



COVERSHEET

Minister	Hon Kris Faafoi	Portfolio	Minister of Commerce and Consumer Affairs
Title of Cabinet paper	Residential Earthquake Prone Buildings Loan Scheme: Request from Kāinga Ora for an Exemption under the Credit Contracts and Consumer Finance Act 2003	Date to be published	22 July 2020

List of documents that have been proactively released

Date	Title	Author
17 June 2020	Residential Earthquake Prone Buildings Loan Scheme: Request from Kāinga Ora for an Exemption under the Credit Contracts and Consumer Finance Act 2003	<i>Office of the Minister of Commerce and Consumer Affairs</i>
17 June 2020	Cabinet Economic Development Committee Minute of Decision - Residential Earthquake Prone Buildings Loan Scheme: Request from Kāinga Ora for an Exemption under the Credit Contracts and Consumer Finance Act 2003	<i>Cabinet Office</i>
28 May 2020	Impact Summary: Residential Earthquake Prone Buildings Loan Scheme: Kāinga Ora CCCFA Exemption	<i>MBIE</i>

Information redacted

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In Confidence

Office of the Minister of Commerce and Consumer Affairs

Cabinet Economic Development Committee

Residential Earthquake Prone Buildings Loan Scheme – Request from Kāinga Ora for an exemption under the Credit Contracts and Consumer Finance Act 2003

Proposal

1. This paper seeks approval for an exemption under s138(1)(a) of the Credit Contracts and Consumer Finance Act 2003 (the **CCCFA**) for the Residential Earthquake Prone Buildings Financial Assistance Scheme (**REPB loans scheme**) to be administered by Kāinga Ora.

Relation to government priorities

2. The proposals in this paper relate to implementation of the national system for Earthquake Prone Buildings that came into effect in July 2017 that requires Earthquake Prone Buildings to be remediated within set timeframes.

Executive Summary

3. This paper seeks approval to exempt loans provided under the REPB loans scheme from being consumer credit contracts under the CCCFA. Cabinet agreed to the settings and parameters for the REPB loan scheme in February 2020 (*CBC-20-MIN0002* refers), and also agreed that Kāinga Ora would be the delivery agent for the Scheme.
4. Because the REPB loans scheme involves providing credit to consumers, for household and domestic purposes, the loans would be consumer credit contracts. This means that Kāinga Ora would, in the absence of any exemption, have to comply with the CCCFA.
5. Kāinga Ora considers that full compliance with current and future obligations under the CCCFA would be onerous and burdensome. This is because Kāinga Ora's normal business does not involve lending, they are not a commercial organisation, and because only a small number of loans (no more than 80) are likely to be made¹. They have estimated that full CCCFA compliance could cost around \$400,000 in legal costs, compared with about \$150,000 if an exemption from the CCCFA is granted.
6. On this basis, Kāinga Ora have applied to the Ministry of Business, Innovation and Employment (**MBIE**) for an exemption for the REPB loans scheme under s138(1)(a) of the CCCFA. Section 138(1)(a) of the CCCFA allows regulations to be made prescribing a class of credit contract that is exempted from being

¹ The maximum loan is limited to \$250,000, and Cabinet has allocated \$10 million in capital to the REPB Loans Scheme.

a consumer credit contract under the CCCFA, and the terms and conditions applying to the exemption.

7. Such regulations can only be made on my recommendation, and only if I am satisfied that the criteria set out in s138(1A) are met. MBIE have prepared an analysis of the Kāinga Ora request against these criteria, attached to this paper as **Annex 1**. After considering this analysis, I am satisfied that the criteria are met.
8. I therefore recommend that regulations be made to exempt credit contracts under the REPB loans scheme from being consumer credit contracts subject to disclosure of relevant information being made to the debtor before taking out the loan and on a six-monthly basis. This information will ensure that borrowers will have the information they need to understand their obligations under the loans.

Background

9. In January 2020, Cabinet agreed to the settings and parameters for a Residential Earthquake-Prone Building Financial Assistance Scheme and for Kāinga Ora to be the delivery agent for the Scheme (CBC-20-MIN-0002 refers).
10. This decision followed a Budget 2019 decision that \$23.3m would be set aside over four years for the REPB loans scheme. This figure includes funding for set-up, on-going administration, concessions on loans and \$10 million in capital for the loans. The Government decisions in Budget 2019 follow the implementation of a new national system for managing earthquake prone buildings that came into effect on 1 July 2017.
11. The eligibility criteria for the REPB loans scheme are very strict as the scheme was designed as a “lender of last resort”. The purpose of the REPB loans is to provide substantial financial assistance to unit owner-occupiers in Residential Earthquake-Prone Buildings (and some household unit owner-occupiers in mixed use Earthquake-Prone Buildings) that are likely to face financial hardship meeting their contribution to remediation costs, and would otherwise be forced to sell their home/unit.
12. Supporting such unit owner-occupiers through the REPB loans scheme will help reduce the chance of a forced sale of their homes/units as a result of needing to contribute to repair costs. In addition, it is in the interests of public safety that these earthquake-prone buildings are strengthened.
13. The eligibility criteria for an REPB loan in respect of hardship are:

- i. those applying must have been declined a loan from a registered bank or non-bank deposit taker; or
 - ii. the bank/non-bank deposit taker finance offered is conditional on sale of the unit on completion of remediation works; or
 - iii. where the finance obtained would cause the owner significant financial hardship.
14. The eligible unit must be in an area of high seismic risk where the remediation timeframes are tighter than other parts of the New Zealand. Most of the units eligible for the scheme are likely to be located in Wellington. The average amount of time remaining on earthquake prone building notices in Wellington is seven years.
15. Ten million dollars in capital has been allocated to the scheme. The maximum loan is capped at \$250,000 (but with limited discretion for the Chief Executive of Kāinga Ora to approve amounts above this level on a case-by-case basis). On this basis Kāinga Ora estimates that it is likely that no more than 80 loans will be approved.
16. In February 2020 the Ministers of Finance and the Minister for Building and Construction announced that Kāinga Ora would be ready to receive applications for loans under the REPB loans scheme by mid-2020. However, this has now been delayed to October 2020 to allow Kāinga Ora to obtain exemptions under the CCCFA.

REPB loans Scheme is a consumer credit contract under the CCCFA

17. The REPB loans scheme involves providing credit to consumers, for household and domestic purposes. This means that the loans fall within the definition of “consumer credit contracts” under the CCCFA², and therefore subject to the consumer protections in the CCCFA.
18. Although the Cabinet decision referred to above noted that the REPB loans scheme would comply with the CCCFA, the operational implications for Kāinga Ora were not fully identified. These include the implications of amendments to the CCCFA that will enter into force on 1 October 2021 which were not taken into account in the Cabinet paper concerned.

Kāinga Ora considers that compliance with the CCCFA would be unduly onerous and burdensome

19. In the absence of any exemption, Kāinga Ora would be required to comply with all the relevant current and future obligations in the CCCFA.
20. Full compliance with the CCCFA is likely to impose significant costs on Kāinga Ora that are disproportionate considering the small scale of lending involved

² A consumer credit contract under the CCCFA is where a natural person is provided credit that is to be used for personal purposes and interest, credit fees or a security interest is charged or taken and where the creditor is in the business of providing credit.

(likely less than 80 loans). Kāinga Ora has estimated that compliance with current and future obligations under the CCCFA could cost around \$400,000, in legal costs alone, compared with around \$150,000 if Kāinga Ora is granted an exemption from CCCFA requirements.

21. In addition, there is a risk that the time taken to achieve compliance with the CCCFA will have the potential to delay implementation of the REPB loan scheme. This could result in some unit owners who might otherwise be eligible for loans under the scheme being forced to sell their units.
22. In light of this, Kāinga Ora has made a request to the MBIE for an exemption from compliance with the CCCFA.

The exemption request

23. Kāinga Ora has requested that any loans provided as part of the REPB loans scheme be exempted from being consumer credit contracts under s138(1)(a) of the CCCFA, subject to specified terms and conditions. Section 138(1)(a) of the CCCFA allows a class or type of credit contract to be exempt from being a consumer credit contract under the CCCFA, subject to any terms and conditions.
24. Other provisions of the CCCFA which apply to all credit contracts generally (and not just “consumer credit contracts”) will continue to apply to the REPB loan scheme. These include, for example, Part 4 (enforcement and remedies) and Part 5 (reopening of oppressive contracts).
25. The exemption is only sought for the REPB loan scheme and would not apply to other similar or identical future schemes. Kāinga Ora has also proposed conditions that would be attached to the exemption to ensure that the interests of borrowers under the REPB loans scheme are adequately protected.

Kāinga Ora’s justification for the request

26. Kāinga Ora’s current activities do not require it to comply with the CCCFA. While they do administer other loan schemes, these involve underwriting loans provided to eligible home owners by registered banks. Lending is not Kāinga Ora’s usual activity and they will not be providing the REPB loans scheme for commercial gain or profit.
27. Kāinga Ora considers that many of the CCCFA’s obligations are not appropriate in these circumstances and would be overly burdensome or onerous. These obligations include:
 - A due diligence duty for directors (in this case the Kāinga Ora board) and senior managers: A breach of this duty may give rise to personal liability of those directors and senior managers. Such liability is inappropriate for a Crown Entity which is not otherwise involved in providing consumer credit.

- Fit and proper person test: this will require the Commerce Commission to certify the board and senior managers of Kāinga Ora as fit and proper persons with appropriate qualifications to make REPB loans. As Kāinga Ora's normal business does not involve lending this would be problematic.
- Plain language mortgage: providing a plain language mortgage would prevent Kāinga Ora from using New Zealand's usual default mortgage terms (the ADLS mortgage terms). These are not in plain language. There would be significant costs involved in drafting a plain language mortgage, which would be disproportionate given the low number of loans likely to be made.
- Affordability and suitability enquiries: the enquiries required are extensive and often inappropriate given the nature of the REPB loans and the number of loans expected to be made. For example, they are likely to require extensive inquiries in relation to the borrower's income and expenditure (along with verification and testing of that income and expenditure). However, the loans will be repaid using the proceeds of the sale of the property and not the unit owner's income so this is irrelevant in this context.
- Disclosure: the CCCFA contains extensive disclosure obligations. The need to meet all of these requirements (and to have policies and procedures to meet ones that may occur but are unlikely, such as request disclosure) would be onerous given the number of REPB loans to be made. To the extent that any particular disclosure obligations are important in the circumstances, they can be dealt with in the conditions of the exemption.

Section 138(1)(a) of the CCCFA

28. Section 138(1)(a) of the CCCFA allows a class or type of credit contract to be exempt from being a consumer credit contract under the CCCFA, subject to any terms and conditions. The exemption is implemented by regulations made by Order-in-Council.
29. Section 138(1A) provides that regulations under s138(1)(a) can only be made on my recommendation, and that I may only make a recommendation for regulations to be made under (1)(a) if I:
 - i. have had regard to the purposes of the Act;
 - ii. am satisfied the exemption would not cause significant detriment to debtors under credit contracts; and
 - iii. am satisfied that compliance with the consumer credit contract provisions of the Act would, in the circumstances, require a creditor to comply with requirements that are unduly onerous or burdensome.

30. A detailed analysis of the exemption requested by Kāinga Ora against the criteria in s138(1A) has been prepared by MBIE and is attached to this paper as **Annex 1**. In this analysis, MBIE recommends that loans provided under the REPB loans scheme be granted a full exemption from being consumer credit contracts subject to the following conditions:
- i. The creditor under the REPB loans scheme is Kāinga Ora or any successor in respect of the scheme.
 - ii. The loan agreement and loan terms and conditions are in plain language, but with no equivalent requirement for the mortgage terms.
 - iii. That Kāinga Ora will disclose the matters set out in paragraphs (a), (aa), (e), (g), (h), (i), (j), (k), (m), (n), (p), (q), (r), (t), and (u) of Schedule 1 of the CCCFA in relation to the REPB loans, but only to the extent each such matter is applicable and ascertainable as at the relevant disclosure date, and as if sections 32-35³ of the CCCFA apply to that disclosure⁴.
 - iv. Kāinga Ora will disclose matters set out in sections 19(1)(a) to 19(1)(f) and s19(1)(h) of the CCCFA in relation to the REPB loans at least every 6 months⁵ but only to the extent each such matter is applicable and ascertainable as at the relevant disclosure date, and as if sections 32-35 of the CCCFA apply to that disclosure.
31. After considering MBIE's analysis, I am satisfied that the criteria set out in s138(1A) of the CCCFA are met. I therefore recommend that the Governor-General make regulations under s138(1)(a) of the CCCFA to exempt the REPB Loans Scheme from being a consumer credit contract under the CCCFA subject to the terms and conditions described above.
32. To date, very few exemptions have been granted under the CCCFA. As a result there is a degree of uncertainty over just what might be the most appropriate terms and conditions to apply to an organisation like Kāinga Ora.
33. In light of this I also recommend that the Committee authorise the Minister of Commerce and Consumer Affairs to make any changes to the conditions that may be necessary to deal with issues that arise during drafting of the exemption regulations. Any amended conditions must still comply with s138(1A) of the CCCFA.

³ Sections 32-35 of the CCCFA set out the standards that a disclosure must meet, and how the disclosure is made.

⁴ A brief description of the matters that Kāinga ora will disclose is contained in the analysis attached as **Annex 1**.

⁵ Section 19(1)(g) of the CCCFA has been excluded from this list due to the technical challenges of producing loan statements with a "next payment" that is not a known amount or date for most of the time, and only becomes a known date once certain events (sale of the unit, death of the owner or ceasing to be an owner occupier) occur. Depending on the exact facts, it may or may not be possible to calculate the expected repayment amount once the future repayment date is known.

Timing of the exemption

34. The exemption regulations will be made as soon as possible so that the REPB loans scheme can get underway in a timely manner.

Financial Implications

35. The proposals in this paper have no financial implications.

Legislative Implications

36. If the proposals in this paper are agreed to, they will be implemented by regulations made by the Governor-General by Order-in-Council.

Impact Analysis

Regulatory Impact Statement

37. The impact analysis (IA) requirements apply to the proposals in this paper. An impact summary has been prepared and is attached.

Quality of the Impact Analysis

38. MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Impact Summary prepared by MBIE. The Panel considers that the information and analysis summarised in the Impact Summary meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

Human Rights

39. The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Consultation

40. The Ministry of Housing and Urban Development, Kāinga Ora, and Treasury have been consulted and agree with the proposals in this paper. The Department of Prime Minister and Cabinet has been informed.
41. Commerce Commission staff have indicated informally that they do not support a full exemption for REPB loan scheme contracts, and consider that a partial exemption would be more appropriate. They have noted that Kāinga Ora is proposing to be required to comply, or partly comply, with a number of obligations in the CCCFA through conditions of the exemption. They have suggested that a partial exemption focussing on specific obligations that are burdensome to comply with would be more appropriate than a full exemption with conditions.
42. However, Kāinga Ora considers that a partial exemption of any sort would still result in an undue burden, as it would need to maintain an extensive CCCFA compliance programme to ensure continued compliance, particularly as the CCCFA was recently amended and obligations changed.

43. I consider that the approach of giving a full exemption is warranted in this instance, given the small size of the scheme, its social objectives and its administration by a Crown entity. Consideration was given to a partial exemption from specific CCCFA obligations, but this was not considered to be sufficient to achieve the purpose of the REPB loan scheme in a timely and cost prudent manner. Given the unique circumstances of the scheme, this exemption is not intended to create a precedent for other complete exemptions from the CCCFA.

Communications

44. No publicity of the exemption or associated regulations is planned.

Recommendations

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

1. **Note** that in January 2020, Cabinet agreed to the settings and parameters for a Residential Earthquake-Prone Building Financial Assistance Scheme and for Kāinga Ora to be the delivery agent for the Scheme (*CBC-20-MIN-0002*) refers)
2. **Note** that loans made under the Scheme fall within the definition of consumer credit contracts and are therefore subject to the CCCFA
3. **Note** that Kāinga Ora has requested an exemption from the CCCFA on the grounds that full compliance with the current and future obligations under the CCCFA would be onerous and burdensome in the light of the small number of loans (likely no more than 80) expected to be made under the REPB Loans Scheme, and that the CCCFA obligations are inappropriate for non-commercial organisation like Kāinga Ora.
4. **Note** that s138(1A) of the CCCFA provides that exempting regulations may be made on my recommendation, and that I may make a recommendation only if I am satisfied that the criteria set out in s138(1A) are met.
5. **Note** that after considering the analysis of Kāinga Ora's request provided by MBIE, I am satisfied that the criteria set out in s138(1A) of the CCCFA are met.
6. **Agree** that to provide an exemption from the CCCFA for credit contracts entered into under the Residential Earthquake-Prone Building Financial Assistance Scheme, subject to the following obligations:
 - i. The loan agreement and loan terms and conditions must be in plain language
 - ii. Kāinga Ora will disclose to the debtor a subset of information from Schedule 1 of the CCCFA ("Key information concerning consumer credit contract") that is ascertainable and relevant to credit contracts under the scheme
 - iii. Kāinga Ora will provide six-monthly account statements to the debtor containing the information from section 19 of the CCCFA ("Content of

continuing disclosure statement”) that is ascertainable and relevant to credit contracts under the scheme

7. **Invite** the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above recommendations.
8. **Authorise** the Minister of Commerce and Consumer Affairs to approve changes to the conditions together with any minor and technical issues that may be necessary to deal with issues that arise during drafting of the exemption regulations, such changes being consistent with the exemption powers in the CCCFA.

Authorised for lodgement

Hon Kris Faafoi

Minister of Commerce and Consumer Affairs