20 October 2022

Consumer Policy Team

Building, Resources, and Markets

Ministry of Business, Innovation, and Employment

BY EMAIL

Thank you for the opportunity to comment on the proposed changes to the CCCFA Regulations and the Responsible Lending Code.

We greatly appreciate that the proposals seek to address the impacts of the December 2021 changes to the CCCFA. Those changes significantly impacted everyday New Zealanders who would previously have had comfortable affordability outcomes, across all lending products, not just home loans.

Credit is an important part of our customers' lives and plays a critical role in the functioning of our economy. We support changes that reduce customer inconvenience and improve access to credit, while ensuring good outcomes.

Changes to expressly exclude discretionary expenses are critical in addressing consumer concern over intrusive affordability inquiries, and are very welcome. Reducing extensive inquiries into expenses that a consumer can choose to make, or not make, from their disposable income will simplify processes, and eliminate invasive questioning. Ultimately, the changes will improve access to responsible credit by removing unnecessary capture of expenses that don't impact affordability.

However, we believe some changes proposed could reduce consumer protection and should be reconsidered. Others may need further criteria or guidance imposed to ensure responsible lending behaviour is required, to protect consumers. These risks are created, again, by an attempt to apply 'one size fits all' rules across all lenders and all products, rather than targeting flexibility or discretion only where there are existing strong, regulatory frameworks that protect consumers.

We also urge the Government to reconsider the penalty framework that continues to apply to the CCCFA. The excessive and punitive framework will continue to drive risk averse behaviour, particularly for large banks. A more sensible balance can be achieved, without undermining incentives to comply with the CCCFA, and we encourage Officials to engage the industry on changes that should be made.

While we set out more detail in the Schedule, our key messages are:

1. **Discretionary expenses:**
    a. We strongly support expressly excluding discretionary expenses from affordability assessments. This change is critical in alleviating the exhaustive, intrusive inquiries lenders must make.
    b. We support a modified version of Option 2 for the proposed Responsible Lending Code guidance. Changes should better align with the approach in the United Kingdom and Australia.
2. **Credit card expenses:**
    a. We do not support a change which would mean lenders can choose not to take a consumer's ability to use all of their credit card limit into account in affordability assessments.

b. While many customers repay their cards in full each month, this change will undermine consumer protection. Customers can choose to use all of their limit and, if they need to repay that limit and new lending, this could cause substantial hardship.

3. **Buy now pay later expenses:**

   a. We strongly support regulating Buy Now Pay Later contracts under the CCCFA. These contracts can cause significant consumer harm if unsuitable or unaffordable.

   b. However, until addressed in the Act itself, we recommend including guidance on treatment of these expenses in the Responsible Lending Code rather than the Regulations, given the unusual structure of the contracts risks overstating or understating expenses.

4. **Exemption for refinancing contracts with other lenders:**

   a. While Option 1 would provide significant benefits to consumers and lenders, and increased flexibility, we are concerned the exemption may be inconsistent with the policy intent of the CCCFA affordability reforms. By allowing consumers to move lenders where monthly repayments reduce, the exemption's scope may be too broad and, without appropriate limits on inquiries or use, could undermine consumer protection. If kept, guiderails should be included to ensure the exemption is not abused.

   b. We do support Option 2. However, to ensure protections remain strong for vulnerable borrowers who need to replace higher-cost lending, we've suggested further criteria for this Option.

5. **Timing and expectations:**

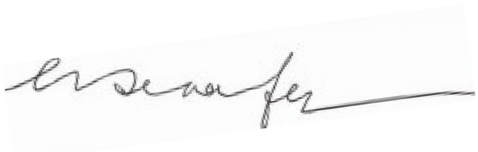
   a. While the changes proposed are permissive, lenders will need to make significant changes to systems and processes, and retrain staff in response.

   b. We believe it is critical lenders have certainty as to the final content of the changes before the end of the year, to implement changes for March 2023.

   c. The expectation of consumers and mortgage advisers will be that lenders will have made the changes by March 2023. So, lenders need early certainty on content, to make changes to systems and processes in time. February 2023 will not provide sufficient time.

We set out our detailed comments on the proposed changes below, and look forward to discussing our submission with your further. If you have any questions or would like to discuss, please contact me by email at
Privacy of natural persons

Kind regards



Cushla Scholfield

Associate General Counsel - Personal

Discretionary expenses - Regulations

Change	ANZ suggested drafting	ANZ comment
Replace paragraph (d) of Regulation 4AE definition of 'listed outgoings'	'any regular or frequently recurring outgoings (for example, tithing ~~or remittances~~ or gifts or money transfers to family) that are material to the estimate of relevant expenses, excluding savings and investments'	Replace or define the term 'remittances'. A 'remittance' usually means a payment from one party to another, usually to pay an invoice or bill. Given draft content for the Responsible Lending Code, we understand 'remittance' is intended to refer instead to a transfer or gift of money to family, usually from someone working overseas to family back home. We suggest using the term 'gifts or money transfers to family' instead to avoid any uncertainty. However, we question whether including examples is necessary. Tithing or gifts of money are still only one type of regular and recurring outgoing, may be discretionary, and would also need to be material to be included. It may be better to remain silent as to what may be regular or frequently recurring outgoings, particularly given proposed Code guidance.
Insert new paragraph (aa) into Regulation 4AE definition of 'relevant expenses'	'may exclude or reduce ~~discretionary expenditure~~ any listed outgoings that are discretionary, meaning those that a responsible lender would reasonably expect ~~the~~ a borrower to cease or reduce if they were at risk of substantial hardship'	We suggest strengthening the intent to create an objective test for the exclusion of discretionary expenses by replacing the term 'the borrower' with 'a borrower'. We also note that the term 'discretionary expenditure' is undefined. We think it may be better to refer back to the definition of 'listed outgoings' in this context (which is defined) and clarify that discretionary means those

		listed outgoings a responsible lender would reasonably expect a borrower to cease or reduce. We also suggest clarifying the lender may *reduce* rather than exclude those expenses in an affordability assessment.

Discretionary expenses - Responsible Lending Code content

Change	ANZ suggested drafting	ANZ comment
Option 1: Lenders who inquire into the borrower's current expenses should, in the first instance, capture expenses that have a significant risk of not being discretionary. A lender may make inquiries to further identify discretionary expenses that a borrower will cease. The proposal is to set out a range of assumptions that lenders should have regard to in considering whether an outgoing is likely to be discretionary.	Not supported – no drafting provided	We do not support Option 1. Option 1 appears inconsistent with Cabinet's decision to 'explicitly exclude discretionary expenses' from the scope of enquiries lenders must make. Instead, Option 1 would continue to require lenders to make extensive enquiries and capture information about discretionary expenses. While lenders may subsequently omit those expenses in affordability assessments, this can only be done after subsequent rounds of enquiry. That process will remain intrusive and time-consuming for consumers and contradicts Cabinet's decision to explicitly exclude those expenses from assessments. Practically, it is entirely unclear what expenses would 'have a significant risk of not being discretionary'. This vague test would drive further unnecessary capture and inquiries into discretionary expenses. A lender could not easily determine this and would be driven to capture more expenses than needed. We assume the assumptions are intended to reflect expenses that

‘have a significant risk of not being discretionary’. If that is the case, the intent should be clearer.

While some expenses may have contractual requirements meaning it is difficult to cease them, it may not necessarily always be impossible to do so. Those expenses would still, by their nature, be discretionary.

Further, many of the examples listed are unlikely to be material to an affordability assessment. Those expenses would likely be omitted, even if a borrower could not cancel the contract easily. We do not see value in including these assumptions, unless other examples of expenses are given that are material.

Regardless, we strongly disagree with imposing any obligations on lenders to assess the contractual arrangements a borrower has entered. A lender should be entitled to assume the arrangements are discretionary, unless the borrower advises otherwise. To impose an obligation to check contractual arrangements would be intrusive and time-consuming.

We also disagree that decreasing restaurant and takeaways would necessarily lead to a material increase in other expenses, like groceries and electricity. We think this likely overstates the impacts. Our view is that reducing eating out and takeaways would generally not materially increase groceries, unless a borrower eats out for most days of the week (groceries are usually less expensive than the equivalent costs for restaurants or takeaways, and electricity costs associated with cooking are generally low).

Option 2: Lenders may presume that all expenses, other than those defined, are discretionary, unless the lender has reason to believe this is not correct for a particular borrower. The proposal is to set out a number of categories of non-discretionary expenses.	'The definition of 'relevant expenses' provides that lenders may exclude or reduce any listed outgoings that are discretionary expenditure from their initial estimate. Broadly, discretionary expenses are those a borrower can choose to spend money on, or not, depending on their financial situation and goals. They are expenses a reasonable lender would expect a borrower to stop or reduce if experiencing financial difficulty. In considering a borrower's living expenses and regular and frequently recurring expenses, lenders should seek to capture the borrower's basic essential expenditure and basic quality-of-living costs. Those are costs or expenses the borrower can't forego or would find hard to reduce beyond a certain point. For example, lenders should only include the borrower's basic quality of living costs for food and groceries, clothing and personal care, and medical expenses. Lenders could exclude discretionary expenses the borrower chooses to make, like going to the movies, vacations, or luxury goods and services. ~~In considering whether expenditure is discretionary expenditure that a borrower would cease or reduce,~~ Lenders may presume that other expenses, beyond basic necessities, ~~other than the following~~ are discretionary, unless a reasonable ~~the~~ lender would have ~~has~~ reason to believe that ~~this is~~ was not correct for a particular borrower or unless the contract is a high-cost consumer credit contract.	We broadly support Option 2, but recommend changes to better align with Cabinet's decision and improve workability for lenders. Restating the list of categories (and in some cases content) from the definition of 'listed outgoings' is unhelpful when providing guidance on what are not discretionary expenses. This approach risks creating confusion that the categories in 'listed outgoings' are never discretionary, which may not be the case. The examples listed as 'fixed financial commitments' may also be treated as 'regular and recurring expenses' by some lenders. And, as reflected in comments on Option 1 above, may not be material to an affordability assessment and would be omitted. We suggest instead focusing on the nature of discretionary expenses and giving guidance similar to that in Australia and the United Kingdom. We believe this will achieve a better outcome for lenders and consumers, addressing the concerns raised in the discussion document around irresponsible exclusion of expenses. We also suggest more closely aligning the guidance to the objective test to be introduced, and encouraging lenders to consider what a reasonable lender in the same circumstances would include.

(a) Generally, fixed financial commitments, payments of debts, and essential living expenses are unlikely to be discretionary.

(b) Basic expenses associated with dependants or pets are unlikely to be discretionary.

(c) Some living expenses (other than those toward essentials and basic quality-of-living) and regular or recurring expenses are likely to be discretionary. Lenders may presume those expenses are discretionary, unless the lender has reason to believe otherwise, and may reduce or exclude those expenses.

(d) Lenders may rely on what a borrower tells them about whether any listed outgoings can be stopped or reduced, unless the lender has reasonable grounds to believe the information is not reliable. ~~Fixed financial commitments – including any expenses with underlying contractual requirements or significant break fees associated with ceasing them (eg some pay television subscriptions, gym memberships, and bundled mobile phone plans)~~

~~(e) Payments of debts~~

~~(f) Essential living expenses, and~~

(g) Lenders may need to check whether a borrower would be prepared or able to stop or reduce ~~Regular or frequently recurring outgoings associated with~~ tithing or ~~remittances~~ gifts or money transfers to a family member overseas as

	while these expenses may appear discretionary, that may not be the case for a particular borrower. (h) ~~, and pets~~.' (i) Lenders may need to consider the borrower's circumstances. For example, a borrower with a large family may be unlikely to reduce their grocery spend significantly.' For high-cost consumer credit contracts, the lender should assume that expenses are unlikely to be discretionary, unless the borrower advises otherwise.'	

Treatment of credit card and buy now pay later expenses - Regulations

Change	ANZ suggested drafting	ANZ comment
Insert a new subclause 4AL(2A)	'Despite subclause (2), relevant expenses in respect of a payment under any revolving credit contract excludes repayments on a credit card if the lender: (a) is satisfied that, over a period of time sufficient to show behaviour and not less than ~~in the previous~~ 90 days, the borrower has not had any interest charged on the credit facility; and (b) has no reason to believe that the borrower will change their use of the credit card or incur interest after entering the revolving credit contract or may be otherwise be unable to meet increased monthly repayments towards the credit limit; and	We do not support this change. We believe responsible lenders take into account that a borrower may need to make repayments towards their full credit limit on a credit card. Many customers are 'transactors', and regularly repay the outstanding balance on their credit cards each month without incurring interest. But, customer behaviour can change, often when the customer is in financial difficulty. Customers in financial difficulty may use more of their available credit limit or take longer to repay, or stop repaying, all of the outstanding balance. There is an increased risk that, while the borrower regularly repays, this changes after taking out the new lending. If that happens, the borrower could face

	(c) is satisfied that the interest free period on the revolving credit card facility is no longer than 60 days; or’	substantial hardship if their ability to make payments towards the full credit limit hasn’t been included in an affordability assessment. We believe the risk of double-counting of expenses is also relatively low, given the level of monthly repayments lenders are obliged to take into account on credit cards (to repay the card over 3 years or meet 3.8% of the credit limit). If this change proceeds, there is risk of market distortion between APRA-regulated banks and other lenders. We are concerned this would drive unintended impacts, driving consumers to lenders with less robust affordability assessments. If the change is kept, we strongly recommend that the Regulations are strengthened to ensure there is a clear responsibility on lenders to take into account that the customer’s use of the card could change. We suggest a requirement to consider a longer history of use showing no interest charges, and a general assessment of whether the borrower could otherwise meet increased monthly repayments on the card if needed.
Insert new subclause 4AL(2B):	Insert guidance into the Responsible Lending Code: ‘Lenders should consider how they best account for the debt commitment or expense a borrower has under a buy now pay later contract in their affordability assessments, in a way that avoids overstating or understating that expense. As advances are often approved on a transaction by transaction basis and paid off in instalments over very short periods of time, taking into account the value of the	While we have no concerns with the proposal, we do not believe it is necessary to address buy now pay later contracts in Regulation 4AL. Instead, as some lenders already choose to capture just the underlying expense, we suggest guidance in the Code to clarify that the contracts are not revolving credit contracts, and lenders should instead ensure they have captured the underlying item purchased in any affordability assessments.

	good or service purchased as an expense in an affordability assessment may be preferable to avoid overstating that expense. However, the lender should consider whether, given the borrower's circumstances, a debt over a longer repayment period, or credit limit, should instead be taken into account.'	We question whether these contracts would all fall within the definition of a 'revolving credit contract', as not all provide an ongoing credit limit. Where a credit limit is set, we understand this is done unilaterally by the provider and not agreed in advance with the borrower. In many cases the borrower is likely unaware of the limit provided and may be unable to vary it. Advances on buy now pay later contracts are approved on a transaction by transaction basis and paid off in instalments over very short periods of time. In our view, these would be a series of short, instalment loans, rather than revolving credit. Capturing buy now pay later contracts as revolving credit contracts under Regulation 4AL would also overstate the expense in any affordability assessment. The ability to repay revolving credit contracts, other than credit cards, must be assessed over a 'reasonable period'. Given the terms on buy now pay later contracts are very short, this would mean that lenders would need to account for very high payments against the maximum credit limit in assessments. Given the borrower may not have requested the limit, may be unaware of it, and may not use it, this is not appropriate. Instead, lenders should be prompted in the Code to consider how they best account for the expense the borrower has in their affordability assessments, in a way that avoids overstating or understating that expense.

Exemptions to general rules for certain variations and replacements of existing contracts – Regulations

Change	ANZ suggested drafting	ANZ comment
Option 1: Insert a new exemption into Regulation 4AH to apply where the borrower is replacing a contract with another lender and the total monthly repayments under the new contract are equal or lower than the existing contract.	Not supported, however if kept suggest: '(1A) Regulations 4AF and 4AI do not apply if: (a) the lender (Lender A) will replace ~~borrower is replacing (or proposing to replace)~~ an existing credit contract the borrower has with ~~the lender (Lender A) and entering (or proposing to enter) into a new credit contract with~~ another lender (Lender B); and (b) the total monthly repayments under the new credit contract~~s~~ will be equal to or lower than the monthly repayments under the existing credit contract~~s.~~; and (c) the total credit limit will not increase; and (d) the new credit contract is not a high-cost consumer credit contract. (1B) For the purposes of subclause (1A) the lender must~~(b)~~: (a) make reasonable inquiries into the borrower's likely income, as if Regulation 4AJ applied; and (b) make reasonable inquiries into the borrower's likely expenses and obtain a credit report; and	We are concerned with the scope of Option 1. While we recognise the option allows consumers to refinance with another lender, avoiding them being locked into lending with higher repayments, this option feels inconsistent with the wider policy intent of the CCCFA reforms. Option 1 will apply in a far wider range of circumstances than supporting customers in financial difficulty. For example, Option 1 may apply where a home loan customer is moving lenders, chasing a better interest rate on their lending. If kept, we strongly recommend strict criteria is incorporated into the Regulation, to limit how Option 1 is to be used and what inquiries are made, to improve consumer protection. We suggest Option 1 is not available where the borrower is increasing their lending, or where the new credit contract will be a high-cost consumer credit contract. However, in using monthly repayments as the comparison, the exemption could apply where lenders extend the loan term to reduce the repayments or offer a short term, promotional interest rate, where the standard rate after that promotional period will be higher. We suggest ensuring the borrower is aware of those risks and accepts them.

(c) make reasonable inquiries into any other debts the borrower has; and

(d) make reasonable inquiries by asking the borrower or reviewing transaction records or other information, to identify if there are any indicators of financial stress or instability with the existing lending; and

(e) explain and confirm the customer accepts they may pay more interest over the life of the loan, if the loan term of the new credit contract is longer; and

(f) explain and confirm the customer accepts they may may more interest over the lift of the loan, if the interest rate of the new credit contract is variable or is a promotional rate that will apply for less than 12 months; and

(f) determine whether, based on their reasonable inquiries, the borrower's income will exceed their likely expenses, and it is likely the borrower will meet their repayments without suffering substantial hardship.

(1C) For the purposes of subclause (1A) the relevant monthly repayments on revolving credit contracts must be calculated on the assumptions that:

(a) in the case of repayments on a credit card, the borrower will make repayments equal to whichever is the greater of the following:

(i) the minimum required payment:

In relying on this exemption, we also suggest the Regulations make it clear what inquiries a lender must complete, to ensure there is adequate consumer protection. We've suggested an approach which is similar to that taken for Regulation 4AG scenarios. We suggest including this content in the Regulations, rather than the Code, for Regulation 4AH, to better protect consumers.

Given the scope of Option 1, we do not believe the informed decision making content proposed for the Responsible Lending Code is entirely relevant or appropriate. If kept for Option 1, we suggest the guidance is changed to reflect that it is only necessary if, having made inquiries, the lender understands the borrower is refinancing because of financial pressure. In that situation, seeking the advice of a financial mentor, or considering personal insolvency, is relevant and a sensible precaution.

	(ii) an amount sufficient to repay the unpaid balance within no more than 3 years from the date on which the debit occurs: (ii) in the case of a revolving credit contract that is a home loan, the borrower will pay the unpaid balance within no more than 30 years from the date that the loan is taken out: (iii) in the case of any other revolving credit contract, the borrower will make payments sufficient to pay, within a reasonable period, the total amount advanced to the borrower under the contract: (b) total monthly repayments means the sum of the payments required under each contract, expressed on a monthly basis.	
Option 1: Insert a new exemption into Regulation 4AH to apply where the borrower is replacing a contract with another lender in an effort to address financial difficulties and the daily interest charge is equal or lower than the existing contract.	Option 2: '(1A) Regulations 4AF and 4AI do not apply if: (a) the lender (Lender A) will replace ~~is varying (or proposing to vary)~~ an existing consumer credit contract the with a borrower has with another lender (Lender B) ~~or replacing (or proposing to replace) an existing credit contract with the same lender~~; and (b) Lender A is satisfied on reasonable grounds that replacing the existing contract with Lender B is necessary to reduce financial difficulties the borrower is experiencing or reasonably expects to experience; and	We support Option 2. As previously submitted, it is important that lenders be able to have the flexibility to support borrowers facing financial difficulty. Where a consumer is in financial difficulty and has higher-cost debt with other lenders, a lender is currently prevented from consolidating that debt, even if doing so may alleviate the borrower's financial difficulties. We continue to support widening the scope of Regulation 4AH to allow new lending to be provided without needing to meet the test in Regulation 4AF, where the lender is satisfied there is a need for the credit to avoid further financial difficulty.

(c) the total credit limit will not increase, or will only increase to the extent necessary to postpone or reduce existing payments to address the financial difficulties the borrower is experiencing or reasonably expects to experience; and

(d) the annual interest rate will be equal to or lower than the existing annual interest rate for at least twelve months; and

(e) the new credit contract is not a high-cost consumer credit contract.'

~~lender B is satisfied that—~~

~~(i) the borrower's total credit limit—~~

~~(A) will not increase; or~~

~~(B) will increase only to the extent reasonably necessary to allow for the postponement or reduction of existing payments to reduce financial difficulties that the borrower is experiencing or reasonably expects to experience; and~~

~~(ii) the total daily interest will not increase.~~

~~(1B) In this clause, total credit limit is calculated as follows:~~

~~a + b~~

~~where—~~

~~(a) is the sum of the maximum unpaid balance permitted under revolving credit contracts~~

The test in Regulation 4AF, which requires a reasonable surplus or equivalent, is unlikely to be met in that situation, meaning borrowers are trapped with higher cost debt where debt consolidation may be a sensible option for them.

We have suggested ensuring the lender has reasonable grounds to believe the refinancing is necessary to address the financial difficulty the borrower is experiencing. And, we suggest ensuring the exemption is not available where the new contract will be a high-cost consumer credit contract.

We also suggest simply requiring that the annual interest rate is lower, rather than introducing a daily interest charge calculation which could become complex and lead to unnecessary delays.

We agree changes to the informed decision making requirements in the Responsible Lending Code are sensible in this regard. MBIE may wish to consider whether the requirement to seek advice from a financial mentor should be incorporated into the Regulation, rather than left to the Code.

~~(including existing contracts being refinanced, or new contracts being entered into, as the case may be)~~

~~(b) is the sum of the unpaid balance on all other credit contracts (including existing contracts being refinanced, or new contracts being entered into, as the case may be)~~

~~total daily interest is calculated as follows:~~

~~total daily interest = ΣCn = 1 [(rn × Un] / 365~~

~~where—~~

~~c is the number of credit contracts for which an individual daily interest rate needs to be calculated~~

~~rn is the annual interest rate of each contract~~

~~Un is the unpaid balance of each contract.'~~