

Consumer Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140

By email: consumer@mbie.govt.nz

10 June 2024

Submission on discussion document – Guidance for lenders on assessing affordability: draft changes to the Responsible Lending Code

- 1 This is a submission by Dentons on the Ministry of Business, Innovation & Employment ('**MBIE**') discussion document *Guidance for lenders on assessing affordability: draft changes to the Responsible Lending Code* ('**Discussion Document**').

About Dentons

- 2 Dentons is one of New Zealand's premier law firms, with a legal team comprising over 100 lawyers acting on government, commercial, and financial markets projects from our offices in Wellington and Auckland. We are part of Dentons, the world's largest law firm, with more than 12,000 lawyers in over 200 locations.
- 3 We have extensive experience advising a range of banks, insurers, non-bank deposit takers, financial advice providers, and financial service providers, all of which will be affected by the proposals set out in the Guidance Note.

General comments

- 4 Generally, we are supportive of the proposals to make the Chapter 5 guidance more fit for purpose for both lenders and borrowers in the affordability and suitability assessment process. However, there are further refinements that would be desirable, particularly to ensure lenders are able to act accordingly where 'reasonable', which will depend on each individual circumstance. The ability for a lender to act with nuance, but at all times reasonably, is critical in ensuring that the loan application process is efficient for borrowers and is focused on the correct issues being material to affordability and suitability.
- 5 Thank you for the opportunity to submit. We would welcome the opportunity to discuss any of the points we have raised.

Yours faithfully



Pauline Ho
Special counsel
Dentons Kensington Swan

D +64 9 909 6345
pauline.ho@dentons.com

Discussion document questions

Guidance (5.1-5.4)

- 1 Do you have any concerns with changes proposed to paragraph 5.1, or other changes we should consider?

Broadly in agreement with the proposed changes which allow for a common-sense approach to assessing any additional burden on borrowers. It is reasonable to align the NZ guidance with the UK guidance as borrowers should not be taking on additional burdens when servicing the loan necessitates increasing a borrower's indebtedness. Suggest further clarification regarding 5.1(b) for the 'financial commitments' to be as specified by the borrower and there is no expectation for the lender to investigate these. The guidance should also acknowledge that it may be reasonable for a borrower to adjust or withdraw from other financial commitments if it means prioritising the proposed credit. For example, it may be appropriate for a borrower who has not had a home loan before to make adjustments to their lifestyle so they can afford mortgage repayments, and may therefore decide to no longer take out health insurance.

- 2 Do you have any concerns with any of the changes proposed to guidance on responsibly estimating the payments that will be required/made under the agreement?

Clarification should be made so it is clear the lender is able to reasonably determine the scope of 'reasonable buffer' and 'reasonable period' based on the income and expenses information both provided to and obtained by it. This will give lenders confidence that there is room for discretion in their decision making depending on the individual circumstances.

- 3 Do you see any other guidance on this topic as desirable? If so, please explain.

We note the commentary to 5.1 states the examples given are not an exhaustive list. While we consider this to be correct, for example, it may be reasonable for a lender to consider any other relevant factors of the borrower, and their individual financial position and expenditures in meeting their responsibility; however at the same time it could be the case for some borrowers the list is exhaustive, or fewer applicable necessities or commitments apply. The possibility of the latter should be acknowledged.

Purpose of inquiries (5.5-5.6)

- 4 Do you have any concerns with the guidance proposed in paragraph 5.5? If so, what changes should we consider?

Supportive of proposed changes, but an acknowledgment that 'means other than income' is intended to be deliberately broad. The borrower should be able to declare these other 'means', and it remains up to the lender to consider this and determine, if appropriate, their inclusion (or not) for the purposes of the affordability and suitability assessment.

- 5 Do you believe the Code should provide general guidance on use of surpluses, buffers and adjustments to account for uncertainty that the loan will be affordable? If so, what would you suggest it say, noting the potential for excessively conservative approaches by lenders.

No - the current drafting of 5.6. is appropriate given the guidance provided in previous paragraphs. An attempt to put parameters around determining surpluses and buffers is likely to unduly hamper the credit approval process and act as a barrier to credit for consumers.

Scope of inquiries (5.7-5.11)

6 Do you have any concerns with the changes proposed to guidance on inquiries into income, or believe we should consider any other changes?

7 **Generally supportive of the changes, which are appropriate in guiding a lender to mitigate the risk of income sources that fluctuate. It should be noted however there could be one-off payments of income such as an inheritance which may be considered 'irregular' but would not be appropriate to adjust if all of it is to be applied in respect of the income component. Accordingly, in 5.8, 'should' should be changed to 'may'.**

8 What wording do you think would work best (in paragraph 5.9.c) to capture other, less essential expenses that may be important for the lender to account for?

Strong preference for the alternative wording to other non-discretionary regular or frequently occurring outgoings... etc'. Framing 5.9c in this way means the starting point is capturing non-discretionary outgoings, which is a much smaller catchment than 'other regular or frequently occurring expenditure', which means the lender has too much information to deal with and would pick up all other frequent but discretionary, such as a flat white or occasional coffee or takeaway.

9 Do you have any concerns with other changes proposed to guidance on inquiries into expenses, or believe we should consider any other changes?

5.9d should be qualified so it only picks up 'material' changes in expenditure.

10 Do you believe guidance on joint expenses would be worthwhile. If so, would you have any issues with paragraphs 5.28 – 5.32 of the current Code being used?

The current Code provisions in 5.28-5.32 are adequate.

11 Do you believe guidance on inquiring into spending through use of Buy Now Pay Later facilities is necessary? If we were to do this, would paragraph 5.33 of the current Code be a good approach?

No, other than to say the existing guidance provisions should take these into account if relevant.

12 Would you have any concerns, based on the proposed guidance, about lenders making unreasonable assumptions that the borrower will reduce certain expenditure? If so, please explain why and what the Code might do to address this.

Although any assumption from a lender should be reasonable, the Code should not preclude a lender from assuming that a borrower will reduce certain expenditures. Any assumptions made should be reasonable, based on the specific circumstances. It is in both the interests of the borrower and lender that the credit provided will not cause hardship or undue difficulty. It is also not good business or common sense for the lender to make unreasonable assumptions about the reduction of expenditure as no lender should enter into a loan knowing there is a reasonable chance it may not be repaid.

Method of inquiries (5.12-5.17)

13 Do you have any concerns with the 2017 guidance on methods of inquiry? Please explain.

The inclusion of 5.14 is appropriate. In relation to 5.13, lenders should have the option to obtain information from a wide range of sources when making reasonable inquiries including allowing

lenders to obtain information from each other, where the borrower consents to information passing from lenders. This should be encouraged and facilitated in line with open banking in New Zealand.

14 Do you believe further guidance on use of statistical information is necessary? If so, why?

No, lenders should be able to use their own statistical information and resources that they may consider reasonable without the type of information or how it is used needing to be prescribed.

15 Do you agree paragraph 5.14 is desirable to make lenders aware of their obligation under the Privacy Act 2020?

No objection to referring to the Privacy Act obligations so long as it is clear it is confirmation of existing obligations of the lender and is not a new obligation.

16 What might be the implications of using the 2017 guidance on verification? What changes, if any, would you suggest?

Support the reinstatement of the guidance of information that was the position in the 2017 chapter, and in particular 5.15 and 5.16. We believe reverting to the 2017 guidance will materially streamline the verification process but with the 'reasonable' qualifiers it ensures lenders are still to act as responsible lenders.

17 Do you have any other feedback on guidance relating to verification or use of information provided by intermediaries?

5.17 appears sufficient – it will be up to the lender to decide whether it can rely on the information provided by that financial adviser or intermediary, but the guidance does not need to prescribe this or in what circumstances further.

Extent of inquiries (5.18-5.21)

18 Do you believe the proposed guidance on extent of inquiries would encourage lenders to make their inquiries more proportionate to affordability risk, as intended? What changes might help to achieve this?

Support the use of 'may' in 5.20. We do not see a need for 5.21 given 5.20 (and in particular, the existences of limbs 5.20c and 5.20d) overlaps with it. The use of 'serious' is problematic as it is subjective and therefore uncertain. It also means that something may not be 'serious' at one point in time, but at another may be, particularly with the benefit of retrospect. This is not helpful at the suitability and affordability assessment stage as it requires too much looking into the future.

19 Do you have any other feedback on guidance to support lenders in assessing affordability risk and what that means for how they should approach inquiries?

The guidance should support lenders being able to collaborate with financial intermediaries, such as brokers and financial advisers so that the assessment can be progressed in a more timely and efficient manner without the need for double ups on verifying borrower information.

Record keeping (5.22-5.25)

- 20 *Do you have any views on the need for guidance on record keeping and changes we should consider?*

Support simplifying the Code and removing the record keeping commentary given the requirements already exist in the CCCFA. The regulator should make it clear however that lenders should be able to determine how operationally they implement their record keeping as required under the CCCFA.

High-cost consumer credit contracts (5.26)

- 21 *Do you have any views on the need for guidance on assessing affordability of high-cost credit and whether changes are desirable?*

5.28 provides for lender's inquiries but makes no comment on what weight or importance the lender should place on them. 5.28b and 5.28c shouldn't be needed or are self-evident given the prohibition in s45F and s45G of the CCCFA. There should still be the ability for the lender to rely on information given by the borrower, but 5.28 suggests the lender should make more investigative inquiries. We consider the current situation in the market where there are no HCCC lenders operating in New Zealand as a signal the HCCC regulations and guidance need further consideration.

Pawnbroking (5.27-5.28)

- 22 *Do you have any views on guidance for assessing affordability in the case of pawnbroking?*

No Comment.

Other

- 23 *Do you have any other feedback on how the draft content for Chapter 5 can better meet its objectives, including anything that might be missing?*

Consider having a separate Chapter for HCCC given it has a tiny share of the consumer lending market.

- 24 *Do you have any suggestions for how this content could be presented more clearly or usefully to users?*

When the revised Code is finalised produce a markup version for comparison purposes so users can easily identify what has changed.