

Credit Contracts Legislation Amendment Bill

MinterEllisonRuddWatts — 17 April 2019

The *Credit Contracts Legislation Amendment Bill* (the **Bill**) will amend the *Credit Contracts and Consumer Finance Act 2003* (**CCCFA**) which, if passed, will come into effect on 1 March 2020 (with some provisions coming into effect at a later date).

Directors/senior managers

The Bill introduces new personal obligations on directors and senior managers of creditors. A “senior manager” is defined in the same way as in the *Financial Markets Conduct Act 2013*, as a person who occupies a position that “allows that person to exercise significant influence over the management or administration” of an organisation. There is no bright line test as to who this would apply to.

- **Duty to exercise due diligence:** directors and senior managers are subject to a new duty to exercise due diligence to ensure the creditor complies with its duties and obligations under the CCCFA. This requires directors and senior managers to exercise the *care, diligence and skill* of a reasonable director or senior manager to ensure the creditor complies with its duties and obligations under the CCCFA. What is reasonable is informed by the nature of the business and the position of the director or senior manager (and the nature of their responsibilities). This includes taking reasonable steps to ensure compliance procedures are in place and followed, implementing methods to identify deficiencies in the effectiveness of the compliance procedures, and promptly remedying any deficiencies discovered. Directors and senior managers who breach this may be subject to pecuniary penalties, or liable for statutory damages or compensation.
- **“Fit and proper” certification regime:** the Bill also introduces a new certification regime for directors and senior managers of creditors and their controlling owners. These people will need to meet a “*fit and proper person*” test in order for the creditor to register on the Financial Services Providers Register. Exemptions to this requirement apply if the lender is already a licensed provider approved by a licensing authority (i.e. banks and non-bank deposit takers). There is also a transitional period for certification until 1 April 2021.

High-cost loans: interest/fee cap

The Bill introduces a cap on the costs of borrowing (interest and fees) recoverable for “*high-cost consumer credit contracts*” — limited to an amount equal to the first advance. High-cost consumer credit contracts are a concept taken from the Responsible Lending Code, and defined as a loan with an annual (or weighted average) interest rate of 50% or higher. This cap applies to any subsequent amount advanced, or any refinance.

Example: if there is an advance to a borrower of \$1,000, the maximum costs of borrowing (interest/fees) that can be charged over the life of the loan is \$1,000.

Declaring “consumer credit contracts”

The Bill will allow regulations to be made that declare certain types of arrangements to be “consumer credit contracts”. A potential target for this provision has been signalled to be “buy-now, pay-later” arrangements, should the Government discern consumer harm.

What next?

The next stage in the legislative process is referral to Select Committee. We also note that the new regulations to govern certain responsible lending obligations are yet to be released. The Bill is likely to have a far reaching impact on the consumer credit industry, and we expect lenders across all sectors will be interested in making submissions on the Bill.

Responsible lending obligations

The Bill strengthens existing lender responsibility principles by requiring creditors to comply with new regulations. These may codify recommended obligations under the Responsible Lending Code, but will add to an already complex regime of broad standards and granular rules.

- **Advertising:** Creditors will be required to comply with advertising standards set in regulations, in addition to existing requirements to ensure advertising is not “misleading, deceptive, or confusing”. There is also a requirement that, where the creditor advertises in a language, disclosure be provided in that language.
- **Reasonable inquiries:** In addition to the current requirement to make “reasonable inquiries” into a borrower or guarantor’s requirements and objectives, and whether payments can be made without substantial hardship, creditors will also need to comply with new regulations specifying the inquiries that are to be made (and the way the results of these inquiries are to be taken into account).

The existing rule in section 9C(7) of the CCCFA that creditors can rely on information provided by a borrower/guarantor (unless they have reasonable grounds to believe otherwise) will be repealed. This will make creditors’ inquiries far more difficult as creditors will need to verify information in a wider range of circumstances. We hope what is expected is clarified in the regulations.

- **Records:** The Bill includes a section prescribing details of the records that creditors are required to keep following their inquiries. This includes a requirement to keep records on how fees were calculated. These records need to be made available to the Commerce Commission on request. We expect that responsible lenders will meet this standard anyway.

Penalties

New civil pecuniary penalties of up to \$600,000 and \$200,000 (for an individual) are available for contraventions of certain provisions, including exceeding the interest/fee cap for high-cost loans, failing to keep records, and breach of directors’ and senior managers’ duties. Directors and senior managers may also be liable for compensation or statutory damages.

Who to talk to?

If you have any questions about the new Bill, please get in touch with one of our experts:



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