

3 August 2018

Competition & Consumer Policy
Ministry of Business, Innovation & Employment
PO Box 1473
WELLINGTON 6140

REVIEW OF CONSUMER CREDIT REGULATION CONSULTATION

1. Russell McVeagh welcomes the opportunity to make a submission in response to the Ministry of Business, Innovation and Employment's ("**MBIE**") discussion paper, "Review of Consumer Credit Regulation" ("**Discussion Paper**").
2. In considering and responding to the questions raised in the Discussion Paper, Russell McVeagh has reviewed the Discussion Paper and the "Additional information to support the discussion paper" ("**Additional Information**").
3. A number of the questions call for information and/or data collected by market participants in respect of issues facing lenders and consumers. As a commercial law firm, to a large extent our experience in relation to consumer credit law arises from advising banks and other large financial institutions in relation to the legislation. Accordingly, to the extent that Russell McVeagh does not have the market knowledge or data necessary to respond to certain questions, we have answered "no comments".
4. Instead, the general focus of our submission relates to ensuring that regulation under the Credit Contracts and Consumer Finance Act 2003 ("**CCCFA**") is clear and consistent with the purposes of the regulatory regime. To the extent that changes are made to the CCCFA or the Responsible Lending Code, we consider that these changes will require thorough consultation and a careful analysis of any increased compliance costs, unintended effects on consumers and lenders and general practicality.

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Issue 1: Regarding the excessive cost of some consumer credit agreements

1	<p>Do you agree that the problems identified with high-cost lending (even where it is compliant with the CCCFA) are significant? Do you have any information or data that sheds light on their frequency and severity?</p>
	<p>Russell McVeagh does not have any information in respect of the problems identified with high-cost lending. However, we consider that any amendments to the CCCFA targeted towards "high-cost lenders" will require a clear definition of "high-cost". Determination of this definition will require thorough consultation with market participants.</p>
2	<p>Do you support any of the extensions of Cap Option A? What would be the impact of these extensions on borrowers, lenders and the credit markets? Do you have any information or data that would support an assessment of the impact of these extensions?</p>
	<p>No comments.</p>
3	<p>Do you agree with our assessment of the costs and benefits of the options for capping interest and fees? Are any costs or benefits missing? Do you have any information or data that would help us to assess the degree or estimate the size of these costs and benefits?</p>
	<p>We do not support caps on interest or fees for the reasons set out in Question 5.</p>
4	<p>Do you have any suggestions for the design of options for capping interest and fees? If so, what would be the impact of your proposed design on borrowers, lenders and the credit markets?</p>
	<p>No comments.</p>
5	<p>Which interest rate cap options, if any, would you prefer? Which interest rate options would you not support? Please explain how you made your assessment.</p>
	<p>Of the options presented in the Discussion Paper, Russell McVeagh considers that Cap Option C is the preferable option, but only if it were to cap interest (and not fees).</p> <p>Cap Option A is likely to present difficulties in calculating, at the outset of a loan, whether 100% of the original loan principal would be charged in interest and fees.</p> <p>In respect of Cap Option B, Russell McVeagh does not support the reintroduction of an equivalent interest rate for the reasons set out in response to Question 19.</p> <p>By contrast, an amended Cap Option C which capped interest rates only would be simple to implement and understandable to borrowers. In our view, fees should not be subject to a cap given their existing regulation under the CCCFA and in light of the Supreme Court's decision in <i>Sportzone v Commerce Commission</i> [2016] NZCSC 53 ("Sportzone").</p>

Issue 2: Regarding continued irresponsible lending and other non-compliance

6	<p>If directors have duties to take reasonable steps to ensure that the creditor complies with its' CCCFA obligations, should any duties apply to senior managers?</p>
	<p>As set out in our response to Question 12, Russell McVeagh does not support the imposition of personal duties on directors and senior managers to ensure that lenders are complying with their CCCFA obligations.</p>
7	<p>If there are to be more prescriptive requirements for conducting affordability assessments, what types of lenders or loans should these apply to?</p>
	<p>No comments.</p>
8	<p>Should there be any change to the requirement that lenders can rely on information provided by the borrower unless the lender has reasonable grounds to believe the information is not reliable? What would be the impact of such a change on borrowers, lenders and the credit markets?</p>
	<p>Russell McVeagh does not support any changes to the requirement that lenders can rely on information provided by the borrower unless the lender has reasonable grounds to believe the information is not reliable.</p> <p>We consider that the current entitlement to reasonably rely upon information provided by the borrower is a workable approach which, when applied consistently with the guidance in the Responsible Lending Code, is effective for ensuring that lenders make good decisions in respect of assessing affordability.</p> <p>It is not clear how, if this entitlement were altered, the obligation to review and assess information provided by a borrower would operate and be enforced. Further, given the personal nature of the information required for lenders to assess affordability, it is not clear how information would be gathered if not from the borrower.</p>
9	<p>Do you consider there should be any changes to the current advertising requirements in the Responsible Lending Code? If so, what would be the impact of those changes on borrowers, lenders and the credit markets?</p>
	<p>No comments.</p>
10	<p>Do you agree with our assessment of the costs and benefits of the options to reduce irresponsible lending and other non-compliance? Are any costs or benefits missing? Do you have any information or data that would help us to assess the degree or estimate the size of these costs and benefits?</p>
	<p>No comments.</p>
11	<p>Do you have any suggestions for the design of options for reducing irresponsible lending and other non-compliance? If so, what would be the impact of your proposed options on borrowers, lenders and the credit markets?</p>
	<p>No comments.</p>

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Which options for reducing irresponsible lending and other non-compliance would you support? Which would you not support? Please explain how you made your assessment.

Registration Option A

Russell McVeagh considers that the expansion of the Commerce Commission's ("**Commission**") powers to permanently deregister lenders and ban directors from the industry is too broad. We do not support Registration Option A in the proposed form.

It is important to note that the District Court has equivalent powers under s 108 of the CCCFA. There are a number of inbuilt protections into the District Court process. These include that there must have been a breach of the CCCFA (as set out in s 108(1)(a)) and the fact that, given that a Court order is required, natural justice is protected. The Commission has the power to apply for an order (under s 109).

If MBIE chooses to progress this option, we consider that any expansion of Commission's powers will require more careful and thoughtful consideration, particularly in respect of the necessary checks and balances.

Registration Option B

Russell McVeagh generally supports the introduction of a fit and proper person test in the registration of lenders.

However, we consider that, for lenders already required to meet similar tests under different legislation, there may be disproportionate compliance costs.

Accordingly, we also support the proposed exemptions for registered banks, licensed non-bank deposit takers and market services licensees.

Registration Option C

Generally, Russell McVeagh agrees with the costs and benefits identified in the Discussion Paper in respect of Registration Option C which would introduce a comprehensive creditor licensing system.

However, we consider that the compliance costs for lenders may be very significant. This will be particularly disproportionate for those lenders already required to hold a number of licences. For example, registered banks are currently required to hold licences under the Reserve Bank of New Zealand Act 1989, the Financial Advisers Act 2008 and the Financial Markets Conduct Act 2013 (licences under the Financial Advisers Act 2008 will be replaced with a "market services licence" when the Financial Services Legislation Amendment Bill is enacted).

We consider that there is likely to be some overlap between the various different licences some lenders are required to hold, resulting in unnecessary compliance costs. Accordingly, we would support and recommend appropriate exemptions, or a cross-credit system, allowing for this overlap.

Enforcement Option A

Russell McVeagh does not support the introduction of pecuniary penalties and statutory damages or the expansion of injunctive relief for breaches of lender responsibilities.

The lender responsibilities are currently principles-based, which makes them incompatible with strict penalties and fines.

Enforcement Option B

Russell McVeagh does not support Enforcement Option B on the basis that directors and senior managers do not have sufficient proximity to the transactions regulated by the CCCFA to justify the imposition of personal liability. It is not appropriate to impose personal liability on individuals who undertake governance functions and are not actively involved in the transactions which may lead to a breach of the CCCFA.

The problems identified in the Discussion Paper and Additional Information that Enforcement Option B seeks to remedy are mainly consumer-facing issues for which directors and senior managers are very unlikely to have any direct involvement or oversight.

We consider that this option is likely to discourage directors and senior managers from taking such positions in the management of lenders and is unlikely to improve outcomes for borrowers.

Enforcement Option C

Russell McVeagh supports the principle underlying Enforcement Option C which requires lenders to substantiate their affordability and suitability assessments. We consider that compliant lenders are likely to already be doing this, as suggested in the Responsible Lending Code. However, we query whether amendment to the law is necessary, given the provisions of the Responsible Lending Code, and that borrowers will usually have the ability to request this information under the Privacy Act 1993, and the Commission will have the ability to request it, in appropriate cases, under s 108 of the CCCFA.

Enforcement Option D

No comments.

Enforcement Option E

Subject to the need to ensure compliance with privacy laws, Russell McVeagh supports Enforcement Option E, which would require lenders and their agents to work with consumers' advocates if asked to do so, and in good faith. Some guidance on the meaning of "good faith" in this context may be helpful to lenders.

We consider that this option is consistent with the Responsible Lending Code.

Responsibility Option A

No comments.

Responsibility Option B

No comments.

Responsibility Option C

Russell McVeagh does not support Responsibility Option C, which would require lenders to provide disclosure documents in the same language as advertising where the borrower is more comfortable communicating in that language.

While we appreciate the mischief this option seeks to prevent, we consider that the complexity of legal disclosure documents does not lend itself to effective translation and is likely to lead to further confusion and worse outcomes for vulnerable borrowers.

Further, we consider that the compliance costs for lenders may be significant and disproportionate as they carry the burden to ensure that terms are consistently and accurately captured in all languages.

Issue 3: Predatory behaviour by mobile traders

13	Do you agree with our assessment of the costs and benefits of the options for covering additional credit contracts under the CCCFA? Are any costs or benefits missing? Do you have any information or data that would help us to assess the degree or estimate the size of these costs and benefits?
	No comments.
14	Do you have any suggestions for the design of options for covering additional credit contracts under the CCCFA? If so, what would be the impact of your proposed options on borrowers, lenders and the credit markets?
	No comments.
15	Which options for changes to cover additional credit contracts would you support? Which would you not support? Please explain how you made your assessment.
	No comments.

Issue 4: Unreasonable fees

16	If prescribed fee caps were introduced, who should they apply to, and what process and criteria should be used to set them?
	Russell McVeagh does not support fee caps for the reasons set out in response to Question 19.
17	Do you agree with our assessment of the costs and benefits of the options for capping interest and fees? Are any costs or benefits missing? Do you have any information or data that would help us to assess the degree or estimate the size of these costs and benefits?
	No comments.
18	Do you have any suggestions for the design of options for reducing unreasonable fees? If so, what would be the impact of your proposed options on borrowers, lenders and the credit markets?
	No comments.
19	Which options for changes to fees regulation would you support? Which would you not support? Please explain how you made your assessment.
	<i>Fees Option A</i> Russell McVeagh supports Fees Option A which would require lenders to substantiate the reasonableness of their fees. This practice would be consistent

with paragraph 10.13 of the Responsible Lending Code and paragraphs 83 to 85 of the Commission's Consumer Credit Fees Guidelines.

Fees Option B

Russell McVeagh does not support fee caps.

We consider that the current purpose of the regulation of fees under the CCCFA is to ensure that fees reflect the costs incurred by lenders in facilitating credit contracts.

In the leading case, *Sportzone*, the difficulty associated with setting fees was recognised. In particular, the Supreme Court stated that the CCCFA indicated that a transaction-specific approach to the setting of fees is appropriate, disapproving of the averaging of a lender's operating costs and applying the average to each credit contract.

We consider that *Sportzone* is authority for the general view that fees can be difficult to set and should be considered with reference to each specific transaction. Imposing fee caps is inconsistent with the comments of the Supreme Court in respect of assessing the reasonableness of fees.

Fees Option C

Russell McVeagh does not support the reintroduction of an equivalent interest rate for the purposes of disclosure and advertising.

Similarly to general fee caps, we consider that a conflated interest/fee rate is inconsistent with the requirement that fees are reasonable.

Further, we consider that an equivalent interest rate is likely to lead to negative outcomes for borrowers and lenders, resulting in borrower confusion and significant compliance costs for lenders.

When the Credit Contracts Act 1981 was replaced by the CCCFA, the "annual finance rate" previously in effect was repealed, primarily for the reasons set out above.

Fees and interest were separated for disclosure and advertising under the CCCFA for the purposes of providing more robust and transparent information to consumers.

The flaws and costs associated with the annual finance rate have been considered numerous times. However, the Ministry of Consumer Affairs in its 2009 "Review of the Operation of the Credit Contracts and Consumer Finance Act 2003" summarised the identified problems as follows:

The criticisms included: imprecise wording for the incorporation of changes, which made judicial interpretation inconsistent and ultimately led to uncertainty; all charges required for a borrower to adequately compare loans from different providers were not provided; a lack of advice to borrowers on how to interpret the "finance rate"; advertising on the basis of the "finance rates" was impractical because calculation of the rate relied on multiple factors; that the rate could not be calculated for revolving credit arrangements and therefore the rate was not required to be disclosed; and variable interest rates caused complications that made it difficult to calculate the finance rate accurately.

The Ministry of Consumer Affairs went on to say:

	<p><i>The provision of the annual interest rate and a clear itemisation of fees and charges applicable to a loan are intended to enable the borrower to more objectively consider loan offerings and their suitability.</i></p> <p>We consider that the reintroduction of an equivalent interest rate is likely to increase the problems that were associated with its predecessor, leading to negative outcomes for lenders and borrowers.</p>
20	<p>Have you seen issues with excessive broker fees, or other unavoidable fees charged by third parties, being added to the loan? If so, are there any specific changes that should be made to the regulation of third-party fees? What would be the impact of these changes on lenders, borrowers and third parties?</p>
	<p>No comments.</p>

Issue 5: Regarding irresponsible debt collection practices

21	<p>Is this an accurate picture of the problems for consumers experiencing debt collection? Do you have information that confirms or refutes these issues, or sheds light on how widespread or severe they are?</p>
	<p>No comments.</p>
22	<p>What information should be provided to borrowers by debt collectors? When and how should this information be provided?</p>
	<p>No comments.</p>
23	<p>Do you agree with our assessment of the costs and benefits of the options for addressing irresponsible debt collection? Are any costs or benefits missing? Do you have any information or data that would help us to assess the degree or estimate the size of these costs and benefits?</p>
	<p>No comments.</p>
24	<p>Do you have any suggestions for the design of options for addressing irresponsible debt collection? In particular, what is an appropriate frequency of contact with debtors before (and then after) a payment arrangement is entered into? Please state the likely impact of your proposed options on borrowers, lenders and the credit market.</p>
	<p>No comments.</p>
25	<p>Which options for changes to the regulation of debt collection would you support? Which would you not support? Please explain how you made your assessment.</p>
	<p><i>Debt Collection Option A</i></p> <p>No comments.</p> <p><i>Debt Collection Option B</i></p> <p>No comments.</p> <p><i>Debt Collection Option C</i></p>

	<p>No comments.</p> <p><i>Debt Collection Option D</i></p> <p>No comments.</p> <p><i>Debt Collection Option E</i></p> <p>Russell McVeagh does not support Debt Collection Option E, which would require external debt collection fees to be cost-based.</p> <p>Under this option, lenders would only be entitled pass down third party debt-collection fees which reflect the third party debt collector's costs. All additional fees charged by the third party debt collector (i.e the collector's profit) would need to be met by the lender.</p> <p>We consider that this option will not be effective in preventing borrowers from being charged excessive debt collection charges, as the additional costs borne by the lender may simply be passed down to the borrower through increased interest rates.</p>
26	<p>Are you seeing harm from loans to small businesses, retail investors or family trusts as a result of them not being regulated under the CCCFA?</p> <p>No comments.</p>
27	<p>Do you think small businesses, retail investors or family trusts should have the same or similar protections to consumers under the CCCFA? Please explain why/why not.</p> <p>No comments.</p>
28	<p>Are there any other issues with the CCCFA or its impact on vulnerable people that are not addressed in this discussion paper? If so, what options should MBIE consider to address these issues?</p> <p>No comments.</p>

Any other comments

	<p>We welcome any other comments that you may have.</p> <p>No comments</p>
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