



SUBMISSION

on the

**Draft Credit Contracts and Consumer Finance
Amendment Regulations 2020
to the**

Finance and Expenditure Committee

February 2020

Introduction

1. This submission is from the Trustee Corporations Association of New Zealand Inc. (**TCA**).
2. TCA is a long established industry association which represents New Zealand's licensed Trustee Corporations which have a unique role in maintaining investor confidence in New Zealand's financial markets. TCA maintains relationships with government ministries, regulatory bodies and financial sector groups, and sets minimum standards as practice guidelines for the performance of Corporate Trustees. Further information about TCA is available at www.tca.org.nz.
3. TCA appreciates this opportunity to comment on the exposure draft of the Credit Contracts and Consumer Finance Amendment Regulations 2020 (**Draft Regulations**).

Submission

4. TCA supports the policy objectives of the Draft Regulations, and in particular current Draft Regulation 22 and 23 relating to securitisation and covered bond arrangements and other similar arrangements.¹ (We have explained the nature of those arrangements, and the substantial economic benefits they provide, in our previous submissions on the Credit Contracts Legislation Amendment Bill (**Bill**)).
5. However, TCA proposes the following clarifications to ensure the exemption in the Draft Regulations applies regardless of the specific legal form of the securitisation or covered bond arrangements, or other similar arrangements.
6. In particular, there are two models which are primarily used in the New Zealand market:
 - a. One structure involves the transfer of rights from the contract manager to the Trustee (which is the model covered by the current Draft Regulations); and
 - b. The other involves the origination of the loan in the name of special purpose vehicle (SPV) itself.
7. In both cases, the Trustee/SPV acts in a passive role. The exemption proposed in Draft Regulations 22 and 23 appears to accept that it is the contract manager (rather than the Trustee/SPV) which should perform the relevant obligations under the CCCFA, and we provide these submissions simply to ensure that the exemption applies as intended (and doesn't inadvertently exclude one of the accepted securitisation models).

Circumstances of exemption

8. In respect of Draft Regulations 22 and 23:
 - a. TCA submits that these should be amended so that they cover situations where, under the structure of the particular securitisation or covered bond arrangement or similar arrangement, the trustee provides the original credit through a special purpose vehicle (but where the contract managers remain functionally accountable to the customer in all respects and continue to bear the risks and rewards of the relevant credit programme). In such situations there is no transfer of rights and so they would not meet the present requirement of Draft Regulation 22(2)(a) even though the commercial outcomes are the same.

¹ TCA considers the wording used in the Draft Regulations to describe the relevant arrangements ("securitisation or covered bond arrangements *or similar arrangements*") is suitably broad and would cover, for example, managed investment funds. TCA considers it would be preferable to state this expressly but appreciates the requirement for brevity so has not specifically submitted on this.

- b. As noted above, we see this solely as a technical change to ensure the agreed exemption applies as intended and does not omit one of the structures typically used in securitisations, covered bond arrangements, and other similar arrangements.
- c. To address this, TCA proposes that Regulation 22 be amended as follows:

(2) The circumstances are that—

(a) either:

(i) the rights of a person who provides credit under a consumer credit contract (an **original creditor**) are transferred (whether by assignment or by operation of law) to another creditor (the **new creditor**); and ~~(b)~~ the transfer is made for the purposes of securitisation or covered bond arrangements or similar arrangements; or

(ii) a person who provides credit under a consumer credit contract does so solely in a representative capacity at the direction of the contract manager for the purposes of securitisation or covered bond arrangements or similar arrangements (**special purpose creditor**); and

(~~b~~e) there is a contract between the new creditor, or the special purpose creditor as the case may be, and a person (a **contract manager**) that provides for the contract manager— (i) to collect all payments from every debtor and guarantor; and (ii) otherwise to manage the relevant contract and every guarantee and to comply with the Act as if the contract manager were the creditor; and (iii) to deal with every debtor or guarantor for those purposes accordingly.

Scope of exemption

- 9. TCA also submits that the Draft Regulations should make clear that the following obligations under the CCCFA, and introduced under the Bill, do not apply to trustees of securitisation or covered bond arrangements or similar arrangements:
 - a. section 9C (the lender responsibility principles);
 - b. section 9CA (the obligation to keep records about reasonable inquiries and provide records on request);
 - c. section 41 (regarding unreasonable fees); and
 - d. section 41A (duties in respect of records and reviews about how fees calculated and provide records on request).
- 10. This could be achieved either by separate regulations (deriving from the powers in section 138(da)(iii) of the CCCFA, enabling the modification of other provisions of the CCCFA in respect of circumstances relating to securitisation or covered bond arrangements or similar arrangements) or by amending current Draft Regulation 23 to include references to the above provisions.²
- 11. TCA's reasons for this submission are that:
 - a. Contract managers (not Trustees) will be the parties carrying out affordability and suitability assessments, and fee calculations, and should be responsible for those processes and for creating and storing records of those processes.
 - b. Imposing the above obligations on Trustees would also create material confusion over whom is primarily responsible for those obligations, and may lead to contract managers taking a more relaxed approach to compliance.
 - c. In addition, the trustee has no involvement with those processes. Given that the records will need to demonstrate how the lender has satisfied itself as to the suitability and affordability of the loan (which is a subjective assessment by the lender) and the

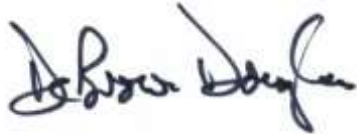
² With the necessary consequential edits to the headings of Draft Regulations 22 and 23.

reasonableness of fees (which requires a detailed understanding of the lender's costs) it will also be impossible for trustees to accurately record those steps.

- d. The application of the above provisions to Trustees would add significantly to the costs of administering and establishing the relevant arrangements. This will likely result in a corresponding reduction in the availability of these alternative funding sources to credit providers. This would negatively impact capital markets which rely on securitisation and covered bond products, and would be to the overall detriment of consumers, businesses and New Zealand's financial markets and economy generally.

As discussed above, these submissions are intended to reflect the distinction between the passive role of the trustee/SPV and the active role of the contract manager. In our view, once that distinction is accepted, it follows that the exemptions for the trustee/SPV should apply not only to the new due diligence duty but also to the other obligations listed above. These submissions are accordingly intended to ensure that the exemption applies logically and comprehensively, and to avoid the adverse consequences noted above.

We are happy to discuss any of these comments in further detail.



Executive Director
Trustee Corporations Association of New Zealand Inc.