



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

**LABOUR &  
COMMERCIAL  
GROUP**



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# Responsible Lending Code

**Discussion Document – July 2014**

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## **Request for submissions**

The Government is developing a Responsible Lending Code and wants to know what you think should be in it. The Code will help lenders comply with new lender responsibility principles included in the Credit Contracts and Consumer Finance Amendment Act 2014.

To decide what should be included in the Code, the Ministry of Business, Innovation and Employment has published this discussion document with information and questions for lenders and consumers to consider or answer. The document discusses industry best practice in New Zealand and how other countries approach responsible lending.

The Ministry has also published a short-form brochure that sets out the key information and questions that the Ministry would like your views on.

See [Responsible Lending Code – What is it? How can you help?](#) ([www.consumeraffairs.govt.nz/legislation-policy/documents/responsible-lending-code-discussion-brochure.pdf](http://www.consumeraffairs.govt.nz/legislation-policy/documents/responsible-lending-code-discussion-brochure.pdf)).

## **Commenting on the discussion document or brochure in your submission**

The discussion document and brochure include questions you may like to answer in your submission. The questions are listed in full on pages 43–47 of this document. 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 13 August 2014**

Email your submission, attached as either a Microsoft Word (.doc) or Acrobat (.pdf) document, to [consumer@mbie.govt.nz](mailto: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 3705, Wellington 6140.

## **Publication and release of your submission**

All submissions will remain 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**

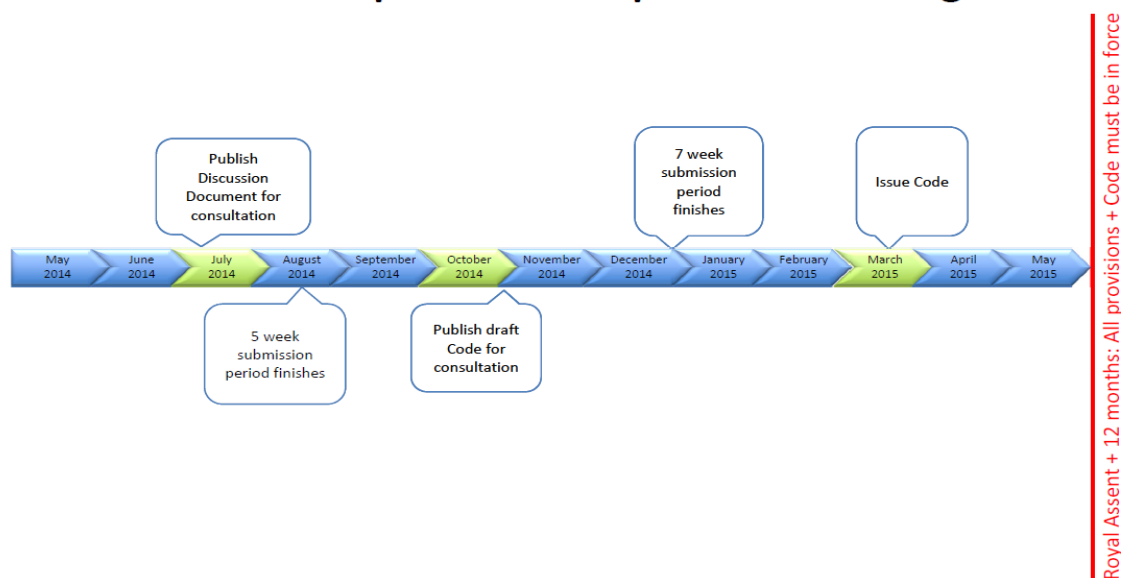
The lender responsibility principles must come into force by 6 June 2015. We intend to issue the Code by March 2015 to give lenders time to adapt their processes as necessary to comply with the principles.

To allow us to meet that timeframe, we intend to publish a draft Code for public comment in late 2014. We will be using the feedback received on this discussion document to help us prepare the draft Code.

The final Code will be prepared taking into account the comments received on the draft Code.

See [Changes to credit laws \(www.consumeraffairs.govt.nz/legislation-policy/changes-to-credit-laws\)](http://www.consumeraffairs.govt.nz/legislation-policy/changes-to-credit-laws) on our website for up-to-date information about the development of the Code.

## Timeline for development of Responsible Lending Code



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## A Introduction

### Reforms to credit laws

1. Credit provides consumers with greater flexibility in how they manage their finances and purchases. Access to credit can improve consumer wellbeing, but over-indebtedness from irresponsible lending and borrowing can harm consumers.
2. The government is changing the laws that cover consumer credit. The main changes are to the Credit Contracts and Consumer Finance Act 2003 (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.<sup>1</sup>
3. The changes are being made through the Credit Contracts and Consumer Finance Amendment Act 2014 (the 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. You can view the Amendment Act [here](#).
4. The aim of updating the CCCFA is to:
  - ensure that creditors lend to consumers and manage consumer credit contracts responsibly; and
  - provide improved protection for vulnerable consumers.<sup>2</sup>

### Responsible lending obligations

5. A key feature of the reforms is the introduction of new responsible lending obligations under the CCCFA.
6. The majority of loans are provided responsibly. Assessing a borrower's ability to repay a loan and helping borrowers understand their obligations will help ensure that loans are repaid.
7. However, particular lending practices can result in borrowers being provided with credit which does not meet their requirements and objectives and which they do not have capacity to repay.
8. 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.

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

<sup>2</sup> See Explanatory Note to the Credit Contracts and Financial Services Law Reform Bill.

### *Lender responsibility principles*

9. The updated CCCFA will set out high level lender responsibility principles which apply to all lenders under consumer credit contracts.<sup>3</sup> Personal loans, credit card facilities, credit sales and mortgages are examples of consumer credit contracts.
10. These principles will 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 will also require lenders to comply with specific lender responsibilities.
11. You can read the full set of principles and lender responsibilities in appendix two.

### *Specific lender responsibilities*

12. In summary, the lender responsibilities require that a lender must, in relation to an agreement with a borrower:
  - Make reasonable inquiries to be satisfied that it is likely that the credit will meet the borrower's requirements and objectives and be repaid without the borrower suffering substantial hardship.
  - Assist the borrower to make an informed decision about whether to enter into the agreement.
  - Assist the borrower to make informed decisions in all subsequent dealings.
  - Treat borrowers and their property reasonably and in an ethical manner, including during any repossession process.
  - Ensure that the terms of the agreement and the exercise of powers by the lender
  - are not oppressive.
  - Meet all legal obligations to the borrower.
13. The lender responsibilities, in so far as they are relevant, are also applicable to guarantees and credit-related insurance products (being insurance over secured property or leased goods, or payment protection insurance).

### *The Responsible Lending Code*

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

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<sup>3</sup> "Consumer credit contract" is defined in section 8 of the updated CCCFA. Consumer credit contracts are those where the credit is wholly or predominantly used for personal, domestic or household purposes and on which interest or credit fees are charged or a security interest is taken. The lender responsibility principles also apply to a credit contract that provides for the repossession of consumer goods and transferees under buy-back transactions.

15. The Amendment Act provides that the Code may set out:
- the nature and extent of inquiries a lender should make before entering into a credit agreement, guarantee, or relevant insurance contract;
  - the processes, practices or procedures that a lender should follow:
    - to ensure that credit advertising is not misleading, deceptive, or confusing to the borrower;
    - when making reasonable enquiries to be satisfied it is likely that the credit/relevant insurance contract will meet the borrower's requirements and objectives and can be repaid without the borrower/guarantor suffering substantial hardship;
    - to assist informed decisions;
    - to ensure that the lender treats borrowers, guarantors, and their property reasonably and in an ethical manner;
    - to ensure that the agreement/guarantee or exercise of a right conferred by an agreement/guarantee is not oppressive;
    - to promote or facilitate compliance with legal obligations;
    - to ensure that fees are not unreasonable;
  - the circumstances in which the lender should require or recommend independent legal advice;
  - the processes, practices or procedures that a lender should follow for the purpose of the repossession provisions of the updated CCCFA; and
  - any other matter that promotes or facilitates the lender responsibility principles and that is not inconsistent with any other legislation.
16. The Code is not binding but 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).
17. The guidance in the Code needs to meet the aims of the updated CCCFA and work for both lenders and consumers. Consumers need to 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.

18. We will use the information provided in response to this discussion document (and later in response to a draft Code) to assess what guidance to set out in the final Code. In making that assessment, we propose to consider the following key criteria:

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

### **This discussion document**

19. To help determine what guidance to put in the Code we need to consider industry best practice in New Zealand and the approaches and codes that have been used in other countries to facilitate responsible lending. Examples include:

- The United Kingdom Financial Conduct Authority's (FCA) *Consumer Credit Sourcebook (CONC)*, which adopts much of the guidance previously set out in the Office of Fair Trading's "*Irresponsible Lending*" guidance
- Regulatory Guides produced by the Australian Securities & Investments Commission (ASIC), in particular *Regulatory Guide 209: Credit Licensing: Responsible lending conduct*
- New Zealand Bankers' Association *Code of Banking Practice*
- Financial Services Federation *Responsible Lending Guidelines*
- The United Kingdom Consumer Finance Association (CFA) *Lending Code for Small Cash Advances*

20. Each section of this discussion document gives a brief overview of how the above guidelines and codes have dealt with different areas of responsible lending to give you an indication of the types of guidance that has been provided elsewhere. We are seeking your views on these examples and information on existing best practice in lending.

#### **Questions for submitters:**

1. Do you agree with the proposed criteria for assessing what guidance should be set out in the Code as set out in paragraph 0? Should retaining sufficient flexibility to allow lenders to adapt the guidance to different products and business models be another criterion? Are there any other key criteria to be considered?
2. Are there any particular features of the New Zealand market which would differentiate our approach from international approaches?



## Proposed structure of the Code

21. We propose that the Code should be divided into different chapters based on the life cycle of a consumer credit contract:
  - Before the consumer credit contract is entered into:
    - Advertising
    - Assisting informed decisions
    - Making reasonable inquiries
  - During the term of the consumer credit contract:
    - Dealings during the term of the agreement
    - Fees
  - Default, enforcement and the end of the consumer credit contract
    - Repayment difficulties and other problems
    - Enforcement
    - Repossession
22. This discussion document follows the same structure.
23. The Amendment Act provides that the Code may contain different provisions in relation to particular lenders, borrowers or agreements or classes of lenders, borrowers or agreements.
24. For example, additional specific guidance may be justified for small amount pay day lending because that type of credit poses particular risks to vulnerable consumers. Conversely, a waiver of some of the steps may be justified if the borrower is an experienced and sophisticated user of credit products.
25. Within each chapter, we propose to set out general requirements that apply across all types of credit as well as sections that provide specific guidance for particular lenders/borrowers/agreements or classes of lender/borrower/agreement where necessary.
26. Some guidance may also be “scalable” in that what constitutes compliance with the principles may differ depending on the circumstances and the type of lender/borrower/agreement. This is the approach adopted by the Australian Securities & Investments Commission (ASIC) in its *Regulatory Guide 209: Credit Licensing: Responsible lending conduct*. For example, the ASIC guide provides guidance on the types of inquiries that lenders should make about the customer and states that lenders may make less or more inquiries depending on the circumstances.<sup>4</sup>

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<sup>4</sup> ASIC Regulatory Guide 209 (RG 209): Advertising financial products and services (including credit): Good practice guidance, RG 209.29-RG209.31.

**Questions for submitters**

3. We consider that the structure of the Code should reflect the lifecycle of a consumer credit contract, do you agree?
4. Are there lenders/borrowers/agreements or classes of lenders/borrowers/agreements that should be treated differently under the Code? If so, why, in what way and how should any such lenders/borrowers/agreements be defined?
5. Should the concept of “scalable” guidance apply to the Code? If so, which principles or responsibilities should be scalable?

**Type of guidance in the Code**

27. The content of the Code must strike a balance between the greater certainty that prescription can provide, and the benefits which can arise from a more flexible regime.
28. A Code that sets out detailed guidance would provide greater clarity and certainty as to the processes, practices or procedures that lenders should follow to comply with the principles. It would also ensure greater consistency in the application of the lender responsibility principles across the credit market and provide greater certainty for enforcement purposes.
29. Less prescriptive guidance may be less certain but would give greater flexibility as to how lenders can achieve compliance. Lenders would be more able to tailor their processes, practices or procedures as appropriate given the nature of their business and the credit products that they supply. The guidance may also be more easily applied to any new forms of credit or any new ways of providing credit that emerge.

**Questions for submitters**

6. How prescriptive should the guidance in the Code be?
7. Should the level of prescription differ for different classes of lenders/borrowers/agreements? If so, which classes and why?

## **B Before entering into a consumer credit agreement**

### **This part**

30. The responsible lending obligations include the principles that require lenders to exercise the care, diligence and skill of a responsible lender in any advertising and before the credit agreement is entered into. There are also a number of lender responsibilities that apply before a credit agreement is entered into. This part seeks comments on the guidance required to comply with those principles and responsibilities.

### **Purpose and objectives**

31. Regulating lender conduct prior to a credit agreement being entered into is important to minimise the risk of consumers entering into credit agreements that do not meet their requirements and objectives or which are unaffordable.
32. There are existing rules in place that regulate certain aspects of lender conduct prior to the credit agreement being entered into. For instance, the CCCFA requires compliance with disclosure requirements; the Fair Trading Act 1986 generally prohibits misleading and deceptive conduct and certain unfair practices; and the Consumer Guarantees Act 1993 provides that services must be carried out with reasonable care and skill and must be reasonably fit for any particular purpose that the consumer makes known to the supplier. Banks and non-bank deposit takers are also subject to prudential supervision by the Reserve Bank.
33. There is, however, no over-arching general legal obligation on lenders to be satisfied that the borrower has the ability to repay the loan or that the borrower understands the terms and conditions of the loan.
34. The lender responsibility principles aim to protect consumers from obtaining credit which does not meet their needs and which they do not have the capacity to repay, by:
  - requiring lenders to be satisfied that it is likely that the credit will meet the borrower's requirements and objectives and will be repaid without substantial hardship; and
  - ensuring borrowers have the information they need to make their own assessment as to whether the credit is suitable and whether they have the capacity to make the repayments required.
35. Information also enables consumers to compare and make an informed choice between competing products and encourages lenders to provide credit at competitive prices that reflect the risks of the loan.

## **The lender responsibilities**

36. Under the lender responsibility principles, the lender has a responsibility before a consumer enters into a consumer credit contract to exercise the skill, care and diligence of a responsible lender:
- in all advertisements for providing credit; and
  - before entering into an agreement to provide credit and before taking a guarantee.
37. The specific lender responsibilities are to:
- make reasonable inquiries to be satisfied that it is likely that the credit will meet the requirements and objectives of the borrower and be repaid without the borrower suffering substantial hardship; and
  - assist the borrower to make an informed decision about whether to enter into the credit agreement.
38. The lender responsibilities, in so far as they are relevant, are also applicable to guarantees and credit-related insurance products.
39. This part considers these responsible lending obligations in more detail. It first concentrates on the information that is provided by the lender – both in terms of advertising and the information provided personally to the borrower/guarantor. This part then considers the lender’s assessment of the suitability and affordability of the credit agreement.

## **Advertising**

### **Purpose and objectives**

40. Advertising has a large bearing on the consumer decision to borrow. Advertising that does not accurately represent the credit product or its key features and risks can lead to poor borrowing decisions.
41. Regulation of credit advertising promotes consumer awareness of competing products, facilitates informed decision-making and helps to ensure that consumers are protected from misleading, deceptive or confusing advertising. Regulation also promotes a level playing field in trying to ensure that irresponsible credit advertising by some lenders does not disadvantage others who do not use irresponsible messages.

### **The lender responsibilities**

42. The responsible lending obligations include the lender responsibility principle to exercise the care, diligence and skill of a responsible lender in advertisements and the lender responsibilities to:
- assist the borrower to make an informed decision as to whether or not to enter into the agreement, including by ensuring that any advertising is not, and is not likely to be, misleading, deceptive or confusing; and
  - meet all the lender’s legal obligations to the borrower, including under the Fair Trading Act.

43. The Amendment Act provides that the Code may set out the processes, practices, or procedures that a lender should follow to ensure that credit advertising is not, or is not likely to be, misleading, deceptive or confusing.<sup>5</sup>

## Precedents

### *Advertising process*

44. The Commerce Commission currently provides guidance to businesses on how to comply with the provisions of the Fair Trading Act that prohibit misleading and deceptive conduct. This guidance includes a sample compliance policy.<sup>6</sup> The sample compliance policy suggests that:
- staff with trading/sales responsibilities undergo Fair Trading Act compliance training;
  - staff are informed about relevant current promotions and representations about the products and services they supply;
  - businesses should have a system for checking and approving all publicity material; and
  - advertising should be checked by a staff member with necessary product knowledge to ensure that the description is accurate.

### *Substance of advertising*

45. The Fair Trading Act 1986 generally prohibits misleading and deceptive conduct. There is established jurisprudence and Commerce Commission guidance as to the meaning of “misleading” and “deceptive”. The Financial Advisers Act 2008 also provides that financial adviser advertising must not be misleading, deceptive or confusing.<sup>7</sup>
46. The Courts have stated that “deceive” or “mislead” implies the creation of an incorrect belief, whereas “confusing” may go no further than perplexing or mixing up the minds of the public.<sup>8</sup>
47. More specific to financial services such as credit, the Advertising Standards Authority (ASA) has issued a Code for Financial Advertising,<sup>9</sup> which sets out the following guidelines in relation to ensuring that advertising is not misleading, deceptive or confusing:

#### “PRINCIPLE 2

*Advertisements should strictly observe the basic tenets of truth and clarity. Advertisements should not or should not be likely to mislead, deceive or confuse consumers, abuse their trust, exploit their lack of knowledge or without justifiable reason, play on fear. This includes by implication, omission, ambiguity, exaggerated claim or hyperbole.*

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<sup>5</sup> New section 9F inserted by the CCCF Amendment Act.

<sup>6</sup> <http://www.comcom.govt.nz/dmsdocument/1711>

<sup>7</sup> Financial Advisers Act 2008, section 35.

<sup>8</sup> *New Zealand Breweries Ltd v Heineken’s Bier Browerij Maatschappij N.V* [1964] NZLR 115, 142.

<sup>9</sup> <http://www.asa.co.nz/fa/ASA%20Code%20for%20Financial%20Advertising%20February%202014.pdf>

Guidelines

*2(a) Advertisements shall be accurate and statements and claims able to be substantiated.*

*2(b) Key information shall be legible and / or audible with care taken to ensure disclosure commensurate with the importance of the information.*

*2(c) Advertisements shall not claim or imply endorsement by any government agency, professional body or independent agency unless there is prior consent and the claim and endorsement are current and verifiable.*

*2(d) Technical language and statistics are acceptable provided they are relevant and used in a way readily understood by consumers without specialist knowledge. Publication of research results must identify the researcher and source references.”*

48. International precedent also refers to examples of specific advertising behavior that is likely to be misleading and deceptive. For example, a key feature of the responsible lending regimes in New Zealand and overseas is the requirement on lenders to be satisfied that the borrower has the capacity to make repayments under the credit agreement. It is unlikely that lenders could comply with that obligation in relation to any new customers without taking time to make enquiries about the customer’s financial position. UK and Australian guidance states that lenders should carefully consider whether claims along the lines of “no credit checks” or “instant approval” are misleading or reflect practices that do not comply with the responsible lending obligations.<sup>10</sup>
49. Australian guidance states that, where an advertisement refers to interest rates and/or fees and charges, it is important that the advertisement gives a realistic impression of overall costs.<sup>11</sup>
50. UK and Australian guidance deals specifically with the use of daily or weekly interest rates in advertising, which may understate the amount of interest payable. CONC provides that if an advertisement includes a rate of interest or an amount relating to the cost of credit, it must also include an annual percentage rate, and whether it is fixed or variable.<sup>12</sup>
51. Australian guidance also states that where an advertisement includes details of interest rates or fees that apply for an initial promotional period, the advertisement should state with equal prominence the period for which the discount applies and describe (not necessarily with equal prominence) what the interest rate or fees will revert to following the initial promotional period.<sup>13</sup>

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<sup>10</sup> ASIC Regulatory Guide 234 (RG 234): Advertising financial products and services (including credit): Good practice guidance, RG 234.111. The United Kingdom Financial Conduct Authority’s (FCA) *Consumer Credit Sourcebook* (CONC), 3.3.3.

<sup>11</sup> RG 234.61.

<sup>12</sup> CONC, 3.5.3.

<sup>13</sup> RG 234.63.

52. CONC also provides for risk warnings to be included in certain forms of advertising. For example, advertising for high-cost short-term credit must contain the warning “Late repayment can cause you serious money problems. For help, go to [moneyadvice.service.org.uk](http://moneyadvice.service.org.uk)”.<sup>14</sup> For advertising for a mortgage or other loan secured on property for which repayments are to be in another currency, the advertising must contain a warning that “Changes in the exchange rate may increase the Sterling equivalent of your debt.”<sup>15</sup>

#### *Targeted advertising*

53. The UK Financial Conduct Authority’s Consumer Credit Sourcebook (CONC) provides that lenders should not target customers with credit agreements which are unsuitable for them, by virtue of their indebtedness, poor credit history, age, health, disability or any other reason<sup>16</sup>.

#### **Issues for the Code to address**

54. Setting out guidance on lenders’ advertising processes should help reduce the likelihood of misleading, deceptive or confusing advertising. However, any such process needs to be workable for lenders of different sizes and nature.
55. In terms of substance of advertising, referring to or adopting existing New Zealand guidance in the Code will help maintain a more consistent framework for obligations relating to advertising. However, given the Code has a degree of legal force,<sup>17</sup> it may not be appropriate to refer to some of the more detailed guidance in the Code.
56. To give guidance on the types of advertising practices that may breach the lender responsibilities, the Code may also set out examples of advertising practices that lenders should follow (for example, use of an annual percentage interest rate to allow comparisons) or examples of specific advertising behavior that is likely to be misleading, deceptive or confusing (for example, advertising interest free loans without stating that the loan is only interest-free for an initial limited period, and without stating the rate of interest after that initial period).
57. As part of exercising care, diligence and skill in any advertising, the Code may also consider whether there should be guidance against advertising which is targeted at specific groups or persons known to have specific characteristics.

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<sup>14</sup> CONC, 3.4.1.

<sup>15</sup> CONC, 3.6.5.

<sup>16</sup> CONC, 2.2.2.

<sup>17</sup> In the sense that evidence of compliance with the Code will be treated as evidence of compliance with the lender responsibility principles.

### Questions for submitters

8. What are the elements of a best practice internal process to ensure that advertising is not misleading, deceptive or confusing? (For example, in relation to training and checking marketing material.)
9. Should guidance on advertising processes take account of the size and nature of the lender? If so, how?
10. What existing guidance or codes of practice for advertising will help inform the Code? Should these codes be referred to or translated into the Code?
11. Are there specific advertising practices that lenders should follow? Or are there specific advertising practices that lenders should refrain from following?
12. Should advertising of certain credit products be accompanied by risk warnings?
13. Should there be specific guidance in relation to advertising which is targeted at a specific group or persons known to have specific characteristics? If so, which groups/characteristics?
14. What other matters should the Code address in relation to advertising?

## Assisting informed decisions

### Purpose and objective

58. The updated CCCFA will require:
  - lenders to make standard form contract terms and costs of borrowing publicly available;<sup>18</sup> and
  - lenders to disclose in writing specified key information (including the annual interest rate, and the method of determining any annual interest rate that is determined by reference to a base rate) as well as all terms and conditions of the credit agreement, guarantee or credit-related insurance agreement before they are entered into.<sup>19</sup>
59. However, publication of standard form contract terms and written disclosure may not be sufficient to achieve borrower/guarantor understanding of the full implications of the relevant agreement.
60. The objective of the lender responsibilities to assist informed decisions is, together with disclosure requirements, to assist the borrower and guarantor to understand the proposed agreement and enable them to reach an informed decision.

### The lender responsibilities

61. The lender responsibility principles include that every lender must exercise the care, diligence and skill of a responsible lender before entering into an agreement to provide credit.

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<sup>18</sup> New sections 9J and 9K inserted by the CCCF Amendment Act.

<sup>19</sup> CCCFA, sections 17, 25 and 70, as amended by the CCCF Amendment Act.



62. The lender responsibilities include that every lender must assist the borrower to reach an informed decision as to whether or not to enter into a credit agreement and to be reasonably aware of the full implications of entering into the agreement, including by ensuring that the terms of the agreement are expressed in plain language in a clear, concise, and intelligible manner and that any information provided to the borrower is not, and is not likely to be misleading, deceptive or confusing.
63. The lender responsibility to assist in making an informed decision also applies to guarantors and credit-related insurance products.<sup>20</sup>
64. The lender responsibilities also include the obligations to ensure that the lender does not induce the borrower to enter into the agreement, or induce the guarantor to enter into the guarantee, by oppressive means and to ensure that the agreement or guarantee is not oppressive.
65. The Amendment Act provides that the Code may set out the processes, practices, or procedures that a lender should follow to assist borrowers and guarantors to reach an informed decision, including where English is not the borrower or guarantor's first language<sup>21</sup>.

## Precedents

### *Manner of explanation*

66. The World Bank's Responsible Lending: Overview of Regulatory Tools publication notes that "*oral disclosure is at least as important as written disclosure*" and that "*establishing clear and specific rules for what information must be orally presented to consumers during the pre-contractual stage of the sales process should both reinforce and expand upon written disclosure*"<sup>22</sup>. However, the World Bank acknowledged that verifying the provision of oral disclosure is harder and more resource-intensive.
67. Oral disclosure is not practical for credit agreements completed online. Alternatives may involve requiring borrowers to work through explanations of key information in order to submit an application of credit or use of online media such as video clips.
68. CONC provides that in deciding on the level and explanation required to be given to the borrower, the lender should consider factors including the type of credit, the amount of credit and associated cost and risk to the borrower, the customer's level of understanding of the explanation provided and the medium through which the credit transaction takes place.<sup>23</sup>
69. Where a customer does not have a good understanding of English, CONC provides that the lender may need to consider alternative methods, such as providing the information through a friend or relative who can assist the customer.<sup>24</sup>

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<sup>20</sup> In relation to credit-related insurance, the obligation is to ensure that any advertising distributed by the lender is not, or is not likely to be misleading, deceptive, or confusing to borrowers, rather than to ensure that the terms of the insurance agreement are in plain language.

<sup>21</sup> New section 9F(1)(b) inserted by CCCF Amendment Act.

<sup>22</sup> World Bank's Responsible Lending: Overview of Regulatory Tools, page 19.

<sup>23</sup> CONC, 4.2.7.

<sup>24</sup> CONC, 4.2.16.

70. CONC also requires lenders to provide the borrower with an opportunity to ask questions about the agreement.<sup>25</sup> For online agreements, this could involve providing a comprehensive set of frequently asked questions or providing a phone number or email address for borrower enquiries.
71. Another element of ensuring borrower understanding is the lender responsibility to ensure that the language of the credit agreement is expressed in plain language in a clear, concise and intelligible manner. The New Zealand Financial Markets Authority has issued a guidance note on effective disclosure which sets out examples of plain language and concise presentation techniques to consider. Techniques include highlighting important information in overviews, diagrams and graphs, use of the active voice and avoiding the use of jargon.<sup>26</sup>
72. In some cases, use of plain English may not be sufficient to provide a meaningful explanation of the implications of the term. For example, a term that references a statutory provision may be in plain language, but may not be sufficient to convey the consequences of the term to most borrowers. An explanation of the implications of a term may be required.
73. CONC also provides that a lender must not unfairly encourage, incentivise or induce a customer to enter into a credit agreement quickly without allowing the customer time to consider information and explanation provided. Stating an end date for a promotion would not breach the rule.<sup>27</sup>

*Information to be explained – credit agreement*

74. CONC requires an adequate explanation of the following matters:
  - the features of the agreement which make it unsuitable for a particular type of use;
  - how much the customer will have to pay periodically and in total;
  - the features of the agreement which may have a significant adverse effect on the customer in a way which the customer is unlikely to foresee;
  - the principal consequences for the customer arising from a failure to make payments due, including where applicable, the total cost of the debt growing, default charges or default interest rates, repossession, legal proceedings, impaired credit rating; and
  - any cancellation rights.<sup>28</sup>

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<sup>25</sup> CONC, 4.2.5.

<sup>26</sup> Financial Markets Authority, Guidance Note: Effective Disclosure, June 2012.

<sup>27</sup> CONC, 4.8.2.

<sup>28</sup> CONC, 4.2.5.

75. CONC also requires specific information to be given to the borrower in relation to particular types of agreements. For example, for high-cost short-term credit, the lender must explain that entering into the agreement would be unsuitable for long-term borrowing.<sup>29</sup> The CFA Code for Small Cash Advances further provides that in relation to short-term loans, lenders should explain to the customer that extending a loan can substantially increase the total cost, as well as the risks of additional interest and default fees if the agreement is breached.<sup>30</sup>
76. Where the agreement is a debt consolidation agreement, CONC provides that the lender must inform the borrower that (if applicable) the effect of consolidating the debts may involve payment of greater interest or charges, a longer period for repayment, or a requirement for collateral.<sup>31</sup>

#### *Information to be explained – guarantees*

77. The NZBA's Code of Banking Practice provides that members will make sure that prospective guarantors are made aware of their obligations and informed that:
- they may become liable instead of, or as well as, the borrower;
  - they should seek independent legal or, if required, other professional advice before giving any guarantee;
  - they may request that the amount of their liability under the guarantee be limited (although the bank is not required to agree to the limit);
  - their guarantee will be unlimited (unless the bank has agreed to the limit); and
  - any interest owed and costs incurred in any recovery process may be claimed against them.<sup>32</sup>

#### *Credit-related insurance*

78. CONC states that lenders must, in relation to a payment protection product, not pressure the borrower to buy the product or offer undue incentives to the customer to buy the product. In relation to insurance linked to a credit agreement, the lender must not discourage or prevent the borrower from seeking or obtaining the insurance from another source.<sup>33</sup>
79. ASIC has also made a number of recommendations in relation to credit-related insurance. They include:<sup>34</sup>
- Use of a sales script to ensure that key information is disclosed to consumers. This includes statements of the intention to sell insurance, that purchase of insurance is optional, an explanation of the main exclusions that apply to the policy and a clear question asking if the consumer consents to the purchase of insurance.

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<sup>29</sup> CONC, 4.2.8.

<sup>30</sup> Consumer Finance Association, *Lending Code for Small Cash Advances*, October 2013, 4.4.5.

<sup>31</sup> CONC, 4.2.15.

<sup>32</sup> Based on *Royal Bank of Scotland v Etridge (No 2)* [2004] 4 All ER 449.

<sup>33</sup> CONC, 2.5.8.

<sup>34</sup> Australian Securities & Investments Commission, *Consumer credit insurance: review of sales practices by authorised deposit-taking institutions* (2011).

- Consumers should be orally informed if insurance premiums are fully funded by the loan and the amount of the interest they will be paying.
- Consumers should receive a separate quote for repayments of insurance premiums. Consumers should be informed of the duration of their insurance policy, and how it relates to the duration of the underlying credit product.

### **Issues for the Code to address**

80. Guidance for lenders on the steps they can take to explain the full implications of the agreements and guarantees in a way that is understandable to the borrower and guarantor will assist consumer awareness of obligations and decision-making.
81. Issues to consider will include whether certain information should be given orally, whether lenders should test the borrower/guarantor understanding of the information provided including through interactive online tools, and which key risks borrowers and guarantors should be alerted to. It may be that the Code should recommend explanation to the borrower of a sub-set of the key information that the lender is required to disclose in writing under the CCCFA.
82. In assessing what information the lender should explain to the borrower to assist an informed decision, another issue to consider will be whether the lender can take into account the fact that the borrower has received independent advice on their personal budget situation.

### **Questions for submitters**

15. Apart from complying with disclosure obligations, how do/should responsible lenders assist borrowers to understand the terms of the credit agreement? How should any guidance cover different modes of providing credit? (e.g. online applications) Should certain information be required to be given orally for face-to-face or telephone interactions with customers?
16. What are/should be responsible lenders' practices where English is not a borrower's first language?
17. What opportunities do/should responsible lenders provide to borrowers to ask questions about the agreement? Would providing access to frequently asked questions be sufficient?
18. What practices do/should responsible lenders undertake to ensure that credit agreements are in plain English, clear, concise and intelligible?
19. How do/should responsible lenders assist borrowers to understand the implications of the credit agreement? E.g. if technical or legal concepts are referred to, should the agreement explain the implications of those concepts?
20. Can you point to good examples of credit agreements that are in plain English, clear, concise and intelligible?
21. What are/should be responsible lenders' processes in relation to independent budgeting or legal advice for borrowers and guarantors? In which circumstances should the lender require or recommend independent legal advice?
22. What do/should responsible lenders do to assist guarantors to make informed decisions?
23. What information do/should responsible lenders give a borrower to assist them to make an informed decision on credit related insurance?

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| <p>24. How do/should responsible lenders ensure that any advertising of credit-related insurance products distributed by the lender is not misleading, deceptive or confusing?</p> <p>25. How do/should responsible lenders ensure that borrowers have sufficient time to make informed decisions?</p> <p>26. What processes and practices do/should responsible lenders undertake to assist informed decision for agreements when the application and approval is undertaken remotely?</p> <p>27. What other matters should the Code address in relation to assisting informed decisions?</p> |
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## **Making reasonable inquiries**

### **Purpose and objectives**

83. Lenders may inquire as to the borrower’s history, circumstances and character in order to determine the risk to the business of providing credit. However, that may not be sufficient to be satisfied that it is likely that the credit will meet the requirements and objectives of a consumer or that the consumer has the ability to repay the credit without suffering substantial hardship.

### **The lender responsibilities**

84. The lender responsibilities require lenders to make reasonable enquiries to be satisfied that when providing consumer credit that it is likely:
- credit will meet the borrower’s requirements and objectives; and
  - borrowers will make the repayments without suffering substantial hardship.
85. The lender responsibilities also require a lender to make reasonable inquiries in relation to relevant guarantees (to be satisfied it is likely that the guarantor can comply without suffering substantial hardship) and relevant credit-related insurance (to be satisfied it is likely that the insurance will meet the borrower’s requirements and objectives and the borrower can make the payments without suffering substantial hardship).
86. The Amendment Act provides that the Code may set out:
- the nature and extent of inquiries a lender should make before entering into a credit agreement, guarantee, or a relevant insurance agreement; and
  - the processes, practices, or procedures that a lender should follow when making reasonable inquiries so as to be satisfied of the matters referred to in the relevant lender responsibilities.<sup>35</sup>

### **Precedent - nature and extent of inquiries**

#### *Information to be obtained*

87. Most lenders already require a consumer to supply information before a loan is granted. This may include evidence of income, expenses and other debts.

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<sup>35</sup> New section 9F inserted by CCCF Amendment Act.

88. ASIC suggests inquiries about the following matters, to assess the consumer's financial position, would be included in reasonable inquiries:<sup>36</sup>
- the consumer's amount and source of income, including the length and nature of their employment;
  - the consumer's fixed expenses, such as rent, repayments to other loans/debts, child support, insurance;
  - the consumer's variable expenses;
  - any existing debts that are to be repaid from the loan;
  - the consumer's credit history;
  - the consumer's age and number of dependants;
  - the consumer's assets;
  - reasonably foreseeable changes, such as the end of a honeymoon period on a loan, impending retirement, or the end of seasonal employment; and
  - geographical factors, such as remoteness (which may increase expenses).
89. ASIC also suggests the following inquiries about a borrower's requirements and objectives:<sup>37</sup>
- the amount of credit needed;
  - the timeframe for which the credit is required;
  - the purpose for which the credit is sought and the benefit to the borrower;
  - 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; and
  - whether the borrower requires any additional expenses, such as premiums for credit-related insurance, to be included in the amount financed, and whether the consumer is aware of the additional costs of these expenses being financed.
90. ASIC states that a lender's obligations are scalable – the information required will vary depending on the circumstances. More extensive inquiries are likely to be necessary where the size of a loan is large relative to the consumer's capacity to repay, the terms of the agreement are complex, the consumer has limited capacity to understand the agreement, the consumer is confused about their objectives or the objectives do not apparently match the product being considered, and where the borrower is a new customer.<sup>38</sup>

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<sup>36</sup> RG 209.32.

<sup>37</sup> RG 209.33.

<sup>38</sup> RG 209.23.

91. The Banking Ombudsman in New Zealand considers that a bank must consider all relevant information available to it across departments when making a decision about lending.<sup>39</sup> The guide notes that it may not be enough for a bank to consider only credit card department information and the fact that a customer has previously met payments on a current credit facility may not in itself establish that the customer can repay a higher level of debt. Further, ASIC notes that lenders should take care when relying on information held by the lender, as it may not reflect the borrower's full financial situation, e.g. they may have a credit card with another lender.<sup>40</sup>
92. Australian legislation and ASIC guidance require lenders to obtain additional information from the borrower for small amount pay day lending, including whether the borrower is currently in default under an existing small amount credit agreement and the source and amount of the borrower's gross income.<sup>41</sup>

#### *Verification of information*

93. Many lenders require consumers to provide information which establishes their ability to repay a loan. It may be relatively easy to verify that information where the consumer is an existing customer.
94. Consumers are, on the whole, free to choose who to take a loan from. They do not necessarily need to have a pre-existing relationship. Some common ways of verifying information for new customers include using a credit check service, requiring copies of recent payslips, confirmation of employment with the employer, and bank account statements.
95. Both consumers and lenders have responsibilities in relation to credit and debt. The statutory responsible lending obligations on the lender do not remove the need for the borrower to undertake their own assessment of their ability to repay the loan, or the borrower's responsibility to provide accurate information to the lender so that the lender can meet its responsible lending obligations.
96. Submitters on the exposure draft Bill considered the concept of "borrower responsibility" and as a result, section 9B(4) was included in the lender responsibilities. This allows lenders to rely on information provided by the borrower or guarantor unless the lender has reasonable grounds to believe the information is not reliable. ASIC suggests that a lender may need to make additional inquiries where the information that a borrower provides is inconsistent with other information held by the lender about the borrower, or the information that the borrower provides is outside the standard range for the type of borrower.<sup>42</sup>
97. CONC provides that where a lender requests information from a borrower for a creditworthiness assessment and the information provided by the customer is false and the lender has no reason to know this is the case, the lender should not contravene the obligations in relation to the creditworthiness assessment.<sup>43</sup>

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<sup>39</sup> Banking Ombudsman Scheme, *Concerns about lending decisions*, 1 October 2013.

<sup>40</sup> RG 209.44.

<sup>41</sup> RG 209.53.

<sup>42</sup> RG 209.46.

<sup>43</sup> CONC, 5.3.1.

98. Under the Australian legislation and ASIC guidance, lenders also need to verify the borrower's financial situation by obtaining and considering recent bank statements for small amount credit contracts.<sup>44</sup>

### Issues for the Code to address

99. The Code should set out what inquiries lenders should make to establish the borrower's financial position and requirements and objectives. Issues to consider include how to balance lender responsibility with borrower responsibility, for example when the lender can rely on information provided by a borrower and when the lender should require additional verification of the information provided by the borrower. Another issue to consider may be how much reliance should be placed on credit checks – including as a result of changes to the Credit Reporting Privacy Code in 2012 allowing for banks, finance companies and utilities companies to share repayment history information with credit reporters.

#### Questions for submitters:

28. What information do/should responsible lenders require from a borrower when they apply for credit? How much reliance should a lender place on a credit check?
29. What do/should responsible lenders explain to the borrower in relation to the purpose of the checks and assessments of affordability?
30. How do/should responsible lenders assess whether the information a consumer has provided is correct? In what circumstances do/should responsible lenders be able to rely on information provided by a borrower?
31. How does/should a responsible lender's checks differ for existing customers and new customers?

### Precedent - requirements and objectives of borrower

100. In assessing whether the credit agreement likely meets the requirements and objectives of the borrower, ASIC states that examples of factors to take into account in making the assessment include<sup>45</sup>:
- the nature of the credit and the borrower's stated objectives (including the relative importance of each different objective);
  - where the credit is used to purchase an item, the term of the credit relative to the likely useful life of the asset;
  - the cost of obtaining the credit;
  - the borrower's understanding of the credit agreement;
  - the complexity of the credit agreement;
  - in relation to switching and refinancing, the extent to which it would benefit the borrower taking into account cost savings and other features of the agreement e.g. convenience or greater flexibility.

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<sup>44</sup> RG 209.53.

<sup>45</sup> RG 209.117.



101. ASIC prescribes circumstances in which certain types of agreement will not be suitable, including where two or more small amount credit contracts are used to obtain credit which could be provided through one contract.<sup>46</sup>

### **Issues for the Code to address**

102. The Code should set out guidance on how lenders should assess whether the proposed credit agreement and credit-related insurance agreement meets the borrower's objectives and requirements. Any guidance will need to be balanced against not unduly restricting the consumer's freedom to access the credit product of their choosing. The assessment of the borrower's objectives and requirements is not a moral judgment as to what those requirements and objectives should be, nor should it require the lender to assess what product best meets the borrower's requirements and objectives from a range of products that equally meet those requirements and objectives.
103. Guidance in the Code will need to take into account the interaction between the lender responsibilities and the obligations under the Financial Advisers Act 2008 (FAA). An assessment as to whether the credit product or any credit-related insurance likely meets the borrower's requirements and objectives may involve giving personalised financial advice that is regulated under the FAA. Assistance in relation to subsequent dealings during the life of that product may also be regulated under the FAA. As such, the FAA may require the individual that undertakes that assessment or provides the assistance to be registered on the Financial Service Providers Register and comply with obligations under the FAA to disclose prescribed information to the client, to exercise care, diligence and skill and to not act or advertise in a way that is misleading, deceptive or confusing.
104. An assessment of whether the credit-related insurance meets the borrower's needs and objectives will likely require an assessment of how the policy is likely to benefit the borrower, whether any of the exclusions are likely to apply to the borrower, and whether alternative means of protecting against the events to be insured against are available to the borrower.

#### **Questions for submitters:**

32. How do/should responsible lenders consider whether credit does/does not meet the requirements and objectives of the borrower?
33. How should the lender responsibility to be satisfied that it is likely that the credit will meet the borrower's requirements and objectives be balanced against not unduly restricting consumer choice?
34. What proportion of credit applications are processed without the involvement of financial advisers permitted to give personalised advice in relation to category 2 products under the Financial Advisers Act 2008? Will regulation under both the lender responsibilities and the Financial Advisers Act impose significant costs for lenders?
35. How do/should responsible lenders deal with the potential conflicting incentives posed by payments of commission/bonuses and the need to be satisfied that it is likely the credit agreement meets the requirements and objectives of the borrower and will be repaid without substantial hardship?

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<sup>46</sup> RG 209.121.

## **Precedent - Substantial hardship (borrowers and guarantors)**

### *Meaning of substantial hardship*

105. Like the CCCFA responsible lending obligations, Australian legislation also includes the concept of substantial hardship. The ASIC regulatory guide expressly states that they do not propose to give any definitive formulation of what substantial hardship means. They consider that the law around substantial hardship will develop as case law is made.<sup>47</sup>
106. CONC requires an assessment of the borrower's ability to meet repayments in a "sustainable manner" without incurring financial difficulties or experiencing significant adverse consequences. CONC states that "sustainable" means that the borrower can without undue difficulty make repayments on time 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.<sup>48</sup>
107. Both CONC and ASIC note that the assessment should be based on the maximum amount to be payable under the credit contract, and should not assess ability to repay based on only the minimum repayment amount.<sup>49</sup>
108. ASIC expects that lenders should have detailed policies and processes to assess whether a credit agreement is likely to cause substantial hardship. This may involve the use of benchmarks to assess whether a borrower's disposable income is below a certain pre-determined level.
109. ASIC suggests that benchmarks could assess whether a consumer's disposable income is below a level where they do not have funds to meet realistic living costs and those of their dependents, below an amount based on an objective indicator such as the Henderson Poverty Index plus a certain margin, or below the maximum applicable level of government benefits for a person in the consumer's financial and family situation.<sup>50</sup>
110. Another option is to set a specific debt-to-income ratio. The World Bank notes that explicit limits provide a bright line for lenders to assess the issue of substantial hardship, but have the potential to exclude access to loans for borrowers who can afford it.<sup>51</sup> We note that it may be difficult to specify appropriate debt-to-income ratios that can apply across different types of products/lenders/borrowers and there is a risk that such ratios could potentially limit competition and innovation. One option is to specify an indicative debt-to-income ratio and policies in relation to when a loan is provided above the suggested ratio.

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<sup>47</sup> RG 209.93.

<sup>48</sup> CONC, 5.3.1.

<sup>49</sup> CONC, 5.3.1 and RG 209, example 4.

<sup>50</sup> RG209.100.

<sup>51</sup> World Bank's Responsible Lending: Overview of Regulatory Tools, page 45.

### *Specific circumstances*

111. There are statutory presumptions in Australia that, in specified circumstances, the consumer will only be able to meet their payment obligations with substantial hardship. These are:
- where the consumer could only comply with their repayment obligation under a credit contract or consumer lease by selling their principal place of residence; or
  - where the consumer is currently in default under an existing small amount credit contract, or has been a borrower under two or more small amount credit contracts in the 90 day period before assessment.<sup>52</sup>
112. CONC also provides that a lender must not base its creditworthiness assessment primarily or solely on the value of any security provided by the borrower.<sup>53</sup> The World Bank states that if a lender has to resort to an above-average number of repossessions compared to its peers, it will often be a sign of a failure to lend responsibly.<sup>54</sup>
113. Assessing what is appropriate security is a matter of business judgment and lenders are entitled to take sufficient security to protect their position. However, there is a question as to whether lenders should take steps to ensure that any security that is taken is not excessive relative to the size and length of the loan.

### **Issues for the Code to address**

114. The Code may set out guidance on what constitutes substantial hardship. In developing such guidance, we will consider issues such as whether there are circumstances in which it should be presumed that borrowers will face substantial hardship.

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<sup>52</sup> RG 209.97.

<sup>53</sup> CONC, 5.3.4.

<sup>54</sup> World Bank's Responsible Lending: Overview of Regulatory Tools, page 35.

**Questions for submitters:**

36. What factors should be taken into account in considering what should constitute substantial hardship?
37. Should substantial hardship be assessed by reference to any particular indicators or reference budgets?
38. Should the Code specify a threshold for substantial hardship? If so, what is an appropriate threshold?
39. To what extent do/should responsible lenders take into account likely future market conditions (e.g. interest rate rises) when assessing affordability for the borrower (particularly for long term credit agreements such as mortgages)?
40. Do/should responsible lenders engage in lending that relies primarily or solely on the value of any security provided by the borrower?
41. Are there circumstances in which it should be presumed that the consumer will only be able to make repayments with substantial hardship?
42. What policies do/should responsible lenders have in place to assess whether the security taken is excessive relative to the size and length of the credit provided?
43. What other matters should the Code address in relation to making reasonable inquiries to assess whether the credit agreement meets the borrower's requirements and objectives and can be repaid without substantial hardship?

## **C During the life of a consumer credit agreement**

### **This part**

115. The responsible lending obligations include a number of responsibilities that apply during a consumer credit agreement. This part seeks your comments on the guidance required in the Code to comply with those responsibilities.
116. This part first concentrates on dealings between the lender and borrower after the agreement is entered into, particularly in relation to variations. It then considers the prohibition on charging unreasonable fees as part of the consumer credit agreement.

### **Dealings during the term of the agreement**

#### **Purpose and objectives**

117. Repayment difficulties sometimes arise where borrowers are provided with additional credit under an existing credit agreement or roll-over credit for a short-term credit agreement without being informed of the full implications and without the lender having assessed whether the borrower can repay the additional credit without substantial hardship.
118. The CCCFA currently requires lenders to comply with variation, continuing and request disclosure requirements throughout the life of a consumer credit contract. However, there is no specific statutory obligation on lenders to assist borrower understanding of the implications of any variations or to be satisfied that the borrower likely has the ability to repay any increased credit.
119. The introduction of the responsible lending obligations will mean that following the initial sale of a consumer credit contract, lenders will have obligations in relation to their behaviour and relationship with the borrower.

#### **The lender responsibilities**

120. After a consumer enters into a consumer credit contract, the lender will be required to continue to comply with the responsible lending principles and exercise the care, diligence and skill of a responsible lender in all subsequent dealings with a borrower or guarantor.
121. Lenders are also required to comply with the following lender responsibilities:
  - Assist the borrower to reach informed decisions in all subsequent dealings in relation to the agreement, including by ensuring that:
    - Any variation to the agreement is expressed in plain language in a clear, concise and intelligible manner; and
    - 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.
  - Meet all the lender's legal obligations to the borrower, including under the CCCFA.

122. The Amendment Act provides that the Code may set out the processes, practices, or procedures that a lender should follow to give assistance in subsequent dealings, to promote or facilitate compliance with legal obligations, and any other matters that promote or facilitate the lender responsibility principles.

### **Precedent**

123. CONC provides that, before significantly increasing the amount of credit to be provided or increasing a credit limit, the lender must undertake an assessment of the borrower's creditworthiness.<sup>55</sup> CONC provides that the rules for assessing creditworthiness and affordability before a credit agreement is entered into apply with necessary modifications to increases in the amount of credit and credit limits.
124. Where a lender has a right to increase the interest rate under a credit agreement, CONC provides that the lender must not do so unless there is a valid reason and must notify the customer of the rate of increase.<sup>56</sup>
125. CONC also provides rules in relation to refinancing, including that a lender must not encourage a borrower to refinance if the result would be that the borrower's commitments are not sustainable. In relation to high-cost short-term credit, lenders are required to inform the borrower that "rolling over or extending your loan may not be the best option and may make things worse".<sup>57</sup>

### **Issues for the Code to address**

126. Certain variations or dealings after the credit agreement has been entered into may have a material impact on whether the credit agreement continues to meet the borrower's requirements and objectives and can be repaid without substantial hardship. In relation to such variations and dealings, guidance in the Code may set out the information that lenders should provide, and consider whether the same considerations should apply as for entering into a new agreement.
127. The Code may also address whether there are other practices that lenders should undertake during the term of the agreement or should refrain from undertaking. For example, the Code may address whether a mobile truck shop lender should inform the borrower that they have a credit balance so that the borrower can decide what to do with the credit balance.

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<sup>55</sup> CONC, 6.2.1.

<sup>56</sup> CONC, 6.7.15-6.7.16.

<sup>57</sup> CONC, 6.7.20.

**Questions for submitters:**

44. What practices and processes do/should responsible lenders have in place to assist borrower decision-making in relation to variations to a contract (e.g. credit card limit increases) or refinancing? What types of variations do/should such practices apply to?
45. What practices and processes do/should responsible lenders have in place in relation to whether a credit agreement would likely meet the borrower's requirements and objectives and can be repaid without substantial hardship following a variation or refinancing? What types of variations do/should such practices apply to?
46. Other than complying with disclosure requirements, what information do/should responsible lenders provide to borrowers in relation to the credit agreement during the life of the agreement? For example, should lenders provide certain information to borrowers to enable borrowers to make decisions as to whether to exercise their rights under the agreement?
47. What practices do/should responsible lenders refrain from during the life of the credit agreement? (For example, should responsible lenders refrain from the practice of holding multiple direct debit forms so that one can be re-submitted if a form is cancelled?)

## Fees

### Purpose and objective

128. Fees are one way for the lender to recover the costs involved with the credit contract.
129. The CCCFA states that a consumer credit contract must not provide for a credit fee or a default fee that is unreasonable.
130. There are different tests for what constitutes an "unreasonable" fee depending on the type of fee in question.

### *Credit Fees*

131. The amended definition of "*credit fees*" will capture a wide range of fees payable by the borrower. Some credit fees are specifically defined by the legislation: establishment fees, prepayment fees and third party fees (where the third party is an "associated person").<sup>58</sup> "*Other credit fees*" is a residual category which will capture all other credit fees, for example: monthly administration fees, statement fees, low equity fees, security, discharge fees, variation fees and over-limit fees. All credit fees, regardless of whether they are specifically defined in the CCCFA must not be "unreasonable".
132. In determining whether a credit fee is unreasonable 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. In determining whether the fee reasonably compensates the creditor for that cost, the court must have regard to "reasonable standards of commercial practice".

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<sup>58</sup> CCCFA, section 45, "fees or charges passed on by a creditor".

### *Default fees*

133. “*Default fees*” are fees that may be payable by the borrower in the event of a breach of a credit contract by the borrower. They do not include default interest charges.
134. Default fees can be a source of problems for borrowers, who sometimes overlook the amount of these fees. This means that a missed payment can become an unmanageable debt.
135. In determining whether a default fee is unreasonable, 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 or for a reasonable estimate of any loss incurred by the creditor as a result of the borrower’s acts or omissions.
136. 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.

### *Third Party Fees*

137. The CCCFA treats third party fees as a distinct category, separate from credit and default fees (unless the third party is a related party of the creditor). It states that a fee or charge payable by a borrower for an amount payable or to reimburse an amount paid by the creditor to a third party must not exceed the actual amount payable by the creditor if that amount is ascertainable when the fee is paid by the borrower.
138. An exception is that a lender may charge a reasonable commission in connection with any credit-related insurance taken out by the borrower.
139. The Amendment Act does not change the general approach to third party fees under the CCCFA but it does prohibit a creditor from charging a commission where:
  - the borrower is required, directly or indirectly, to obtain the insurance from a particular provider or providers; or
  - the insurance is financed under the credit contract and the creditor has, in relation to the contract, breached the lender responsibility in relation to credit-related insurance in any respect.
140. The lender responsibilities include an obligation on a lender to make reasonable inquiries in relation to a relevant insurance contract, to be satisfied that it is likely that the contract will meet the borrower’s requirements and objectives and that the borrower can make payments under the contract without suffering substantial hardship. The lender must also assist the borrower to reach an informed decision about whether to enter the contract, and to be reasonably aware of the full implications of entering the contract.

### *Prepayment fees*

141. The Amendment Act provides that a “*prepayment fee*” is a fee that relates only to prepayment 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.
142. The Amendment Act provides that a prepayment fee is unreasonable if it exceeds a reasonable estimate of the creditor’s loss arising from the prepayment.



143. Note that guidance on prepayment fees payable for a full prepayment in respect of a fixed-rate contract is not within the scope of the Code and a safe harbour formula is already provided by the Credit Contracts and Consumer Finance Act Regulations 2004.
144. A creditor may also charge a credit fee relating to administrative costs in relation to a part prepayment or a full prepayment (which must not be unreasonable).

### **Lender responsibilities**

145. The lender responsibilities under the Amendment Act state that the lender must meet all legal obligations to the borrower, including obligations in relation to credit fees.
146. The Code may set out the processes, practices or procedures that a lender should follow to ensure that fees are not 'unreasonable'.<sup>59</sup> Evidence of a lender's compliance with the Code will be treated as evidence that a default fee or credit fee is not unreasonable.<sup>60</sup>

### **Precedent on fees**

#### *Commerce Commission guidelines*

147. The Commerce Commission published draft guidelines on credit fees in 2010 following a public consultation process. These draft guidelines have not been finalised as the application of legal principles in this area are currently the subject of an appeal case and remain unsettled. You can read the Commerce Commission draft guidelines at this link: <http://www.comcom.govt.nz/consumer-credit/guidelines-for-credit-fees/>
148. Given the status of these guidelines and the fact that the principles are subject to appeal, there is a question of whether, or to what extent, such material should inform guidance on fees.

### **Issues for the Code to address**

149. The Code could provide guidance on the kinds of costs to the lender which can be taken into consideration when establishing whether a credit fee or default fee is unreasonable. Providing this guidance should help to increase certainty.
150. The Code could incorporate the Commerce Commission's draft guidelines, or parts of those guidelines. The Code may also set out the process for calculating:
  - a "reasonable estimate of loss" in relation to a default fee; and
  - how "reasonable standards of commercial practice" can be applied as a subordinate consideration to the primary cost recovery test for credit fees and default fees.<sup>61</sup>

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<sup>59</sup> New section 9F(1)(b)(vii) inserted by the CCCF Amendment Act.

<sup>60</sup> New sections 9D(1)(b)(vii) and section 44B inserted by the CCCF Amendment Act.

<sup>61</sup> Credit Contracts and Financial Services Law Reform Bill, report of the Commerce Committee, page 9.

**Questions for submitters**

48. What practices should lenders follow in order to set a fee that is not unreasonable?
49. What costs should the lender be able to recover through establishment fees (e.g, overheads, administration costs)?
50. What costs should the lender be able to recover through credit fees generally?
51. What costs or losses should the lender be able to recover through default fees?
52. Are there any particular reasonable standards of commercial practice that should be taken into account when deciding whether a fee reasonably compensates the lender for a reasonable estimate of costs or losses incurred by the lender as a result of the borrower's acts or omissions?
53. How and when should fees be reviewed to ensure they remain reasonable?
54. What is a reasonable amount of commission for a lender in relation to credit-related insurance?
55. Should the Code incorporate parts of the Commerce Commission draft guidelines on fees? What changes would be needed to those guidelines to reflect subsequent case law, views on unreasonable fees and changes to the CCCFA?
56. What other matters should the Code address in relation to fees?

## **D Default, enforcement and the end of a consumer credit agreement**

### **This part**

151. The responsible lending obligations include responsibilities that apply when a borrower is facing difficulties with repayment or facing enforcement action under the agreement. This part seeks comments on the guidance required in the Code to comply with those responsibilities.

### **Purpose and objectives**

152. Provided they have complied with their legal obligations, lenders' ability to enforce their rights must be preserved. Any restrictions on their ability to recover debts may affect their willingness to lend.
153. The responsible lending obligations that apply before a credit agreement is entered into should reduce the likelihood of repayment difficulties arising. However, a consumer who is fully informed of the implications of the agreement may not sufficiently consider the possibility of being unable to make repayments at a later date due to changes in wider market conditions or in their own personal circumstances.
154. Regulating lender conduct when a borrower is facing repayment difficulties, repossession or enforcement action is important to clarify rules for lenders and protect consumers in a vulnerable and often stressful situation.

### **The lender responsibilities**

155. The lender responsibility principles will require a lender to exercise the skill, care and diligence of a responsible lender in all subsequent dealings with a borrower in relation to an agreement.
156. The specific lender responsibilities include requirements to:
- treat the borrower and their property (or property in their possession), and the guarantor, reasonably and in an ethical manner; and
  - ensure that the lender does not exercise a right or power conferred by the agreement in an oppressive manner.
157. This part considers these responsible lending obligations in more detail. This part first considers lender responsibilities in the context of working with borrowers to find solutions when repayment difficulties arise. It then considers lender responsibilities when taking enforcement action, including repossession.

## Repayment difficulties and other problems

### Purpose and objectives

158. Many lenders are prepared to work with borrowers to find appropriate solutions when repayment difficulties arise. If the borrower faces unforeseen hardship (which may include injury or loss of employment), the CCCFA includes the right for borrowers to apply to the lender to change their loan by extending the term, or by reducing or postponing payments due. The updated CCCFA will extend the time in which borrowers can access unforeseen hardship relief and impose time limits for lenders to make decisions in relation to such applications.
159. However, there are currently no consistent standards as to how lenders should treat borrowers when repayment difficulties arise or when they consider unforeseen hardship applications.

### Lender responsibilities

160. The specific lender responsibilities include obligations to treat borrowers and their property reasonably and in an ethical manner, including when:
- breaches of a credit agreement have occurred or may occur or when other problems arise; or
  - a borrower suffers unforeseen hardship.
161. The unforeseen hardship provisions will require lenders to decide whether to agree to changes to the credit agreement in compliance with the lender responsibility principles.<sup>62</sup>
162. The Amendment Act provides that the Code may set out the processes, practices, or procedures that lenders should follow to ensure compliance with those responsibilities.

### Precedents

163. The FSF Guidelines consider that if a borrower is having trouble making payments they should contact the lender as soon as possible. In addition, the Guidelines state that a responsible lender should:

*“Work with you to find solutions if you are having problems with your money, or suddenly face hardship. This may include referring you to someone who can give you advice about how best to manage your money.*

*Refer you to a budget advisor and work with the budget advisor if you ask for that.*

*Help you to deal with any social service provider (such as Work and Income New Zealand) if you ask for that...”*

164. One of the overarching principles in CONC is that a firm should pay due regard to the interests of its consumers and treat them fairly<sup>63</sup>. CONC also sets out specific rules and guidance on post contractual requirements and arrears, default and recovery.

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<sup>62</sup> New section 57A inserted by the CCCF Amendment Act.

<sup>63</sup> Principle 6 of CONC.

165. CONC requires a firm to monitor a customer's repayment record and take appropriate action where there are signs of actual or possible repayment difficulties. Compliance with this rule should generally include:
- notifying the customer of the risk of escalating debt; and
  - providing contact details of not-for-profit debt advice bodies.<sup>64</sup>
166. CONC guidance on arrears, default and recovery includes the following elements:
- arrears policies which ensure fair and appropriate treatment of customers;
  - dealing fairly with customers in arrears or default; and
  - forbearance and due consideration – including allowing a customer reasonable time and opportunity to repay the debt.<sup>65</sup>
167. CONC also puts specific rules in place relating to continuous payment authorities to deal with irresponsible practices by lenders that use such authorities to take payments directly from a customer's bank account. For instance, CONC requires that a lender must exercise its rights under such an authority in a manner which is reasonable, proportionate and not excessive and must exercise appropriate forbearance if it becomes aware that the customer is or may be experiencing financial difficulties. Similarly, a lender must not improperly or unfairly inhibit or discourage a customer from cancelling a continuous payment authority.<sup>66</sup>
168. The UK Consumer Finance Association Lending Code for Small Cash Advances considers how to deal with customers experiencing financial difficulties or hardship. If a customer has previously faced financial difficulties, members must take this into account when considering any future applications for credit and not allow customers to enter into further loan agreements until all outstanding loans have been repaid. Where appropriate, customers may be referred to a debt advisor.<sup>67</sup>

### **Issues for the Code to address**

169. The Code may set out details of policies or procedures that responsible lenders should have in place for dealing with breaches or potential breaches of the agreement or other problems, as well as unforeseen hardship applications.
170. Such guidance may refer to processes, practices or procedures for monitoring of repayments, communications with borrowers in relation to repayments, reminding borrowers of unforeseen hardship relief and referring borrowers to independent budget advisers or financial dispute resolution schemes. The Code may also provide guidance on the factors lenders should take into account when assessing unforeseen hardship applications.

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<sup>64</sup> CONC, 6.7.3.

<sup>65</sup> CONC, 7.3.

<sup>66</sup> CONC, 7.6.

<sup>67</sup> UK Consumer Finance Association Lending Code for Small Cash Advances, section 6.6.

**Questions for submitters:**

57. How do/should responsible lenders monitor whether the borrower may be facing actual or possible repayment difficulties? Is it practical to check for possible repayment difficulties?
58. What policies or procedures do/should responsible lenders have in place for dealing reasonably with borrowers who have or may breach the agreement or when other problems arise? (e.g., in relation to assistance to be provided to the borrower)
59. What do/should responsible lenders do to assist borrowers to be informed of their rights? (e.g., in relation to unforeseen hardship relief and access to dispute resolution schemes.)
60. How do/should responsible lenders communicate with borrowers in relation to breaches or potential breaches of the agreement to ensure that they treat borrowers reasonably and in an ethical manner? (e.g. in relation to staff training and policies and enforcement of those policies)
61. What do/should responsible lenders take into account when considering repayment plans proposed by a borrower (in connection with an application for unforeseen hardship relief)?
62. What are the elements of a good internal complaints process?
63. What other matters should the Code address in relation to borrowers facing repayment difficulties or other problems?

## **Enforcement action and the end of the credit agreement**

### **Purpose and objectives**

171. Where the borrower does not make the repayments due, lenders have various rights to recover the amount of the loan, including referring the loan to a debt collection agency, seeking an attachment order to deduct an amount from income to repay the debt, and initiating bankruptcy proceedings. The remedy of repossession is considered specifically in more detail below.
172. Lenders that have complied with their legal obligations are entitled to exercise their rights to ensure that the debt is repaid. However, a disproportionate response may result in significant adverse outcomes for consumers.

### **Lender responsibilities**

173. As noted, the lender responsibilities include requirements to:
  - treat the borrower and their property (or property in their possession), and guarantors, reasonably and in an ethical manner; and
  - ensure that the lender does not exercise a right or power conferred by the agreement in an oppressive manner.
174. Lenders will be responsible for the behaviour of their agents, including debt collectors or repossession agents. Where a lender has assigned a debt to a debt collector or other party, that other party will be the lender for the purpose of the CCCFA and will be required to comply with the lender responsibility principles.

## Precedents

175. CONC provides that a lender must not take disproportionate action against a borrower in arrears or default. This includes not applying to the court for an order for sale or submitting a bankruptcy petition without having first fully explored more proportionate options.<sup>68</sup>
176. CONC also provides rules in relation to lender contact with customers, including providing that a lender must not contact borrowers at unreasonable times, must not unfairly disclose or threaten to disclose information relating to the debt to a third party, and must not act in a way likely to public embarrass the borrower.<sup>69</sup>
177. In the area of debt collection, the Council for Debt Collectors in South Africa adopted a code of conduct in 2003 under the Debt Collectors Act 1998. The Code of Conduct states that a debt collector, in the process of collecting a debt, shall have due regard for the person, the property and the civil rights of the borrower, and shall ensure that any action taken against a borrower does not humiliate, threaten or cause distress to a borrower.<sup>70</sup>
178. The Fair Debt Collection Practices Act in the United States aims to eliminate abusive practices in the collection of consumer debts, to promote fair debt collection and to provide consumers with an avenue for disputing and obtaining validation of debt information in order to ensure the information's accuracy.<sup>71</sup> The Act creates guidelines under which debt collectors must conduct business and prohibits certain behaviours including:
- contacting a consumer outside the hours of 8am – 9pm
  - failing to cease communication upon request
  - communicating with consumers at their place of employment
  - publishing a consumer's name or address on a "bad debt" list
  - threatening arrest or legal action
  - using abusive or profane language
  - communicating with third parties about the debt
  - contacting borrowers via embarrassing media.

## Issues for the Code to consider

179. Issues for the Code to address may include guidance on the processes a lender should follow in determining whether a particular enforcement action is a proportionate response.

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<sup>68</sup> CONC, 7.3.14.

<sup>69</sup> CONC, 7.9.

<sup>70</sup> Section/Clause 5(2) of the Debt Collectors Act, 1998 (Act no. 114 of 1998) Code of Conduct.

<sup>71</sup> 15 U.S. Code Chapter 41, Subchapter V - DEBT COLLECTION PRACTICES, § 1692 Congressional findings and declaration of purpose.

180. The Code may also address what the lender should do once they have been repaid, for example, whether they should release any security, notify the guarantor and cancel direct debit authorities.

**Questions for submitters:**

64. What is the range of enforcement responses that lenders take in response to default by the borrower?
65. What policies or procedures do/should responsible lenders have in place for considering whether their enforcement response is proportionate?
66. What steps do/should responsible lenders go through before taking enforcement action? For example, before sending debts to a debt collection agency?
67. What are/should be responsible lenders' practices in relation to charging interest and/or fees once they have started enforcement action? (For example, once a debt has been sent to a collection agency.)
68. What steps do/should responsible lenders take to ensure that they treat borrowers and their property reasonably and in an ethical manner during the course of any enforcement action (including the manner in which the lender or their agents communicate with the borrower)?
69. What other matters should the Code address in relation to enforcement action?
70. What do/should responsible lenders do once they have been fully repaid? (For example, arranging release of securities.)

## Repossession

### Purpose and objectives

181. Repossession and sale of secured goods is a remedy available to a lender to recover an unpaid debt under a credit contract.<sup>72</sup>
182. The repossession process is currently governed by the Credit (Repossession) Act 1997 (CRA). The Amendment Act transfers many of the obligations from the CRA into the CCCFA, for example the obligation on the creditor to provide consumers with a repossession warning notice<sup>73</sup> prior to repossession. In addition the Amendment Act will:
- restrict the ability of the creditor to repossess certain essential household goods like fridges, beds and washing machines;
  - require all consumer goods subject to repossession to be specifically identified in the credit contract/security agreement;
  - require all repossession agents to be licenced, or hold a certificate of approval under the Private Security Personnel and Private Investigators Act 2010; and

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<sup>72</sup> The right to repossess must be contained in the security agreement or credit contract. Note that repossession only applies to secured debt over chattels or vehicles.

<sup>73</sup> The CCCFA refers to this as a pre-repossession notice.



- require repossession agents to be registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008, if the debt has been assigned to them as part of the recovery process.<sup>74</sup>

183. Some obligations included in the updated CCCFA will impact directly on the individual carrying out the repossession (for example, a restriction on the time of the repossession), however the lender responsibilities will apply only to lenders. The lender is ultimately responsible for the conduct of its agents, including repossession agents.

184. The purpose of regulating the repossession process, and the expectation that lenders will engage responsible and licensed repossession agents, is to protect consumers against irresponsible enforcement action.

### **The lender responsibilities**

185. The lender responsibilities relevant to repossession include the responsibility to comply with the CCCFA itself, including the obligations in Part 3A of the updated CCCFA.<sup>75</sup>

186. Part 3A of the updated CCCFA provides that:

- A lender or lender's agent may not repossess consumer goods unless:
  - the borrower is in default under the credit contract or the goods are at risk;<sup>76</sup>
  - the lender has fully complied with the requirements under Part 3A; and
  - the lender complies with the lender responsibility principles.
- A lender must specify a reasonable place to which the borrower may voluntarily deliver the goods specified in the repossession warning notice.
- A lender must not begin or continue repossession enforcement action until a borrower's complaint in relation to any repossession enforcement action or an unforeseen hardship application by the borrower has been resolved.
- The lender must ensure that every aspect of the sale of repossessed consumer goods is commercially reasonable and take reasonable care to obtain the best price reasonably obtainable.

187. Other lender responsibilities include requirements to:

- Treat the borrowers and their property (or property in their possession) reasonably and in an ethical manner, including during the repossession process 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.<sup>77</sup>

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<sup>74</sup> This situation is unlikely, as a repossession agent is likely to act as an agent to the creditor only.

<sup>75</sup> New section 9C(3)(f) and section 9F(1)(d) inserted by the CCCF Amendment Act.

<sup>76</sup> Section 83C provides that the 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 contract."

- Comply with the lender responsibilities when exercising their right to enter premises.<sup>78</sup>

### **Precedents**

188. The FSF Guidelines provide that a responsible lender should treat a borrower fairly if it has to repossess the borrower's property, remembering that the lender also has a right to be repaid.

- Being treated fairly includes:
  - making reasonable efforts to tell the borrower about other payment options before the property is repossessed;
  - repossessing only the property named as security in the loan contract; and
  - treating the borrower and their property with dignity and making sure the repossession agents also treat the borrower fairly.

189. CONC also encourages pre-action contact between the parties as an alternative to repossession.<sup>79</sup>

### **Issues for the Code to address**

190. Part 3A of the updated CCCFA will set out the obligations on a lender in relation to repossession. The Code can provide guidance on the behaviour that a lender might demonstrate in order to achieve compliance.

191. Guidance in the Code may cover the situation where repossession may not be a proportionate response because alternative options exist.

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<sup>77</sup> New section 9B(3)(e) inserted by the CCCF Amendment Act.

<sup>78</sup> New section 83K inserted by the CCCF Amendment Act.

<sup>79</sup> CONC, 7.3.19.

**Questions for submitters:**

71. How/what steps should a lender take to satisfy itself on reasonable grounds that goods are at risk in accordance with Part 3A?
72. What policies do/should responsible lenders have in place in terms of considering alternative options that could be explored before exercising the remedy of repossession?
73. Should the Code provide guidance on the repossession of items of little economic value?
74. What arrangements should a responsible lender have in place for borrowers to voluntarily return goods when a repossession warning notice is issued?
75. Should the Code refer to the internal complaints resolution process used to resolve borrower complaints (given that a lender must not begin or continue repossession enforcement action until a borrower's complaint in relation to any repossession enforcement action has been resolved)?
76. What guidance should the Code provide in terms of how lenders or their repossession agents should enter premises?
77. What policies do/should responsible lenders have in place to consider whether repossession (and the costs involved in repossession) is proportionate to the scale of the default?
78. How do/should responsible lenders ensure that ethical behaviour is observed when effecting a repossession?
79. Should the Code provide guidance about how responsible lenders should carry out the process of selling repossessed goods?
80. What other matters should the Code address in relation to repossession?

# Appendix One: Summary of questions for submitters

## Introduction

1. Do you agree with the proposed criteria for assessing what guidance should be set out in the Code as set out in paragraph 0? Should retaining sufficient flexibility to allow lenders to adapt the guidance to different products and business models be another criterion? Are there any other key criteria to be considered?
2. Are there any particular features of the New Zealand market which would differentiate our approach from international approaches?
3. We consider that the structure of the Code should reflect the lifecycle of a consumer credit contract, do you agree?
4. Are there lenders/borrowers/agreements or classes of lenders/borrowers/agreements that should be treated differently under the Code? If so, why, in what way and how should any such lenders/borrowers/agreements be defined?
5. Should the concept of “scalable” guidance apply to the Code? If so, which principles or responsibilities should be scalable?
6. How prescriptive should the guidance in the Code be?
7. Should the level of prescription differ for different classes of lenders/borrowers/agreements? If so, which classes and why?

## Before entering into a consumer credit agreement

### Advertising

8. What are the elements of a best practice internal process to ensure that advertising is not misleading, deceptive or confusing? (For example, in relation to training and checking marketing material.)
9. Should guidance on advertising processes take account of the size and nature of the lender? If so, how?
10. What existing guidance or codes of practice for advertising will help inform the Code? Should these codes be referred to or translated into the Code?
11. Are there specific advertising practices that lenders should follow? Or are there specific advertising practices that lenders should refrain from following?
12. Should advertising of certain credit products be accompanied by risk warnings?
13. Should there be specific guidance in relation to advertising which is targeted at a specific group or persons known to have specific characteristics? If so, which groups/characteristics?
14. What other matters should the Code address in relation to advertising?

### *Assisting informed decisions*

15. Apart from complying with disclosure obligations, how do/should responsible lenders assist borrowers to understand the terms of the credit agreement? How should any guidance cover different modes of providing credit? (e.g. online applications) Should certain information be required to be given orally for face-to-face or telephone interactions with customers?
16. What are/should be responsible lenders' practices where English is not a borrower's first language?
17. What opportunities do/should responsible lenders provide to borrowers to ask questions about the agreement? Would providing access to frequently asked questions be sufficient?
18. What practices do/should responsible lenders undertake to ensure that credit agreements are in plain English, clear, concise and intelligible?
19. How do/should responsible lenders assist borrowers to understand the implications of the credit agreement? E.g. if technical or legal concepts are referred to, should the agreement explain the implications of those concepts?
20. Can you point to good examples of credit agreements that are in plain English, clear, concise and intelligible?
21. What are/should be responsible lenders' processes in relation to independent budgeting or legal advice for borrowers and guarantors? In which circumstances should the lender require or recommend independent legal advice?
22. What do/should responsible lenders do to assist guarantors to make informed decisions?
23. What information do/should responsible lenders give a borrower to assist them to make an informed decision on credit related insurance?
24. How do/should responsible lenders ensure that any advertising of credit-related insurance products distributed by the lender is not misleading, deceptive or confusing?
25. How do/should responsible lenders ensure that borrowers have sufficient time to make informed decisions?
26. What processes and practices do/should responsible lenders undertake to assist informed decision for agreements when the application and approval is undertaken remotely?
27. What other matters should the Code address in relation to assisting informed decisions?

### *Making reasonable inquiries*

28. What information do/should responsible lenders require from a borrower when they apply for credit? How much reliance should a lender place on a credit check?
29. What do/should responsible lenders explain to the borrower in relation to the purpose of the checks and assessments of affordability?
30. How do/should responsible lenders assess whether the information a consumer has provided is correct? In what circumstances do/should responsible lenders be able to rely on information provided by a borrower?
31. How does/should a responsible lender's checks differ for existing customers and new customers?

32. How do/should responsible lenders consider whether credit does/does not meet the requirements and objectives of the borrower?
33. How should the lender responsibility to be satisfied that it is likely that the credit will meet the borrower's requirements and objectives be balanced against not unduly restricting consumer choice?
34. What proportion of credit applications are processed without the involvement of financial advisers permitted to give personalised advice in relation to category 2 products under the Financial Advisers Act 2008? Will regulation under both the lender responsibilities and the Financial Advisers Act impose significant costs for lenders?
35. How do/should responsible lenders deal with the potential conflicting incentives posed by payments of commission/bonuses and the need to be satisfied that it is likely the credit agreement meets the requirements and objectives of the borrower and will be repaid without substantial hardship?
36. What factors should be taken into account in considering what should constitute substantial hardship?
37. Should substantial hardship be assessed by reference to any particular indicators or reference budgets?
38. Should the Code specify a threshold for substantial hardship? If so, what is an appropriate threshold?
39. To what extent do/should responsible lenders take into account likely future market conditions (e.g. interest rate rises) when assessing affordability for the borrower (particularly for long term credit agreements such as mortgages)?
40. Do/should responsible lenders engage in lending that relies primarily or solely on the value of any security provided by the borrower?
41. Are there circumstances in which it should be presumed that the consumer will only be able to make repayments with substantial hardship?
42. What policies do/should responsible lenders have in place to assess whether the security taken is excessive relative to the size and length of the credit provided?
43. What other matters should the Code address in relation to making reasonable inquiries to assess whether the credit agreement meets the borrower's requirements and objectives and can be repaid without substantial hardship?

#### **During the life of a consumer credit agreement**

##### *Dealing during the term of the agreement*

44. What practices and processes do/should responsible lenders have in place to assist borrower decision-making in relation to variations to a contract (e.g. credit card limit increases) or refinancing? What types of variations do/should such practices apply to?
45. What practices and processes do/should responsible lenders have in place in relation to whether a credit agreement would likely meet the borrower's requirements and objectives and can be repaid without substantial hardship following a variation or refinancing? What types of variations do/should such practices apply to?

46. Other than complying with disclosure requirements, what information do/should responsible lenders provide to borrowers in relation to the credit agreement during the life of the agreement? For example, should lenders provide certain information to borrowers to enable borrowers to make decisions as to whether to exercise their rights under the agreement?
47. What practices do/should responsible lenders refrain from during the life of the credit agreement? (For example, should responsible lenders refrain from the practice of holding multiple direct debit forms so that one can be re-submitted if a form is cancelled?)

#### *Fees*

48. What practices should lenders follow in order to set a fee that is not unreasonable?
49. What costs should the lender be able to recover through establishment fees (e.g, overheads, administration costs)?
50. What costs should the lender be able to recover through credit fees generally?
51. What costs or losses should the lender be able to recover through default fees?
52. Are there any particular reasonable standards of commercial practice that should be taken into account when deciding whether a fee reasonably compensates the lender for a reasonable estimate of costs or losses incurred by the lender as a result of the borrower's acts or omissions?
53. How and when should fees be reviewed to ensure they remain reasonable?
54. What is a reasonable amount of commission for a lender in relation to credit-related insurance?
55. Should the Code incorporate parts of the Commerce Commission draft guidelines on fees? What changes would be needed to those guidelines to reflect subsequent case law, views on unreasonable fees and changes to the CCCFA?
56. What other matters should the Code address in relation to fees?

### **Default, enforcement and the end of a consumer credit agreement**

#### *Repayment difficulties and other problems*

57. How do/should responsible lenders monitor whether the borrower may be facing actual or possible repayment difficulties? Is it practical to check for possible repayment difficulties?
58. What policies or procedures do/should responsible lenders have in place for dealing reasonably with borrowers who have or may breach the agreement or when other problems arise? (e.g., in relation to assistance to be provided to the borrower)
59. What do/should responsible lenders do to assist borrowers to be informed of their rights? (e.g., in relation to unforeseen hardship relief and access to dispute resolution schemes.)
60. How do/should responsible lenders communicate with borrowers in relation to breaches or potential breaches of the agreement to ensure that they treat borrowers reasonably and in an ethical manner? (e.g. in relation to staff training and policies and enforcement of those policies)

61. What do/should responsible lenders take into account when considering repayment plans proposed by a borrower (in connection with an application for unforeseen hardship relief)?
62. What are the elements of a good internal complaints process?
63. What other matters should the Code address in relation to borrowers facing repayment difficulties or other problems?

*Enforcement action and the end of the credit agreement*

64. What is the range of enforcement responses that lenders take in response to default by the borrower?
65. What policies or procedures do/should responsible lenders have in place for considering whether their enforcement response is proportionate?
66. What steps do/should responsible lenders go through before taking enforcement action? For example, before sending debts to a debt collection agency?
67. What are/should be responsible lenders' practices in relation to charging interest and/or fees once they have started enforcement action? (For example, once a debt has been sent to a collection agency.)
68. What steps do/should responsible lenders take to ensure that they treat borrowers and their property reasonably and in an ethical manner during the course of any enforcement action (including the manner in which the lender or their agents communicate with the borrower)?
69. What other matters should the Code address in relation to enforcement action?
70. What do/should responsible lenders do once they have been fully repaid? (For example, arranging release of securities.)

*Repossession*

71. How/what steps should a lender take to satisfy itself on reasonable grounds that goods are at risk in accordance with Part 3A?
72. What policies do/should responsible lenders have in place in terms of considering alternative options that could be explored before exercising the remedy of repossession?
73. Should the Code provide guidance on the repossession of items of little economic value?
74. What arrangements should a responsible lender have in place for borrowers to voluntarily return goods when a repossession warning notice is issued?
75. Should the Code refer to the internal complaints resolution process used to resolve borrower complaints (given that a lender must not begin or continue repossession enforcement action until a borrower's complaint in relation to any repossession enforcement action has been resolved)?
76. What guidance should the Code provide in terms of how lenders or their repossession agents should enter premises?
77. What policies do/should responsible lenders have in place to consider whether repossession (and the costs involved in repossession) is proportionate to the scale of the default?



78. How do/should responsible lenders ensure that ethical behaviour is observed when effecting a repossession?
79. Should the Code provide guidance about how responsible lenders should carry out the process of selling repossessed goods?
80. What other matters should the Code address in relation to repossession?

## Appendix Two: 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:
    - “(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.

## Appendix Three: Glossary

ASA	New Zealand Advertising Standards Authority
ASIC	Australian Securities and Investments Commission
CCCFA	Credit Contracts and Consumer Finance Act 2003
CCCF Amendment Act	Credit Contracts and Consumer Finance Amendments Act 2014
CFA	United Kingdom Consumer Finance Association
CONC	United Kingdom Financial Conduct Authority's Consumer Credit Sourcebook
CRA	Credit (Repossession) Act 1997
FAA	Financial Advisers Act 2008
FCA	United Kingdom Financial Conduct Authority
FSF	Financial Services Federation
NZBA	New Zealand Bankers' Association