



COVERSHEET

Minister	Hon Kris Faafoi	Portfolio	Commerce and Consumer Affairs
Name of package	Request to Introduce Credit Contracts and Consumer Finance Amendment Bill	Date of issue	8 May 2019

List of documents that have been proactively released

Date	Title	Author
19 March 2019	<i>Credit Contracts and Consumer Finance Amendment Bill: Approval for Introduction</i>	<i>Minister of Commerce and Consumer Affairs</i>
19 March 2019	<i>Cabinet Minute LEG-19MIN-0029</i>	<i>Cabinet Office</i>

In Confidence

Office of the Minister for Commerce and Consumer Affairs

Chair, Cabinet Legislation Committee

Credit Contracts and Consumer Finance Amendment Bill: Approval for Introduction

Proposal

1. This paper seeks approval for the introduction of the Credit Contracts and Consumer Finance Amendment Bill (**the Bill**).

Policy

2. Problem debt is seriously affecting the lives of many consumers and their families. It exacerbates financial hardship and stress, contributes to lasting health problems, and can contribute to persistent, intergenerational poverty. Problem debt presents a significant challenge to our ability to build a productive, sustainable and inclusive economy.
3. On 21 September 2018, Cabinet agreed to make a range of improvements to the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**) [CAB-18-MIN-046; DEV-18-MIN-0204]. The attached Bill implements those decisions, as described below.

Interest and fee cap

4. The Bill caps accumulated interest and fees of high-cost loans¹ to 100 percent of the original loan principal. This cap extends subsequent loans from the same lender that repay or replace a high-cost loan. Creditors whose products are subject to the cap will be required to disclose its application and effect.

'Fit and proper person' tests for creditors and mobile traders

5. The Bill requires all directors and top executives of creditors under consumer credit contracts to meet a "fit and proper person" test, in order for the creditor to be registered on the Financial Service Providers Register. To avoid duplication there are exceptions for directors and others who already undergo similar assessments by the Reserve Bank or Financial Markets Authority.
6. Cabinet agreed to the "creation of an independent assessment officer, to be employed by the Commerce Commission (rather than being a function of a Commissioner)". The Bill does not include an explicit requirement that the assessments be made by an employee of the Commission. After discussion with the Commerce Commission, officials advised that making these explicit stipulations in

¹ The definition of 'high-cost loan' in the Bill is based on the relevant Responsible Lending Code definition, in which any loan with an annualised interest rate of 50 percent or more is a high-cost loan.

the drafting was not necessary to achieve the policy intent, and risked causing confusion. Assessments are likely to be delegated to employees of the Commission in any case. Therefore, I have decided that an explicit requirement in the Bill for an “independent assessments officer” should be omitted. I consider this decision to be in line with Cabinet’s agreement to delegate this function within the Commission and its authorisation for me to make technical changes on issues that arise in drafting.

7. The Commerce Commission will be able to charge fees for administering fit and proper person assessments on a cost recovery basis.

Directors duty and banning orders

8. The Bill places a new duty on directors and top executives of creditors, to exercise due diligence to ensure that the creditor complies with its CCCFA obligations.
9. The Bill also makes it easier to seek prohibition or restriction orders for a creditor or a person involved in the management of a creditor, by broadening the range and reducing the number of proven contraventions that make a person eligible for an order.

Improving assessments of loan affordability and suitability, and disclosure in other languages

10. Lenders will be required to substantiate that they had made the required assessments of affordability and suitability, and to substantiate that their fees are reasonable.
11. Cabinet agreed to enable mandatory prescriptive standards in regulations for how creditors must assess loan affordability and suitability, and regulations covering responsible advertising. The Bill removes the presumption that lenders conducting affordability and suitability assessments for credit or credit-related insurance can rely on information provided by the borrower or guarantor.
12. When advertising is provided in a language other than the predominant language used by the creditor (e.g. English), creditors will be required to provide disclosure in that language in appropriate circumstances, with an infringement offence for failing to do so.

Increasing penalties and remedies for non-compliance

13. Cabinet further agreed to provide for civil pecuniary penalties and statutory damages for breaches of the CCCFA, and to expand the court’s powers to order compliance, in particular:
 - 13.1. civil pecuniary penalties to be available for breaches of the CCCFA, with maximum penalties of \$200,000 for an individual or \$600,000 for a body corporate;
 - 13.2. statutory damages to be available for breaches of responsible lending principles, and the interest and fee cap on high-cost loans. The court would have the ability to order a bar on further charging of interest and fees, and affordable repayment of the principal; and

- 13.3. creating the ability for the court to make orders requiring creditors to take positive steps to comply with the Act, or to take such other steps as the court considers necessary in the circumstances.

Debt collection

14. When debt collection commences, the debt collector will be required to inform the debtor of key loan information (to be set out in regulations). This will include the name of the original creditor, the date on which the debt was passed to debt collection, any fees added in relation to debt collection, and information about the borrower's rights.

Mobile traders

15. Cabinet agreed that all mobile traders who offer products or services door-to-door on deferred payment terms will be required to be registered on the Financial Services Provider Register and be members of a dispute resolution scheme (even those who do not currently qualify as 'creditors'). A 'fit and proper person' test will be imposed on directors and top executives as a prerequisite to registration.
16. I note that Cabinet also agreed to strengthen the legal status of "do not knock" stickers, by amending the Fair Trading Act 1986 (**FTA**). This change will be implemented separately, alongside other changes to the FTA arising from reviews currently underway. Policy decisions on those reviews are likely to be before Cabinet in the second half of 2019.

Future-proofing the Act

17. Because credit markets are evolving quickly, Cabinet also agreed to the introduction of a new regulation-making power to declare that a type of agreement is, or is not, a consumer credit contract, and to specify who is and is not a creditor under such an agreement. The Bill includes appropriate limits on the scope of this regulation-making power, and criteria for its use. These include the Minister being required to have regard to the economic substance of the agreement and the purposes of the Act, and to consult with affected parties.

Section 99(1A)

18. In 2017, Cabinet agreed that section 99(1A)² of the Act be amended, so that in future a lender has the right to apply to a court for relief from the presumption of 100 percent forfeiture of all interest and fees [EGI-17-MIN-0105].
19. In 2018, Cabinet confirmed the previous Government's decisions above [DEV-18-MIN-0121]. The Bill gives effect to these decisions.

Technical changes

20. The Bill also includes a number of technical changes:

2 Section 99(1A) provides that if lenders fail to disclose information required by the CCCFA, borrowers are not liable for the payment of any interest or fees over the time that the disclosure went uncorrected. Where many borrowers are involved, this may be a very large amount of money and out of all proportion to the seriousness of the disclosure breach.

- 20.1. which Cabinet previously agreed (in relation to lay-by sales, disclosure when there has been a change to a credit contract, family trusts and enforceable undertakings); and
- 20.2. which are non-controversial, minor, and consistent with current policy. These relate to disclosure in an online environment, continuing disclosure, disclosure of variations to a contract, and disclosure in specific situations (such as where there are joint borrowers for a loan). I propose to include these changes now as the Bill provides a timely legislative vehicle. This is within scope of Cabinet's agreement to minor and technical changes.

Aspects of the Bill that are likely to be contentious

21. Most of the proposals in the Bill are likely to be contentious at select committee. Some lender representatives have submitted against almost all of the proposals that impose further obligations or increased liability on lenders. A number of consumer stakeholders have argued that the changes do not go far enough.
22. During select committee, banks and other lenders are likely to raise the new duties of due diligence for directors and top executives. I expect them to raise concerns about personal liability for directors and top executives, and the maximum penalties for a breach. I note that directors and others are only liable for breach of their duty to exercise due diligence (rather than being directly liable if the creditor breaches its obligations). I consider it is appropriate that directors and executives have a duty to take reasonable steps to bring the lenders they control into compliance with the law.
23. Another area I expect to be raised at select committee is the cap on interest and fees. Some high-cost lenders may not have understood the full scope of policy decisions on the cap. In particular, the fact that the cap also includes any extensions to and top-ups of loans with the same lender is likely to be a concern. This approach is necessary to protect borrowers, as it prevents lenders from avoiding the cap by extending or topping up loans.

Impact analysis

24. A Regulatory Impact Assessment (**RIA**) was prepared in accordance with necessary requirements, and submitted to Cabinet on 21 September 2018.
25. A Cost Recovery Impact Statement (**CRIS**) was also prepared by MBIE to aid decision-making in relation to fees for the 'fit and proper person' test, and submitted to Cabinet on 21 September 2018.
26. MBIE's Regulatory Impact Analysis Review Panel reviewed the RIA and the CRIS. The Panel considered that the information and analysis summarised in the RIA and the CRIS each met the criteria necessary for Ministers to fairly compare the available policy options and take informed decisions on the proposals.

Compliance

27. The Bill complies with:
 - 27.1. the principles of the Treaty of Waitangi;
 - 27.2. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 - 27.3. the disclosure statement requirements (a copy of that statement is attached to the paper);
 - 27.4. the principles and guidelines set out in the Privacy Act 1993;
 - 27.5. the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

Consultation

28. The following departments were consulted on this paper: the Treasury, the Ministry of Social Development, the Ministry for Pacific Peoples and the Ministry of Justice. The Commerce Commission, Financial Markets Authority and the Reserve Bank of New Zealand were consulted on the Bill. The Legislative Design and Advisory Committee also provided advice on the Bill.
29. The Department of Prime Minister and Cabinet (including the Child Poverty Unit) and Te Puni Kōkiri (TPK) were informed about this paper. MBIE consulted with TPK in development of the discussion paper and final policy proposals.
30. The major proposals were subject to a public discussion paper, on which 86 submissions were received. Submitters included consumers, consumer advocates, lenders, debt collectors, industry associations and dispute resolution schemes.

Binding on the Crown

31. The CCCFA is binding on the Crown. This Bill does not amend this provision.

Allocation of decision making powers

32. The decision making power to certify persons as fit and proper, impose conditions and suspend or cancel certifications is being allocated to the Commerce Commission (the current enforcement agency for the CCCFA). The Commerce Commission will gain significant information from the certification process, which will assist with industry monitoring and enforcement.

Associated regulations

33. Regulations will be needed in relation to: debt collection disclosure; the introduction of prescriptive requirements regarding advertising; fit and proper person assessments and inquiries to be made regarding affordability and suitability prior to entering into a credit contract.
 - 33.1. Debt collection disclosure regulations will specify which key information must

be disclosed when debt collection is commenced.

- 33.2. Specific aspects of the 'fit and proper person' test will be clarified in regulations.
 - 33.3. Requirements regarding the responsible advertising of credit will be specified.
 - 33.4. Regulations will also specify what considerations must, at a minimum, be addressed by lenders when conducting affordability or suitability assessments.
34. Exposure drafts will be published for public consultation in mid-2019. Regulations are likely to be finalised by early 2020. The drafting task to develop these will be moderate.

Commencement of legislation

35. The Bill will come into force on 1 March 2020, with the following exceptions:
- 35.1. The day after Royal Assent: Regulation-making powers, enforceable undertakings and provisions providing relief to lenders from liability under section 99(1A);
 - 35.2. 1 June 2020: Lenders and mobile traders will be able to apply for certifications as fit and proper persons from this date;
 - 35.3. 1 September 2020: Provisions related to disclosure in another language and clarifications of the definitions of a consumer credit contract and layby sales agreement will commence;
 - 35.4. 1 April 2021: Provisions requiring lenders and mobile traders to be certified will commence.

Parliamentary stages

36. The Bill has [REDACTED]
37. I intend to introduce the Bill on 2 April 2019 and, depending on availability of House time, I will move first reading as soon as possible. The Bill should be passed by the end of December 2019.
38. I propose that the Bill be referred to the Finance and Expenditure Committee for consideration, for a period of four months.

Proactive Release

39. I intend to proactively release this paper, with any redactions in line with the Official Information Act 1982.

Recommendations

The Minister for Commerce and Consumer Affairs recommends that the Committee:

1. **note** that in September 2018, Cabinet Economic Development Committee agreed to a range of improvements to the Credit Contracts and Consumer Finance Act 2003 [CAB-18-MIN-046; DEV-18-MIN-0204];
2. **note** that the Credit Contracts and Consumer Finance Amendment Bill (**the Bill**) implements the decisions referred to in paragraph 1 above (with the exception of the decision relating to “do not knock” stickers, which will be implemented as part of reforms to the Fair Trading Act 1986 to be considered by Cabinet in the second half of 2019);
3. **note** that the Bill [REDACTED]
4. **approve** the Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
5. **agree** that the Bill be introduced on 2 April 2019;
6. **agree** that the Government propose that the Bill be:
 - 6.1. referred to the Finance and Expenditure Committee for consideration for a period of four months;
 - 6.2. enacted by the end of December 2019.

Authorised for lodgement

Hon Kris Faafoi

Minister for Commerce and Consumer Affairs