



## COVERSHEET

<b>Minister</b>	Hon Dr David Clark	<b>Portfolio</b>	Commerce and Consumer Affairs
<b>Title of Cabinet paper</b>	Credit Contracts Legislation Amendment Act 2019: Additional Regulations for Implementation	<b>Date to be published</b>	10 May 2021

### List of documents that have been proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
17 March 2021	<i>Credit Contracts Legislation Amendment Act 2019: Additional Regulations for Implementation</i>	<i>Office of the Minister of Commerce and Consumer Affairs</i>

### Information redacted

YES / **NO**

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**In Confidence**

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet Economic Development Committee

**Credit Contracts Legislation Amendment Act 2019: Additional Regulations for Implementation**

**Proposal**

- 1 This paper seeks Cabinet Committee agreement to make various regulations that are necessary for the implementation of the Credit Contracts Legislation Amendment Act 2019. These regulations will:
  - 1.1 set the fees that will be charged to creditors obtaining certification from the Commerce Commission (Commission);
  - 1.2 define the changes in circumstances that certified persons must notify the Commission of;
  - 1.3 provide an exemption from the certification requirement in securitisation and covered bond arrangements;
  - 1.4 provide an exemption from the certification requirement and directors duties for non-financial services businesses that provide credit on an interim basis, with certain conditions;
  - 1.5 provide an exemption from affordability and suitability requirements for insurance premium funding arrangements; and
  - 1.6 make technical amendments to existing regulations that may have unintended consequences.

**Executive Summary**

- 2 The Credit Contracts Legislation Amendment Act (Amendment Act) was passed into law in 2019 to strengthen the protections for borrowers against irresponsible and high-cost lending, and against predatory behaviour by mobile traders. There are a number of regulations that need to be made to allow effective implementation. There have also been a number of exemptions requested by stakeholders, which I consider have merit.
- 3 This paper seeks decisions around setting fees for 'fit and proper' certification for creditors and the prescribed changes in circumstance certified persons are required to notify the Commerce Commission of. It also seeks agreement to grant three exemptions; two exemptions from the 'fit and proper' certification requirement and directors' duties, and the third from affordability and suitability requirements. This paper also seeks authorisation to make some minor technical amendments to existing regulations.

- 4 All of the proposed regulations are required to be made before the Amendment Act's backstop commencement date of 1 October 2021. If agreement is reached on these proposals my officials will proceed with the making of the required regulations and provide drafting instructions to the Parliamentary Counsel Office.

## **Background**

- 5 The Credit Contracts Legislation Amendment Act 2019 (Amendment Act) amends the Credit Contracts and Consumer Finance Act 2003 (CCCFA) to strengthen the protections for borrowers against irresponsible and high-cost lending, and against predatory behaviour by mobile traders.
- 6 One way that the Amendment Act will protect borrowers is through the introduction of a certification requirement. This requires creditors and mobile traders to hold a certification from the Commerce Commission that their directors and senior managers are fit and proper persons. Businesses that are unable to satisfy this requirement will be unable to act as creditors in consumer credit contracts.
- 7 The requirement to hold a certification will be phased in from 1 October 2021. From this date, any entities that register on the financial service providers register (FSPR) will need to hold a certification. Entities that are already registered will have until their next annual confirmation to obtain certification. An annual confirmation is when a registered business confirms or updates the information that the registration authority requires them to provide to maintain registration.
- 8 The Commerce Commission will incur costs in carrying out these fit and proper person assessments. The Amendment Act provides for fees to be set in regulations to allow the Commission to recover these costs.
- 9 As well as setting the fees for certifications, there are a number of related issues that I am recommending regulations to address, including:
- 9.1 requirements for certified creditors to update the Commerce Commission if anything that might affect their certification changes;
  - 9.2 exemptions from certification for special purposes vehicles under loan securitisation arrangements;
  - 9.3 exemptions from certification for certain retailers and motor vehicle dealers who only act as creditors on an interim basis;
  - 9.4 the treatment of 'insurance premium funding'; and
  - 9.5 minor technical changes to existing regulations.

## **Regulations to set fees for applications for certification**

- 10 The Amendment Act introduces a requirement for a creditor in a consumer credit contract to hold a certification from the Commerce Commission that its directors and senior managers are fit and proper persons. This is intended to prevent unsuitable persons from operating in the sector, rather than needing to take action against them after issues have arisen.

- 11 When processing applications for certification the Commerce Commission will consider a range of factors about the entity's directors and senior managers. In doing so, the Commission will incur costs and the Amendment Act provides for regulations to be made so that the Commission can recover these costs. It is appropriate that these costs are recovered from applicants as they will receive the benefit from holding the certification as it will enable them to act as a creditor in consumer credit contracts.
- 12 I propose that all applicants be charged a flat fee of \$1044 (excluding GST) as well as an additional charge of \$11 (excluding GST) for a Ministry of Justice criminal records check. These fees will be charged for each individual director and senior manager, unless the same individual holds both roles in respect of a single entity in which case the fee will only be charged once.
- 13 Certifications will generally be issued for a duration of five years. A certified person is required to notify the Commission of any prescribed changes in their circumstances and if a new senior manager or director is required to be appointed as a result, the new director or senior manager will be charged the fee. The notification requirements that will apply to creditors are discussed further in paragraphs 16 and 17.
- 14 I consider that this fee model will allow the Commission to fully recover its costs while incentivising the Commission to be efficient and effective. As it is a fixed fee, it will also provide certainty to applicants of the costs that they will incur.
- 15 However, as this is a new regime, there is a high degree of uncertainty of both the number of potential applicants, and the costs the Commission will incur in carrying out these applications. I therefore propose to review the fees after they have been in place for three years as we will then have a clearer picture of the industry and will be well positioned to determine if there has been any significant over or under recovery.

#### **Notification of changes in circumstance**

- 16 Creditors who hold a certification will be subject to a duty to notify the Commerce Commission if there have been any prescribed changes in circumstances. This is intended to allow the Commission to determine whether the certification remains appropriate.
- 17 The Commission has set the assessment criteria for certification, however the changes in circumstances that require notification are to be set in regulations. Having considered the purposes of the CCCFA, and the assessment criteria that has been set by the Commission, I propose to make regulations that require certified persons to notify the Commission if a director or senior manager:
- 17.1 has resigned, is removed, appointed or replaced;
  - 17.2 has been charged with, or convicted of, a crime punishable by imprisonment in New Zealand or overseas;
  - 17.3 has entered into personal insolvency in New Zealand or overseas;

- 17.4 is a director or senior manager of a corporate entity that has been placed into liquidation, receivership or voluntary administration in New Zealand or overseas;
- 17.5 has been subject to regulatory action, or disciplinary action taken by a professional body;
- 17.6 has been prohibited from acting as a director or promoter of a company or taking part directly or indirectly in the management of a company in New Zealand or overseas;
- 17.7 has been prohibited from providing credit or other financial services in New Zealand or overseas; or
- 17.8 has held this role for another corporate entity that has been convicted of a criminal or civil offence or subject to regulatory action in New Zealand or overseas.

### **Exemption for creditors involved in securitisation**

- 18 I propose to provide an exemption from the certification requirement for special purpose vehicles used in securitisation and covered bond arrangements. These arrangements are used by banks and other finance companies to finance their lending activities.
- 19 Under a securitisation or covered bond arrangement, a lender establishes a loan and then sells a pool of credit contracts to a special purpose vehicle which then issues this pool of credit as a security to investors. In almost all securitisation cases the special purpose vehicle enters into a contract with the original lender who services the credit contract as a “contract manager”.
- 20 Recognising the limited role that the special purpose vehicle plays in these arrangements, the Credit Contracts and Consumer Finance Amendment Regulations 2020 provides an exemption for the directors and senior managers of a special purpose vehicle from the directors’ duties in the Amendment Act. This only applies when there is a contract between the special purpose vehicle and a contract manager for the servicing of the loan, and the directors and senior managers of the contract manager are subject to these duties.
- 21 I propose to provide a similar exemption from the certification requirements for special purpose vehicles when there is a contract manager to service the loan, and the contract manager is itself certified, or otherwise exempt from the certification requirement (e.g. a bank that has been registered by the Reserve Bank of New Zealand).
- 22 The costs associated with certification of these special purpose vehicles would be significant and given their lack of a substantive role in the lending process there would be minimal benefits for consumers in requiring certification. I consider that borrowers will have the same level of protections as they otherwise would under the proposed exemption, with lower costs on businesses.

### **Exemption for interim credit provision by non-financial service businesses**

- 23 Some retailers and motor vehicle dealers operate under a financing model in which they initially enter into the credit contract with the borrower, but the lending process is actually controlled by an underlying finance company who provides the finance and is assigned the contract after one day.
- 24 These retailers and motor vehicle dealers are treated as ‘creditors’ under the CCCFA when the contract is entered into, and would currently need to be certified (although they have an exemption from registration under the Financial Service Providers Register). In addition to this they will be currently solely legally responsible for initial responsible lending obligations such as affordability and suitability checks. To avoid the certification requirements, these retailers and motor vehicle dealers would need to change the financing model they operate and instead become agents of the creditor.
- 25 To better reflect the economic reality of these transactions, ensure that the underlying lender is liable for responsible lending obligations, and reduce unnecessary compliance costs, I propose to:
- 25.1 declare the underlying lenders using this model to be creditors; and
  - 25.2 exempt the retailers and motor vehicle dealers using this model from the need to be certified as ‘fit and proper’ persons.
- 26 I consider that the approach of exempting the non-financial services business and declaring the finance company to be a creditor from the beginning of the consumer credit contract will ensure that borrowers are protected at all times during the life of the contract while avoiding unnecessary costs on business. This approach maintains the protections of the Act for consumers and removes the costs associated with non-financial service businesses meeting the certification requirements or moving to an agency model arrangement.

### **Insurance Premium Funders Industry Group Exemption Request**

- 27 When insurance is purchased through a broker it is generally charged as an annual premium. Insurance premium funding is a form of finance provided by insurance brokers that allows customers to spread the cost of that annual insurance premium to assist their cash flow. It is an alternative to businesses (and some consumers) being required to pay significant insurance premium costs up front in a lump sum when purchasing through a broker. Insurance premium funding is primarily used by businesses although some consumers also purchase insurance through a broker and enter into this type of agreement.
- 28 Essentially, the insurance premium funder pays the annual premium on behalf of the customer in full, who then repays the insurance premium funder in predominantly monthly instalments, with an additional interest charge. These arrangements are consumer credit contracts and the lender is required to carry out affordability and suitability enquiries required by the CCCFA.

- 29 I propose providing an exemption from the affordability and suitability requirements of the CCCFA for insurance premium funding arrangements.
- 30 These agreements are distinct from other forms of credit, primarily in that they do not require consumers to provide personal guarantees or securities over their assets, no credit fees or default interest charges are incurred and consumers can exit the contract at any time, with no negative impacts aside from losing their insurance coverage. As such I consider this exemption to be of low risk to borrowers.

### **Minor technical amendment to existing regulations**

- 31 Some parts of the Credit Contracts and Consumer Finance Amendment Regulations 2020 that relate to advertising of consumer credit may have unintended consequences for lenders. Policy decisions behind these regulations have already been made.
- 32 Specifically, the current wording of regulation 4AAAR(2)(d) has the unintended effect of requiring lenders to provide certain information in advertisements which have limited space. I am seeking authorisation to make minor technical amendments to these regulations in order to align them with the policy intent.

### **Implementation**

- 33 The requirement to be certified under the Amendment Act comes into force on 1 October 2021. Creditors are able to start applying to the Commerce Commission after 1 June 2021. Creditors who are registered on the FSPR before 1 October 2021 are not required to hold certification until their first annual confirmation after this date.
- 34 Accordingly, the regulations relating to fees and notification requirements will commence on 1 June 2021 to allow the Commission to charge for applications it receives, and receive notifications from any certified persons.
- 35 I propose that the regulations relating to the proposed CCCFA exemptions commence on 1 October 2021 to align with the date that the certification requirements come into force.

### **Financial Implications**

- 36 There are no financial implications from the proposals in this paper.

### **Legislative Implications**

- 37 The proposals in this paper will require the making of regulations under the Credit Contracts and Consumer Finance Act 2003.

### **Impact Analysis**

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

- 39 The Regulatory Impact Analysis Team at the Treasury has determined that the regulatory proposals in this paper relating to exemptions from the CCCFA are exempt from the requirement to provide a Regulatory Impact Statement on the basis that they have no or minor impacts on businesses, individuals or not for profit entities.

### **Population Implications**

- 40 There are no significant population implications from these proposals.

### **Consultation**

- 41 The Department of the Prime Minister and Cabinet (Policy Advisory Group), the Treasury and the Commerce Commission were consulted on the content of this paper.
- 42 MBIE carried out targeted consultation with interested parties on the certification fees and the exemption for non-financial service businesses. Four submissions were received. The final fees in this paper are marginally lower than those that were consulted on.
- 43 Submitters had divergent views on which fee model would be best. The main industry body for relevant affected parties (the FSF) favoured the proposed fee model over other options, and provided some feedback on the underlying assumptions that have been factored into the fee model.
- 44 The Commerce Commission carried out consultation on the prescribed changes in circumstances that would require notification, as it was developing its certification criteria. The proposed requirements broadly align with the feedback received, as well as with similar reporting requirements under the Financial Markets Conduct Act 2013.
- 45 Financial service providers involved in securitisation supported the proposed exemption from the certification requirements and directors' duties for special purpose vehicles.
- 46 Submitters supported proposals to provide an exemption from certification and directors' duties for retailers and motor vehicle dealers in the relevant circumstances.
- 47 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this proposal as there is no direct emissions impact.

### **Communications**

- 48 MBIE will notify key affected stakeholders of the policy decisions in this paper.

### **Proactive Release**

- 49 I intend to release this paper proactively, subject to any redactions consistent with the Official Information Act 1982, within 30 days. MBIE will publish a copy of this paper on its website.



## Recommendations

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

- 1 **note** that the Credit Contracts Legislation Amendment Act 2019 (Amendment Act) introduces a requirement for creditors and mobile traders to hold a certification;
- 2 **note** that the Commerce Commission must issue a certification if it is satisfied that the applicant's directors and senior managers are fit and proper persons;
- 3 **agree** that the Commerce Commission should fully recover the costs associated with considering applications for certification;
- 4 **agree** to introduce a fee of \$1044.00 (GST exclusive) per director and senior manager that will be charged on application for certification, or when there is a new director or senior manager appointed;
- 5 **agree** to introduce a fee of \$11 (GST exclusive) per director and senior manager that will be charged on application for a Ministry of Justice Criminal Record Check, or when there is a new director or senior manager appointed;
- 6 **note** that these fees will be reviewed by MBIE after they have been in force for three years;
- 7 **note** that the Amendment Act imposes a duty on certified persons to notify the Commerce Commission about any prescribed changes in circumstances, and that the Act provides for changes in circumstances to be set in regulations;
- 8 **agree** to make regulations that require certified persons to notify the Commission if a director or senior manager:
  - 8.1 has resigned, is removed, appointed or replaced;
  - 8.2 has been charged with or convicted of a crime punishable by imprisonment in New Zealand or overseas;
  - 8.3 has entered into personal insolvency in New Zealand or overseas;
  - 8.4 is a director or senior manager of a corporate entity that has been placed into liquidation, receivership or voluntary administration in New Zealand or overseas;
  - 8.5 has been subject to regulatory action, or disciplinary action taken by a professional body;
  - 8.6 has been prohibited from acting as a director or promoter of a company or taking part directly or indirectly in the management of a company in New Zealand or overseas;
  - 8.7 has been prohibited from providing credit or other financial services in New Zealand or overseas; or

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- 8.8 has held a director or senior manager role for another corporate entity that was convicted of a criminal or civil offence or subject to regulatory action in New Zealand or overseas;
- 9 **agree** to provide an exemption from the certification requirement for creditors that, for the purposes of securitisation or covered bond arrangements, have entered into a contract with a contract manager to service a consumer credit contract;
- 10 **agree** that the exemption will only apply when the contract manager holds certification from the Commerce Commission, or is otherwise exempt from the certification requirement;
- 11 **note** that although some non-financial services businesses that provide credit on an interim basis are 'creditors' they are currently exempt from some obligations;
- 12 **agree** to extend a further exemption for non-financial services businesses that provide credit on an interim basis from the certification requirement and duties for directors and senior managers introduced by the Amendment Act;
- 13 **agree** to declare that where the exemption for interim creditors applies the underlying lender is a creditor under the credit contract;
- 14 **agree** to provide an exemption from the CCCFA's affordability and suitability requirements for insurance premium funding arrangements;
- 15 **note** that regulation 4AAAR(2)(d) of the Credit Contracts and Consumer Finance Amendment Regulations 2020 currently requires all advertisements that state a fixed interest rates to disclose how long the interest rate is fixed for;
- 16 **note** that regulation 4AAAR(2)(d) is broader than intended and may have unintended consequences for space-constrained advertising mediums;
- 17 **authorise** the Minister of Commerce and Consumer Affairs to amend regulation 4AAAR(2)(d) so that credit advertisements that state a fixed interest rate only need to disclose how long interest rate is fixed for if this is less than the whole term of the contract;
- 18 **authorise** the Minister of Commerce and Consumer Affairs to issue drafting instructions to Parliamentary Counsel Office to give effect to the decisions above;
- 19 **authorise** the Minister of Commerce and Consumer Affairs to make minor or technical amendments, consistent with the policy decisions in this paper.

Authorised for lodgement

Hon Dr David Clark

Minister of Commerce and Consumer Affairs

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