5 February 2020

The CCCFA review team

Competition and Consumer Policy — Building, Resources, and Markets

Ministry of Business, Innovation, and Employment

Submission on draft Credit Contracts and Consumer Finance Amendment Regulations 2020

Thank you for the opportunity for ANZ Bank New Zealand Limited to submit on the Credit Contracts and Consumer Finance Amendment Regulations 2020 (Regulations).

We support Regulations that will provide lenders with certainty around what lenders must do to meet the lender responsibility principles under the Credit Contracts and Consumer Finance Act 2003 (Act).

However, we strongly suggest that Officials make changes to the draft Regulations to avoid imposing minimum rules that don't reflect existing, responsible lending practices in the banking industry. We're concerned the Responsible Lending Code's (Code) flexibility and scalability, being the ability to make different levels of inquiry depending on borrower, product, or risk, is absent in the draft Regulations.

For example, collecting and extensively verifying expenses as proposed will slow down the lending process without necessarily improving the quality of lending outcomes for borrowers, as was the experience in Australia. The extent of information needed will prevent borrowers from easily shopping around for credit or drive borrowers towards less scrupulous lenders.

Key suggestions

While we provide more detailed comment on the draft Regulations, as general comments we recommend the Regulations:

1. use language that is consistent with the Act.
2. provide scalability and flexibility where possible — if the Regulations are too prescriptive or difficult for lenders to meet it will impact access to credit that is considered responsible
3. consider differentiating lenders or lending products so that increased prescription is proposed only where there is evidence of harm to consumers, specifically high-cost consumer credit contracts
4. take a more balanced approach to affordability, including:
    a. allowing lenders to better reflect the borrower or lending circumstances — assessing income and expenses is not the only way to assess affordability
    b. providing flexibility in collecting and verifying income and expenses, surpluses, using benchmarks
5. reflect the scope and scale of advertising media and that exhaustively providing information in consumer credit advertising is likely to confuse borrowers, rather than help them shop around.

Contact for submission

We are happy to discuss our submission further with MBIE officials. Please contact Cushla Scholfield, Acting Associate General Counsel, at cushla.scholfield@anz.com or 07 557 7493. Once again, we thank MBIE for the opportunity to submit on these Regulations, and for being willing to engage collaboratively with the banking industry.

Yours sincerely

Cushla Scholfield

Acting Associate General Counsel, Retail and Business Banking

Draft Regulation 4AA – Assessing lending suitability

We support setting out the minimum suitability inquiries in the Regulations, but suggest:

- using the same language as section 9C(3)(a)(i) and (5A) to avoid interpretation differences
- giving lenders flexibility where borrowers don't know how much they can afford, how long they will take to repay, or have no set purpose other than availability of credit, and
- ensuring there is a clearer boundary between suitability and matters lenders must address to help informed decision making.

We set out further comments below, and suggested drafting after this section.

Consistency of language between Act and Regulations

We recommend aligning the language in Regulation 4AA, including headings and subheadings, with section 9C(3)(a)(i) to avoid interpretation issues.

The Regulation should keep reference to 'making reasonable inquiries' and 'so as to be satisfied it is likely' that the credit or finance meets the borrower's requirements and objectives as key elements of section 9C(3)(a)(i).

We also suggest using the term 'credit limit', which the Act defines, rather than referring to a 'maximum amount' in Regulation 4AA(2)(a). Using the term 'maximum amount' for revolving loans is problematic, and could require lenders to the total borrowing over the loan's life, which is unknown. Using 'credit limit' also better aligns Regulation 4AA with the new definition of 'material change' in the Act.

Maximum amount – flexibility for common lending scenarios

The Regulations should allow lenders flexibility to reflect that, in assessing suitability, the amount of credit may be unknown and the lender may discuss and agree the amount with the borrower following affordability inquiries.

We suggest that Regulation 4AA(2)(a) requires a lender to make inquiries into the amount of credit the borrower seeks, *if known* or *unless that amount will be discussed and agreed after affordability inquiries*.

Requiring inquiries into the amount a borrower seeks assumes a borrower will know how much credit they want. For some lending, the borrower will have a need or wish to borrow, but do not know how much. This scenario is common for home loans, and to a lesser extent for credit cards.

Often, the first step a borrower takes before house hunting is to find out how much they can borrow. When applying, a borrower may not have a good understanding of how much they can borrow, other than wanting to borrow as much as they can afford. There is an information asymmetry. Lenders try to address this by providing calculators and tools that give indications, but until the borrower applies for lending and provides detailed information, the amount a borrower *could* borrow may be difficult to determine.

Purpose of the credit or finance

A borrower's purpose may be ongoing access to credit on demand, which is common with overdrafts and credit cards.

We suggest the Regulations or Code provide examples that highlight that the purpose of credit may be access to credit. We also suggest the Code could include further guidance to help lenders meet their responsibility to aid informed decision making where the purpose is access to credit.

Term of the credit or finance

We suggest combining Regulation 4AA(2)(c) and (d) so they are alternatives, reflecting that term won't always be relevant, for example for revolving credit contacts. A better approach (particularly given comments around purpose above) may be to use clauses 4.3(c) and (d) of the Code, requiring lenders to consider:

- whether the borrower needs credit on a one-off basis for a specific need at that time, or over a longer timeframe for ongoing expenditure, and
- the time frame for which the borrower requires credit, if they seek any particular term.

A borrower may also not know what term they need when they apply for lending. For example, for home loans a borrower may want to understand how much they can borrow and what loan term is affordable. Borrowers may want to know the shortest term they can afford to reduce interest, or the longest term to reduce repayments. We also suggest adding 'if known' at the end of 4AA(2)(c).

Fees or charges for any other additional goods or services

We think the inquiries in Regulation 4AA(2)(e) are more relevant to informed decision making. A lender should explain any key fees and charges, including for goods or services forming part of the consumer credit contract, to meet the lender responsibility to aid informed decision making. We suggest removing this part of the Regulations.

Alternatively, we suggest limiting Regulation 4AA(2)(e), requiring a lender to consider whether any goods or services provided under the agreement could be inconsistent with the borrower's stated purpose.

The approach in Regulation 4AA(2)(e) also does not reflect the range of goods or services that may be available with some credit products, how the borrower uses them, and how the lender recovers those costs.

- Goods or services may be an inherent part of the credit contract itself. For example, a borrower can use a credit card to withdraw cash from the card account. If the borrower does so, a higher interest rate applies. The borrower can't opt in or opt out of that feature, it is part of the product itself. However, the borrower can choose not to use it, and avoid the charge.
- Lenders may bundle some costs. For example, a premium credit card's annual account fee may cover the cost of providing travel insurance, concierge services, travel rewards points, and more, whether the borrower uses those services or not.

We suggest that, if kept, Regulation 4AA(2)(e) should not apply where a borrower can avoid the fees or charges by not getting or using those added goods or services.

However, driving our recommendation to remove Regulation 4AA(2)(e) is a concern the approach taken will treat some fees and charges differently to others. Fees or charges that do not relate to added goods or services may be equally important to a borrower, for example default fees. We strongly believe that this is the purpose of requiring lenders to help borrowers to make an informed decision whether to enter the agreement and be reasonably aware of the full implications. We're concerned the Regulations are unnecessarily blurring the boundaries between suitability and informed decision making, which will make it more difficult for lenders to comply and harder for borrowers to understand their rights.

Fees and charges being added to the credit

Regulation 4AA(2)(f) requires lenders to assess whether the borrower wants to add fees or charges to the credit, and whether the borrower is aware of the added costs of financing those fees or charges.

We think the latter element of Regulation 4AA(2)(f) more correctly falls within a lender's responsibility to aid informed decision making. We recommend limiting Regulation 4AA(2)(f) to making inquiries into whether a borrower requires any fees or charges to be added to the credit.

We suggest, however, that Regulation 4AA(2)(f) should not apply where:

- a lender would not, generally, agree to add fees or charges to the credit (for example, some lenders may not allow borrowers to borrow establishment fees), or
- a lender always adds the fees or charges to the outstanding balance under the contract's terms and the borrower can't separately pay those fees or charges.

For example, a lender may always add a monthly account fee charged on an overdraft, an annual card fee charged on a credit card, or credit card repayment insurance charged on a credit card to the outstanding balance.

Again, we believe the examples above show why it isn't correct for lenders to make those inquiries under Regulation 4AA. Instead, we believe the lender should address those matters by explaining the fees and charges to a borrower under informed decision making.

Lender to assess information

We suggest that Regulation 4AA(3) should more clearly reflect the language in section 9C(3)(a)(i), and refer to considering whether the lending is likely to meet the borrower's requirements and objectives.

We also suggest that lenders should assess whether the credit contract sought or offered is compatible with the outcomes of the inquiries made under Regulation 4AA(2). We note the commentary accompanying the draft Regulations reflect this approach, but it has not been included in drafting Regulation 4AA(3).

Actually assessing suitability is crucial to a lender's compliance. The inquiries made may become meaningless if the Regulations give no direction about how lenders must consider or weigh those inquiries. To address this, we suggest that Regulation 4AA(3) reflects:

- the Code — lenders must be satisfied the credit is within the range of products likely to meet the borrower's requirements as assessed in clause 4AA(2), recognising that some features or requirements may require trade-offs, or
- MBIE's commentary and ASIC's RG209, requiring lenders to assess whether the credit is compatible or not inconsistent with the outcomes of 4AA(2) inquiries, recognising there may be trade-offs between features or requirements.

We also suggest the Regulations guide lenders on what they should do if their assessment under Regulation 4AA(3) leads the lender to decide the credit is unlikely to be suitable. While a prudent lender may choose not to go ahead, there may be situations where a borrower wishes to do so. In that situation, the responsibility to aid informed decision making is likely to be onerous. The Regulations should preserve borrower freedom of choice where the borrower is fully informed, which is the approach taken in other legislation. We think it would be helpful for the Code to give guidance on this.

Suitability inquiries where there is a material change

For material changes, the lender should only make the inquiries in Regulation 4AA(2) if relevant to, or likely to change because of, that material change. For example, when assessing a loan top up or credit limit increase, a lender would ask about the amount and purpose of the increase, and term required (if not added to the existing loan).

Recommended drafting changes

Based on our comments above, we suggest the following approach to Regulation 4AA below.

4AA Lender must make reasonable inquiries and consider a borrower's requirements and objectives

(1) This Regulation:

(a) applies for the purpose of section 9C(3)(a)(i) and (5A) of the Act, before a lender enters an agreement or makes a material change to an agreement;

(b) sets the inquiries a lender must make; and

(c) having made those inquiries, set out how a lender must determine whether it is satisfied that the credit or finance to be provided is likely to meet the borrower's requirements and objectives.

Lender must make reasonable inquiries

(2) To make reasonable inquiries, the lender must make inquiries to understand the following aspects of the borrower's requirements and objectives:

(a) the credit limit, if known;

(b) the purpose of the credit or finance, which may include whether the credit is required for a specific need at that time or over a longer timeframe for expenditure on an ongoing basis;

(c) the term of the credit or finance, if known or if applicable to that type of credit or finance;

(d) if the agreement or the material change will result in mandatory fees or charges for goods or services that were not part of the borrower's stated purpose under (b) above, whether any of those goods or services are inconsistent with the borrower's stated purpose;

(e) whether the borrower requires any fees or charges to be added to the amount of credit (for example, whether the borrower requires an establishment fee to be financed), however the need to inquire does not apply or is limited where the:

(i) lender does not permit some or all fees or charges to be added to the amount of credit, or

(ii) fees or charges are always added to the amount or credit, or unpaid balance, under the agreement.

(3) To avoid doubt, for a material change, a lender only needs to make the inquiries in (2) above in connection with the material change, not the existing agreement.

Lender must consider whether it is likely the credit or finance meets the borrower's requirements and objectives

(4) To be satisfied it is likely the credit or finance will meet the borrower's requirements and objectives, the lender must consider:

(a) the aspects of the borrower's requirements and objectives determined under (2) above; and

(b) whether the lender is satisfied that the credit or finance is within the range of products likely to meet those aspects, recognising there may be trade-offs between features, or requirements and objectives.

Draft Regulation 4AB – assessing suitability of waivers, warranties, and insurance

We support setting out the minimum suitability inquiries in the Regulations, but suggest:

- Regulation 4AB uses the same language as section 9C(3)(a)(i), 9C(5)(a)(i), and (5A) to avoid interpretation differences, and
- the duties proposed reflect the Act's credit related insurance provisions and the likely expertise of lenders.

We set out further comments below, and suggested drafting after this section.

Scope of Regulation 4AB

While we don't offer repayment waivers or extended warranties, we do question whether section 9B(4) does work to require a separate suitability assessment under section 9C(3)(a)(i).

While 9B(4) deems a repayment waiver or extended warranty to form part of an *agreement* (which section 9B defines), it does not deem them to be part of the credit or finance. Section 9C(3)(a)(i) requires an assessment of whether *the credit or finance* which is *provided under an agreement* is likely to meet the borrower's requirements and objectives. The provision does not require an assessment of whether other aspects of the agreement, including repayment waivers or extended warranties, are suitable.

We also question 4AB's application to 'material changes'. New section 9C(8) defines a 'material change' as an increase to credit, which would not be relevant for a repayment waivers or extended warranties (nor is it relevant to credit related insurance). Given the scope of 'material changes', we recommend removing Regulation 4AB(1)(a)(ii).

New obligations on lenders may be inconsistent with the scope of credit-related insurance

We're concerned that Regulation 4AB(2)(a) imposes requirements that:

- do not reflect credit-related insurance, which includes insurance a lender may require a borrower to hold as a condition of the lending
- go beyond guidance in the Code, and may be impractical for lenders.

Regulation 4AB(2)(a) requires lenders to decide whether the insurance 'is useful' for the borrower. This terminology is different from the language, and thus standard, imposed by section 9C(5)(a). We strongly recommend aligning the language to avoid interpretation differences.

We also note 'usefulness' to the borrower is unlikely to be proper for a lender to consider every time. Credit-related insurance includes insurance a lender requires to manage its risks under the consumer credit contract. For example, the insurance may include cover to protect assets the lender will take security over. Or, it may include insurance to cover repayment of lending if the borrower suffers an illness, dies, or is otherwise unable to pay.

Regulation 4AB(2) should incorporate the inquiries in clause 9.3 of the Code, which better reflect the nature and scope of credit-related insurance. For example, clause 9.3(a) requires a lender to consider the risks the borrower wishes to get cover against or, where the lender requires the insurance, the risks the lender seeks cover against. Clause 9.3 includes similar construction elsewhere.

We're also concerned Regulation 4AB(2)(a) goes beyond guidance in the Code, and may be impractical for lenders.

Regulation 4AB(2)(a)(i) requires lenders to consider whether the borrower has existing insurance cover that protects against some or all the risks for which the borrower is seeking cover. But Regulation

4AB(2)(a)(i) is not clarified in the way clause 9.4 of the Code clarifies clause 9.3. Clause 9.4 provides that where a borrower already has cover, a lender may rely on information the borrower provides about that cover. The Code does not expect a lender to review the borrower's policies to decide whether they do, in fact, provide some or all the cover sought. However, a lender should give a borrower the opportunity to seek advice, if needed.

Given the complexity and the variety of insurance available in the market, comparing insurance where a lender has not arranged the cover, is likely to be outside a lender's expertise. We think this would expose lenders to much risk, as the likelihood of making a mistake about the nature of cover would be high.

Similarly, we believe it would be burdensome to require lenders to exhaustively find out:

- what insurance the borrower may already hold, or
- the extent of cover under those policies.

Even if the lender received a privacy waiver allowing the insurer to provide information about the policy and its scope, we doubt insurers would provide this information, as they are not compelled to. Similarly, a lender would still need to rely on the borrower identifying all insurance held.

Unless the lender arranged the existing insurance, we don't believe lenders could practically find out the scope of that cover, other than by relying on the borrower's understanding of their existing insurance. We think this is reflected in clause 9.4 of the Code (and section 9C(7) of the Act before its removal); that a lender may rely on information a borrower provides.

The Code's clause 9.3(c) is quite deliberate and should be reflected in Regulation 9AB(2)(a)(i). Clause 9.3(c) only requires consideration of whether a borrower's existing insurance may cover similar risks *for insurance over secured property or leased goods*. Specific insurance over secured property or leased goods is most likely to overlap with general contents insurance a borrower is likely to already hold. The clause also reflects that insurance for death, illness, or loss of employment may be included in a wide range of insurance products, and overlaps anticipated.

The drafting of Regulation 4AB(2)(a)(ii) also goes beyond the requirements in the Code. In particular, we believe it would be difficult for a lender to make exhaustive inquiries to find out whether a borrower may be ineligible to claim. For example, a borrower may be ineligible to claim if they've failed to provide relevant information to the insurer. Or, a borrower may not have cover for some benefits under a house insurance policy if an extension to the property was built without correct consents.

Again, we suggest the drafting in Regulation 4AB(2) reflects the wording in clause 9.3(d) of the Code. Clause 9.3(d) provides that, for consumer credit insurance only, a lender must inquire into whether the borrower's employments status may make them ineligible. We think this could be usefully extended to capture whether the borrower's age may also make them ineligible to claim under consumer credit insurance, which is a common eligibility threshold.

Cost of insurance

We think the requirement to find out whether the borrower accepts the costs of insurance in Regulation 4AB(2)(b) more suitably falls within a lender's responsibility to aid informed decision making.

In some situations, like credit card repayment insurance, the premiums will not be ascertainable in advance, only the method of calculating those premiums. Equally, the premiums may be unknown until the insurer (not the lender) assesses the insurance risk.

We think the cost of insurance is something a lender should cover to meet their lender responsibility to aid informed decision making, and we strongly urge that the boundary between those lender responsibilities is preserved.

Lender to assess information

We suggest that Regulation 4AB(3) should more clearly reflect the language in sections 9C(3)(a)(i) and 9C(5)(a)(i), and instead refer to considering whether the relevant insurance contract is likely to meet the borrower's requirements and objectives.

We also suggest that there is a need for the lender to assess whether the insurance sought or offered is compatible with the outcomes of the inquiries made under Regulation 4AB(2). Actually assessing suitability is crucial to a lender's compliance. The nature and extent of inquiries may become meaningless if the Regulations give no direction about how lenders should consider or weigh those inquiries. To address this, we suggest that Regulation 4AB(3) reflects the Code. Lenders should consider whether the insurance is within the range of products likely to meet the borrower's requirements and objectives assessed in clause 4AB(2), recognising that some features or requirements may require a trade-off.

Recommended changes

Based on our comments above, we recommend the following changes to draft Regulation 4AB:

4AB Additional requirements for certain waivers, warranties, and insurance

Purpose and application

(1) This Regulation:

(a) applies for the purpose of section 9C(5)(a)(i) and (5A) of the Act, before a lender arranges a relevant insurance contract;

(b) sets out the inquiries a lender must make; and

(c) having made those inquiries, sets out how a lender must determine whether it is likely that the relevant insurance contract will meet the borrower's requirements and objectives.

Lender must make reasonable inquiries

(2) To make reasonable inquiries, the lender must make inquiries to understand the following aspects of the borrower's requirements and objectives:

(a) the risks the borrower or lender (subject to section 69 of the Act) wishes to obtain cover against;

(b) the term of cover the borrower or lender (subject to section 69 of the Act) requires, if any or if known;

(c) for insurance over secured property or leased goods, whether the borrower has existing cover which may protect against any of the risks in (a) above; and

(d) for consumer credit insurance, whether the borrower's employment status or age may make them ineligible to claim most of the benefits under the relevant insurance contract.

(3) When making inquiries under (2)(c) and (d) above, the lender:

(a) may rely on the information the borrower provides about their existing insurance cover or circumstances;

(b) is not required to otherwise review or further consider the terms of any existing cover.

Lender must consider whether the insurance is likely to meet the borrower's requirements and objectives

(4)	To be satisfied that it is likely the relevant insurance contract will meet the borrower's requirements and objectives, a lender must consider: (a) the aspects of the borrower's requirements and objectives determined under (2) above, and (b) whether the lender is satisfied that the relevant insurance contract is within the range of products likely to meet those aspects.

Regulations 4AC to 4AI – assessing lending affordability

We support Regulations which provide greater certainty and clarity for both lenders and borrowers around minimum rules when making reasonable inquiries into affordability under the Act. The Regulations should focus on practices which are leading to unaffordable lending. In our view, implementing onerous Regulations where there is no evidence of harm or uncertainty is unnecessary.

We're concerned the Regulations, applying to all lenders and credit products, may be inflexible, and won't reflect the range of lenders, borrowers, and credit products that exist now or in future. 'One size fits all' will not work. The Regulations are too prescriptive, and will inevitably lead to poor customer outcomes, increased compliance costs, and limit access to credit that is considered responsible.

As a general comment, the Regulations should make it clear that a lender can make inquiries from the borrower, or using information it already holds about the borrower or about borrowers more generally. Borrowers expect us to use the information we hold, and can question why we are asking this information from them again when we should already have it to hand.

We also question whether there should be guidance for lenders on how to deal with situations where a lender's inquiries and assessment lead the lender to conclude that the credit is not likely to be affordable. There may be situations where, being fully informed, a borrower still wishes to proceed. We provided several examples of this in our submission on the recent Amendment Act and are happy to discuss these with Officials further. As suggested for suitability, we think it would be sensible to give guidance in the Code, to preserve freedom of choice for fully informed borrowers.

Regulation 4AC — Purpose

We recommend aligning the language in Regulation 4AC with section 9C(3)(a)(ii) and (5A) to avoid interpretation issues. We think it is important to keep references to a lender making 'reasonable inquiries' to be 'satisfied that it is likely that' the borrower can make payments under the agreement.

Regulation 4AD – Interpretation

Income

The draft Regulations should make it clearer that income will include future income. For example where a borrower is returning to work, starting new employment, or knows they will get rent or board when they buy a property. We recommend either defining income in 4AD or its use in 4AE and 4AF to include any income, including known future income, that will be used to repay the lending.

We also believe income could be clarified to recognise forms of income other than PAYE. In particular, the definition should better reflect income for self-employed persons, income from businesses, and government benefits.

Relevant expenses

We agree that it is helpful to classify relevant expenses. However, we suggest defining the categories slightly differently, particularly to give clarity around whether expenses are discretionary. For example, living expenses includes school fees, however, we would usually treat private school fees as discretionary on the basis the borrower can choose to remove or reduce those expenses to ensure they can meet repayments without substantial hardship.

We suggest categorising relevant expenses as follows:

- **Existing debt and liabilities**: these are debt repayments that a borrower will continue to make after the agreement is entered

- **Fixed non-discretionary**: these are fixed, essential living costs like rent, insurance, rates, body corporate fees, child care or school costs that will continue or arise after entering the agreement, which the borrower cannot remove
- **Variable non-discretionary**: these are essential living costs and personal expenses that will continue or arise after entering the agreement, which the borrower cannot remove, but the amount may vary, like utilities (electricity, phone, etc), groceries, and transport, and
- **Fixed or reoccurring discretionary**: these are regular or frequently recurring material discretionary expenses a borrower could forego, like gym membership, but which the borrower confirms they're unwilling to forego or will incur after entering the agreement.

We expect the Code could provide more guidance on what goes in each category.

ANZ recently conducted research to understand how people look at their expenses, and the categories above reflect the way people identify their expenses. Our research showed that people broadly break their expenses down into the following categories: regular bills (water, power, rent, etc), basic living expenses (clothes, food, etc) and discretionary (e.g. beauty, hobbies). We believe that, with debt commitments, these categories provide a useful grouping for the Regulations.

We note that our proposed categories are also like those used in ASIC's RG209, which break down expenses as fixed costs (like debt commitments and rent, etc), and variable costs (like discretionary and non-discretionary expenses).

Scope of discretionary expenses

We also know from our research that what is deemed to be 'discretionary' varies between borrowers, and lenders.

To ANZ, discretionary means the borrower has control over whether they spend or not, or how much they spend. In our research, people talked about 'leftover money' when thinking about discretionary spend, or 'optional extras – the first to go if money is tight' and 'things I choose to spend money on'. One person referred to 'essential versus non-essential spending'.

Not all discretionary expenses will be, or should be, relevant to a responsible lender's affordability assessment, and some may be included within general living expenses (like spending on cigarettes included with groceries). For example, a borrower may regularly spend money to purchase a newspaper or a coffee. The spending is discretionary, and is regular, but the amount is small and is unlikely to have a material impact on affordability. Or, a borrower has a one-off, discretionary expense, like a holiday. While the amount may be more significant, the expense is discretionary and not regular or frequently occurring. Therefore, our recommended categories define discretionary expenses to better align with how most lenders would treat them in an affordability assessment.

Continuation of expenses

Affordability assessments should consider any regular, material expenses (commitments) the borrower would be unwilling to forego. ANZ only captures material expenses the borrower intends to continue with after the lending.

Given the definition of relevant expenses, and the approach in Regulation 4AG to 4AH, lenders must capture all existing expenses, verify, and then consider foreseeable changes. We believe this will lead to unnecessary effort where a borrower is willing to forego those expenses or won't have those expenses after the lending. For example, a borrower buying a house to live in may no longer have rent to pay. A lender should not capture and verify rent as part of the affordability assessment. Instead, lenders should only consider the expenses that will continue after the borrower enters the agreement.

Capturing only those expenses the customer is unwilling or unable to forego will also align with how the FCA in the UK defines fixed costs, being commitments which will continue after the lending is entered.

Approach to revolving credit commitments

We also note the definition of relevant expenses in Regulation 4AD does not specifically deal with revolving credit commitments, like credit cards, overdrafts, or revolving home loans. We suggest that a consistent method of treating these types of debt may be useful. For example, we suggest adopting the approach followed by most NZ lenders, which is to use 3% of a credit card's available credit limit as the monthly debt obligation.

ASIC requires lenders to include credit card debt as if it were being repaid over a three year period, considering fees and interest. We note there are fewer 'transactors' (those who pay their cards off in full each month) than 'revolvers' (those who do not pay their cards off in full each month) in Australia.

Recommended changes

Based on our comments above, we recommend the following changes to draft Regulation 4AC and 4AD:

4AC Purpose

Regulations 4AD to 4AI:

(a) apply for the purpose of section 9C(3)(a)(ii) and (5A) of the Act, before a lender enters into an agreement or makes a material change to an agreement;

(b) set out the inquiries a lender must make; and

(c) having made those inquiries, set out how a lender determines whether the lender is satisfied that it is likely that the borrower will make the payments under the agreement without suffering substantial hardship.

4AD Interpretation

In Regulations 4AE to 4AI, unless the context otherwise requires:

(1) **Income** means:

(a) present or future personal net income after tax, KiwiSaver, or other superannuation contributions, and other similar deductions (for example, in the case of an employee or self-employed person, their take-home pay) that will be relied on to meet payments under the agreement, or

(b) other forms of present or future regular income that will be relied on to meet payments under the agreement (for example, rental income, investment income, or income from a business)

(2) **Relevant expenses** means:

(a) **Existing debts and liabilities:** these are known payments for debts and other liabilities that will continue or arise after the agreement is entered, including any child support that is payable under the Child Support Act 1991:

(b) **Non-discretionary expenses**: these are essential living costs the borrower will continue to have or will incur after the agreement is entered, being:

(i) **fixed, non-discretionary expenses**, where the amount of any payment towards that essential living cost does not change often or is likely to be relatively stable over a reasonably foreseeable period;

(ii) **variable non-discretionary expenses**, where the amount of any payment towards that essential living cost may change often or is likely to be unstable over a reasonably foreseeable period, for any reason; and

(iii) within the categories in (i) and (ii) above, essential living costs like accommodation costs, insurance, rates, body corporate fees, utilities (like electricity, gas, phone, Internet), food and groceries, personal expenses (including clothing and personal care), costs associated with dependants if applicable (such as school fees and child care), medical expenses, and transport expenses;

(c) **Fixed or recurring discretionary expenses:** these are any regular or frequently recurring material discretionary expenses that a borrower could forego but is unwilling to forego or will incur after the agreement is entered, like savings or investments, gym memberships, or entertainment costs.

(3) For the purpose of (2)(a) above, where any debt or liability includes payments under a revolving credit contract, and unless the borrower advises a higher amount, a lender must assume the borrower will make regular monthly payments:

(a) calculated as a minimum of 3% of the credit limit for a credit card;

(b) calculated as if the revolving credit contract had monthly principal and interest payments over a 30 year term for revolving home loans; and

(c) in all other cases, calculated as if the revolving credit contract had monthly principal and interest payments over a 10 year term.

Draft Regulation 4AE – General rule

Consistency of language between Act and Regulations

We recommend aligning the language in Regulation 4AE(b) with section 9C(3)(a)(ii) to avoid interpretation issues. We think it is important to keep reference to 'making reasonable inquiries' rather than being satisfied on 'reasonable grounds', as this is a key to section 9C(3)(a)(ii). The Act requires lenders to make 'reasonable inquiries so as to be satisfied'. We recommend aligning the wording, to avoid the risk of differences in interpretation.

Requirement to assess income and expenses

For most lending transactions, we support a requirement to assess a borrower's income and expenses and decide they can meet their repayments under the agreement. However, assessing income or expenses may not be relevant for all transactions, and instead a lender's reasonable inquiries may consider other aspects.

We also suggest care is needed for borrowers who need to refinance lending that has become unaffordable due to circumstances. The lending being refinanced may be unaffordable when assessing income and expenses alone, but may be better than the borrower has, and may provide the best opportunity for the borrower to recover. We believe it is important to preserve the ability for lenders to help borrowers in those situations.

We suggest that Regulation 4AE provide that a lender may make reasonable inquiries into income and expenses. Or, where those inquiries will not be relevant to the nature of the consumer credit contract, the lender may make other reasonable inquiries, subject to verification.

Definition of 'reasonably foreseeable time period'

We believe it will be important to define what the term 'reasonably foreseeable time period' in Regulation 4AE(a) means. We don't believe it right to leave this guidance to the Code alone.

Undefined, the term may be problematic for long term lending like a home loan or for revolving lending that does not have a loan term. We will need to ask this question of customers and therefore would need to be able to give them guidance on what a reasonably foreseeable period means.

We understand that it is important to capture not only what the customer's income and expenses are when they take out the lending, but also whether those are likely to remain stable. However, the timeframe for how long a customer can estimate stability of income needs to be realistic.

Most people could give a reasonable estimate of income and expenses over the next 12 months, and anything after that would be challenging. Everyone's circumstances are different, and we recognise there can be significant life changes that may impact income and expenses, like retirement or having a child. Predicting those things more than 12 months ahead is unlikely to be realistic for most customers.

Requirement for reasonable surplus

The Regulations require the lender to consider whether the borrower's likely income exceeds their likely relevant expenses, allowing a reasonable surplus to pay or save for other expenses.

There is no dollar figure or percentage of income or debt set for what makes up a 'reasonable surplus'. We understand the 'reasonable surplus' may have been intended to allow for any potential underestimation of relevant expenses or for payment of savings for other expenses.

The Regulations already address underestimation of relevant expenses by verifying or benchmarking expenses where appropriate. Requiring a 'reasonable surplus' will lead to double counting. Similarly, savings may be reflected in treatment of income (which takes net income after Kiwisaver and other superannuation) or as a discretionary expense, again leading to double counting.

A subjective assessment of 'reasonable surplus' based on lending, would be difficult to apply given the heavy use of automated decision tools.

We also believe it likely the requirement for a reasonable surplus in Regulation 4AE is inconsistent with the test in the Act, which requires an assessment of whether the borrower will suffer substantial hardship. We think there is a strong risk the size of a 'reasonable surplus' is likely to exceed what is necessary to avoid substantial hardship under the Act.

The requirement for a reasonable surplus also appears inconsistent with guidance in the Code. The Code provides that a lender should be satisfied that it is likely the borrower will make payments under the agreement without undue difficulty:

- while meeting necessities, and other financial commitments, and
- without having to realise security or assets (other than security or assets the borrower is willing and intending to dispose or realise)

We think the test in the Code better reflects the industry approach to affordability.

Regulation 4AE also doesn't reflect that lenders may:

- adjust income and expenses, and
- stress test interest rates in assessments (creating a reasonable buffer).

We suggest, if kept, adjusting Regulation 4AE(b)(i) to require a reasonable surplus *unless* a lender has already adjusted the likely income or expenses in a way that achieves the same result.

Exceptional circumstances

We suggest that 'exceptional circumstances' will be too narrow, and 'other reasonable circumstances' may better reflect capture the types of circumstances reflected in Regulation 4AE(b)(iii). For example, a borrower may be waiting on a term deposit or other investment to mature, which will be used to repay some or all the credit or finance.

Some lending may interconnect — and assessing one credit product should be relied on for the other. For example, a borrower may get a temporary overdraft to pay for a deposit on a new house, where the borrower will repay the overdraft when the borrower draws down their home loan. The lender fully assesses the home loan, considering income and expenses, with a loan amount to cover the house purchase and repayment of the temporary overdraft. Lenders may not separately assess the overdraft's affordability, instead relying on the reasonable inquiries already made for the home loan.

We think a change to the approach in the Regulations is necessary to preserve scalability and flexibility to ensure lenders can continue to address individual circumstances. Requiring an assessment of income and expenses is not appropriate in all cases. However, the same rigour of assessing whether the borrower is likely to meet repayments without substantial hardship applies.

Recommended changes

Based on our comments above, we recommend the following changes to draft Regulation 4AE:

4AE General rule

Lender must make reasonable inquiries

(1) To make reasonable inquiries, the lender must make inquiries to understand the following aspects of the borrower's financial situation:

(a) an estimate over a reasonably foreseeable period of the borrower's likely income (see Regulation 4AF) and likely relevant expenses (see Regulations 4AG and 4AH) on a weekly, fortnight, or monthly basis; or

(b) if the borrower will not rely on income, or will not only rely on income, how the borrower intends to meet any payments under the agreement, which may include:

(i) realising assets or allowing the lender to realise assets, like selling property or goods or other assets, including under a pawnbroking transaction

(ii) drawing, accessing, or realising savings or investments

(iii) relying on expected receipt of funds, like dividends or other drawing from a business, money from family, an inheritance, or tax refund, or

(iv) any other reasonable basis for meeting any payments.

(2) To avoid doubt, for a material change to an existing agreement, a lender only needs to make the inquiries in (1) above in connection with the material change.

(3) For the purposes of (1) above, **reasonably foreseeable period** means a minimum of 12 months from when the borrower intends to enter the agreement or, if the loan term is less than 12 months, that loan term.

Lender must consider whether it is likely the borrower will make the payments under the agreement without suffering substantial hardship

(3) To be satisfied that it is likely the borrower will make the payments under the agreement without suffering substantial hardship the lender must consider:

(a) the aspects of the borrower's financial position determined under (1) above; and

(b) whether the lender is satisfied that it is likely that:

(i) the borrower's likely income exceeds their likely relevant expenses and any payments to be made under the agreement; or

(ii) the borrower is otherwise likely to be able to meet the payments under the agreement without undue difficulty, while still meeting their likely relevant expenses.

Draft Regulation 4AF – Lender must estimate borrower's likely income

Statement of current income

The Regulations require that the lender gets a statement of the borrower's current income.

- We don't believe it is correct that the statement must always be *from the borrower.* A lender may already hold information about the borrower that allows the lender to decide some or all the borrower's income.
- We also don't believe it is correct that the statement is in writing. For example, a borrower may apply for lending over the phone or face to face, with the lender recording a borrower's answers to specific questions about their income and expenses. The reference to statement may have come from lenders who use the term 'statement of position'. However, this term simply reflects the process a lender completes to understand a borrower's financial position, including their income and expenses.
- We don't believe it is appropriate that the requirement is limited to *current income*. In particular, future known income may be relied on. For example, a borrower wants to buy a house as they have re-located to a new city for a new job. Their current income will be irrelevant, as the borrower will not be using that income to meet their payments under the agreement.

Verifying information – reliable documentary evidence

Again, the wording 'reliable documentary evidence' implies lenders require written information, or that lenders must get physical copies rather than electronic records like transaction data.

We suggest removing 'documentary', to allow for more flexibility in how lenders validate information, provided they verify against 'evidence'. In particular, we believe that lenders can rely on data they hold to validate a borrower's declared income. For example, if a borrower's salary is credited to an ANZ account, we can verify that by checking the regular salary that is deposited into the account.

The Regulations provide that verification may include checking 'financial statements'. We suggest clarifying this to include business financial statements, which will be relevant for borrowers who are self-employed or receiving income from a business.

We note that up-to-date financial statements may not always be available when lending, as financial statements are generally annual. ANZ may rely on older financial statements (up to 18 months old). We suggest that guidance around using financial statements and business-sourced income could be useful to include in the Code.

We're also concerned verifying income based on 'reliable' evidence may be difficult in some situations or reduce a lender's ability to rely on information a borrower provides without further, often costly, inquiries. For example, we sometimes use or rely on financial projections where a customer is will rely on income from their business to buy an owner-occupied property. In that situation, we consider the reliability of the projections provided, but would not necessarily verify this by having those projections independently audited. That approach may still raise a question over whether use of the projections was 'reliable' evidence.

Equally, we may rely on a letter or contract of employment for borrowers who are starting a new job. Unless there is something to suggest the letter or contract may be fraudulent, we would otherwise rely on the information the borrower provided. Section 9C(7) allowed lenders to rely on information a borrower provided, unless the lender had reason to believe the information was unreliable. In the absence of section 9C(7), the lender responsibility imposes a duty to make 'reasonable' inquiries, which does not expressly forbid relying on information a borrower provides. We believe the requirement in Regulation 4AF(b) risks requiring lenders to take exhaustive steps to identify lending fraud or other errors in information provided to avoid an argument they did not verify against 'reliable' evidence. We suggest that Regulation 4AF (and 4AG) should allow a lender to rely on information a borrower provides if the lender reasonably believes that information is reliable.

Changes to income

We believe the Regulations should more clearly specify how lenders take foreseeable changes to income into account. For example, a borrower says they will be going on parental leave. We would ask how the borrower will still meet their duties under the agreement, which may include government payments and savings. We would then consider whether we're satisfied the borrower will still meet their obligations.

Stability of income can arise in a wide range of situations. For example, borrowers who are on short term employment contracts or who are seasonal workers. We will consider whether it's likely employment will continue or other employment, with a similar income, found. However, that consideration cannot be verified. We do, and should still be able to, lend to these borrowers. We believe the Regulations should better capture this type of variability.

We expect that what this limb of the Regulations is trying to capture is any known reductions in their income. Limb (a) is intended to capture income plus any expected future income, while (c) is more around any known reductions to income the borrower anticipates or foresees. We suggest rewording (c) to reflect this, as it might reduce the concerns raised above around short term contracts. A customer may be likely to change roles soon, but know that their income is unlikely to change (and that change shouldn't impact their lending assessment).

We note that ASIC provides some guidance around the term 'likely'. RG 209.178 provides that 'likely' should not be interpreted in a way that would require a lender to consider every possibility. We think it is appropriate to consider what is reasonably foreseeable (e.g. known, planned, or expected future events).

'Adequately reconciling' information

Regulation 4AF(2) requires lenders to ensure any conflict between information about income is adequately reconciled. We're concerned the term 'adequately reconciled' is uncertain about what a lender must do.

As a general approach, if we find a difference between what a customer has declared and what we have verified, we discuss this with the borrower. Or, rather than raise with the borrower or definitively resolve, we may adjust income, like averaging or 'haircutting' some types of income that are prone to variability or vulnerability.

The Regulation should reflect that a lender may be able to get comfort around the lending based on particular circumstances. For example, borrowers wanting a credit card with a high limit for international travel may show limited income, but are asset rich and willing to access investments to clear any unpaid balance if needed.

Recommended changes

Based on our comments above, we recommend the following changes to draft Regulation 4AF:

4AF Lenders must estimate borrower's likely income

(1) The lender, when estimating the borrower's likely income, must:

(a) obtain information about the borrower's income; and

(b) verify the borrower's income; and

(c) ask the borrower whether there are any reasonably foreseeable changes that could reduce the borrower's income within a reasonably foreseeable period.

(2) For the purpose of (1)(a) above, the lender may:

(a) obtain the information from the borrower or another source, if the lender believes that other source is reliable, or

(b) use information the lender already holds about the borrower, if the lender believes that information is reliable (for example, a bank may use information about income from bank account transaction records).

(3) For the purpose of (1)(b) above, the lender may:

(a) verify the borrower's income by checking payslips, tax records, bank account transaction records, financial statements, business financial statements, or a letter form an employer, the Ministry of Social Development, or any other source of the income

(b) use information the lender already holds about the borrower, if the lender believes that information is reliable (for example, a bank may use information about income from bank account transaction records)

(c) rely on documents a borrower or their agent provides, unless the lender believes those documents are unreliable; and

(d) rely on documents or information from other sources, if the lender believes that source is reliable.

(4) For the purpose of (1)(b) above, where the lender identifies any conflict between information about income, the lender must consider how to reconcile that conflict, which may include assessing whether some or all of that income should be included or adjusted in any estimate required under Regulation 4AE.

(5) For the purpose of (1)(c) above:

(a) **reasonably foreseeable period** means a minimum of 12 months from when the borrower intends to enter the agreement or, if the loan term is less than 12 months, that loan term; and

(b) **reasonably foreseeable changes** means changes that are known, planned, or expected.

Draft Regulation 4AG estimating the borrower’s likely expenses

We believe the extent of verification of relevant expenses in the draft Regulations creates three challenges for financial institutions.

- Borrowers and lenders may struggle to discover the nature of the transactions which may be up to 90 days old. Borrowers and lenders may also struggle to adequately identify where funds are transferred to and for what purpose. We believe the requirements will create errors and inconsistencies in affordability assessments, which is not a good outcome for borrowers.
- Many borrowers will be uncomfortable with providing the level of detail proposed in the Regulations, and the nature of some transactions may be personally sensitive. We’re concerned that the extent of information required will create a more combative or interrogatory relationship between lenders and borrowers, which will be a poor customer experience and will reduce the level of information given.
- We believe the volume of information that will need to be collected and verified is simply impractical for lenders. ANZ alone processes tens of millions of transactions a year. Assessing each of those transactions in an affordability assessment is not viable without specialist technology, and will materially impact processing times and costs.

We suggest amending the Regulations to better direct lenders on what reasonable inquiries they should make and when or how they can verify particular types of relevant expenses. Those requirements may include use of benchmarking, forecasting, or other approaches.

We believe the changed approach will not lessen the responsibility on lenders to make reasonable inquiries and be satisfied the borrower will not suffer substantial hardship. In particular, the new requirements to keep records which show how a lender satisfied themselves they met their lender responsibility, with updated guidance in the Code, will help meet policy objectives to protect consumers.

Some expenses can’t be verified

It is important to recognise that it is difficult to verify some expenses. Because of this difficulty, ANZ may instead assess the expenses against, or use, reasonable cost estimates. We do this in two scenarios.

- Essential living costs such as food, transport, and personal expenses: There is often significant variability in the amount, frequency, volume, and interpretation of these types of expenses, which makes it difficult for us to accurately verify manually or using automated tools. For example, many businesses like The Warehouse provide multiple goods and services, including grocery items which would be an non-discretionary expense. Verifying expenses by looking at bank transactions would be difficult if not impossible. We believe the expense may be unclear from the transaction record. Instead a borrower would have to identify what every purchase was for, which may be inaccurate. Similarly, for some transactions it may be difficult or impossible for a lender (or a borrower) to easily identify who the merchant was. Instead, ANZ uses a reasonable cost estimate at ‘group’ level for these types of expenses. For example, ANZ uses a reasonable cost estimate for ‘groceries’. That reasonable cost estimate captures transactions with supermarkets, grocery stores, meats, shellfish, dairies, convenience stores, and liquor stores. Given the range of transactions, using a reasonable cost estimate here is appropriate to avoid unnecessary verification. We also use a reasonable cost estimate for motor vehicle expenses, utilities, and home insurance.
- Future expenses: Usually, we cannot verify future expenses that will arise once the borrower enters the agreement, and may depend on the final use of the funds by the borrower. For example, a future expense could be the running costs for a first car purchase. The expenses, like

insurance, may depend on the car the borrower finally buys. Again, ANZ uses a reasonable cost estimate at 'group' level for these types of expenses.

The reasonable cost estimates we use may include statistical information drawn from:

- transaction information from borrowers across our lending portfolio, and
- external sources, like Statistics New Zealand.

While we may group that statistical information based on some basic characteristics, like home owner, vehicle owner, joint or individual household, household with dependants, we would not necessarily go more granular. For example, we would not group statistical information by region.

We do not use reasonable cost estimates where it is straightforward to verify an expense using bank transaction records (e.g. rent, monthly insurance). Fixed or recurring discretionary expenses are also easy to verify, like gym memberships. We do not use reasonable cost estimates where there could be significant variation in the expenses between borrowers. In those situations, we will rely on information the borrower provides.

We suggest that lenders should use a reasonable cost comparison only where verifying expenses may be difficult or impracticable.

Categorised statement of current relevant expenses

Regulation 4AG(1)(a) requires lenders to obtain from the borrower a categorised statement of their current relevant expenses.

We have some concerns about whether the term 'categorised statement' is clear about how granular categories should be. In particular, the Regulations should not require lenders to collect a detailed breakdown of a customer's relevant expenses. For example, a customer spends $10 at Columbus Café, would this be included as 'food' or as 'entertainment'? Given the lack of materiality and its discretionary nature, we would not generally incorporate the expense in affordability assessments.

Relying on information a lender already holds

Borrowers expect us to use information we already hold. We think that the Regulations should specify that a lender can use information it already holds, without having to ask the borrower for it, provided the lender believes the information is complete and relevant.

A lender should confirm with the borrower whether the information held is complete and relevant. For example, we may ask whether the borrower has other accounts elsewhere where they're receiving income or paying expenses. Or, we may ask whether there have been any material changes in their situation, if we're relying on information we captured in an earlier application for credit. We note ASIC provides something similar in RG 209.112.

Some lenders overseas are pre-populating expense information using automated statement assessments, which is then reviewed with the borrower. We believe this is a sensible approach and should be permitted under Regulations here.

Lenders should also be able to rely on information a borrower provided in an earlier application for credit, if the lender believes the information remains reliable. For example, we approve a borrower for a new home loan. The borrower applies for a top up 3 months later to do some renovations. We should be able to rely on information about the borrower's income and expenses from their earlier home loan application. We don't ask for all the information again (provided we check that nothing material has changed).

90 days' worth of transaction records

Depending on the materiality of the transaction, ANZ will discuss any withdrawals or transfers of funds out of the borrower's main bank account (the account into which income is received) with the borrower. However, ANZ would not normally seek bank statements for all the accounts a borrower may transfer income to. Given the way many borrowers bank and use their accounts, we believe this is onerous and unrealistic.

- Lenders are unlikely to easily discover where the funds have been transferred, and whether the transfer is to another account the borrower owns (particularly for non-bank accounts).
- Borrowers have complex banking relationships, and use multiple accounts and credit cards across multiple banks and institutions.

The extent of verification needed here is made more complex by the broad definition of bank account in 4AG(3). We suggest limiting the definition, if kept, to *transactional* accounts into which the borrower regularly transfers income. As any bank account could be used for payment of expenses, then the current definition would capture all accounts, including transaction accounts, savings accounts, credit cards, etc.

If too broad, the requirement in Regulation 4AG will become burdensome, not only for the lender but also the borrower, who may be asked to produce 90 days' of transaction records for all their accounts. We think this is the case for non-bank lenders, who may not have easy access to electronic records. The approach could lead to 'capture', and mean borrowers are less willing to shop around for credit. The volume of information they would need to provide to a new lender would be prohibitive.

The approach to bank statements may also be problematic for shared expenses. For example, we regularly see situations where the borrower may pay the relevant expense in some months, and their partner may pay the expense in others. Or, expenses may be split – where one party pays one group of expenses, and the other a separate group of expenses.

The 90 days' requirement could also become arbitrary and may exclude expenses lenders regularly capture and verify, like less often charged insurance or rates.

The Regulations must provide flexibility to allow lenders to deal with the range of borrowers and their situations.

Cash withdrawals

As a general comment, we believe most cash withdrawals will contribute towards payment of a relevant expense. People generally do not withdraw money unless they intend to use it to buy goods or services.

ANZ considers regular, material cash withdrawals within the categories of expenses identified earlier in our submission. Generally, regular cash withdrawals are likely to be part of the borrower's non-discretionary expenses, unless a borrower advises us otherwise. But we do not necessarily ask the borrower to confirm what they are using the withdrawals for, as this may be intrusive.

Because of how cash withdrawals are usually treated by lenders, we don't believe it necessary to specifically address them in the Regulations. Instead, guidance in the Code could clarify that lenders should assess expenses, regardless of how those expenses are paid. Customers think about spend by category, not spend by the way they buy the item (cash, eftpos, credit/debit card). We expect that the expenses that are paid for by cash withdrawals will be declared by customer, without them thinking about how they pay for it. A lender should be entitled to rely on the borrower's disclosure of their expenses.

If kept, we recommend limiting the cash withdrawals that must be verified. For example 'material cash withdrawals given account balances or account behaviour or regular withdrawals for the same amount'.

If there is no threshold which assesses materiality, lenders would need to check all cash withdrawals, regardless of amount, as it will be impossible for the lender to identify whether the withdrawal 'may contribute towards a payment of a relevant expense'.

Changes to relevant expenses

Under Regulation 4AG(1)(d), lenders must ask the borrower about any likely changes to their relevant expenses. We support this idea, and already ask for expenses in a way that is forward thinking. However, we expect that this requirement however is trying to capture is any foreseeable *increases* to expenses, and this should be clearer.

Reflecting our earlier comments on changes to income, we also suggest that using the term 'reasonably foreseeable' may be preferable to using the term 'likely'. We think it is right to consider what is reasonably foreseeable (e.g. known, planned, or expected future events).

Obtain a credit report

Regulation 4AG(1)(e) requires lenders to get a credit report to identify other relevant expenses. The requirement is compulsory for all lending applications, regardless of amount or circumstances. We do not believe this is right and lacks flexibility for lenders to decide whether to get a credit report to help the lender understand or verify the borrower's expenses.

While ANZ gets and checks credit reports for most lending scenarios, we do not get a credit report in all instances. For example, we would not get a credit report to assess an application for a low value overdraft or increase to credit. We also wouldn't get a credit report for borrowers with strong internal credit rating given account conduct and other behavioural signs, or we'd recently lent to the borrower and obtained a credit report then. We also note that bureau data is generally only supplied monthly by lenders. We believe there would be little point in getting a new credit report if a lender had already obtained one in the last 30-60 days.

The reliability of credit reports remains problematic. In our experience, 40% of credit reports may include errors or be out of date. And, not all lenders give information to credit bureaus, or may not give information to all credit bureaus available. We do not believe it is right to require or rely solely on a credit report as evidence of a borrower's expenses.

Reconciling conflicts

As explained in our earlier comments around similar requirements for income, we're concerned the term 'adequately reconciled' is uncertain as to what a lender must do.

As a general approach, if we find a inconsistency between what a customer has declared and what we have verified, we discuss this with the borrower. Or, rather than raise with the borrower or definitively resolve, we may adjust expenses, using reasonable cost estimates or taking the higher of that estimate and the declared amount. We may then average or increase some types of expenses that are prone to variability or vulnerability.

Even if there are differences, a lender may be able to get comfort around the lending based on particular circumstances. For example, we may make fewer, or less detailed inquiries into expenses for a credit card application where a borrower's account conduct is strong and shows a high disposable income compared to expenses.

When discussing discrepancies, a lender may need to consider whether they can or should rely on information the borrower provides. We note that ASIC provides at RG 209.180 that exercising judgement is required as to whether to accept statements made by borrowers. RG209 also provides that it is good practice to keep records of matters of the reasons the lender relied on in exercising judgment. We believe this is consistent with the new record keeping requirements introduced into the Act.

In resolving conflicts, we also believe it is important to consider the materiality of the expense being considered or the impact of that expense on the lender's affordability assessment. We do not believe a requirement to resolve should require a balance at a transactional level. Instead, lenders should take reasonable and proportionate steps to confirm that what a borrower has declared or the lender will use in an affordability assessment is broadly accurate.

Recommended changes

Based on our comments above, we recommend the following changes to draft Regulation 4AG:

4AG Lenders must do initial estimate of borrower's likely relevant expenses

(1) The lender, when estimating the borrower's likely relevant expenses, must:

(a) obtain information about the borrower's relevant expenses; and

(b) verify the borrower's relevant expenses; and

(c) ask the borrower whether there are any reasonably foreseeable changes that could increase their relevant expenses within a reasonably foreseeable period.

(2) For the purpose of (1)(a) above, the lender may:

(a) obtain the information from the borrower or another source, if the lender believes that source is reliable;

(b) use information the lender already holds about the borrower or borrowers generally, if the lender believes that information is reliable (for example, a bank may use information about income from bank account transaction records); or

(c) use a reasonable cost estimate (see Regulation 4AH) (for example, a lender may use statistical information it holds about its borrowers sourced from transactions or applications over time).

(3) For the purpose of (1)(b) above, the lender may verify the borrower's relevant expenses by:

(a) checking the borrower bank account transactions, including considering any regular, material cash withdrawals;

(b) checking a credit report;

(c) using information the lender already holds about the borrower, if the lender believes that information is reliable (for example, a bank may use information about expenses from bank account transaction records)

(d) comparing the likely relevant expenses against a reasonable cost estimate (see Regulation 4AH) (for example, a lender may use statistical information it holds about its borrowers sourced from transactions or applications over time)

(e) rely on documents a borrower or their agent provides, unless the lender believes the documents are unreliable; and

(f) rely on documents or information from other sources, if the lender believes that source is reliable.

(4) For the purpose of (1)(b) above, where the lender identifies any conflict between information about relevant expenses, the lender must consider how to reconcile that conflict, which may include assessing whether those relevant expenses should be adjusted when determining any estimate required under Regulation 4AE.

(5) For the purpose of (2) and (3) above, **bank account** means any transactional account with a registered bank or other financial institution that the borrower receives income into.

(5) For the purpose of (1)(c) above:

(a) **reasonably foreseeable period** means a minimum of 12 months from when the borrower intends to enter the agreement or, if the loan term is less than 12 months, that loan term; and

(b) **reasonably foreseeable changes** means changes that are known, planned, or expected.

Draft Regulation 4AH – adjusting initial estimate of borrower's likely expenses

We support using benchmarks or reasonable cost estimates to verify and moderate a borrower's relevant expenses, and use benchmarks in our affordability process. But we don't believe it appropriate for lenders to compare all relevant expenses against a benchmark.

As a general comment, outlining that industry benchmarks like the Australian Household Expenditure Model (HEM) or NZ Statistics Household Economic Survey may be used for reasonable cost estimates would be beneficial. We think this guidance may benefit smaller financial institutions who might not have the ability or access to data to create their own suitable benchmarks, and to provide consistency across the industry. However, the Regulations should allow larger lenders, with more sophisticated processes and systems, to develop and use their own benchmarks. We think this could be better addressed through guidance in the Code.

Should use verified expenses if lower than benchmarks

Where a lender has verified the borrower's expenses are lower than benchmarked it is a more accurate figure to use in the affordability assessment.

There are often situations where a borrower's relevant expenses may be lower than a benchmark. For example, benchmarks may become unreliable at low income levels, given the statistical pool of borrowers is also smaller. Similarly, there are valid reasons some borrower's expenses may be small or lower than expected. For example, we find students will have very low expenses.

Benchmarks for discretionary expenses

We do not think it is right to use benchmarks for frequently occurring, discretionary expenses. There are too many variables that will influence a borrower's discretionary expenses for benchmarking to be reliable. For example, 'eating out' would vary from person to person and capture fast food to fine dining.

We recommend clarifying in the Regulations that benchmarking or reasonable cost estimates should be used for fixed, non-discretionary expenses and, where possible, for variable, non-discretionary expenses.

Definition of 'reasonable cost of expenses'

As a general comment, we believe the term 'reasonable cost of expenses' may be more clearly framed as 'reasonable cost estimate', to make it clearer this refers to benchmarking or cost estimating.

We recommend amending the definition in the Regulations to reflect that benchmarking considers broad matters like the borrower's personal circumstances (single household, multi household), property or vehicle ownership, and income. In particular, we note that our experience is borrowers with higher incomes will generally have far higher relevant expenses.

The definition in Regulation 4AH(3) also provides that benchmarking must, if relevant, reflect the age of dependents and where the borrower lives (that is, regionally adjusted). We believe it would be difficult for benchmarking to take these variables into account reliably.

For example, for a dependant's age, even if we used broad categories for benchmarking, say under 5, there would be variation with childcare costs. For example, stay at home parents or those with help from family members who do not pay child care, and those who use paid child care services like kindergartens, day cares, nannies, au pairs, etc. There is also an assumption the costs are lower for younger children, which may not always be the case, as child care costs for under 5s may significantly reduce once a child starts school. The costs for older children may also vary dramatically with the choice of schooling.

While age of dependants and where a borrower lives may sometimes be relevant, we believe this will be captured in a borrower's declared expenses. For example, a borrower with small children will include the cost of nappies, formula, etc in their grocery costs, and will declare their childcare costs. Often, while the nature of costs change, they may still be comparable, e.g. school children have uniform costs, sports fees etc.

Recommended changes

Based on our comments above, we recommend removing Regulation 4AH, and instead adding a new subclause to Regulation 4AG:

(6) For the purpose of (3)(d) above, a **reasonable cost estimate** means an estimate of relevant expenses, individually or as groups of expenses, drawn from one or more of the following:

- (a) statistical information about borrowers or the public that the lender holds, (for example, a lender may use statistical information it holds about its borrowers sourced from transactions or applications over time);
- (b) an industry benchmark (for example, a lender may use the Australian Household Expenditure Model); or
- (c) statistical information about borrowers or the public obtained from other sources (for example, a lender may use statistical information from Statistics New Zealand's Household Economic Survey;

(7) In using any of the sources in (6) above as a reasonable cost estimate, the lender must be satisfied that information is reliable and relates to the relevant expenses to be verified.

Or, if Regulation 4AH is to be kept, we suggest the following changes to draft Regulation 4AH:

4AH Lenders must adjust initial estimate of borrower's likely relevant expenses

(1) When using a reasonable cost estimate to estimate likely relevant expenses for the purpose of Regulation 4AG(2)(c), the lender must be satisfied that reasonable cost estimate is reliable and applies to the relevant expense being estimated.

(2) When comparing likely relevant expenses against a reasonable cost estimate for the purpose of Regulation 4AG(3)(d), the lender must take the higher of the lender's initial estimate and the reasonable cost estimate, unless the lender reasonably believes using the lower is appropriate in the circumstances.

(3) To avoid doubt, there is nothing in (1) or (2) above which requires a lender to use a reasonable cost estimate. Under Regulation 4AG, a lender may collect or verify a borrower's relevant expenses in other ways.

(4) In this Regulation and Regulation 4AG, a **reasonable cost estimate** means an estimate of relevant expenses, individually or as groups of expenses, drawn from:

- (a) statistical information about borrowers or the public generally, if the lender believes that information is reliable (for example, a lender may use statistical information it holds about its borrowers sourced from transactions or applications over time);
- (b) an industry benchmark, if the lender believes that information is reliable; or
- (c) statistical information about borrowers or the public obtained from other sources, if the lender believes that information is reliable (for example, a lender may use statistical information from Statistics New Zealand's Household Economic Survey).

Relying on other methods to assess affordability

As we suggested earlier, we believe the Regulations must allow lenders the flexibility to assess affordability in a way that reflects the borrower or the lending circumstances.

To reflect the general approach taken in the Regulations of setting minimum standards for lenders, we suggest supporting the changes to Regulation 4AE with the following:

Assessing how the borrower intends to make payments, other than by using income

(1) Where a borrower will not rely, or will not only rely, on income to meet any payments under the agreement, the lender must, for the purposes of Regulation 4AE(1)(b):

(a) obtain information about how the borrower intends to meet the payments

(b) verify that information, if possible; and

(c) ask the borrower about any reasonably foreseeable changes that may adversely affect the borrower's ability to meet the payments in the way identified under (a) above.

(2) For the purposes of (1)(a) above, the lender may:

(a) obtain the information from the borrower or another source, if the lender believes that other source is reliable; or

(b) use information the lender already holds about the borrower, if the lender believes that information is reliable (for example, a bank may use information it holds in bank account transaction records).

(3) For the purposes of (1)(b) above, the lender may verify information by:

(a) checking appropriate records like statements for savings or investments, financial statements, business financial statements, deed of acknowledgement of debt, sale and purchase agreements, etc;

(b) checking the value of any property, goods, or assets the borrower intends or is willing to realise;

(b) using information the lender already holds about the borrower, if the lender believes the information is reliable (for example, a bank may use information it holds in bank account transaction records)

(c) relying on documents a borrower or their agent provides, unless the lender believes those documents are unreliable; and

(d) relying on documents or information from other sources, if the lender believes the source is reliable.

(4) Where the lender identifies any conflict between information obtained for the purposes of (1)(a) and (1)(b) above, the lender must consider how to reconcile that conflict.

(5) For the purpose of (1)(c) above:

(a) **reasonably foreseeable period** means a minimum of 12 months from when the borrower intends to enter the agreement or, if the loan term is less than 12 months, that loan term; and

(b) **reasonably foreseeable changes** means changes that are known, planned, or expected.

Advertising

We support the intent of Regulations 4AJ to 4AN, but suggest:

- the Regulations should encourage lenders to advertise in simple terms that customers are more likely to understand, rather than prescribing extensive information that must be included
- advertising of rates other than annual, percentage, interest rates should be prohibited
- a clearer approach to 'class of credit contracts' is applies to avoid unintended consequences for common products like home loans and credit cards.

Draft Regulation 4AK – advertising payment amounts

ANZ does not currently advertise its products by reference to a payment amount. Nevertheless, we recommend that this draft Regulation is amended to remove the reference to the 'class of credit contracts'. We've also suggested this for using the term in draft Regulation 4AL.

The term 'class of credit contract' is unclear in this setting, and could accidentally capture products that fall within the same 'class', but have different 'features'. For example, we consider that a 'credit card' is a 'class of credit contract', but there may be a selection of cards available with different 'features', like travel rewards or low rates. A travel rewards credit card would not be a separate class of credit contract to a low rate credit card.

Similarly, a 'term home loan' would be a class of credit contract. But, that class of contract may have different 'features' that a borrower may take advantage of over the term of the contract, like the choice of floating or fixed interest rates. A home loan with a one year fixed interest rate would not be a different class of credit contract to a home loan with a floating interest rate. Indeed the contract may have different interest rates over the term of the same contract.

Also to the issues caused by using the term 'class of credit contract' we think the requirements in Regulation 4AK are impractical for advertising. A better approach may be to address the underlying concern where a lender advertises a payment amount. A lender should be clear how the lender has calculated that amount, so the borrower has a true signal of the likely costs to them. Where other interest rates could apply to the repayments, we suggest that the Regulations require the lender to use the higher of those interest rates to calculate the payment advertised.

As a general comment, the assumptions around calculating total interest and total amounts payable are contained in Regulations, rather than the Act, and this should be clearer in Regulation 4AK.

We have more comments below about Regulation 4AL, which may explain some suggested changes below.

Recommended changes

Based on our comments above, we recommend the following changes to draft Regulation 4AK:

4AK Advertising of repayment amounts

(1) This Regulation applies if an advertisement is being distributed to the public or a section of the public and it refers to an amount of a repayment under an agreement.

(2) The advertisement must state:

(a) the total amount of the repayments, but only if:

(i) ascertainable; and

(ii) the contract would, on the assumptions prescribed by Regulations, be paid out within 7 years of the date on which credit is first provided under the contract; or

(b) in any other case, the annual interest rate expressed as a percentage, repayment frequency, and term used to calculate that repayment.

(3) For the purposes of (2)(b) above, where there is more than one interest rate or a range of rates available for borrowers obtaining the same class of credit contract, the annual interest rate used to calculate the repayment must be the highest of those rates.

(4) The advertisement must express the information in (2) above clearly, concisely, and in a manner likely to bring the information to the attention of a reasonable person.

Draft Regulation 4AL – advertising of interest rates and charges

We support the clear and simple advertising of credit so borrowers are aware of the likely cost of borrowing under the advertised agreement and can compare with other lenders' offers. As drafted, we don't think the Regulation achieves that purpose. We don't believe the draft addresses the harm caused by lenders who advertise high cost consumer credit at daily or monthly rates, which may disguise the true cost of credit.

We're also concerned the proposed requirement will materially impact how banks and other large lenders responsibly advertise now. In particular, the information required to be included is likely to make advertisements confusing, and sometimes, impossible. In particular, requiring certain information to be 'prominent' will detract from a lender's ability to provide information in a format most likely to be understood by consumers. We're concerned the approach proposed will make it harder for consumers to distinguish between rates offered than it is now.

Annual interest rate only

We recommend amending this Regulation to ban advertising credit with any interest rate other than an annual rate. This would address most of the harm caused by lenders who mislead vulnerable consumers by advertising a monthly or weekly, rather than annual, rate. If, as drafted, credit can advertised using different rates (the actual rate and annual rate) we strongly believe this will likely to confuse consumers further.

Rates that must be disclosed

We understand MBIE's intention is not to require lenders to disclose every rate for a credit product. Instead, the proposal is to capture lenders who publish advertisements that target consumers, some or many of whom may be not be eligible to receive that rate. We note the Fair Trading Act's bait advertising provisions address this likely harm.

The draft Regulations draw from the cost of borrowing disclosure Regulations. We do not believe it is right to use those Regulations in the context of advertising. Advertising is not about giving information about *all* rates and fees for *all* credit products offered, and is instead targeted, focusing on a single product, rate, or feature.

Where there may be multiple rates available for a credit product, we instead recommend that any advertisement makes the nature of the rate advertised, including whether there are eligibility criteria that apply, clear.

Class of contract

We also believe the reference to 'the class of credit contracts covered by the advertisement' is uncertain. At its widest, it could require listing all fixed and floating interest rates for home loans, including special rates or rates that apply if certain criteria are met, for example borrowers with large deposits. We suggest this is effectively limited in the Regulations to avoid unintended consequences.

Ordinarily available

Similarly, we suggest removing the reference in Regulation 4AL(4)(a) to rates 'ordinarily available'. This requirement will not reflect that the advertising may target a specific part of the public. For example, those with large deposits who may obtain the lower interest rate advertised. The higher rate, and not the advertised lower rate, might be seen as the rate 'ordinarily available' to the public. As drafted, the Regulation may restrict this advertising targeted to a sector of the public.

We also believe the requirement to state rates that are 'ordinarily available' would make targeted advertising ineffective. For example, an advertisement targeted to customers with a larger deposit would also need to include the higher rate ordinarily available to the public.

The purpose of an advertisement may be to target a particular group of borrowers and the rates may be a special available for a short time and not ordinarily available. For example, we may advertise a short term special interest rate for borrowers who want a loan over a certain amount. That rate may not be one that is ordinarily available to borrowers. Instead, it is a targeted, special rate applying to a specific group of borrowers.

Unless clear that the advertisement targets a part of the public, the Regulations should require lenders to include a statement to the effect that a higher rate than advertised may apply. For example, the rate may apply to particular groups of borrowers under eligibility, risk, or other criteria. We believe this approach is better than requiring all rates to be included within an advertisement. As noted above, including all rates is likely to increase consumer confusion and prevent a wide range of advertising formats from being used.

Specifying nature of the rate

We also think there needs to be more flexibility around how lenders describe fixed and floating interest rates. Often, this will be clear from the context of the advertisement, without needing to be specifically addressed. For example, in an advertisement for ANZ's one year fixed interest rate, it is clear that the rate is fixed for one year, without needing a separate statement to that effect. This may have been intended, but we suggest the Regulations are clearer this is not required.

Use of current rates

While we generally agree that current rates should be used in advertising, we believe including a specific requirement to this effect in the Regulations may penalise lenders for accidentally using an out-of-date interest rate. Interest rates can be subject to sudden, market changes, outside our control. The rates may move suddenly, and lenders may be unable to give warning to borrowers – this is why the alternative publication rules in the Credit Contracts and Consumer Finance Regulations were developed.

In that context, it could be that a lender has advertising in market that it cannot quickly remove. For example, there may be billboards or other advertising in place that advertise a particular rate that has now become out-of-date. In those cases, responsible lenders quickly stop or remove any advertising if the rate is no longer accurate, to ensure we comply with the Fair Trading Act. But the lender may not always be able to do this before a rate change happens. We note we avoid advertising interest rates on billboards for this reason, but we still experience a 'lag' in removing impacted in market advertising is there is a sudden rate change. This is why we state rates are subject to change or make it clear how long special offers apply for.

Instead, we recommend that a lender should make it clear in advertising if the rate advertised is subject to change, including if it applies for a limited time. We believe the rules in the Fair Trading Act will also adequately protect consumers.

Alternatively, the Regulations must make it clear that a lender will not breach their obligations to use current rates where the rate moves suddenly, including because of market changes outside the lenders control.

Requirement for prominence of all required information

We currently advertise consumer credit products such as home loans and credit cards in a variety of formats – including newspapers, TV, website banners, social media and Google search advertisements. Those advertisements, particularly on the Internet, are short. For example, setting out the rate, a reference to eligibility criteria and term, but requiring the customer to click to receive full information on a landing page. We believe this approach is prevalent amongst large retail banks in New Zealand and overseas, and is understood by consumers. We would not be able to continue to advertise in those formats if significantly more information must be included. We believe this would not lead to good customer outcomes, as consumers will not receive information that allows them to shop around.

We also note that there is a clear hierarchy of information in advertisements. Requiring some or all content to be prominent, or more information to be provided prominently, will detract from key messages and create confusion for customers. We believe it will make it harder for customers to understand and differentiate between offers or understand the actual offer being promoted by the lender.

Instead, we recommend Regulation 4AL(4) requires lenders to present the information in a fair and clear way.

Mandatory fees

While Regulation 4AL(2)(e) provides an example, we are unsure what 'mandatory credit fees' is intended to capture. We think that, as drafted, the Regulation is unclear whether only set up fees or fees that will be charged regardless of the borrower's actions or inactions, are included. We recommend this is clarified.

We also do not believe requiring lenders to include the method of calculating the fee in an advertisement is right. For example, for our low equity premium, which is tiered and calculated as a percentage of the loan amount, this would be problematic. Instead, lenders should make it clear a fee can be charged, and, where not ascertainable, where information about how the fee can be found.

Recommended changes

Based on our comments above, we recommend the following changes to draft Regulation 4AL:

4AL Advertising of interest rates or charges

(1) This Regulation applies if an advertisement is being distributed to the public or a section of the public and it refers to an interest rate or an interest charge.

(2) The advertisement must:

(a) state the interest rate as an annual percentage;

(b) if the advertisement targets a section of the public, make it clear that a higher interest rate than advertised may apply;

(i) to a specific borrower or class of borrowers;

(ii) in specific situations (for example, where eligibility, risk, or other criteria apply); or

(iii) at the end of a promotional period (for example, where the rate advertised relates to a balance transfer on a credit card);

(c) clarify whether an annual interest rate is variable or adjustable, or is fixed for the term or any part of the term of the contract;

(d) state whether any mandatory credit fees (meaning any establishment fees, regular account management fees, or other credit fees that must be paid when the agreement is entered) are payable and:

(i) if ascertainable, the amount of the fees; or

(ii) if not ascertainable, where information about the method of calculation can be obtained.

(3) However, subclause (2) does not require the advertisement to state matters in relation to default interest charges.

(4) The advertisement must express the information in (2) above clearly, concisely, and in a manner likely to bring the information to the attention of a reasonable person.

Draft Regulation 4AM

Our comments on mandatory fees apply here also.

Draft Regulation 4AN

While we agree that advertising 'instant approval' is inappropriate, otherwise promoting speed to approve should not, itself, be prohibited. We're concerned that specifically prohibiting claims like '15 minute approval' suggests that there is a problem with advertising fast approvals. Speed of approval does not mean or imply that a lender won't or hasn't made any inquiries. It simply implies that the process of approval is quick. Lenders should be careful to make it clear that the approval process is quick, provided they have all of the information needed to assess a lending application. We think it is still appropriate for lenders to be able to promote or differentiate themselves based on the speed of their processes. The focus should be on whether the advertisement does, or is likely to, imply the lender won't or hasn't made inquiries under the Act.

Draft Regulations 4F to 4H – disclosure of agreed changes under section 22 of the Act

We understand the intent of these Regulations is that customers are to receive information about the impact of the change, and not just the full particulars of the change itself. However, on the current drafting it is unclear what information will need to be disclosed under the new rules.

We strongly recommend that only forward-looking information is provided

Calculating comparative information from the loan's start or the last loan change (given elapsed time, volume of loan changes, and inherently indicative information) would be difficult for lenders and likely confusing for borrowers. We believe this approach, if that was what was intended, would impose significant compliance costs and need large technology changes unlikely to be achievable within the timeframes set, if it could be achieved at all.

Disclosing total interest and total amounts under Regulation 4F(2)(f) and (h) will mislead customers, unless clear those amounts are indicative and calculated as amounts *remaining to be paid* on the loan.

Loan terms, like repayments, may change for many reasons (for example, rate changes or customer requests). Those changes may affect the total interest and amounts a borrower may pay over the loan's remaining term.

Requiring lenders to disclose total interest and payments where the contract will be repaid within seven years is arbitrary for agreed changes, and will lead to customers with similar loans being treated differently, or even the same loan being treated differently at different times.

For example, a customer varies a 20-year home loan in the last seven years of the loan's term will receive information about the remaining total interest cost and payments. But a customer with a similar loan who makes the same variation with eight years remaining will not. Likewise, lenders would not have disclosed those amounts in initial disclosure for the 20-year home loan, but must disclose the amounts if the loan is changed towards the end of the loan's term. We see no reason for this inconsistency.

We recommend removing the requirement to disclose total interest and total amount payable entirely. However, if kept, we suggest that the information is only disclosed if the lender was required to give that information when it made initial disclosure, and the lender discloses the information for the *remaining* loan term, after the agreed change takes effect.

As a general comment, we also recommend changing the reference in Regulation 4F(2) to 'the variation' to the language of section 22 – 'the agreed changes' – to avoid any interpretation differences.

Recommended changes

We have provided two drafting alternatives below. We believe these alternatives will meet the policy objectives of increasing the information lenders must provide under section 22 where there is an agreed change.

- First, the drafting alternatives ensure that lenders give consumers information to help understanding of the change's wider effects.
- Second, the drafting alternatives provide certainty to lenders about the information they must provide when making disclosure under section 22, encouraging greater compliance and enforcement.

As discussed above, not all the information in Schedule 1 of the Act may be relevant to the credit contract, or will change. And lenders may not have needed to disclose the information under section 17.

We do not believe it is practical or helpful to consumers to disclose changes that are the result of the passage of time. The information disclosed should be on a forward looking basis. In particular, the information given under section 17 is likely to be out of date when a borrower asks for a change to their loan. Any requirement to compare information against information given under section 17 is likely to confuse or mislead – the borrower's obligations may have decreased or increased due to the passage of time or other changes.

OPTION ONE - Preferred

4F Disclosure of agreed changes

(1) This Regulation applies for the purposes of section 22(1) of the Act.

(2) The information that must be disclosed is the key information that was disclosed before the contract was entered for the purposes of section 17(1), but only to the extent that:

(a) the change agreed to affects any of that key information; and

(b) the updated key information is calculated, where applicable, as at the date of the change will take effect and on a forward-looking basis.

OPTION TWO

4F Disclosure of agreed changes

(1) This Regulation applies for the purposes of section 22(1) of the Act.

(2) Any consequential changes to the information described below must be disclosed, but only where that information is applicable to the contract and was required to be disclosed before the contract was entered into pursuant to section 17(1):

Credit limit

(a) the credit limit;

Annual interest rate

(b) the annual interest rate or rates under the contract (with the rate or rates being expressed in terms of a percentage);

(c) if there is more than 1 rate, how each rate applies;

(d) if an annual interest rate is fixed for the term or any part of the term of the contract, the period during which the annual interest rate is fixed;

(e) if an annual interest rate is determined by referring to a base rate, particulars that describe how the annual interest rate is determined, including:

(i) the name of the base rate or a description of it; and

(ii) the margin or margins (if any) above or below the base rate to be applied to determine the annual interest rate; and

(iii) where and when the base rate is published or, if it is not published, how the debtor may ascertain the rate; and

(iv) the current annual interest rate or rates;

Total interest charges

(f) the total amount of interest charges payable under the contract, if ascertainable (but only if the contract would, on the assumptions set out in Regulations, be paid out within 7 years of the date on which credit is first provided under the contract);

Credit fees and charges

(g) if the contract is a high-cost consumer credit contract, a statement of the rate of charge under the contract, as required to be calculated in accordance with section 45D of the Act and these Regulations;

Payments required

(h) if more than 1 payment is to be made:

(i) the amount of the payments or the method of calculating the amount; and

(ii) if ascertainable, the number of the payments; and

(iii) if ascertainable, the total amount of the payments (but only if the contract would, on the assumptions set out in Schedule 1, be paid out within 7 years of the date on which credit is first provided under the contract); and

(iv) when the first payment is due after the effective date of the change, if ascertainable, and the frequency of payments.

(3) Any information disclosed under 2(f) and (h) above is to be calculated from the effective date of the change to the contract.

Debt collection disclosure

While we support providing clear information to borrowers about a debt to be collected, we're concerned that the extent of information to be disclosed is likely to hinder, rather than help, a borrower — we're happy to provide an example to show this. Communicating to customers who may be in financial difficulties requires empathy, and often a light touch. Information should be clear and simple, explaining what will happen and why, and what the borrowers next steps are. We're concerned the Regulations go far beyond this, and may confuse or distress borrowers unnecessarily when they are vulnerable.

Purpose of lending

Under the transitional provisions, Regulation 24 applies to existing agreements, even though lenders were not required and may not have collected information about the purpose of lending. This should be reflected in the draft Regulation.

Also, customers of large retail banks can and often do change the purpose of their borrowing over time. For example, a borrower gets a revolving home loan to buy a home, but may later use the credit limit for renovations, a car purchase, or to reduce interest charges. We suggest amending the Regulation to clarify the loan's purpose doesn't need to be provided where, in the reasonable judgement of the lender, that information is likely to be unnecessary, unhelpful, or confuse the borrower.

Statement about debt to be collected

We have previously suggested reducing the information lenders must provide borrowers when debt collection begins. Information must be clear and simple to avoid overwhelming a borrower.

Borrowers receive continuing disclosure every six months (or less) and significant details disclosed each time. We believe there are risks the fulsome debt collection disclosure required will repeat content already provided to a borrower. If there are concerns over providing information where debt is collected before any statements have been provided, then we suggest specifically addressing this in the Regulations. For example, the information should be provided unless a continuing disclosure statement has been provided in the last 6 months or 45 working days.

The proposed approach in Regulation 24(4), however, provides far more targeted information, and discloses what we believe a borrower will most want to understand about a debt being collected. We recommend the approach in Regulation 24(4) is be applied to all debt collection. Alternatively, Regulation 24(3) could apply to high-cost loans only. Regulation 24(4) could apply separately (i.e. a lender under a high cost loan contract must provide two sets of information, being a page of the Regulation 24(3) information and a page of the Regulation 24(4) information).

Dispute resolution services and other information

Under Regulation 24(1)(f)(iii), it is unclear what the 'explanation of what that service provides' means. The services provided by disputes resolution schemes are extensive, and subject to specific terms of reference. It would be difficult to comprehensively include an explanation of those services in a debt collection letter. We instead recommend developing a short, simple explanation with the industry and relevant schemes, to include where appropriate, or the approach to financial mentoring services, described below, is applied.

Regulation 24(1)(g) refers to the borrower's right to apply to change an agreement under section 55 of the CCCFA. As a borrower in default does not have the right to make an application if any circumstances under section 57 apply, we suggest deleting or reframing that content.

Please see our comments about the meaning of 'payment reminder' in section 132A in the next section below.

Financial mentoring services

We think lenders should be required to provide content about financial mentoring services with the information about dispute resolution services, but not necessarily on the front page of the communication. We think that this may, in some situations, be confronting to customers – particularly as it could imply the lender doesn't believe the customer can manage their financial affairs without help. We suggest requiring that the information is clear, concise, and brought to the attention of a reasonable person.

Recommended changes

Based on our comments above, we recommend the following changes to draft Regulations:

24 Disclosure before debt collection starts

(1) The following information is the information that must be disclosed under section 132A of the Act concerning the contract as is applicable:

Information about the credit contract

(a) the full name and contact details of the creditor at the date of the credit contract;

(b) the date of the credit contract;

Statement about debt to be collected

(c) a statement as required by subclause (3);

Information about debt to be collected

(d) the full name and contact details of the debt collector unless already disclosed under (a) above;

(f) information about ways in which the debtor can make a complaint about the debt collector, including:

(i) the contact details for the Commerce Commission;

[OPTION ONE]

(ii) where the creditor is a member of a dispute resolution scheme under the Financial Service Providers (Registration and Dispute Resolution) Act 2008;

(A) the name and contact details for the dispute resolution scheme of which the creditor is a member;

(B) the following prescribed statement explaining what service that scheme provides; and

(C) a statement that the creditor will not charge a fee to any complainant to investigate or resolve a complaint.

[PRESCRIBED STATEMENT TO BE AGREED]

[OPTION TWO]

(ii) where the creditor is required to be a member of a dispute resolution scheme under the Financial Service Providers (Registration and Dispute Resolution) Act 2008:

(A) a statement that the person can ask that scheme to investigate or help to resolve a complaint against the creditor for free;

(B) the contact details for that scheme, including a link to the scheme's internet site.

Other information

(g) that the person can ask for free and confidential budgeting and financial capability advice from MoneyTalks, and basic information about how to contact MoneyTalks.

(2) The information about MoneyTalks must be provided in a way that brings the information to the attention of a reasonable person.

Statement about debt to be collected

(3) The statement required by subclause (1)(d) must disclose:

(a) the unpaid balance before any default fees relating to the debt collection are debited to the debtor under the contract; and

(b) the total amount of any default fees to be debited to the debtor under the contract, and the total amount to be collected (as increased by those further fees), to the extent that those amounts are ascertainable at the time of disclosure; and

(c) the rates of any ongoing interest charges, credit fees, and default fees that will continue to be charged under the contract.

Disclosure about dispute resolution and financial mentoring services

Disclosure of dispute resolution services after complaint

We support providing dispute resolution services information where there is the potential for a dispute between us and the customer about our consumer credit products.

Not all complaints relate to our duties under the Act. For example, we might receive complaints when a branch closes, services are unavailable, or where ATMs don't dispense notes in a denomination desired. In those situations, it would be inappropriate and even annoying to the customer to be told about a service that will not be able to deal with their complaint.

We recommend clarifying that lenders must only disclose dispute resolution services when receiving complaints that, if substantiated, breach the Act, or where the complaint relates to a consumer credit contract. We suggest defining 'complaint' as 'an expression of dissatisfaction about a lender's conduct, to which a response or resolution is explicitly or implicitly expected and, if proved, would be a breach of the Act'.

We also suggest defining complaint to make it clear that the expectation must be for a written response, which will help address materiality. For example, a customer make a complaint in person, and expects a response from the staff member. We do not believe it would be right or possible to provide disclosure proposed during those types of interactions.

Disclosure of financial mentoring services with payment reminder

We support providing financial mentoring services to customers who need it.

We use several different ways of contacting customers when they miss a payment. These include SMS messages, IVR (interactive voice response) phone calls and emails. We also post letters and our staff make scripted telephone calls in some cases. Some customers may not be comfortable receiving SMS messages or emails, or have not provided cell phone or email contact details to us. We contact some of those customers by IVR or scripted telephone call to remind them if the miss a payment or exceed a limit.

We think that Regulation 5A(3) might unintentionally narrow what a 'payment reminder' can be. Section 132A(6) of the Act broadly defines 'payment reminder' as 'a communication'. We understand communication includes verbal communication like IVR messages or scripted calls to a customer. Regulation 5A(3) requires lenders to disclose information about financial mentoring services in a payment reminder that is 'sent' to the customer. We think using the word 'sent' suggests lenders must give financial services information in writing. We recommend changing 'sent' to 'given', which more naturally includes verbal communications. Lenders should be able to disclose dispute resolution services verbally in payment reminders.

If not amended, the provision risks requiring lenders to disclose financial mentoring services in writing. That would prevent lenders from using IVR messages or scripted phone calls. For some customers, this would mean that we have no effective way of contacting them immediately after they miss a payment to remind them to make the payment.

We're also concerned that long messages about financial mentoring services may create an impression of a general communication from us, rather than targeted notice that the borrower has missed a payment. Borrowers may not read (or listen to) carefully. An appropriate balance can be struck by inviting the customer to click or ask for the details of financial mentoring services. An example might be: 'Concerned about your finances? [Click here/press 1/ask us] for information about free financial mentoring services.'

We also suggest that there is a trigger applied before disclosure is included in payment reminders. For example, a lender may contact a borrower where they have exceeded their credit limit by a small amount. Referring to financial mentoring services in that context is likely to be unnecessary and potentially insulting to a borrower.

Payment reminders for exceeding a credit limit

We also suggest clarifying that a 'payment reminder" (in section 132A(6)) includes reminders sent when a customer exceeds a credit or overdraft limit. Payment reminders shouldn't be limited to where a customer misses a scheduled payment, such a fortnightly mortgage repayment or monthly minimum credit card repayment.

We understand the intent is that both types of reminders should be treated the same. That is debt collection disclosure is required under section 132A, unless the 'payment reminder' exception applies, and the financial mentoring services disclosure is required under section 26B(2) with any 'payment reminder'.

However, section 26B(2) is clearer in its inclusion of credit limit defaults than section 132A(6). We note this may require an urgent amendment to the Act itself. Unless the definitions of 'payment reminder' in sections 132A and 26B are aligned, lenders may be reluctant to give any reminder where a borrower exceeds a credit limit. If the section 132A(4) 'payment reminder' exception does not apply the lender would have to give full debt recovery disclosure under section 132A.

Securitisation under Part 3A

We support the submission made by UDC Finance Limited, which suggests a new regulation to apply to securitisation, covered bond arrangements, and similar.

Under Part 3A of the Act, the name and address of the creditor must be disclosed to the debtor:

- under section 83G, in a repossession warning notice
- under section 83O(e), if a creditor exercises a right of entry to repossess consumer goods, and
- under section 83V, in a post-repossession notice.

We submit that it is incorrect and illogical to require the SPV's details to be disclosed to a debtor under Part 3A, given the creditor doesn't have to disclose the assignment under section 26A:

- Disclosure is likely to confuse debtors, which section 26A(3) and Regulations were intended to avoid.
- The SPV is exempt from the FSP Register and dispute resolution scheme requirements, which again could confuse debtors if they want to raise a dispute.
- The provisions treat types of securitised consumer credit contracts differently, depending on whether they cover security over consumer goods.

To address, we suggest a new Regulation 21A:

21A Disclosing creditor information under Part 3A of Act to apply only to the contract manager for securitisation, covered bond arrangements, or similar

(1) In respect of a relevant contract, if the creditor (or creditor's agent) is required to serve or produce a Part 3A notice in accordance with Part 3A of the Act, the creditor information to be contained in the Part 3A notice may be substituted with the corresponding information pertaining to the contract manager of that relevant contract (as if the contract manager were the creditor under that relevant contract).

(2) In this regulation:

contract manager has the meaning given to it in regulation 20(2)

creditor information means any information relating to the creditor that is required to be contained or set out in a Part 3A notice, including the creditor's name and contact details

relevant contract means a consumer credit contract that has been transferred to another creditor in circumstances where section 26A of the Act does not apply in accordance with regulations 19 and 20

Part 3A notice means a repossession warning notice, a post-repossession notice or any document that a creditor (or creditor's agent) is required to produce in accordance with section 83O(e) of the Act.

Commencement Order

We support the NZBA's previous recommendation to change the proposed commencement date of 1 June 2020 for the due diligence duty for directors and senior managers of lenders to give lenders enough time for lenders to develop, review, or upgrade robust compliance programmes.

We strongly support extending the implementation date for the director and senior manager due diligence duty in section 59B to 1 April 2021.

- The due diligence needed to meet the new duty, given the personal liability imposed and size and complexity of banking businesses, is extensive and time-consuming.
- Providing compliance assurance is problematic while creditors are making significant changes to policies, processes, systems, and training. Work will need to be duplicated once changes are made to meet the new Regulations and Responsible Lending Code.

We do not believe extending the commencement date for section 59B will undermine the policy intent. Instead, we believe it will ensure directors and senior managers have enough time to meet their due diligence duty, thoroughly and effectively, to better support overall compliance with the CCCFA.

We're happy to discuss the logistics and the need to extend the commencement date for section 59B further with Officials or the Minister.

Reporting – contents of annual return

We understand MBIE has provided the NZBA and its members with an extension to provide comments on the matters to be included in annual returns to the Commerce Commission under section 116AAA of the Act. We will provide ANZ's comments at that time.