goods during usual opening hours, unless:

- a. that place is impractical given the nature of the secured good, including due to space constraints; or
- b. the premises is operated by a party that has assigned the credit agreement to another party; or
- c. doing so would pose a safety risk to the lender's staff; or
- d. some other place is more convenient to both the borrower and the lender.

13.10. In undertaking repossession, lenders or their agents should:

- a. where practicable, carry out the repossession at a time when the borrower is at the premises to avoid exercising any right to enter by force when the borrower is not present:
- b. when exercising a right to enter premises by force, look over the property to consider a method of entry that would cause the least amount of damage and that would reasonably enable the premises to be left not obviously open:
- c. not use trickery or deception to gain access to a house or other premises, such as by misleading occupants into thinking that the repossession personnel are police officers or bailiffs:
- d. take all reasonable steps to protect the borrower's privacy by only disclosing information about the borrower to other occupants of the premises or other persons where necessary to undertake the repossession. Where the borrower is present, the lender or its agent should not disclose any information about the credit agreement and repossession to any other occupants that are present. Where the borrower is not present, the lender or its agent may disclose to an occupant the fact that they are exercising a right of repossession against the borrower:
- e. make and keep a record of any damage that occurs to secured goods or other property during the repossession:
- f. allow adequate time to take possession, dismantle, where necessary, and carefully store easily damaged items:
- g. use materials, tools, and containers (as necessary) for taking and carrying items that are fit for the purpose for which they are used:

- h. provide the borrower a reasonable opportunity to remove other items not covered by the security interest from inside the secured goods, such as children's car seats. Where the borrower is not present, the lender or its agent should:
 - i. where practical, take reasonable steps to remove such items: or
 - ii. alternatively, give a borrower a reasonable opportunity to uplift any such items from the lender following repossession.
- i. check to ensure that property to be repossessed are the goods secured under the agreement:
- j. use a transportation vehicle or mechanism that is appropriate for the secured goods and minimises the risk of damage or loss to the secured goods. through exposure to weather or by leaving them unsecured against theft.

13.11. A lender should not threaten, harass or use force against the borrower or other occupants.

Commentary

Post repossession and sale

Under Part 3A of the Act a lender must ensure that every aspect of the sale of repossessed goods is commercially reasonable and take reasonable care to obtain the best price reasonably obtainable for the goods as at the time of sale.

Guidance

Post repossession and sale

13.12. Following repossession, a lender should (and should ensure that their agents):

- a. release personal property securities from the Personal Property Securities Register where lenders have repossessed and sold all items subject to the registered security:
- b. take all reasonable steps to store and protect the secured goods so that they are not damaged or subject to loss, including taking steps to protect against the risk of damage by fire, theft, vandalism, or weather exposure:
- c. take reasonable care to obtain the best price reasonably obtainable for the goods as at the time of sale. This can be done through:
 - i. an auction or tender that is advertised in a way appropriate to the nature of the goods (for instance, by advertising addressed to persons most likely to have an interest in purchasing such goods or in media that such persons are likely to read); or
 - ii. a private sale where the lender is satisfied the price is the best price reasonably obtainable for those goods. One way in which the lender can be satisfied of this is where the price is consistent with an independent valuation

by a person with experience in the relevant goods or by reference to another independent benchmark:

Example

For common consumer items, sale by auction may be a suitable method for obtaining the best price.

For unique items of high value, a lender should consider obtaining a valuation or consulting a person with experience in relation to such items to determine an appropriate sale method.

Where available, lenders could, refer to price benchmarks; in the case of used vehicles, for second-hand cars listed on TradeMe, Autoselect, or in other motor trade publications.

- d. If a lender repossesses low-value goods that prove unsaleable after a reasonable period of time, it should make the goods available for collection by the borrower.

13. Questions for submitters

- 13.1. Please provide any comments you may have on the guidance provided in this chapter, including any suggested revisions or additions.
 - 13.2. In your view, will this guidance: (1) protect the interests of consumers; (2) promote the confident and informed participation in credit markets by consumers; and (3) promote and facilitate fair, efficient, and transparent credit markets? Please provide reasons as to how it may or may not do this.
 - 13.3. Does the guidance in this area provide sufficient certainty for lenders as to how to comply with the relevant principles and responsibilities? Please provide any comments you may have on whether the guidance (and which aspects) should be more prescriptive, or more flexible, and the reasons for that.
 - 13.4. For lenders, please provide an estimate of cost (both one-off costs and ongoing costs), over and above costs you incur in relation to repossession today:
 - a. that you may incur if you had to comply with the relevant principles and responsibilities without any guidance in these areas;
 - b. that you may incur if you comply with the guidance in this chapter.
-

14. Oppression²⁰

Principle

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).

Lender responsibilities

A lender must, in relation to an agreement with a borrower, ensure, in the case of an agreement to which Part 5 applies, that—

(i) the agreement is not oppressive:

(ii) the lender does not exercise a right or power conferred by the agreement in an oppressive manner:

(iii) the lender does not induce the borrower to enter into the agreement by oppressive means; (see s 9C(3)(e) of the Act).

A lender must ensure, in the case of a guarantee that is to be treated as forming part of a credit contract for the purposes of Part 5 under section 119, that—

(i) the guarantee is not oppressive:

(ii) the lender does not exercise a right or power conferred by the guarantee in an oppressive manner:

(iii) the lender does not induce the guarantor to give the guarantee by oppressive means; (see s 9C(4)(d) of the Act).

A lender must meet all the lender's legal obligations to the borrower including [...] prohibitions on unfair contract terms under the Fair Trading Act (see s 9C(3)(f) of the Act).

Commentary

The question of whether there has been oppression is highly dependent on the circumstances of the particular credit arrangement. What will be oppressive in relation to one borrower may not be oppressive in relation to another. A responsible lender will be alert to the risk that oppression may arise in any credit arrangement by taking into consideration the below Guidance.

The Guidance is based on the factors the courts have expressed as generally relevant to the determination of what constitutes oppression and the factors which the Court must have regard to as set out in the Act. The factors in the Act include whether the borrower or guarantor is reasonably able to protect their interests taking into account their particular characteristics (including their age or physical or mental condition). The Guidance does not limit the Court's ability to reopen a credit agreement on grounds of oppression under Part 5 of the Act.

²⁰ The Guidance set out in this section is issued under subsections 9F(1)(b)(v) and (e) of the Act.

Guidance

- 14.1. To comply with the lender responsibility to ensure that the lender does not induce the borrower to enter into the agreement or a guarantor to give a guarantee, by oppressive means, a lender should:
- a. ensure the lender applies the rest of the Guidance in this Code in relation to assisting borrowers and guarantors to make informed decisions:
 - b. not pressure borrowers or guarantors to enter into an agreement or give a guarantee immediately without allowing them time to consider the information and explanations of the agreement or guarantee provided by the lender:
 - c. not use threats to take enforcement action in response to a borrower's default under one agreement to pressure the borrower to enter into another credit agreement or a guarantor to give a guarantee:
 - d. require lending staff and agents to consider whether there are any matters which lead them to reasonably believe that the borrower or guarantor may not be reasonably able to protect their own interest (for example, due to their age or physical or mental condition):
 - e. have policies providing for the lender to take particular care when dealing with borrowers that appear to not be reasonably able to protect their own interests, including recommending for those borrowers or guarantors to be provided with, or referred for, independent legal advice or other specialist expertise.
- 14.2. To comply with the lender responsibility to ensure that the terms of the agreement and guarantee are not oppressive, a lender should have processes that provide for:
- a. the lender to consider when drafting terms of credit agreements and guarantees:
 - i. how the proposed terms of any credit agreement and guarantee compare to reasonable standards of commercial practice. The mere fact that a particular term is common does not mean it is reasonable. However, consideration of common standards of commercial practice will be helpful:
 - ii. whether the terms are reasonably necessary to protect the interests of the lender and allow the borrower to be reasonably able to comply with their obligations:
 - iii. the current Commerce Commission guidance in relation to unfair contract terms for standard form consumer contracts; and
 - b. lending staff and agents to:
 - i. consider whether there are any matters which lead them to reasonably believe that the borrower or guarantor may not be reasonably able to protect their own interest (for example, due to their age or physical or mental condition):
 - ii. take particular care when dealing with borrowers or guarantors that appear to not be reasonably able to protect their own interests to avoid the possibility of

entering into an unconscionable agreement, including recommending that the borrower or guarantor get independent legal advice or other specialist advice.

- 14.3. To comply with the lender responsibilities to ensure that the lender does not exercise a power in an oppressive manner, a lender should ensure it they apply the rest of the Guidance in this Code in relation to assisting borrowers and guarantors to make informed decisions.

Commentary

A lender that treats the borrower, guarantor and their property reasonably and in an ethical manner in accordance with the Guidance in sections 12 and 13 of this Code, including when breaches of an agreement have occurred in accordance with the lender responsibilities is unlikely to be exercising a power in an oppressive manner.

14. Questions for submitters

- 14.1. Please provide any comments you may have on the guidance provided in this chapter, including any suggested revisions or additions.
-

15. Glossary

Lenders under **high-cost short-term credit agreements** should follow Guidance identified as applying to those agreements. The Code treats high-cost short-term credit agreements as those agreements where:

- The agreement is not a continuing credit agreement; and
- The loan amount is small (for instance, less than \$2,000 will be small); and
- The period for repayment is short (for instance, within 3 months will be short); and
- The loan is likely to be unsecured; and
- The annual interest rate is high relative to bank personal borrowing rates (for instance, 50% or above) or mandatory fees are high relative to the amount of credit.

The Code treats as an **experienced user of credit** an individual:

- who has had experience as a borrower under a similar credit agreement recently (for instance, in the previous two years) without encountering any problems or repayment difficulties; and
- who appears to be fluent in English; and
- who is not seeking to be a borrower or guarantor under a high-cost short-term credit agreement.

15. Questions for submitters

- 15.1. Please provide any comments you may have on the suggested definitions in this glossary, including any suggested revisions or additions.
 - 15.2. Should the definition of high-cost short-term credit agreement instead be based on definitive thresholds? How should any such thresholds be framed to avoid gaming by lenders who provide credit just outside of any such thresholds?
-

16. Appendix

Part A: Key definitions from the Act

The definitions of **consumer credit insurance**, **creditor**, **credit-related insurance**, and **repayment waiver** are set out in section 5(1) of the Act as follows:

consumer credit insurance means insurance cover in the event of the insured's disability or death or the insured contracting a sickness, sustaining an injury, or becoming unemployed, if the liability of the insurer is to be determined by reference to the liability of the insured under a credit contract or a consumer lease

creditor means a person who provides, or may provide, credit under a credit contract; and, if the rights of that person are transferred by assignment or by operation of law, includes the person for the time being entitled to those rights"

credit-related insurance means, in connection with a credit contract or consumer lease,—

- (a) insurance over secured property or leased goods; or
- (b) insurance that provides cover for the shortfall that occurs if secured property or leased goods are totally or substantially destroyed and the insurance proceeds from another insurance contract are insufficient to pay any outstanding obligations of the debtor under the credit contract or the lessee under the consumer lease; or
- (c) consumer credit insurance

repayment waiver means an agreement between a creditor or lessor and a debtor or lessee under which the creditor or lessor, for an additional consideration, agrees to waive the creditor's or lessor's right to any amount payable under the credit contract or consumer lease in the event of the unemployment of, sickness of, injury to, or the disability or death of the debtor or lesser

The definitions of **buy-back transaction**, **occupier**, and **transferee** are set out in section 8 of the Act as follows:

8 Meaning of buy-back transaction

(1) In this Act, unless the context otherwise requires, buy-back transaction means a transaction under which—

- (a) a person (the occupier) transfers, or agrees to transfer, an estate in land to another person (the transferee); and
- (b) the land is the principal place of residence of the occupier at the time that the occupier enters into the transaction; and
- (c) the occupier, or a person designated by the occupier, has, after the transfer, a right to occupy the whole or any part of the land; and
- (d) 1 or more of the following applies:
 - (i) the occupier, or a person designated by the occupier, has a right to repurchase the estate in the land in whole or in part:
 - (ii) there is an understanding between the occupier and the transferee that the occupier, or a person designated by the occupier, has a right to repurchase the estate in the land in whole or in part:

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(iii) there is an understanding between the occupier and any buy-back promoter that the occupier, or a person designated by the occupier, has a right to repurchase the estate in the land in whole or in part; and

(e) the occupier is a natural person who enters into the transaction primarily for personal, domestic, household, or investment purposes.

(2) If, by virtue of any contract or contracts (none of which by itself constitutes a buy-back transaction) or any arrangement, there is a transaction that is in substance or effect a buy-back transaction, the contract, contracts, or arrangement must, for the purposes of this Act, be treated as a buy-back transaction made at the time when the contract, or the last of those contracts, or the arrangement, was made, as the case may be.

The definition of **consumer credit contract** is set out in section 11 the Act, which is set out below:

11 Meaning of consumer credit contract

(1) A credit contract is a consumer credit contract if—

(a) the debtor is a natural person; and

(b) the debtor enters into the contract primarily for personal, domestic, or household purposes; and

(c) 1 or more of the following applies:

(i) interest charges are or may be payable under the contract:

(ii) credit fees are or may be payable under the contract:

(iii) a security interest is or may be taken under the contract; and

(d) when the contract is entered into, 1 or more of the following applies:

(i) the creditor, or one of the creditors, carries on a business of providing credit (whether or not the business is the creditor's only business or the creditor's principal business):

(ii) the creditor, or one of the creditors, makes a practice of providing credit in the course of a business carried on by the creditor:

(iii) the creditor, or one of the creditors, makes a practice of entering into credit contracts in the creditor's own name as creditor on behalf of, or as trustee or nominee for, any other person:

(iv) the contract results from an introduction of one party to another party by a paid adviser or broker.

(2) This section is subject to sections 14 and 15.

The definition of “**relevant insurance contract**” is set out in new section 9B of the Act as follows:

“**relevant insurance contract** means, in relation to a lender, a credit-related insurance contract entered into, or to be entered into, by a borrower if—

(a) the borrower has also entered into, or is seeking to enter into, an agreement with the lender; and

(b) the insurance is arranged by the lender.

New Section 9B(2) of the Act goes on to explain when insurance is arranged by the lender in the following terms:

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“(2) For the purposes of this Part (*New Part 1A*), insurance is arranged by the lender if 1 or more of the following applies:

- (a) the lender is the insurer:
- (b) the lender acts as the agent of the insurer in relation to the insurance:
- (c) the lender receives a commission in relation to the insurance:
- (d) the lender requires the borrower to obtain the insurance from a particular insurer or particular insurers:
- (e) the lender has in place any arrangement that has the effect of requiring the borrower to obtain the insurance from a particular insurer or particular insurers:
- (f) the insurance is financed under the agreement entered into by the borrower and the lender.”

Part B: The lender responsibility principles

“9C Lender responsibility principles

“(1) Every lender must comply with the lender responsibility principles.

“(2) The lender responsibility principles are that every lender must, at all times,—

“(a) exercise the care, diligence, and skill of a responsible lender—

“(i) in any advertisement for providing credit or finance under an agreement;
and

“(ii) before entering into an agreement to provide credit or finance and before taking a relevant guarantee; and

“(iii) in all subsequent dealings with a borrower in relation to an agreement or a guarantor in relation to a relevant guarantee; and

“(b) comply with all the lender responsibilities specified in subsections (3), (4), and (5).

“(3) The lender responsibilities are that a lender must, in relation to an agreement with a borrower,—

“(a) make reasonable inquiries, before entering into the agreement, so as to be satisfied that it is likely that—

“(i) the credit or finance provided under the agreement will meet the borrower's requirements and objectives; and

“(ii) the borrower will make the payments under the agreement without suffering substantial hardship; and

“(b) assist the borrower to reach an informed decision as to whether or not to enter into the agreement and to be reasonably aware of the full implications of entering into the agreement, including by ensuring that—

“(i) any advertising is not, or is not likely to be, misleading, deceptive, or confusing to borrowers; and

“(ii) the terms of the agreement are expressed in plain language in a clear, concise, and intelligible manner; and

“(iii) any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing; and

“(c) assist the borrower to reach informed decisions in all subsequent dealings in relation to the agreement, including by ensuring that—

“(i) any variation to the agreement is expressed in plain language in a clear, concise, and intelligible manner; and

“(ii) any information provided by the lender to the borrower after the agreement has been entered into is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing; and

“(d) treat the borrower and their property (or property in their possession) reasonably and in an ethical manner, including—

“(i) when breaches of the agreement have occurred or may occur or when other problems arise:

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“(ii) when a debtor under a consumer credit contract suffers unforeseen hardship (see section 55):

“(iii) during a repossession process (including by taking all reasonable steps to ensure that goods and property are not damaged during the process, that repossessed goods are adequately stored and protected, and that the right to enter premises is not exercised in an unreasonable manner); and

“(e) ensure, in the case of an agreement to which Part 5 applies, that—

“(i) the agreement is not oppressive:

“(ii) the lender does not exercise a right or power conferred by the agreement in an oppressive manner:

“(iii) the lender does not induce the borrower to enter into the agreement by oppressive means; and

“(f) meet all the lender's legal obligations to the borrower, including under this Act, the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Financial Service Providers (Registration and Dispute Resolution) Act 2008, and the Financial Advisers Act 2008, which include—

“(i) obligations in relation to disclosure, credit fees, unforeseen hardship applications, and credit repossession under this Act; and

“(ii) prohibitions on false or misleading representations and unfair contract terms under the Fair Trading Act 1986; and

“(iii) the guarantee that the service of providing credit and any other services will be carried out with reasonable care and skill under the Consumer Guarantees Act 1993.

“(4) The lender responsibilities are also that a lender must, in relation to a relevant guarantee that is taken by the lender,—

“(a) make reasonable inquiries, before the guarantee is given, so as to be satisfied that it is likely that the guarantor will be able to comply with the guarantee without suffering substantial hardship; and

“(b) assist the guarantor to reach an informed decision as to whether or not to give the guarantee and to be reasonably aware of the full implications of giving the guarantee, including by ensuring that—

“(i) the terms of the guarantee are expressed in plain language in a clear, concise, and intelligible manner; and

“(ii) any information provided by the lender to the guarantor is not presented in a manner that is or is likely to be misleading, deceptive, or confusing; and

“(c) treat the guarantor reasonably and in an ethical manner, including when breaches of a credit contract to which the guarantee applies have occurred or may occur or when other problems arise; and

“(d) ensure, in the case of a guarantee that is to be treated as forming part of a credit contract for the purposes of Part 5 under section 119, that—

“(i) the guarantee is not oppressive:

“(ii) the lender does not exercise a right or power conferred by the guarantee in an oppressive manner:

“(iii) the lender does not induce the guarantor to give the guarantee by oppressive means; and

“(e) meet all the lender's legal obligations to the guarantor, including under the Acts specified in subsection (3)(f).

“(5) The lender responsibilities are also that a lender must, in relation to a relevant insurance contract,—

“(a) make reasonable inquiries, before the contract is entered into, so as to be satisfied that it is likely that—

“(i) the insurance provided under the contract will meet the borrower's requirements and objectives; and

“(ii) the borrower will make the payments under the contract without suffering substantial hardship; and

“(b) assist the borrower to reach an informed decision as to whether or not to enter into the contract and to be reasonably aware of the full implications of entering into the contract, including by ensuring that—

“(i) any advertising distributed by the lender is not, or is not likely to be, misleading, deceptive, or confusing to borrowers; and

“(ii) any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing.

“(6) Subsections (3)(b)(iii) and (c)(ii), (4)(b)(ii), and (5)(b)(ii) do not apply to information that is subject to section 32(1).

“(7) For the purposes of the inquiries required under subsections (3)(a), (4)(a), and (5)(a), the lender may rely on information provided by the borrower or guarantor unless the lender has reasonable grounds to believe the information is not reliable.

Part C: Content of responsible lending Code

9C Content of Responsible Lending Code

“(1) In order to achieve its purpose, the Responsible Lending Code may set out any, or all, of the following:

“(a) the nature and extent of inquiries a lender should make before entering into an agreement, before a relevant guarantee is given, or before a relevant insurance contract is entered into:

“(b) the processes, practices, or procedures that a lender should follow—

“(i) to ensure that advertising for providing credit or finance under agreements is not, or is not likely to be, misleading, deceptive, or confusing to borrowers:

“(ii) when making reasonable inquiries referred to in section 9C(3)(a), (4)(a), and (5)(a) so as to be satisfied of the matters referred to in those paragraphs:

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“(iii) to give the assistance referred to in section 9C(3)(b) and (c), (4)(b), and (5)(b) (including where the borrower’s or guarantor’s first language is not English):

“(iv) to ensure that the lender treats borrowers, guarantors, and their property (or property in their possession) reasonably and in an ethical manner:

“(v) in the case of an agreement or a guarantee to which Part 5 applies, to ensure that the agreement or guarantee is not oppressive, the lender does not exercise a right or power conferred by the agreement or guarantee in an oppressive manner, and the lender does not induce the borrower to enter into the agreement, or the guarantor to give the guarantee, by oppressive means:

“(vi) to promote or facilitate compliance with the legal obligations referred to in section 9C(3)(f) and (4)(e) (for example, by reference to compliance programmes):

“(vii) to ensure that fees are not unreasonable in terms of section 41, 80, or 82:

“(c) the circumstances in which the lender should require or recommend independent legal advice to be obtained:

“(d) the processes, practices, or procedures that a lender should follow for the purposes of Part 3A:

“(e) any other matter that promotes or facilitates the lender responsibility principles (set out in section 9C(2)) and that is not inconsistent with any other enactment.

“(2) The Code may also contain different provisions in relation to particular—

“(a) lenders or classes of lenders:

“(b) borrowers or classes of borrowers:

“(c) guarantors or classes of guarantors:

“(d) agreements or classes of agreements.