Responsible Lending Code

Revised February 2021

In force 1 October 2021 (except Chapter 12, in force 1 February 2022)

The Responsible Lending Code was issued by the Minister of Commerce and Consumer Affairs under section 9G of the Credit Contracts and Consumer Finance Act 2003 (the Act). All provisions of the original Code came into force on 6 June 2015.

This version of the Responsible Lending Code was amended by the Minister of Commerce and Consumer Affairs under section 9I of the Credit Contracts and Consumer Finance Act 2003, and comes into force in two stages:

- All chapters other than Chapter 12 come into force on 1 October 2021.
- Chapter 12 comes into force on 1 February 2022. Until this date, Chapter 12 of the previous version of the Responsible Lending Code remains in force.

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Contents

1 Introduction 4

2 Obligations that apply before and throughout the agreement 8

3 Advertising 14

4 Inquiries into and assessment of borrowers' requirements and objectives 18

5 Inquiries into and assessment of substantial hardship (borrowers) 24

6 Inquiries into and assessment of substantial hardship (guarantors) 35

7 Assisting borrowers to make an informed decision 39

8 Assisting guarantors to make an informed decision 50

9 Credit-related insurance, repayment waivers and extended warranties 54

10 Fees 61

11 Subsequent dealings 66

12 Repayment difficulties and other problems 70

13 Repossession 84

14 Oppression 90

15 Glossary 93

16 Appendix 94

1 Introduction

Commentary

Lender responsibility principles

*Since 2015, the Credit Contracts and Consumer Finance Act 2003 (**the Act)** has set out a range of lender responsibility principles. These principles were further extended by the Credit Contracts Legislation Amendment Act 2019, and the Credit Contracts and Consumer Finance Regulations 2004 (**the Regulations**). These are further amended by the Credit Contracts and Consumer Finance Amendment Regulations 2020 and the Credit Contracts and Consumer Finance (Lender Inquiries into Suitability and Affordability) Amendment Regulations 2020.*

The lender responsibility principles apply to every lender, defined as:

- ***a.*** *a creditor under a consumer credit contract; or*
- ***b.*** *a transferee under a buy back transaction of land.*

The lender responsibility principles and other lender obligations also apply to mobile traders, where they supply consumer goods to natural persons under a credit sale.

The key definitions are set out in the appendix. Any terms not defined in this Responsible Lending Code, but which are defined in the Act or Regulations, should, unless the context indicates otherwise, be read as having the meaning set out in the Act or Regulations.

The lender responsibility principles requires lenders to:

- ***a.*** *exercise the care, diligence, and skill of a responsible lender when advertising credit or finance, and before and after providing consumer credit or finance and taking a relevant guarantee; and*
- ***b.*** *comply with specific lender responsibilities.*

Purpose of the Responsible Lending Code

The purpose of the Responsible Lending Code (the Code) is to elaborate on and offer guidance on how the lender responsibility principles (including the more detailed lender responsibilities) (see section 9E(1) of the Act) and the Regulations may be implemented by lenders.

The Regulations provide detailed obligations that lenders must undertake to fulfil their lender responsibilities under the Act. This Code provides non-binding guidance on how lenders can meet the prescribed obligations in the Regulations. It also provides further guidance outside what is prescribed in the Regulations. The legislation (see section 9F(1)(b) of the Act) provides that the Code may set out certain processes, practices or procedures that a lender should follow to comply with the lender responsibility principles. The list of matters that may be set out in the Code are set out in section 9F(1) and (2) of the Act, which are outlined in the Appendix.

Status of the Code

The legislation provides that the Code is not binding. Lenders are able to comply with the lender responsibility principles in other ways.

*The Code is also not a "safe harbour". **Compliance** with the Code is not deemed to be compliance with the lender responsibility principles (see section 9E(3) of the Act). The guidance provided in the Code is not (and cannot be) an exhaustive statement of what a lender should or should not do in order to be a responsible lender.*

*However, **evidence of a lender's compliance** with the provisions of the Code will be treated as evidence of compliance with the lender responsibility principles, including the specific lender responsibilities (see section 9E(3) of the Act). But evidence of compliance with the Code will be weighed against other evidence.*

This document contains the following:

- ***a.*** *Summaries of certain **legal obligations** including under the lender responsibility principles and lender responsibilities from the Act and Regulations.*
- ***b.*** ***Guidance** – the numbered provisions of the Code (which are issued under the authority of various provisions in section 9F of the Act) set out processes, practices and procedures which a lender should follow to comply with the lender responsibility principles and Regulations and also "elaborate on" certain lender responsibility principles (see section 9E(1)(a) of the Act).*
- ***c.*** ***Commentary** and **Examples** – the commentary provides information, context, and explanation, including references to various other relevant legislative provisions. The examples are for illustrative purposes only.*

Evidence of compliance with the provisions of the Code labelled as "Guidance" are to be treated as evidence of compliance with the lender responsibility principles. The sections labelled "Commentary" and "Examples" do not purport to set out additional processes, practices, or procedures for lenders to follow and they are not provisions of the Code against which evidence of compliance is to be assessed.

In keeping with its evidentiary status, the Code uses a number of conventions which are relevant to how it is applied.

- *'Must' is used when referring to statutory obligations in the Act or Regulations and indicates actions a lender must take to be compliant.*
- *'Should' indicates actions that a lender needs to take to show that it is compliant with the Code and therefore to use as evidence of compliance with the Act and Regulations.*

The Code also uses the word 'may' in a number of ways that differ depending on the context. 'May' generally indicates an example of behaviour which would be evidence of compliance, but where lenders could show compliance with the Code without this behaviour, or in other ways. 'May' is also used in some cases to provide exceptions from the Code requirements.

Structure of the Code

The structure of the Code is based around the lender responsibility principles broadly in the order that they would apply throughout the life cycle of a credit agreement. The Code is divided into the

following chapters:

- *Obligations that apply before and throughout the agreement*
- *Advertising*
- *Inquiries into and assessment of borrowers' requirements and objectives*
- *Inquiries into and assessment of substantial hardship*
- *Assisting borrowers to make an informed decision*
- *Assisting guarantors to make an informed decision*
- *Credit related insurance, repayment waivers and extended warranties*
- *Fees*
- *Subsequent dealings*
- *Repayment difficulties and other problems*
- *Repossession*
- *Oppression*

Different products and circumstances

The Code provides:

a. *the extent of reasonable inquiries a lender should undertake; and*
b. *the extent of assistance a lender should provide*

To comply with the relevant lender responsibilities may differ depending on factors relating to the credit agreement or the borrower (as set out in the relevant sections of the Code).

For instance, to assess whether a borrower will make repayments without substantial hardship, the lender should conduct more detailed inquiries for products or borrowers where the consequences of default are serious or there is a greater risk of default.

The lender can make a judgement as to the extent of inquiries, as well as the extent of assistance, that should be provided for any given transaction based on the factors set out in the relevant section of the Code. However, the lender should be satisfied that the extent of inquiries and assistance is reasonable and will be sufficient to comply with the lender responsibility principles, including the requirements set out in the regulations.

Whether credit is provided online or in-person is not one of the factors which affects the extent of inquiries or extent of assistance. Unless otherwise stated, the guidance in the Code is intended to be technology neutral in the sense that:

a. *a lender should be able to comply with the guidance in the Code when lending online or in-person.*
b. *the level of responsibility for lenders (and the level of consumer protection provided) should not be lower for any particular lending channel used, although the steps that lenders take to achieve compliance with the guidance in the Code may differ depending on the lending channel.*

Regardless of the channel a lender uses to interact with a borrower, the lender should take sufficient steps to meet the lender responsibility principles.

The Code also provides in various provisions throughout this document that lenders should act "reasonably" or act within a "reasonable time". What is reasonable will depend on the circumstances, including the circumstances of the lender and the borrower, and the nature of the

product, and should be considered with regard to the purposes of the Act.

Disclaimer

The Code does not constitute legal advice. Lenders are encouraged to seek their own professional advice on how the credit contracts and consumer finance laws in New Zealand apply.

This version of the Code was issued in February 2021. The Code may be amended from time to time. Where changes are proposed to the Code (other than minor changes), parties that are substantially affected (or their representatives) will be consulted. There may also be developments in case law which further elaborate on the lender responsibility principles.

2 Obligations that apply before and throughout the agreement

Legal obligations

Lender responsibility principles

Every lender must, at all times, exercise the care, diligence, and skill of a responsible lender:

- *in any advertisement for providing credit or finance under an agreement or for providing credit-related insurance under a relevant insurance contract;*
- *before entering into an agreement to provide credit or finance or a relevant insurance contract and before taking a relevant guarantee; and*
- *in all subsequent dealings with a borrower in relation to an agreement or a relevant insurance contract or a guarantor in relation to a relevant guarantee (see section 9C(2)(a) of the Act).*

Every lender must, at all times, comply with all the lender responsibilities specified in sections 9C(3), (4) and (5) (see section 9C(2)(b) of the Act).

Commentary

Lender responsibility principles (and their associated lender responsibilities) are the core provisions of the Part 1A of the Act.

To comply with these principles, a lender must comply with all of the specific lender responsibilities, including requirements in the Regulations. The Code provides further guidance and elaboration on how a lender could meet those responsibilities and requirements. If the lender breaches any of the lender responsibilities, it is likely that they will also have breached the lender responsibility principle to act with care, diligence, and skill.

The principle that lenders must at all times exercise care, diligence, and skill is a standalone responsibility which, depending on the circumstances of lending, is likely to require a lender to adopt practices additional to those prescribed as lender responsibilities.

Lenders will need to identify any changes to their lending practices that are necessary to comply with the lender responsibility principles, including changes prescribed in the Regulations. Depending on the nature, size and complexity of the lender's business, these practices may be referred to, or codified in, formal policies and procedures that govern aspects of the lender's

operations. These policies and procedures may need to be revised, and staff and agents acting on the lender's behalf will need to be adequately trained.

Where relevant, this Code sign-posts specific legal obligations that are likely to be particularly relevant at various points during the life cycle of a credit agreement, although it does not provide an exhaustive list. For instance, see Chapter 3 in relation to processes for compliance with the Fair Trading Act 1986 and Chapter 13 in relation to parts of the repossession obligations under the Act.

The Code does not offer guidance on how lenders can comply with all legal obligations. Compliance with the guidance in the Code is not evidence that lenders will be complying with any legal obligations other than the lender responsibility principles set out in section 9C of the Act.

The Fair Trading Act 1986 imposes obligations independently of this Code. Case law under the Fair Trading Act may be useful in ascertaining whether a lender has complied with the Act and the provisions of the Code relating to advertising that is, or is likely to be misleading, deceptive or confusing to borrowers. Neither the Act nor Code limits the application of the Fair Trading Act.

The Human Rights Act 1993 prohibits discrimination on a number of grounds including sex, marital status, colour, race, family status, disability, age and employment status. Lenders must not refuse credit, or make it more difficult to obtain, on any of the prohibited grounds. What is required in each case is an individualised assessment of all of the borrower's circumstances to assess how the principles apply to that particular borrower.

The guidance in this Code is not intended to require lenders to provide financial advice under the Financial Markets Conduct Act 2013 in order to comply with that guidance. Lenders must comply with the Financial Markets Conduct Act when regulated financial advice is given. Clause 10 of Schedule 5 provides an exception for certain financial advice given in order to comply with lender responsibilities under the Credit Contracts and Consumer Finance Act, or as a reasonably incidental consequence of doing so. Lenders need to be familiar with the requirements of the Financial Markets Conduct Act and understand when financial advice is given and the restrictions on who may provide financial advice.

Guidance

Compliance policies, procedures and training

2.1. Lenders should develop and implement the policies, procedures and training that are necessary to ensure ongoing compliance with the lender responsibility principles.

Ensuring compliance

2.2. A lender should take reasonable steps to require and monitor compliance with its policies and procedures, and the lender responsibility principles. This may include lenders:

a. requiring staff and agents acting on the lender's behalf to comply with the policies and procedures relevant to their role;

b. being satisfied that staff and agents acting on the lender's behalf understand what they should do to comply with the relevant policies, processes and practices, and the lender responsibility principles, before those staff and agents come into contact with borrowers;

c. monitoring compliance with the relevant policies and procedures and lender responsibility principles by staff and agents acting on the lender's behalf, and addressing any breaches of those measures; and

d. confirming with agents acting on the lender's behalf that they have appropriate practices in place to ensure that the agents and their staff understand and will comply with the lender's relevant policies and procedures and the lender responsibility principles. A lender could choose to develop policies or training specifically for agents to implement. For instance, a finance company could develop policies for point-of-sale retailers to implement.

Reviewing policies, procedures and training

2.3. A lender should also monitor and review policies, procedures, and training so they continue to deliver compliance with the lender responsibility principles and the lender's legal obligations. This should include reviewing, at regular intervals, complaints that have been through the lender's internal complaints process and the lender's dispute resolution scheme to assess whether they indicate problems that should be addressed.

Record-keeping

Commentary

Under section 9CA of the Act, a lender must keep specific records about the inquiries made by the lender under section 9C (including the results of those inquiries) (see Chapters 4, 5 and 6).

This section provides guidance on records that lenders should keep in respect of other lender responsibilities.

2.4. A lender should make and keep records that show how the lender complies with lender responsibility principles and the Guidance in the Code. For records other than those required to meet section 9CA of the Act, the records could, for instance, be in the form of:

a. the policies and procedures referred to above, and records of the steps the lender has taken to ensure compliance with those policies, such as training, monitoring and enforcement; and

b. records of actions taken by the lender in specific transactions.

2.5. The records may also be in some other form. Regardless of the approach taken, the records should contain sufficient detail to show how a lender complies with lender responsibility principles and the Guidance in the Code, including the matters that are left up to individual discretion.

Commentary

The above guidance reflects that to be able to demonstrate and evidence compliance with the lender responsibility principles and the Code, lenders are likely to need to document and record relevant lending practices.

*However, the fact that a lender complies with the record keeping Guidance set out at paragraph **2.4** above above does not mean that a Court or dispute resolution scheme will accept those records as sufficient proof of the actions a lender took in any individual transaction.*

Agents and other lenders

Lenders may meet the lender responsibility principles through agents or other persons, but the lender remains responsible for ensuring that these obligations are met. Agents of a lender can include lawyers or conveyancers, third party debt collection or repossession businesses, or retailers or motor vehicle dealers that facilitate access to credit at the point of sale. Lenders are responsible for the conduct of their agents and other persons acting under their direction or with their agreement.

In some circumstances, dealers or retailers may be a lender, such as when they enter into a consumer credit contract with a customer and then assign their rights under the agreement to a finance company. A person who has the rights of a creditor transferred to them (by assignment or operation of law) may also be a lender. All of those businesses or persons who are lenders will be subject to the lender responsibility principles.

*Lenders (including any dealers, retailers, debt collectors, repossession businesses or brokers that are lenders) may contract another person (such as the actual party providing the credit) to provide services or take action in order to meet the lender responsibility principles. For instance, for a retailer, the policies referred to at paragraph **2.1** may be policies provided by the finance company for the retailer to apply, under the contract between the finance company and the retailer.*

Any such contractual arrangement does not affect the obligations or liabilities of those lenders under the Act.

Contacting borrowers and guarantors

2.6. When contacting a borrower or guarantor by any means, a lender should:

a. take steps to verify they are dealing with the borrower (or guarantor), a person who is authorised to act on the borrower's (or guarantor's) behalf, or a contact provided by the borrower (or guarantor);

b. having established that they are dealing with one of the persons in paragraph **2.6.a**, identify themselves, the name of the lender, and the purpose of the contact;

c. comply with their obligations to not disclose information about the borrower and guarantor to third parties under the Privacy Act 2020, and in addition, avoid indirectly revealing the borrower or guarantor's personal information to others to the extent practicable (such as by leaving messages with a workmate that reveal that the inquirer is a lender); and

d. if authorised by the borrower (or guarantor), co-operate with the borrower's or guarantor's advisors, including, where possible, by giving those advisors the information the advisor needs to advise a borrower or guarantor.

2.7. If the borrower or guarantor indicates a preferred channel of communication, then the lender should make reasonable efforts to contact the borrower or guarantor using that channel unless it is impractical to do so.

2.8. A lender should contact a borrower or guarantor at reasonable hours (ie between 8am and 9pm), taking into account all the circumstances and the borrower's reasonable wishes, except in exceptional circumstances, or where the borrower has specifically asked to be contacted at another reasonable time.

Working with borrower and guarantor representatives

2.9. This part of the Code provides guidance for lenders when working with borrower representatives. A representative may be a person acting in their professional capacity, such as a **financial mentor**, lawyer or advocate, or acting in their personal capacity as a family or whānau member or friend.

2.10. Where a borrower or guarantor has requested that the lender work directly with their representative, a lender should do so in good faith. This includes working constructively and collaboratively with the representative. In the case of repayment difficulties, this also includes attempting to reach a mutually agreeable solution for both the borrower or guarantor and the lender.

2.11. A lender may refuse to work with a representative if the lender reasonably believes that the representative is not acting in the interests of the borrower, or where the lender has reasonable grounds, for example, when the representative has acted abusively towards the lender's staff. Where a lender refuses to work with a representative, the lender should provide the borrower with the contact details for a service where the borrower could seek new representation.

2.12. Before a lender works with a representative, the lender should require a privacy waiver or other authorisation that gives the representative the authority to receive information and/or act on the borrower's behalf.

2.13. Lenders may refuse a waiver where it does not meet the lender's standards (eg being time-bound and specific) or have requisite verification.

3 Advertising

Principle

Every lender must, at all times, exercise the care, diligence, and skill of a responsible lender in any advertisement for providing credit or finance under an agreement or for providing credit related insurance under a relevant insurance contract. (see section 9C(2)(a)(i) of the Act).

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see section 9C(2)(b) of the Act).

Lender responsibilities

A lender must, in relation to an agreement with a borrower, assist the borrower to reach an informed decision as to whether or not to enter into the agreement and to be reasonably aware of the full implications of entering into the agreement, including by ensuring that any advertising:

- *complies with the advertising standards set out in the regulations; and*
- *is not, or is not likely to be, misleading, deceptive, or confusing to borrowers (see section 9C(3)(b)(i) of the Act).*

A lender must, in relation to an agreement with a borrower, meet all the lender's legal obligations to the borrower, including under this Act, the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Financial Service Providers (Registration and Dispute Resolution) Act 2008, and the Financial Markets Conduct Act 2013 (see section 9C(3)(f) of the Act).

Regulations – minimum advertising standards

As part of complying with the lender responsibility in section 9C(3)(b) of the Act, lenders must meet the minimum advertising standards prescribed in regulations 4AAAQ–4AAAU. In summary, these regulations require that lenders advertising consumer credit must ensure their advertisements comply with the following:

- *if the advertisement states a payment amount, it must also display the total amount of payments if ascertainable, or the annual interest rate or rates for the advertised products and (for credit sales) information about lump sum payments;*
- *if the advertisement includes an interest rate, it must also state the annual interest rate or range of rates that may apply as well as any mandatory credit fees;*
- *If the advertisement includes an interest rate, it must state if an annual interest rate is fixed for the term, or any part of the term or if the interest rate is not fixed for that term;*
- *if a lender advertises interest free credit contracts, the advertisement must include any mandatory credit fees; and*
- *the above matters must be stated in plain language in a clear, concise and intelligible manner.*

Lenders are prohibited from certain advertising practices such as making certain representations in their advertisements that lenders will not inquire or take into account the borrower's circumstances (for example, "no credit checks", "bankrupt - OK"). If an advertisement includes a reference to a speed of approval in minutes or hours, it must also contain a prominent reference to responsible lending criteria and inquiries.

Guidance

"Confusing"

3.1. A lender should comply with the following general practices to ensure that advertising is not confusing:

a. set out advertisements in a way that allows them to be readily understood by the intended audience;

b. make sure key information is legible or audible, or both, and take care to disclose information in a level of detail that is commensurate with its importance; and

c. use technical language and statistics only where they are relevant and in a way that can be readily understood by consumers without specialist knowledge.

Commentary

Content of advertising – "misleading" and "deceptive"

Existing provisions under the Fair Trading Act 1986 prohibits:

- *misleading and deceptive conduct; and*
- *unsubstantiated representations.*

To comply with the Fair Trading Act 1986 and to ensure that advertising is not and is not likely to be misleading or deceptive, a lender should refer to the Commerce Commission's Fair Trading Act fact sheets and other guidance for general practices. Lenders can also refer to relevant industry codes including the Advertising Standards Authority's Code for Financial Advertising. In particular, lenders should in relation to advertising:

- *have reasonable grounds for making any claim (other than puffery (ie obvious exaggeration);*
- *only use fine print to elaborate on the main selling message, not to contradict it;*
- *disclose any conditions that are unusual, inconsistent with, or modify, in an unexpected manner, the main message of the advertisement; and*
- *only make comparisons between sufficiently like products.*

Note that the test under the lender responsibility differs from that set out in the Fair Trading Act 1986 in that the lender responsibility also includes ensuring that advertising is not confusing (see section 9C(3)(b)(i) of the Act).

"Prominent manner"

3.2. A lender should comply with the following guidance to ensure they meet the requirements prescribed in regulations 4AAA-4AAB and 4AAAQ-4AAAT which requires particular information to be stated in a prominent manner.

3.3. Prominence is context-specific and will depend on the advertising medium used. A lender should ensure that the required information is likely to come to the attention of, and be understood by, the average audience that the communication is directed too. Factors that may affect prominence include whether the information is:

a. legible or audible or both;

b. brought to the attention of a reasonable person in a clear manner that is unlikely to be overlooked, reflecting its importance;

c. of a size, colour and position that is appropriate for that advertisement or medium; and

d. not hidden or obscured.

High-cost credit agreements

3.4. Under regulation 4AAB, advertisements must include a prominent risk warning that high-cost credit should not be used for long-term borrowing. When using a celebrity to advertise high-cost credit, a lender should include the risk warning required by regulation 4AAB as part of the message conveyed by the celebrity.

Online advertising

3.5. Where the Regulations require that an advertisement must state particular information, that information should be presented in the advertisement itself. Lenders should not rely on providing the required information on a separate website that the advertisement links or directs the consumer to.

Processes

3.6. To comply with the above principle, lender responsibilities and regulations, a lender should have policies or procedures in place to ensure that advertising complies with their legal obligations and is not misleading, deceptive, or confusing. Such policies or procedures may also include compliance with relevant industry codes.

3.7. A lender's policies or procedures should aim to ensure that:

a. relevant staff and agents acting on the lender's behalf are required to comply with the Act, Regulations and Fair Trading Act 1986 and follow the Guidance in this Code and other relevant guidance from regulatory bodies and the lender is satisfied their staff or agents understand how to comply;

b. relevant sales staff and agents acting on the lender's behalf are adequately informed of current promotions and representations about credit products;

c. all advertising material is subject to an approval process;

d. advertising is checked by a staff member with necessary product knowledge to ensure that the description is accurate; and

e. the need for legal advice is considered when advertisements are being developed.

4 Inquiries into and assessment of borrowers' requirements and objectives

Legal obligations

Lender responsibility

A lender must, in relation to an agreement with a borrower, make reasonable inquiries, before entering into the agreement, and before making a material change referred to in section 9C(8), so as to be satisfied that it is likely that the credit or finance provided under the agreement will meet the borrower's requirements and objectives (see section 9C(3)(a)(i) of the Act).

Regulations - minimum requirements for inquiries and assessment

As part of complying with the lender responsibility in section 9C(3)(a)(i) of the Act, lenders must comply with the minimum requirements for inquiries and assessment prescribed in regulation 4AA (see section 9C(5A)).

Commentary

The effect of the Act and the Regulations is that lenders must:

- *determine particular aspects of the borrower's requirements and objectives prescribed by regulations 4AA, such as the amount of credit or finance that the borrower seeks, and the purposes of the credit or finance*
- *make other reasonable inquiries required by section 9C(3)(a)(i) (the inquiries mandated by the regulations are non-exhaustive)*
- *make the assessment required in section 9C(3)(a)(i), taking into account the results of complying with the relevant regulation and any other reasonable inquiries required by section 9C(3)(a)(i).*

Record keeping

The lender must keep records about the inquiries made by the lender under section 9C (including the results of those inquiries). Those records must demonstrate how the lender has satisfied itself as to the matters in section 9C(3)(a), (4)(a), and (5)(a) (see section 9CA of the Act).

Guidance

There may be a range of products that will meet the borrower's requirements and objectives

4.1. To meet this lender responsibility and comply with regulation 4AA, the lender's inquiries and assessment may take into account that there may be a range of products that meet the borrower's requirements and objectives. A credit agreement may have a number of different features, and there may be trade-offs between those features. The lender does not need to assess whether the proposed agreement best meets the borrower's requirements and objectives, but should be satisfied that it is likely that the product is within the range of products that will meet the borrower's requirements and objectives.

General scope and methods of inquiry

4.2. A lender should be satisfied that the scope and methods of inquiry are reasonable and will provide a sufficient basis for the lender to:

a. determine the matters specified in regulation 4AA; and

b. be satisfied that it is likely that the credit agreement will meet the borrower's requirements and objectives.

Scope of inquiries

4.3. The inquiries specified in regulation 4AA are non-exhaustive. Depending on the circumstances, it may be reasonable for the lender to make inquiries into other matters to be satisfied that it is likely that the credit will meet the borrower's requirements and objectives. For example, the lender may ask the borrower about any product-specific features or benefits they are seeking, such as the ability to earn rewards on a credit card.

Method of inquiries

4.4. In making reasonable inquiries, a lender may obtain information:

a. directly from the borrower;

b. that it holds about the borrower, provided the lender is satisfied that the information is current; or

c. about the borrower from reliable third parties.

Example

Lender L wishes to provide personal loans online. Lender L is required to inquire into the term for which credit is sought. One way that Lender L could inquire into the term for which credit is sought is by including a question in its application form asking the term of the loan that the borrower is seeking, along with multiple-choice options.

4.5. A lender may ask for or receive information from financial advisers or other intermediaries acting on behalf of the borrower. Where that is the case:

a. A lender may treat the information provided to it by a financial adviser or intermediary as though it had been provided to the lender by the borrower.

b. A lender should require financial advisers and intermediaries to implement and maintain appropriate policies and procedures to collect information from the borrower and make any necessary inquiries, and to train their staff on the Code and the lender responsibility principles.

c. The lender, not financial advisers or other intermediaries, remains responsible for ensuring the lender complies with its responsible lending obligations.

Determining aspects of the borrower's requirements and objectives may be an iterative process

Commentary

Regulations 4AA(2) (and also 4AB(2)), require the lender to make reasonable inquiries to enable it to determine various specific aspects of the borrower's requirements and objectives (eg the amount of credit the borrower seeks). Once the lender has determined these requirements and objectives, regulations 4AA(3) (and also 4AB(3)), require the borrower to compare them against the agreement (or relevant insurance contract) in order to assess whether the agreement or contract meets those requirements and objectives.

The use of 'determine' in this context means that the lender needs to make inquiries in order to come to a view about the aspects of the borrower's requirements and objectives specified. There is flexibility as to how the lender does so. Given that borrowers will sometimes not come equipped with a detailed and well-articulated understanding of their requirements and objectives (eg a view about the term of the loan that would suit them, or whether they want to finance a repayment waiver), some iteration between the lender and the borrower may be required.

4.6. Lenders may make a series of iterative inquiries in order to determine the borrower's requirements and objectives. For example, a lender may determine the borrower's requirements and objectives through the following steps:

a. asking the borrower about their requirements and objectives;

b. discussing available products with the borrower;

c. working with the borrower to refine their requirements and objectives; and

d. finally confirming that the product is likely to meet the borrower's requirements and objectives (as refined with the borrower and understood by the lender).

Conflicts between the borrower's requirements and objectives

4.7. Borrowers may specify requirements and objectives that may appear in conflict with each other. For example, a borrower entering into a home loan may specify that they want certainty as to their payments for a period (which may require a fixed interest rate loan), but also flexibility to pay in lump-sum amounts (which would require a floating interest rate loan). Where there is an apparent conflict between the requirements and objectives specified by the borrower, a lender should make inquiries to understand which of the conflicting requirements and objectives are the borrower's highest priority (for example, by asking the borrower to choose) and take this as the borrower's requirement or objective.

Extent of inquiries

4.8. The scope and method of inquiries that are reasonable for a lender to make to meet this lender responsibility may differ depending on the circumstances. A lender should make more extensive inquiries where there is a greater risk that the agreement will not meet the borrower's requirements and objectives. This includes where:

a. the agreement is complex or uncommon, such as a buy-back transaction or reverse equity mortgage;

b. the agreement is a high-cost credit agreement; or

c. the borrower is a **vulnerable borrower**.

4.9. A lender may undertake less extensive inquiries (subject to complying with the regulations) where there is a low risk that the agreement will not meet the borrower's requirements and objectives. This includes where:

a. the agreement is a simple credit agreement that is widely understood, such as an overdraft; or

b. the borrower is a well-informed user of credit.

4.10. Lenders should also undertake further inquiries, if all of the following apply:

a. the potential further inquiries are reasonably practicable;

b. one or more of the following apply to information the lender has received about the borrower's requirements and objectives:

i information is inconsistent or contradicts other information provided by the borrower or known to the lender;

ii the information is unrealistic; or

iii the lender has other reasonable grounds to suspect that the information is not reliable; and

c. the information is material to the assessment.

Guidance on specific situations

Buy-back transactions

4.11. For buy-back transactions, a lender's inquiries should include (as part of the inquiry into product features or flexibility) whether the borrower wishes to transfer ownership of their home to the lender.

Material changes

Commentary

Regulations 4AA(2)(b) provides that if a material change is being made to an agreement (as defined in section 9C(8)), the lender must determine certain aspects of borrower's requirements and objectives to the extent that they are relevant to the material change.

4.12. When a material change is proposed, a lender should determine the aspects of the borrower's requirements and objectives listed in regulation 4AA(2)(a)–(i) if these aspects will change from the original agreement. For example, in respect of a loan 'top-up', the lender may make inquiries to determine the amount of the top-up that the borrower seeks, the purpose of the top-up, and (if the term of the loan is proposed to change) the new loan term that the borrower requires. Other requirements and objectives could be relevant, for example if the change will finance additional fees or charges. Lenders are not required to reassess whether the original agreement meets the borrower's requirements and objectives.

Fees or charges to be financed under the agreement

4.13. Regulation 4AA(2)(e) provides that if the agreement will provide for any fees or charges to be financed under the agreement, but those fees or charges could be paid for separately (for example, premiums for insurance related to the credit or payment for extended warranties or repayment waivers to be financed), a lender must inquire into whether the borrower wants that outcome and accepts the additional costs of the fees or charges being financed. Lenders should follow the guidance under paragraph **7.2.d** and ask the borrower whether they want that outcome and accept the additional costs of the fees or charges being financed. Lenders are not required to calculate and disclose the dollar cost of capitalising fees or charges.

Record keeping

4.14. The lender should keep a record of:

a. any specific inquiries made to meet regulations 4AA and 4AB and the results of those inquiries;

b. any other inquiries made to meet section 9C(3)(a)(i) and the results of those inquiries;

4.15. In recording the borrower's purpose in seeking the credit, the lender may capture a brief summary.

4.16. In recording how the lender satisfied itself as to the matters in section 9C(3)(a)(i), the lender may record a brief summary of the lender's decision.

5 Inquiries into and assessment of substantial hardship (borrowers)

Legal obligations

Lender responsibility

A lender must, in relation to an agreement with a borrower, make reasonable inquiries, before entering into the agreement, and before making a material change referred to in subsection (8), so as to be satisfied that it is likely that the borrower will make the payments under the agreement without suffering substantial hardship (see section 9C(3)(a)(ii) of the Act).

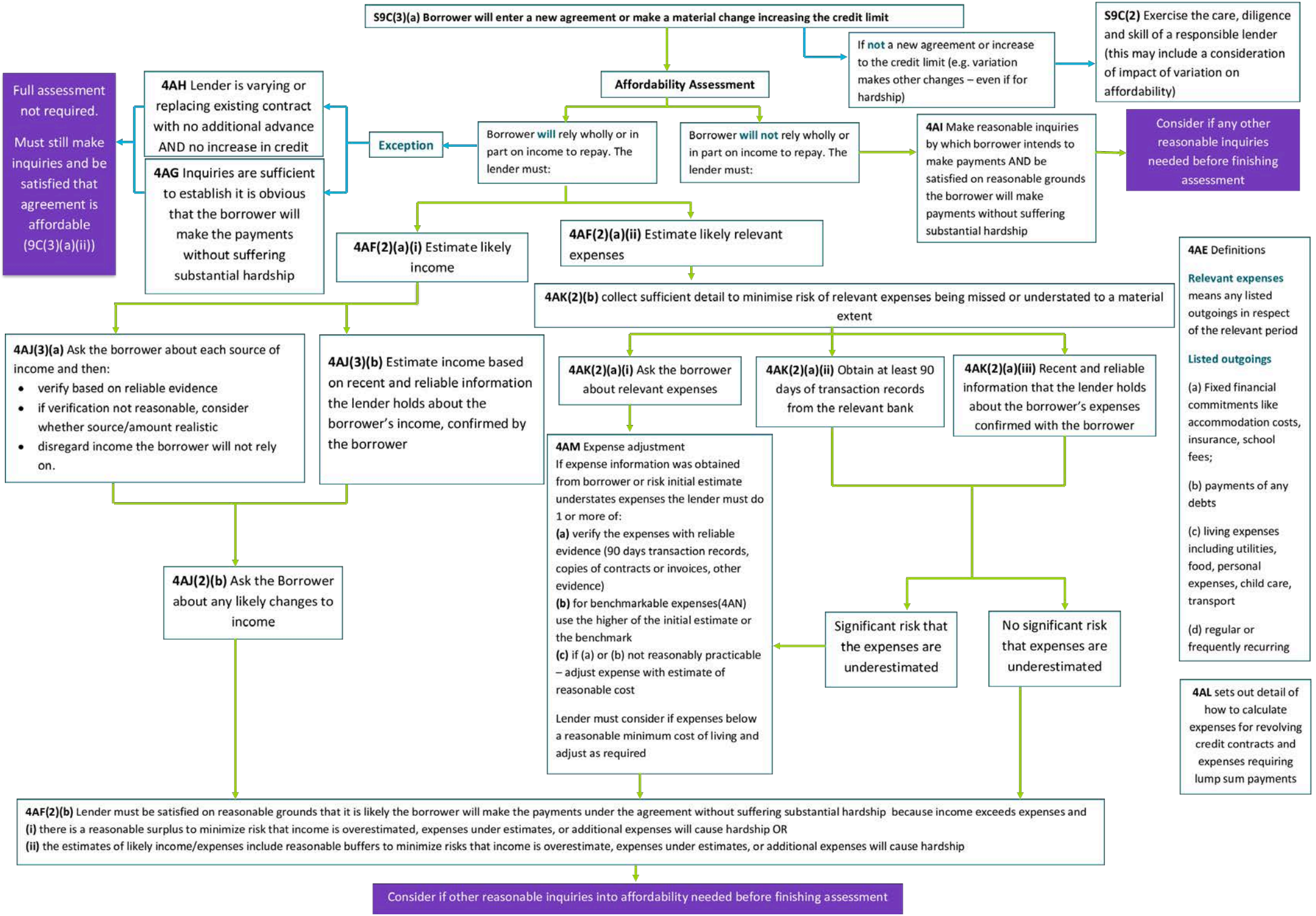
Regulations - minimum requirements for inquiries and assessment

As part of complying with the lender responsibility in section 9C(3)(a)(ii) of the Act, lenders must comply with the minimum requirements for inquiries and assessment prescribed in regulations 4AE–4AO (see section 9C(5A))..

Commentary

Regulation 4AD provides an outline of regulations 4AE–4AO, which set out requirements for making reasonable inquiries about the likelihood that the borrower will make the payments under the agreement without suffering substantial hardship.

Below is a diagram of this process. Note that this is illustrative only and does not represent every step or legal test provided by regulations.


S9C(3)(a) Borrower will enter a new agreement or make a material change increasing the credit limit
If not a new agreement or increase to the credit limit (e.g. variation makes other changes – even if for hardship)
S9C(2) Exercise the care, diligence and skill of a responsible lender (this may include a consideration of impact of variation on affordability)
Affordability Assessment
Full assessment not required.
Must still make inquiries and be satisfied that agreement is affordable (9C(3)(a)(ii))
4AH Lender is varying or replacing existing contract with no additional advance AND no increase in credit
4AG Inquiries are sufficient to establish it is obvious that the borrower will make the payments without suffering substantial hardship
Exception
Borrower will rely wholly or in part on income to repay. The lender must:
Borrower will not rely wholly or in part on income to repay. The lender must:
4AI Make reasonable inquiries by which borrower intends to make payments AND be satisfied on reasonable grounds the borrower will make payments without suffering substantial hardship
Consider if any other reasonable inquiries needed before finishing assessment
4AF(2)(a)(i) Estimate likely income
4AF(2)(a)(ii) Estimate likely relevant expenses
4AE Definitions
Relevant expenses means any listed outgoings in respect of the relevant period
Listed outgoings
(a) Fixed financial commitments like accommodation costs, insurance, school fees;
(b) payments of any debts
(c) living expenses including utilities, food, personal expenses, child care, transport
(d) regular or frequently recurring
4AK(2)(b) collect sufficient detail to minimise risk of relevant expenses being missed or understated to a material extent
4AJ(3)(a) Ask the borrower about each source of income and then:
• verify based on reliable evidence
• if verification not reasonable, consider whether source/amount realistic
• disregard income the borrower will not rely on.
4AJ(3)(b) Estimate income based on recent and reliable information the lender holds about the borrower's income, confirmed by the borrower
4AK(2)(a)(i) Ask the borrower about relevant expenses
4AK(2)(a)(ii) Obtain at least 90 days of transaction records from the relevant bank
4AK(2)(a)(iii) Recent and reliable information that the lender holds about the borrower's expenses confirmed with the borrower
4AM Expense adjustment
If expense information was obtained from borrower or risk initial estimate understates expenses the lender must do 1 or more of:
(a) verify the expenses with reliable evidence (90 days transaction records, copies of contracts or invoices, other evidence)
(b) for benchmarkable expenses(4AN) use the higher of the initial estimate or the benchmark
(c) if (a) or (b) not reasonably practicable – adjust expense with estimate of reasonable cost
Lender must consider if expenses below a reasonable minimum cost of living and adjust as required
Significant risk that the expenses are underestimated
No significant risk that expenses are underestimated
4AJ(2)(b) Ask the Borrower about any likely changes to income
4AL sets out detail of how to calculate expenses for revolving credit contracts and expenses requiring lump sum payments
4AF(2)(b) Lender must be satisfied on reasonable grounds that it is likely the borrower will make the payments under the agreement without suffering substantial hardship because income exceeds expenses and
(i) there is a reasonable surplus to minimize risk that income is overestimated, expenses under estimates, or additional expenses will cause hardship OR
(ii) the estimates of likely income/expenses include reasonable buffers to minimize risks that income is overestimate, expenses under estimates, or additional expenses will cause hardship
Consider if other reasonable inquiries into affordability needed before finishing assessment

Record keeping

The lender must keep records about the inquiries made by the lender under section 9C (including the results of those inquiries). Those records must demonstrate how the lender has satisfied itself as to the matters in section 9C(3)(a), (4)(a), and (5)(a) (see section 9CA of the Act).

Guidance

Inquiries

5.1. A lender should be satisfied that the scope and methods of inquiry are reasonable and will provide satisfaction that it is likely that the borrower will make payments under the agreement without suffering substantial hardship.

Commentary

Regulations 4AF and 4AJ–4AO require lenders to make particular inquiries into the borrower's income and expenses.

5.2. Depending on the circumstances, it may be reasonable for the lender to make inquiries into matters in addition to those specified in the regulations to be satisfied that it is likely that the borrower will make payments without suffering substantial hardship (for example, where conflicting information is received in response to prescribed inquiries).

Credit reports

5.3. The regulations require a lender to obtain a credit report, in certain circumstances. A credit report must cover credit information that is relevant to identifying the borrower's financial commitments, however it need not contain positive credit information.

Verification – affordability

5.4. Subject to requirements in the regulations to verify particular information about income and expenses, lenders may rely on the information provided to them by the borrower unless the lender has reasonable grounds to believe that the information is not reliable. Where the lender has reasonable grounds to believe the information is not reliable, the lender should take reasonable steps to verify the information provided by the borrower.

5.5. A lender may ask for or receive information from financial advisers or other intermediaries acting on behalf of the borrower. Where that is the case:

5.6. A lender may rely on information provided to it by a financial adviser or intermediary as though it had been provided to it by the borrower.

5.7. A lender should require financial advisers and intermediaries to implement and maintain appropriate policies and procedures to collect information from the borrower and perform any necessary verification, and to train their staff on the Code and the lender responsibility principles. The lender, not financial advisers or other intermediaries, remains responsible for ensuring the lender complies with its responsible lending obligations.

Surpluses, buffers or adjustments

Commentary

This part of the Code provides guidance on how lenders should assess the adequacy of surpluses, buffers or adjustments provided in accordance with regulation 4AF(2)(b).

Regulation 4AF(2)(b) requires that the surplus, buffers or adjustments adequately address the risks that likely income may be overestimated, likely relevant expenses may be underestimated or the borrower may need to incur other expenses that cause them to suffer substantial hardship.

5.8. Lenders should seek to have a consistent set of surpluses, buffers or adjustments across credit products the lender offers to adequately address the risk that income is overstated or relevant expenses understated.

5.9. However, lenders may apply different surplus, buffers or adjustments across credit products to reflect the different risks of those products to affordability. For example, a lender may apply a different uncommitted monthly income requirement for a lower risk loan compared to a higher risk loan.

5.10. Whilst the amount of a surplus, buffer or adjustment is not prescribed, the amount must adequately address the risk. The determination of what is adequate will depend on the nature of the credit provided and the risk that income is overstated or relevant expenses understated. For example, a buffer or adjustment may depend on the size, term or revolving nature of the credit product. A surplus, buffer or adjustment may be a percentage amount or an absolute amount.

5.11. Where the interest rate under an agreement can vary, a lender should take account of the risk that interest rates may rise. Lenders should consider applying buffers to the loan's interest rate, to mitigate the risk that potential increases in the interest rate adversely impact on a borrower's capacity to repay. For example, lenders could:

a. use a single, sensitised interest rate (which includes a buffer) regardless of the loan's actual interest rate or use the loan's actual interest rate plus a margin (which functions as a buffer);

b. apply an interest rate floor, to ensure the interest rate buffer applied reflects higher likely average interest rates over the longer term when operating in a low interest rate environment.

5.12. For interest only loans, where the interest only period is shorter than the term of the loan, lenders should consider assessing the borrower's ability to repay the loan on a principal and interest basis, excluding the interest-only period. For example, if the loan's term is 5 years, and the interest-only period will be 1 year, the lender should assess affordability over the 4 years of principal and interest.

5.13. Lenders should consider adjusting volatile, irregular, or variable income, for example discounting seasonal income, bonuses, overtime, rental income, or investment returns.

Payments where there is an option to extend a loan term

5.14. Where the borrower asks for a loan term that is shorter than the maximum available for that credit product, lenders may assess the borrower's ability to repay the credit over a longer loan term, if all of the following apply:

a. the lender has told the borrower that the longer agreement term is available, but the borrower wants to keep a shorter term as more suitable for them;

b. the borrower has a right to extend the term of the loan up to the longer term at any time without fee, and the borrower is aware of this ability;

c. the borrower is aware that repaying over a shorter term may require more financial commitment or a further reduction in expenses; and

d. the agreement is not a high-cost consumer credit contract.

Example

Borrower B is seeking a home loan of 25 years, but the maximum available for that product that the borrower can obtain is 30 years. The lender may assess the borrower's ability to repay the credit over 25 years, or over a longer period, up to 30 years.

Joint expenses

Commentary

This part of the Code provides guidance on how lenders should estimate a borrower's likely relevant expenses when a borrower shares expenses with others.

Some of the borrower's relevant expenses may be shared with other people (for example, a partner, spouse, or extended family).

5.15. Where the lending is joint between two or more borrowers, the lender should consider each borrower's individual relevant expenses, any relevant expenses the borrowers share together, and any relevant expenses each borrower shares with any other person.

5.16. Where the lending is to one borrower, the lender should consider that borrower's individual relevant expenses, and any relevant expenses that borrower shares with any other person.

5.17. When estimating the borrower's likely relevant expenses, lenders should consider whether it is appropriate to apportion shared expenses in the circumstances. If so, lenders should consider:

a. whether a known amount for that borrower's individual contribution to the shared expenses is reasonable and can be used (for example, a borrower who is in a flatting situation contributes $30 a week towards power); or

b. whether apportioning expenses based on the salary of the borrower and other parties is appropriate in the circumstances; or

c. whether to apply the whole amount of the expense.

Example

A couple, A and B, have a joint home loan and a joint bank account into which they each have their income paid. A applies to a lender, L, for a personal loan, with A as the sole debtor. In apportioning payments on the shared home loan, L decides it is appropriate to apportion according to A's share of A and B's joint income.

5.18. In considering how to apportion shared expenses, the lender should take into account any information provided by the borrower about how their expenses are apportioned between them and others.

5.19. Lenders should consider the approach they will take when apportioning shared expenses to reduce the risk that the expenses are underestimated. If relevant, the lender should also consider whether the apportionment itself is likely to change over the relevant period. For example:

a. if the partner of an individual borrower's income is known to be reducing during the period of the loan, and it is likely the proportion of expenses the borrower will need to meet will increase from 50% to 90%;

b. if a tenant with their name on the house lease shares rent and other expenses with flatmates who are not on the lease, the lender should consider whether there is a risk that the tenant will become liable for a greater share of those expenses.

Exception to general rule if it is obvious there will be no hardship

Commentary

Regulation 4AG provides an exception from regulation 4AF (full income and expense estimates) if the lender makes inquiries that are sufficient to establish that it is obvious in the circumstances of the particular case that the borrower will make the payments under the agreement without suffering substantial hardship, so as to make the inquiries required by regulation 4AF disproportionate.

This is intended to be a high test.

Example

Lender L makes inquiries that determine that Borrower B is a high net worth customer earning $350,000 a year with over $1m in net assets. Borrower B is seeking a credit card with a balance of $10,000 in order to obtain Airpoints on purchases. Lender L establishes that it is obvious that the borrower will make the payments under the agreement without substantial hardship.

Record keeping

Commentary

This part of the Code illustrates the kind of information that lenders should consider keeping to meet sections 9CA(1) and (2) of the CCCFA. These records are kept for 'successful' assessments in which a lender has entered into an agreement or agreed a material change with a borrower.

Lenders are required to ensure their records are fit for their intended purpose, including disclosure on demand to the Commission, dispute resolution service, the borrower, or guarantor.

However, the way information is presented by a lender under section 9CA(3) to (6) may depend on the way in which the lender collected and recorded information, verified that information where required, and made its assessments under section 9C(3)(a), (4)(a), and (5)(a).

5.20. Where the lender has followed the approach in regulation 4AF, the lender should keep a record of:

a. the borrower's likely income on a weekly, fortnightly, or monthly basis;

b. the reliable evidence for that likely income or, if verification was not reasonably practicable, a concise summary as to why the source and amount were realistic ;

c. a statement about any likely changes to the borrower's income disclosed by the borrower;

d. the borrower's likely relevant expenses on a weekly, fortnightly, or monthly basis;

e. a list of relevant expenses, or groups of relevant expenses (eg living expenses), and the initial estimates used by the lender for each;

f. where those likely relevant expenses were derived by using 90 days' of transaction records or other reliable evidence, copies of that information;

g. any information or documents obtained when making reasonable inquiries into whether financial commitments were omitted, like a credit report;

h. where those likely relevant expenses were verified by using 90 days' of transaction records or other reliable evidence, copies of that information;

i. where those likely relevant expenses were benchmarkable expenses and were compared against a benchmark, a list of the relevant expenses or groups of relevant expenses that were benchmarked and a brief description of the benchmark;

j. where any likely relevant expenses were adjusted by estimating a reasonable cost for the expense, a statement to that effect and a list of relevant expenses that were estimated;

k. where any living expenses were compared to a reasonable minimum cost of living for a person in similar circumstances to the borrower, a statement to that effect and a list of relevant expenses or groups of relevant expenses that were adjusted;

l. if a buffer or adjustment (in accordance with 4AF(2)(b)(ii)) was applied to income or a relevant expense, a statement to that effect;

m. a list of relevant expenses, or groups of relevant expenses (eg living expenses), and the final estimates of those expenses used by the lender; and

n. any other inquiries made under section 9C(3)(a)(ii).

5.21. In recording how the lender satisfied itself as to the matters in section 9C(3)(a)(ii) where the approach in regulation 4AF was followed, the lender may choose to capture a concise summary of the lender's decision or some other record of how the lender satisfied itself. This may include references to its policies or procedures and how they were applied. For example, the lender could keep a record summarising that:

a. the lender was satisfied based on inquiries made that the borrower's likely income of $(amount) exceeded their likely relevant expenses of $(amount); and

b. the lender was satisfied based on inquiries made that:

i there was a reasonable surplus to adequately address the risk that likely income may be overestimated, likely relevant expenses underestimated, or that the

borrower may need to incur other expenses that cause them to suffer substantial hardship;

ii the lender's estimates of likely income and likely relevant expenses included reasonable buffers or adjustments to adequately address the risk that likely income may be overestimated, likely relevant expenses underestimated or that the borrower may need to incur other expenses that cause them to suffer substantial hardship.

5.22. Where the lender has used the exception in regulation 4AG, the lender should keep a record of:

a. the specific inquiries that were made to establish that it is obvious in the circumstances of the particular case that the borrower will make the payments under the agreement without suffering substantial hardship;

b. the results of those inquiries; and

c. the lenders' reasons why it is obvious in the circumstances of the particular case that the borrower will make the payments under the agreement without suffering substantial hardship.

5.23. Where the lender has followed the approach in regulation 4AI, the lender should keep a record of any specific inquiries made into the means by which the borrower intends to make the payments under the agreement and the results of those inquiries, including any documents or information relied on.

5.24. In recording how the lender satisfied itself as to the matters in section 9C(3)(a)(ii) where the approach in regulation 4AI was followed, the lender may choose to capture a concise summary of the reasons for the lender's decision. For example:

a. the lender was satisfied based on inquiries made that the borrower has listed their existing property for sale and the likely sale proceeds will be sufficient to repay the lending by the end of the loan term;

b. the lender was satisfied based on inquiries made that the borrower has funds on term deposit that will be sufficient to repay the lending by the end of the loan term.

High-cost consumer credit contracts

Commentary

This part of the Code provides guidance for lenders under high-cost credit agreements when assessing whether the borrower has existing high cost loans or has had high cost loans within the preceding 90 days.

Under section 45F and section 45G of the Act, lenders are prohibited from entering into high-

cost credit contracts with certain borrowers. Regulation 4AO applies a rebuttable presumption of substantial hardship if the lender has reasonable evidence that the borrower has defaulted in payment on a consumer credit contract in the preceding 90 days.

In the case of a high-cost consumer credit contract, a lender may not enter into a high cost credit contract with a debtor who:

- *has unpaid balance on any high-cost consumer credit contract with another creditor (s 45F(1)(a));*
- *has had, at an any time within the preceding 15 days, an unpaid balance on any high-cost consumer credit contract with another creditor (s 45F(1)(b));*
- *has entered into 2 or more high-cost consumer credit contracts at any time within the preceding 90 days (s 45G(1)); or*
- *has been in default under one or more loans in the preceding 90 days. (see section 45F, section 45G and regulation 4AI).*

Lender's inquiries – high cost lending

5.25. In making reasonable inquiries, a lender should obtain information through all of the following:

a. explaining to the borrower what a high-cost loan is;

b. asking the borrower if they have entered into any high-cost loans in the past 90 days with another lender, and if so, determining the dates on which those contracts were entered;

c. asking the borrower if they currently have any high-cost consumer credit contracts with another lender, or have repaid any high-cost consumer credit contracts with another lender over the past 15 days;

d. collecting information from the borrower that would enable the lender to determine whether the borrower's recent or existing loans are high cost loans – eg copies of the contracts, or if these are unavailable, standard contracts or loan disclosures that may give a range of the interest rates of the relevant loans;

e. verifying the information provided by the borrower and checking for any contracts that may have been omitted through:

i asking the borrower about any other names they use, and checking their own loan record systems and those of any associated lender;

ii bank statements (looking for deposits from other lenders, or outgoings to other lenders);

iii reviewing credit reports for enquiries or defaults;

iv asking the borrower for evidence that a high-cost consumer credit contract with another lender has been repaid; and

v going back to the borrower to clarify any discrepancies.

Pawnbroking

Commentary

Pawnbroking transactions are subject to and must comply with both the Act and the Secondhand Dealers and Pawnbrokers Act 2004 (SDPA).

For a pawnbroking transaction, a borrower can make payments under the agreement in the form of either:

- *monetary payment of the redemption price (as defined under the SDPA); or*
- *the sale of the pledged item by the lender on behalf of the borrower.*

5.26. In assessing whether it is likely the borrower can make payments without substantial hardship, the lender under a pawnbroking transaction may inquire into and assess:

a. whether the borrower can pay the redemption price through monetary payments without substantial hardship by making inquiries in accordance with regulations 4AF and 4AJ–4AO; or

b. whether the borrower can make the payments through a sale of the pledged item without substantial hardship, in accordance with regulation 4AI. Sale of the pledged item may cause substantial hardship to the borrower if the item is essential to the borrower.

5.27. If the lender makes an assessment under paragraph **5.24.b**, the lender should be satisfied that an item is not essential, taking into account the borrower's circumstances.

Commentary

Regulations 4AJ(3)(a)(i) and 4AM(2)(a)(i) require verification (or allow for verification) of some information provided by the borrower about their income and expenses.

Borrowers may provide other information for the purposes of the lender's inquiries into whether the agreement is affordable.

6 Inquiries into and assessment of substantial hardship (guarantors)

Principle

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see section 9C(2)(b) of the Act).

Lender responsibility

A lender must, in relation to a relevant guarantee that is taken by a lender, make reasonable inquiries, before the guarantee is given, so as to be satisfied that it is likely that the guarantor will be able to comply with the guarantee without suffering substantial hardship (see section 9C(4)(a) of the Act).

Guidance

General

6.1. To meet this lender responsibility, a lender should be satisfied that it is likely that the guarantor will be able comply with the guarantee without undue difficulty, as well as:

a. meet necessities (such as accommodation, food, utilities, transport, required medical expenses);

b. meet other financial commitments (such as repayments on existing debts);

c. without having to realise security or assets, other than security or assets that:

i the guarantor is willing to dispose of, or realise the value of; and

ii disposing of the assets or realising their value would not cause the guarantor to suffer substantial hardship.

6.2. The assessment should take into account the extent of the guarantor's liability under the guarantee, for instance whether the guarantor may be called upon to make full payment of all outstanding amounts owed by the borrower, or whether the guarantor's liability or the lender's right of recourse is limited, or where the guarantee is taken in conjunction with a security interest.

6.3. Where the interest rate under the agreement can vary, a lender should take account of the risk that the interest rate may rise.

Inquiries

6.4. To meet this lender responsibility, a lender should make reasonable inquiries into how the guarantor will comply with the guarantee, or make any payments that could be required under the guarantee. Guarantors may rely on income to comply with the guarantee, or could rely on disposing of or realising the value of the guarantor's assets.

6.5. If the guarantor will rely, wholly or in part, on income to comply with the guarantee, a lender should also make reasonable inquiries into a guarantor's income, expenses and the likelihood of making payments.

6.6. A lender should be satisfied that the scope and methods of inquiry are reasonable and will provide a sufficient basis for the lender to assess whether it is likely that the guarantor will be able to comply with the guarantee without suffering substantial hardship.

Scope of inquiries

6.7. A lender's inquiries into the guarantor's income may include inquiries into:

a. the guarantor's current income level; and

b. the sources and stability of the guarantor's income, including likely changes.

6.8. A lender's inquiries into the guarantor's expenses may include inquiries into:

a. the guarantor's expenses to meet necessities (such as accommodation, food, utilities, transport, required medical expenses);

b. the guarantor's other financial commitments, including repayments on existing debts;

c. other regular expenditure that the guarantor intends to make (such as tithing, pay TV subscriptions); and

d. likely changes in the guarantor's expenditure.

6.9. A lender's inquiries into the guarantor's likelihood of making payment may include inquiries into:

a. the guarantor's credit history, which may be obtained through the results of a credit check; and

b. other information that the lender considers reliable to assess the likelihood of making payment.

6.10. Depending on the circumstances, it may be reasonable for the lender to make inquiries into other matters to be satisfied that it is likely that the guarantor will make payments without suffering substantial hardship.

Method of inquiries

6.11. In making the reasonable inquiries, a lender may obtain information:

a. directly from the guarantor (including any supporting documents);

b. that it holds about the guarantor (who may be an existing customer of the lender), if satisfied that the information is reliable and current;

c. about the guarantor from reliable third parties such as government departments, credit reporting agencies or valuers; or

d. which is generated based on statistical information relating to an appropriate class of guarantors, provided that:

i the statistical information is reliable and recent; and

ii use of this method is reasonable in the circumstances (for instance, if a component of household expenditure is estimated using statistical information, there is a low risk that the estimate will be materially lower than the particular guarantor's expenditure).

Extent of inquiries

6.12. The scope and method of inquiries (as referred to at paragraphs **6.7** to **6.11**) that are reasonable for a lender to make to be satisfied of the matters set out in paragraph **6.2** may differ depending on the circumstances. A lender should make more extensive inquiries where:

a. There is a greater risk that the guarantor will not be able to comply with the guarantee. This includes where:

i the size of the guarantor's potential liability is large relative to the guarantor's ability to repay;

ii the guarantor is a **vulnerable guarantor**; or

iii the credit agreement is a **high-cost credit agreement**; or

b. The consequences of the guarantor not being able to comply with the guarantee may be serious. This includes where the potential consequences include the loss of a significant asset of the guarantor.

6.13. A lender could undertake less extensive inquiries where the consequences of the guarantor not being able to comply with the guarantee are limited.

Verification

6.14. Lenders may rely on the information provided to them by the guarantor unless the lender has reasonable grounds to believe that the information is not reliable.

6.15. Where the lender has reasonable grounds to believe the information is not reliable, the lender should take reasonable steps to verify the information provided by the guarantor.

6.16. A lender may ask for or receive information from financial advisers or other intermediaries acting on behalf of the borrower or guarantor. Where that is the case:

a. A lender may rely on information provided to it by a financial adviser or intermediary as though it had been provided by the guarantor.

b. A lender should require financial advisers or other intermediaries to implement and maintain appropriate policies and procedures to collect information from the guarantor and perform any necessary verification, and to train their staff on the Code and the lender responsibility principles.

c. The lender, not financial advisers or other intermediaries, remains responsible for ensuring the lender complies with its responsible lending obligations.

7 Assisting borrowers to make an informed decision

Legal obligations

Principle

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see section 9C(2)(a) and (b) of the Act).

Lender responsibilities

A lender must exercise the care, diligence, and skill of a responsible lender:

- *in any advertisement for providing credit or finance under an agreement or for providing credit-related insurance under a relevant insurance contract; and*
- *before entering into an agreement to provide credit or finance or a relevant insurance contract and before taking a relevant guarantee; and*
- *in all subsequent dealings with a borrower in relation to an agreement or a relevant insurance contract or a guarantor in relation to a relevant guarantee.*

A lender must, in relation to an agreement with a borrower or when providing credit-related insurance, assist the borrower to reach an informed decision as to whether or not to enter into the agreement or relevant insurance contract and to be reasonably aware of the full implications of entering into the agreement or contract, including by ensuring that:

- *any advertising complies with advertising standards set out in the regulations and is not, or is not likely to be, misleading, deceptive, or confusing to borrowers;*
- *the terms of the agreement are expressed in plain language in a clear, concise, and intelligible manner;*
- *any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing*
- *reasonable steps are taken to offer to the borrower information about the agreement in another language (language A) if:*
  - *advertising that is wholly or significantly in language A is being, or within the preceding 6 months has been, distributed to the public or a section of the public; and*

- *the steps are necessary to ensure that the borrower can reach an informed decision (for example, if the borrower may not have a good understanding of the language in which the lender is otherwise providing information to the borrower under this Act) (see section 9C(3)(b) of the Act).*

Commentary

The lender responsibility to assist informed decisions is separate from, and additional to, the lender's obligations under the Act to:

- *publish standard form credit agreements and costs of borrowing information; and*
- *make initial disclosure of key information set out in Schedule 1 of the Act and of all terms of the contract.*

Guidance

Advertising

7.1. See the earlier Guidance in Chapter 3.

Communicating key features

7.2. To assist a borrower to make an informed decision as to whether to enter into an agreement and to be reasonably aware of the full implications of entering that agreement, a lender should inform the borrower of the key features of the agreement. The lender (or their agent) should clearly highlight those features in a way that draws the borrower's attention to that information. This information should be provided at a time that assists the borrower to make an informed decision. The key features should include:

a. the amount of credit or finance under the agreement and the term of the agreement, if any;

b. the amount of any establishment fees and any other mandatory fees the borrower must pay when entering the agreement, and information on whether other interest or fees, including periodical or event-based fees, may be charged over the loan term;

c. any non-avoidable fees or charges for additional goods or services provided under the agreement;

d. in relation to any fees or charges to be financed under the agreement but which could be paid for separately (for example, premiums for insurance related to the credit, extended warranties or repayment waivers), that financing these under the agreement

means the borrower pays additional interest costs and the amount the borrower will ultimately pay will be larger;

e. interest rates expressed as an annual rate (in terms of a percentage), and the total amount of interest payable, if ascertainable (but the lender may choose not to include the total amount of interest if the agreement would not, on the assumptions prescribed by regulations under the Act, be paid out within 7 years of the date on which credit is first provided under the agreement);

f. where relevant, repayments on a periodic basis and the total amount of payments, if ascertainable (but the lender may choose not to include the total amount of payments if the agreement would not, on the assumptions prescribed by regulations under the Act, be paid out within 7 years of the date on which credit is first provided under the agreement);

g. the cancellation period under section 27 of the Act and under section 36 of the Fair Trading Act 1986, and any other cancellation rights that the lender may offer;

h. key risks and characteristics of the specific product. For instance, where applicable:

i that secured property is at risk if the borrower defaults or does not make the repayments, including in the context of a pawnbroking transaction;

ii the fact that the interest rate is variable or that the lender has the power to unilaterally change the interest rate;

iii that a prepayment fee may be payable under a fixed-rate agreement if the borrower repays some or all of the credit early;

iv the rate of any default interest and the amount of any default fee;

v for reverse equity mortgages:

- how the reverse equity mortgage agreement works;
- how the following can affect the borrower's net equity in the home: the amount of any loan being considered, changes in interest rates or the value of the home, and life expectancy (these may be highlighted through a home equity release calculator);
- whether the borrower has a right to occupy the home for the rest of their life;
- whether the borrower's liability under the agreement is or is not limited to the net realisable sale price for the home; and
- the borrower's obligations to maintain the home;

i. for buy-back transactions:

i how the buy-back transaction works;

ii whether the borrower has a right to occupy the home for the rest of their life;

iii the amount and frequency of rental payments;

iv the terms of the borrower's right to repurchase, including the purchase price or how and when it will be calculated; and

v the borrower's obligations to maintain the home.

7.3. For borrowers who are refinancing an existing agreement, lenders may instead of highlighting the key features listed in paragraph **7.2**, highlight to the borrower any differences in the key features between the refinancing agreement and the existing agreement, if known.

7.4. A lender should respond promptly to a borrower's requests for further information about the features of the agreement. Where a lender allows borrowers to arrange credit online or remotely, a lender should ensure that borrowers are provided with a simple, clear and timely way to seek further information from the lender.

Example

Lender L allows credit to be arranged via its website. Lender L provides a free call number, local rate telephone number or live web chat system for borrowers who wish to seek further explanation.

Legal advice

7.5. A lender should generally recommend that borrowers seek independent legal advice when the lender is aware that:

a. more than one party will be the borrower under a credit agreement, but that only one of those parties will receive the direct benefit of all money lent; or

b. any borrower may be under undue influence from any other party, including another borrower or any third party who will receive the direct benefit of all money lent.

7.6. The lender should recommend that the independent legal advice be sought from a lawyer who is not also advising another borrower, guarantor or a third party who may be exerting undue influence over the borrower.

7.7. The lender should, where reasonably practicable, make these recommendations to the relevant borrower without the presence of other borrowers or guarantors, or any third parties who the lender has reasonable grounds to believe may be exerting undue influence over the borrower.

7.8. A lender should require borrowers to seek independent legal advice when entering into reverse equity mortgages or buy-back transactions. The lender should require that the

independent legal advice be sought from a lawyer who is not also advising the lender in the proposed transaction.

Commentary

Lenders providing reverse mortgages and buy-back transactions may also refer to the Ministry of Social Development's Home Equity Release Schemes Code of Standards.

Guidance

Means and level of communications

7.9. A lender should highlight the key features identified at paragraph **7.2** to the borrower in a way that draws the information to the attention of the borrower and assists an informed decision, regardless of the channel through which credit is arranged.

Example

Borrower B is seeking credit from Lender L at Lender L's premises. One way that Lender L can draw the information about key features to the attention of Borrower B is by providing Borrower B with a credit agreement and explaining the key features of the agreement while at the same time highlighting the parts of the agreement relating to those key features.

7.10. A lender should be satisfied that the level of assistance provided when informing the borrower of the key features and the extent of any additional assistance provided (referred to below) will be sufficient to assist the borrower to reach an informed decision and to be reasonably aware of the full implications of entering into the agreement.

7.11. The level of explanation and assistance that are reasonable for a lender to provide when informing the borrower of the key features identified at paragraph **7.2** may differ depending on the circumstances. Greater or further assistance should be provided when informing the borrower of the key features where:

a. there is a greater risk that a borrower may not be aware of the implications of entering into the agreement. This includes where:

i the agreement is complex or uncommon, such as a buy-back transaction or reverse equity mortgage;

ii the agreement is a high-cost credit agreement;

iii the borrower is a **vulnerable borrower**;

iv the borrower would be a new customer of the lender; or

v there is a greater risk that the borrower will not be able to comply with the agreement. This includes where the size of the loan is large relative to the borrower's ability to repay; or

b. the consequences of the borrower not being able to comply with the agreement may be serious. This includes where:

i the potential consequences include the loss of a significant asset; or

ii the default interest plus default fees are high relative to the amount of the loan or the credit limit.

7.12. A lender may provide a lower level of assistance when informing the borrower of the key features where there is a low risk that a borrower may not be aware of the implications of entering into the agreement. This includes where:

a. the credit agreement is a simple credit agreement that is widely understood, such as an overdraft; or

b. the borrower will receive legal advice before entering into the agreement; or

c. the borrower is a well-informed user of credit.

7.13. A lender should allow borrowers a sufficient opportunity to fully consider an offer of credit, including by:

a. giving the borrower the opportunity to take information about the key features off-site where the credit is arranged in person;

b. giving the borrower the opportunity to seek the advice of others; and

c. making clear that the offer of credit is available for a reasonable period specified by the lender (subject to the closing dates of special promotional offers that are open for a reasonable period of time and changes to market pricing).

7.14. Where a lender reasonably suspects that the borrower does not have a good understanding of the language the lender is using to communicate with the borrower, a lender should provide, or refer the borrower to alternative mechanisms for receiving the relevant information. This could involve the lender providing access to, or referring the borrower to, an interpreter or member of staff who is fluent in the relevant language or providing access to the information in that particular language. A lender should not rely on children under 18 or those with a potential conflict of interest to act as interpreters; for instance, where a parent is obtaining a loan for an adult child's benefit, the child should not be an interpreter. (See additional guidance below where a lender advertises in another language at paragraphs **7.21** to **7.23**.)

7.15. Where the lender has explained the key features of the agreement in detail but the lender is aware that the borrower has not understood the key features of the agreement as explained by the lender, a lender should take further steps to assist the borrower's understanding. For instance, the lender could provide further assistance by recommending that the borrower

takes away a copy of the contract and other information provided and seeks legal advice or advice from organisations that provide information about consumer rights to obtain a better understanding of the implications of the agreement.

Online credit applications

7.16. Regardless of the channel(s) used for credit applications, a lender must assist the borrower to reach an informed decision as to whether or not to enter into the agreement and to be reasonably aware of the full implications of entering into the agreement.

7.17. In online formats, it may be more difficult to gauge whether the borrower has understood the terms of the contract, compared to in-person interactions. Where a lender provides an online application process, a lender should take reasonable steps to ensure that the borrower understands the key features before entering into the loan agreement.

7.18. As well as providing the key information in paragraph **7.2** in an online format, this includes:

a. expressly encouraging prospective borrowers who wish to have the information explained further, or who may be unsure about the meaning or effect of the information provided to contact the lender for assistance before making a decision to enter into the credit agreement, and

b. contacting a prospective borrower by other means prior to entering into a credit agreement, in cases where:

i the lender knows from previous interactions with the borrower that the individual is unlikely to understand the nature of the transaction or information provided online (for instance because they do not have a good understanding of English or because they do not have basic knowledge about financial matters); or

ii where the lender's staff evaluating the application identify that the individual may not have a good understanding of English or may not have a basic knowledge about financial matters (eg. based on the individuals' answers on the application form or the staff member's other interactions with the individual).

7.19. In addition, a lender may also make available on their website a standard contract for different types of lending, with the key features highlighted.

Example

Borrower B is seeking credit from Lender L through Lender L's website. One way that Lender L can draw the information about key features to the attention of Borrower B is by ensuring that the borrower progresses through (and is unable to skip) screens that highlight information about the key features, giving the borrower the opportunity to see and read the explanations provided, and including prominent prompts encouraging Borrower B to ask questions, or request the information be explained verbally by a staff member.

Example

*Borrower A has misunderstood the meaning of some questions in the online application form. In speaking with B to obtain the correct information, Lender C's staff member notices that Borrower A is not a confident speaker of English but can understand and respond to the staff member's questions when they are put to them verbally as part of a conversation. Lender C ensures that the information in paragraph **7.2** is provided as a phone conversation rather than relying only on the online presentation.*

Further steps for lenders

7.20. Nothing in this section of the Code is intended to suggest that lenders should routinely ask questions specifically for the purpose of determining whether a borrower is vulnerable, may not have a good understanding of the lender's usual language, or may not have understood the information provided, in circumstances where lenders otherwise have no reason to suspect this to be the case.

Advertising in another language

Commentary

A lender must take reasonable steps to offer the borrower information about the agreement in another language if the lender is advertising in that language, and if this is necessary to ensure the borrower can reach an informed decision.

This obligation applies only if a lender distributed advertising that was wholly or significantly in another language to the public or to a section of the public in the previous 6 months. This obligation generally only applies to systematic advertising. For instance, a newspaper advertisement in another language would constitute an advertisement to the public or a section of the public, but an ad hoc discussion with an individual borrower by an employee of a lender in another language would not.

This obligation only applies to credit advertising and does not cover general brand advertising or advertising relating to non-credit products.

7.21. Where the lender has advertised in a language in the previous 6 months, a lender must take reasonable steps to offer information about the loan in the advertising language for the borrower to make an informed decision about entering the agreement.

7.22. Lenders should establish processes that give borrowers opportunities to opt in to receive information in the advertising language at relevant points before an agreement is entered into. Lenders may provide these opt-in opportunities in different ways, for example:

a. Lenders may include a question in an application form about the borrower's primary language and whether the borrower would like to receive information in this language.

b. Lenders may advise borrowers that information is available in other languages when dealing with the borrower in person.

7.23. Where a lender reasonably suspects that the borrower does not have a good understanding of the lender's usual language and the lender knows that the borrower speaks the advertising language, the lender should offer to provide information about the type of agreement in the advertising language. Some of the ways that lenders may offer this information include:

a. the lender may offer translated material in the advertising language that provides the borrower with the key features of the agreement (as per paragraph **7.2**); or

i by providing a key information sheet which includes:

ii Information about the type of loan and its features, including how interest is calculated and charged, and the nature of security taken;

iii Information about the right to cancel, what to do in the event of repayment difficulties and the lender's dispute resolution scheme; and

iv a translation guide on where to locate information about the loan amount, term, repayments, total interest and total amounts payable, within the loan agreement; or

b. the lender may refer the borrower to an interpreter or a member of staff who is fluent in the advertising language or to translation services (at the lender's cost).

Plain language agreement

7.24. To comply with the lender responsibility to ensure that the terms of the agreement are expressed in plain language in a clear, concise, and intelligible manner, a lender should:

a. set out agreements using a layout and font size that can be easily read;

b. set out the terms in a logical order that is easy for borrowers to follow;

c. highlight important information; and

d. explain complex information in plain language and include a clear explanation of any necessary jargon.

7.25. "Concise" refers to the presentation of specific information rather than the overall length of the communication or document. A longer but clearly written document, may take less time to read and understand than a shorter, but poorly written one.

7.26. "Intelligible" involves an overall assessment of whether the terms are understandable and comprehensible to borrowers in the target market.

Example

Lender L is putting together terms for a new credit product. Potential steps the lender could take to ensure that the agreement is in plain language in a clear, concise, and intelligible manner include:

- *using a communications or plain language adviser to help prepare the terms of their new credit product;*
- *consulting a focus group.*

*The focus group could be made up of a representative group of consumers (including individuals with no experience in credit agreements) and a **financial mentor**. The lender could ask the focus group to review whether the terms are clear, concise and intelligible, and take into account the focus group's feedback to refine the agreement.*

Manner of presenting information

7.27. To ensure that any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing, a lender should apply the following Guidance to all information provided to the borrower in relation to the agreement before it is entered into, regardless of the form and time at which information is given.

7.28. A lender should comply with the following practices to ensure that information provided to the borrower is not misleading, deceptive or confusing:

a. make sure important information is legible or audible, or both, and take care to disclose information in a level of detail that is commensurate with the importance of it;

b. use technical language and statistics only where they are relevant and in a way that can be readily understood by consumers without specialist knowledge;

c. where referring to fees or costs, avoid giving an unrealistic impression of the overall levels of fees and costs;

d. where referring to an interest rate or an amount of interest:

i convey with equal importance as any other interest rate or amount of interest an annual percentage interest rate;

ii advise if that rate is fixed, variable or capped; and

iii advise if fees will apply, and, if ascertainable, provide the amount of any establishment fees and any other mandatory fees the borrower must pay when entering into the agreement;

e. where referring to the amount of regular repayments for a particular term loan, include an indication of the total costs of borrowing, which could be through an indication of:

i the total amount payable under the agreement, if ascertainable (but the lender may choose not to include the total amount of interest, if on the assumptions prescribed in the regulations under the Act, the agreement will not be paid out within 7 years of the date on which credit is first provided under the agreement); or

ii how the total amount payable under the agreement will be calculated;

f. when referring to the amount of regular payments, the amount of any lump sum payments and when they are required to be made;

g. when providing details of interest rates or fees that apply for an initial promotional period, state the period for which the discount applies and:

i where ascertainable, what the interest rate or fees will change to after that initial promotional period; or

ii where the subsequent interest rate is not ascertainable, how the subsequent interest rate will be calculated.

Processes

7.29. To comply with the above lender responsibility principle and lender responsibilities, a lender should have policies and procedures in place to ensure that any information it gives a borrower complies with legal obligations and is not misleading, deceptive, or confusing. Such policies and procedures may also include complying with relevant industry codes.

7.30. A lender's policies and procedures should include:

a. requiring relevant staff and agents who have customer contact on the lender's behalf to comply with the Act, Regulations, Fair Trading Act 1986 and the Guidance in this Code and the lender being satisfied that they understand how to do so;

b. being satisfied that relevant staff and agents who have customer contact on the lender's behalf are familiar with the features of the credit products which they deal in, as well as current promotions and representations; and

c. requiring that all online, print and other promotional materials are subject to an approval process, including being checked by a staff member with necessary product knowledge to ensure that the description is accurate.

8 Assisting guarantors to make an informed decision

Principle

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see section 9C(2)(b) of the Act).

Lender responsibilities

A lender must, in relation to a relevant guarantee that is taken by a lender, assist the guarantor to reach an informed decision as to whether or not to give the guarantee and to be reasonably aware of the full implications of giving the guarantee, including by ensuring that:

- *the terms of the guarantee are expressed in plain language in a clear, concise, and intelligible manner;*
- *any information provided by the lender to the guarantor is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing; and*
- *reasonable steps are taken to provide the guarantor with information about the guarantee in another language (language A) if:*
  - *advertising that is wholly or significantly in language A is being, or within the preceding 6 months has been, distributed to the public or a section of the public; and*
  - *the steps are necessary to ensure that the guarantor can reach an informed decision (for example, if the guarantor may not have a good understanding of the language in which the lender is otherwise providing information to the guarantor under this Act) (see section 9C(4)(b) of the Act).*

Guidance

Communication of information

8.1. To assist a guarantor to make an informed decision as to whether or not to give a guarantee, and to be reasonably aware of the full implications of entering the agreement, a lender should inform the guarantor of the key features of the guarantee. The lender should clearly highlight those features in a way that draws the guarantor's attention to that information. This information should be given at a time that assists the guarantor to make an informed decision. The key features that should be highlighted include:

a. that by giving a guarantee, the guarantor will become liable as well as, or instead of, the borrower;

b. that the guarantor will be liable for the full amount of the borrower's liabilities under the credit agreement and other costs unless the lender has agreed to limit the guarantor's liability;

c. that the guarantor may ask that their liability under the guarantee be limited (but a lender may not always agree to that);

d. that, throughout the life of the loan, there could be times when the contract is changed, which may increase the borrowers' obligations or change the time at which payments must be made under the contract, and that the lender will inform the guarantor if those changes happen.

e. whether or not the guarantor will be informed of repayment difficulties with the loan, and if so, the point at which they will be informed; and

f. the key features relating to the credit agreement as set out at paragraph **7.2**, to the extent that they are relevant to the guarantor's liability.

8.2. A lender should respond promptly to guarantors' requests for further information about the features of the agreement.

8.3. A lender should not provide information to the guarantor indirectly through the borrower.

8.4. A lender may, instead of providing the information set out at paragraph **8.1** above directly to the guarantor, rely on the guarantor's lawyer or conveyancer's explanation of that information if the lender is reasonably satisfied that

a. the lawyer or conveyancer has the necessary knowledge and qualifications in the circumstances, and it is otherwise appropriate for them to explain the information to that guarantor; and

b. the guarantor's lawyer or conveyancer has done so (for instance, because the lawyer or conveyancer has confirmed that they have done so. In the case of a lawyer, this could be through a Solicitor's Certificate confirming that the lawyer has explained the information requested).

8.5. A lender should generally recommend that guarantors seek legal advice or advice from organisations that provide information about consumer rights before giving the guarantee, and allow them sufficient time to do so before they provide a guarantee.

8.6. A lender should generally require a guarantor to seek legal advice where the guarantor's own home will be available as security under a mortgage to the lender for lending to a borrower, except where the guarantor is effectively the same party as the borrower (such as where the guarantor is a trust, and the borrower(s) are individual(s) who are also trustee(s) of the trust).

8.7. A lender should generally require a guarantor to seek independent legal advice where it has reason to believe that a guarantor may be under undue influence from any other party, including another guarantor, borrower, or any third party who will receive the direct benefit of any money lent. The lender should require that the independent legal advice be sought from a lawyer who is not also advising the borrower, another guarantor or any third party who may be exerting undue influence over the borrower.

Means and level of communication

8.8. A lender should highlight the key features identified at paragraph **8.1** to the guarantor in a way that draws the information to the attention of the guarantor and assists them to reach an informed decision, regardless of the channel through which credit is arranged.

Example

One way a lender may highlight some of the above information is by providing a link to a video explaining the implications of giving a guarantee.

8.9. A lender should be satisfied that the level of assistance provided when informing the guarantor of the features identified at paragraph **8.1** and the extent of any additional assistance provided will be sufficient to assist the guarantor to reach an informed decision and to be reasonably aware of the full implications of giving the guarantee.

8.10. The level of explanation and assistance that are reasonable for a lender to provide when informing the guarantee of the key features identified at paragraph **8.1** will differ depending on the circumstances. Greater or further assistance should be provided when informing the guarantor of the key features where:

a. there is a greater risk that a guarantor may not be aware of the implications of entering into the agreement. (This includes where the guarantor is a **vulnerable guarantor**);

b. there is a greater risk that the borrower will not be able to comply with the agreement. (This includes where the size of the guarantor's potential liability is large relative to the guarantor's ability to repay); or

c. the consequences of the guarantor not being able to comply with the guarantee are serious, such as the loss of a significant asset of the guarantor (such as the guarantor's home)

8.11. A lender may provide a lower level of assistance when informing the guarantor of the key features where:

a. there is a low risk that a guarantor may not be aware of the implications of entering into the agreement. This includes where the guarantor:

i will receive legal advice before entering into the agreement; or

ii is a well-informed user of credit; or

b. where the consequences of the guarantor not being able to comply with the guarantee are limited. This includes where the guarantor is a professional or independent trustee whose liability is limited to the assets of a trust.

8.12. A lender should also apply the Guidance set out in paragraphs **7.13** to **7.19** to guarantors, as if the references in those paragraphs to "borrowers" were references to "guarantors".

8.13. The lender should ensure that it gives a guarantor the opportunity to ask questions of the lender without the borrower present.

Advertising in another language

8.14. The lender should refer to paragraphs **7.21** to **7.23** for guidance on providing the guarantor the information in paragraph **8.1** above in another language when a lender has advertised in that language, as if the references in those paragraphs to "borrowers" and "the loan" were references to "guarantors" and "the guarantee".

Plain language guarantee

8.15. The lender should, in drafting the terms of the guarantee, apply the Guidance on how to provide information in a clear, concise, and intelligible manner set out in paragraphs **7.24** to **7.26**.

9 Credit-related insurance, repayment waivers and extended warranties

Legal obligations

Principle

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see section 9C(2)(b) of the Act).

Lender responsibilities

A lender must, in relation to a relevant insurance contract:

- *make reasonable inquiries, before the contract is entered into so as to be satisfied that it is likely that:*
  - *the insurance provided under the contract will meet the borrower's requirements and objectives; and*
  - *the borrower will make the payments under the contract without suffering substantial hardship (see section 9C(5)(a) of the Act).*
- *assist the borrower to reach an informed decision as to whether or not to enter into the contract and to be reasonably aware of the full implications of entering into the contract, including by ensuring that:*
  - *any advertising distributed by the lender is not, or is not likely to be, misleading, deceptive, or confusing to borrowers; and*
  - *any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing (see section 9C(5)(b) of the Act).*

Regulations – minimum required inquiries

As part of complying with the lender responsibility in section 9C(3)(a)(i) or section 9C(5)(a)) of the Act, lenders must comply with the minimum requirements for inquiries and assessment prescribed in regulation 4AB (see section 9C(5A)).

Commentary

The Regulations require lenders to determine particular aspects of the borrower's requirements and objectives relating to repayment waivers, extended warranties and credit-related insurance and can be summarised as follows.

Prior to making the assessment under section 9C(3)(a)(i) or 9C(5)(a)(i), lenders must make reasonable inquiries to enable them to determine the borrowers requirements and objectives. These inquiries must include:

- *whether the borrower has existing cover or existing rights under the Consumer Guarantees Act 1993, that may protect against some or all of the risks for which the borrower is seeking cover from the lender*
- *whether the borrower's age, employment status or residency status may make them ineligible to claim some or all of the benefits*
- *whether the borrower accepts the costs.*

These requirements apply in addition to the requirements in regulation 4AA which are covered by Chapter 4.

Relevant insurance contracts

The above lender responsibilities apply to "relevant insurance contracts", which are credit-related insurance contracts entered into, or to be entered into, by a borrower if:

- *the borrower has also entered into, or is seeking to enter into, a credit agreement with the lender; and*
- *the insurance is arranged by the lender (see section 9B(1)).*

The circumstances in which insurance is "arranged" by the lender are set out in section 9B(2) of the Act which is set out in the Appendix of this document, along with the definition of "credit-related insurance" and "consumer credit insurance".

Note that a lender can in some circumstances require borrowers to take out credit-related insurance – for instance to protect a secured asset. However, section 69 of the Act provides that a lender must not make any unreasonable requirement as to the terms on which the borrower is to take out or obtain credit-related insurance. Section 69 provides that a requirement is unreasonable if it is not reasonably necessary for the protection of the legitimate interests of the lender or is not reasonably justifiable in light of the risks undertaken by the parties to the arrangement.

Repayment waivers and extended warranties

A repayment waiver is an agreement between a lender and a borrower under which the lender, for an additional consideration, agrees to waive the lender's right to any amount payable under the credit contract in the event of the unemployment of, sickness of, injury to, or the disability or death of the borrower. The way in which a repayment waiver operates is similar to the way in which consumer-credit insurance operates, from the borrower's point of view and should therefore be treated in the same way as consumer-credit insurance.

An extended warranty is an agreement between a creditor or lessor and a debtor or lessee under which the creditor or lessor, for an additional consideration, agrees to repair or replace defective goods outside of the warranty period that would otherwise apply. The Fair Trading Act 1986 includes provisions that assist consumer understanding of extended warranties, and a lender should refer to Commerce Commission guidance on those obligations when providing extended warranties.

Section 9B(4) of the Act provides for this as it states that "if an agreement involves a repayment waiver or an extended warranty, the repayment waiver or extended warranty is to be treated as forming part of the [credit] agreement for the purposes of this Part [relating to the lender responsibilities]".

Guidance

Repayment waivers and extended warranties

9.1. The practices and processes set out below in relation to entering into a relevant insurance contract should also be followed by lenders in relation to repayment waivers and extended warranties, in order to comply with the lender responsibilities set out in sections 9C(3)(a) and 9C(3)(b) of the Act and the inquiries prescribed in regulation 4AB.

Borrower's requirements and objectives for insurance contracts

9.2. To meet the lender responsibilities, the lender's inquiries into and assessment of the borrower's requirements and objectives may take into account that there may be a range of products that meet the borrower's requirements and objectives. A relevant insurance contract may have a number of different features, and there may be trade-offs between those features. The lender does not need to assess whether the proposed contract best meets the borrower's requirements and objectives, but should be satisfied that it is likely that the product is within the range of products that will meet the borrower's requirements and objectives.

9.3. In assessing whether it is likely that the borrower's requirements and objectives will be met by the relevant insurance contract, a lender should inquire into and consider the following matters, where relevant:

a. for the purposes of regulation 4AB(2)(a)(iii):

i the risks that the borrower wishes to obtain cover against;

ii the length of time for which the borrower wishes to obtain cover. For consumer credit insurance or a repayment waiver this period should usually match any term of the credit agreement unless the borrower has a reason for seeking cover for a different period;

b. whether the premium (including interest where the premium is financed under the credit agreement) for any consumer credit insurance policy is excessive when compared to the loan amount or credit limit.

9.4. Where a borrower already has insurance cover, the lender may rely on the information provided by the borrower in respect of that cover. The lender is not expected to review the terms of borrowers' existing insurance policies to establish whether they already provide some or all of the protection sought by the borrower. However, the lender should give the borrower an opportunity to check or seek advice on the borrower's existing insurance policies.

9.5. Where the lender will be lending a small amount over a short term, a lender should consider whether the short time period and likely low value of any cover relative to the cost of the premium means that any consumer credit insurance may be unlikely to meet the borrower's requirements and objectives.

Example

Borrower B is currently unemployed. The consumer credit insurance contract that Lender L can arrange provides cover primarily for loss of employment. That may be an indication (without other relevant factors, such as that Borrower B will shortly be starting a new job) that the consumer credit insurance is unlikely to meet the borrower's requirements and objectives.

Example

Where a loan is for $500 and to be repaid over 2 weeks, the consumer credit insurance cover may be unlikely to meet the borrower's requirements and objectives as the cover may be too low and too short to be useful to the borrower relative to the cost of the policy given the low likelihood or amount of a claim during the short period of the loan.

Substantial hardship

9.6. The lender should apply the guidance in Chapter 5 of this Code in relation to whether it is likely that the borrower will make the payments under the relevant insurance contract without suffering substantial hardship as follows:

a. If the lender knows that the premium for a relevant insurance contract is to be financed under the credit agreement, the lender should factor in the amount of the premium into the repayments under the credit agreement; or

b. If the premium for a relevant insurance contract is not financed in the credit agreement but the lender knows that an insurance contract will be entered into, the lender should include the amount of the premiums (if known) or an estimate of the likely amount of the premiums as part of the borrower's expenses in its assessment of whether the borrower will make repayments under the credit agreement; or

c. if:

i the premium for a relevant insurance contract is not financed in the credit agreement; and

ii in approving credit under the credit agreement, the lender was not able to adequately take into account the premiums payable under the relevant insurance contract in an assessment of whether the borrower will make repayments under the credit agreement without substantial hardship; then

the lender should separately assess whether the borrower will pay the premiums under the relevant insurance contract without substantial hardship.

Assisting informed decisions

9.7. A lender should not mislead borrowers about whether borrowers have a choice as to whether to enter into a relevant insurance contract and from which providers. In particular:

a. unless the lender requires the borrower to obtain credit-related insurance (in compliance with section 69 of the Act), a lender should explain that credit-related insurance is optional and the borrower should be required to expressly opt in to credit-related insurance; and

b. unless the lender requires the borrower to obtain credit-related insurance from a particular insurer or insurers (in compliance with section 69 of the Act) or an insurance policy is the only one that effectively relates to the credit agreement, a lender should not represent to the borrower that they cannot obtain insurance from other providers.

9.8. A lender may set certain criteria that the borrower's preferred insurer must meet to be acceptable to the lender, such as a minimum credit rating. However, the lender should ensure that those criteria do not have the effect of materially limiting the borrower's choice of preferred insurer.

Communicating key features

9.9. A lender should apply the Guidance set out at paragraphs **9.10** to **9.16** to all relevant insurance contracts, unless the relevant insurance contract is one that is financed by the

lender but which is entered into independently by the borrower with an insurer that does not have a relationship with the lender, and without the lender's facilitation.

9.10. To assist a borrower to make an informed decision as to whether to enter into a contract and to be reasonably aware of the full implications of entering that contract, a lender should inform the borrower of the key features of the contract or require the insurer to do so. The lender (or insurer) should clearly highlight those features in a way that draws the borrower's attention to that information. This information should be given at a time that assists the borrower to make an informed decision. Those key features should include:

a. the amount of the premium, or how the premium will be calculated;

b. where the premium is funded by the loan, the total amount of interest payable, or how the interest will be calculated;

c. if there is the option for the borrower to pay the premiums in instalments, rather than as a lump sum, the lenders should advise the borrower of this option (because it will mean the borrower will not pay interest on the lump sum premium);

d. the cover provided (including the risks insured against and the amount of the cover) and the excesses that apply;

e. that exclusions apply (if applicable), together with clear information about where to find the exclusions in the relevant insurance policy;

f. the duration of the cover, if the period of cover is limited; and

g. any cooling-off period provided under the terms of the policy during which the borrower can cancel the policy.

9.11. A lender should respond promptly to borrowers' requests for further information about the key features of the contract. Where a lender allows borrowers to arrange credit and the relevant insurance contract online or remotely, the lender should ensure borrowers are provided with a simple, clear and timely way to seek further information from the lender.

9.12. A lender should highlight the key features identified at paragraph **9.10** to the borrower in a way that draws the information to the attention of the borrower, regardless of the channel through which insurance is arranged.

9.13. A lender should be satisfied that the level of assistance provided when informing the borrower of the key features will be sufficient to assist the borrower to reach an informed decision and to be reasonably aware of the full implications of entering into the contract.

9.14. The level of explanation and assistance that are reasonable for a lender to provide (including through an insurer) when informing the borrower of the key features of the contract may differ depending on the circumstances. Greater or further assistance should be provided when informing the borrower of the key features where there is a greater risk that the borrower may not be aware of the implications of entering into the contract. This includes where

a. the borrower is a **vulnerable borrower**; or

b. the borrower would be a new customer of the lender.

9.15. A lender may provide a lower level of assistance when informing the borrower of the key features where there is a low risk that a borrower may not be aware of the implications of entering into the contract. This includes where the borrower is a person (other than a **vulnerable borrower**) who lenders can reasonably expect to have a good pre-existing understanding of insurance contracts of that type, which may be due to their previous experience with insurance contracts of that type.

9.16. A lender should also follow the guidance at paragraphs **7.11** to **7.15** in relation to:

a. allowing borrowers a sufficient opportunity to consider the terms of the relevant insurance contract; and

b. dealing with borrowers who do not appear to have a good understanding of English or who do not appear to have understood the explanations provided.

Advertising

9.17. A lender should ensure that advertising or marketing material promoting credit-related insurance that is developed and distributed by the lender is:

a. developed in conjunction with the insurer;

b. based on guidance from the insurer; or

c. checked by the insurer to ensure that the description of the insurance product is accurate.

9.18. If the lender uses advertising material developed and supplied to the lender by the insurer, the lender should require that the advertising material complies with all legal obligations. The lender should also apply the general advertising guidance at Chapter 3, where relevant.

10 Fees

Legal obligations

Principle

Every lender must, at all times, comply with all the lender responsibilities specified in sections 9C(3), (4) and (5) (see section 9C(2)(b) of the Act).

Lender responsibility

A lender must, in relation to an agreement, meet all the lender's legal obligations to the borrower, including under this Act… which include obligations in relation to… credit fees (see section 9C(3)(f) of the Act).

Commentary

The lender responsibilities require lenders to meet all legal obligations to the borrower and section 9F(1)(b)(vii) of the Act provides that the Code may set out the processes, practices, or procedures that a lender should follow to ensure that fees are not unreasonable in terms of section 41, 80 or 82.

Section 44B of the Act states that evidence of compliance with the provisions of the Code relating to fees is to be treated as evidence that a credit fee or a default fee is not unreasonable. However, as with the rest of this Code, this section does not set out "safe harbours". Compliance with the Code is not deemed to be compliance with the fees provisions of the Act (see section 44B of the Act). Evidence of compliance with the Code will be weighed against other evidence.

The processes and practices that a lender should follow to ensure that fees under consumer credit contracts are not unreasonable were the subject of the Supreme Court judgment, Commerce Commission v Sportzone/MTF [2016] NZSC 53 (Sportzone). Note that while some of the relevant provisions have been amended by the Credit Contracts and Consumer Finance Amendment Act 2014, the Sportzone case remains relevant as some of the legislative wording in relation to the costs which lenders can recover through fees remains unchanged.

The Commerce Commission also provides guidelines on how it interprets the fees provisions and how it intends to enforce them.

Establishment fees are defined as fees or charges that relate to the costs incurred by the creditor in connection with the application for credit, processing and considering that application, documenting the contract, and advancing the credit; but does not include any fee or charge to the extent that it is a charge for an optional service. The relevant legislative

provisions (see section 42 of the Act) provide that in determining whether an establishment fee is unreasonable, the Court must have regard to whether the amount of the fee is equal to or less than the creditor's reasonable costs (or average reasonable costs for the class of consumer credit contract) in connection with the application for credit, processing and considering that application, documenting the contract, and advancing the credit.

Prepayment fees are defined as fees that relate only to prepayment in part or in full in respect of a fixed-rate contract and only for that part of the creditor's loss that arises from the prepayment as a result of differences in interest rates. The legislation (see section 43 of the Act) provides that a prepayment fee is unreasonable if, and only if, it exceeds a reasonable estimate of the creditor's loss arising from the part or full repayment. Section 54 of the Act provides that a fee payable for full prepayment must be calculated in accordance with the procedure provided in the regulations or through an appropriate procedure set out in the consumer credit contract. Lenders may also impose a credit fee relating to administrative costs associated with prepayment, which is subject to the credit fees provisions in section 44 of the Act.

Credit fees are defined as fees or charges payable by the debtor under a credit contract, or payable by the debtor to, or for the benefit of, the creditor in connection with a credit contract. In determining whether a credit fee (other than an establishment fee and a prepayment fee) is unreasonable, the Act (see section 44) provides that the Court must have regard to, in relation to the matter giving rise to the fee, whether the fee reasonably compensates the creditor for any cost incurred by the creditor. This includes the cost of providing a service to the borrower if the fee relates to the provision of a service. In determining whether the fee reasonably compensates the creditor for that cost or the provision of that service, the Court must have regard to reasonable standards of commercial practice.

Default fees are fees or charges payable on a breach of a credit contract by a debtor or on the enforcement of a credit contract by a creditor; but does not include default interest charges. For default fees, the Act (see section 44A) provides that the Court must have regard to, in relation to the matter giving rise to the fee, whether the fee reasonably compensates the creditor for any cost incurred by the creditor and for a reasonable estimate of any loss incurred by the creditor as a result of the borrower's acts or omissions. In determining whether the fee reasonably compensates the creditor for that cost or loss, the court must have regard to reasonable standards of commercial practice.

For buy-back transactions of land, the Act (see section 80(1)) provides that a buy-back transaction must not provide for a buy-back fee or buy-back default fee that is unreasonable.

Guidance

Establishment fees

10.1. In setting an establishment fee, a lender should

a. assess the reasonable costs likely to be incurred by the lender in connection with the application for credit, processing and considering that application, documenting the contract, and advancing the credit. In doing so the lender should:

i identify the tasks undertaken in order to establish the credit contract or that class of consumer credit contract and calculate the costs of undertaking each of those tasks;

ii take into account past experience in relation to the level of reasonable costs incurred for those activities for that class of consumer credit contracts but apply that experience on a forward looking basis to assess the reasonable costs that are likely to be incurred in the future; and

b. ensure that establishment fees only seek to recover those likely reasonable costs.

Prepayment fees

10.2. In setting a prepayment fee, a lender should either:

a. use a procedure to calculate a reasonable estimate of loss arising from the prepayment (being losses resulting from differences in interest rates) and ensure that any procedure it uses to calculate prepayment fees only seeks to recover those estimated losses; or

b. use the formula set out in regulations 8 to 11 of the Credit Contracts and Consumer Finance Regulations 2004 to calculate fees for full prepayments.

Credit fees

10.3. In setting a credit fee (other than an establishment fee or prepayment fee), a lender should:

a. identify the activities closely related to the matter giving rise to the fee;

b. assess the costs likely to be incurred in relation to the matter giving rise to the fee. The assessment should take into account past experience in relation to the level of costs incurred for those activities for the same or similar credit products but apply that experience on a forward looking basis to assess costs that are likely to be incurred in the future;

c. ensure that the credit fee only seeks to compensate the lender for those likely costs; and

d. ensure that any costs that are likely to be recovered through credit fees, and the activities generating those costs, are consistent with reasonable standards of commercial practice. A common commercial practice is not necessarily a reasonable standard of commercial practice.

10.4. For those credit fees which are insurance premiums (ie insurance premiums where the lender requires the borrower to obtain the insurance cover from a particular insurer or particular insurers) and where the premiums are payable for credit-related insurance provided by the lender, the lender may also recover an amount that reflects the risks insured against.

Default fees

10.5. In setting a default fee, a lender should:

a. assess the losses likely to be incurred as a result of the borrower's default; and

b. assess costs likely to be incurred as a result of the borrower's default. The assessment should take into account past experience in relation to the costs incurred as a result of the borrower's default for the same or similar credit products but apply that experience on a forward looking basis to assess costs that are likely to be incurred in the future.

10.6. The default fee should only seek to compensate the lender for the above costs and losses.

10.7. A lender should ensure that any costs that are likely to be recovered from default fees, and the activities generating those costs, are consistent with reasonable standards of commercial practice. A common commercial practice is not necessarily a reasonable standard of commercial practice.

Buy-back fees

10.8. In setting buy-back fees and buy-back default fees, a lender should follow the guidance in paragraphs **10.3** to **10.7** in relation to credit fees and default fees.

Fees generally

10.9. Lenders should ensure that costs recovered relate to the specific credit contract or that class of credit contract. Costs should be sufficiently close and relevant to the steps in the lending process to which the fee relates that they can reasonably be said to be incurred in relation to those steps.

10.10. Lenders may average the relevant costs across a class of credit contracts. When averaging using past experience, a lender should use a representative sample of transactions.

10.11. Because fees are set on a forward-looking basis, the Guidance is not intended to suggest that there can or should be exact precision in terms of matching fees to likely costs and losses. However, lenders must undertake an assessment of costs and losses in order to set fees that meet the unreasonable fees provisions of the Act.

Reviewing fees

Commentary

Section 41A provides that a creditor must—

(a) review a credit fee or a default fee if the creditor knows, or ought reasonably to know, that there has been a change that is likely to materially affect the reasonableness of the fee (for example, a change in the creditor's business or costs); and

(b) reduce the fee if the result of the review is that the fee is now unreasonable.

A lender must make and keep records of how they calculated the fees payable, in accordance with that section.

10.12. A lender should review fees to ensure they are not unreasonable:

a. prior to or as soon as practicable following any material changes to the lender's costs in providing the product due to:

   i changes to the product itself;

   ii changes to the way the lender provides that credit product;

   iii changes to the lender's business or cost structure; and

b. as soon as practicable after becoming aware that the lender generated a material profit through fees where it appears that:

   i the profit was generated as a result of something other than the inevitable imprecision in matching fees with likely costs and losses; and

   ii the generation of a material profit is likely to continue on an ongoing basis.

11 Subsequent dealings

Principle

Every lender must, at all times, exercise the care, diligence, and skill of a responsible lender in all subsequent dealings with a borrower in relation to an agreement or a relevant insurance contract or a guarantor in relation to a relevant guarantee (see section 9C(2)(a)(iii) of the Act).

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see section 9C(2)(b) of the Act).

Lender responsibilities

A lender must, in relation to an agreement with a borrower, assist the borrower to reach informed decisions in all subsequent dealings in relation to the agreement, including by ensuring that:

- *any variation to the agreement is expressed in plain language in a clear, concise, and intelligible manner; and*
- *any information provided by the lender to the borrower after the agreement has been entered into is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing.(see section 9C(3)(c) of the Act)*

Guidance

Information provided

11.1. To ensure that any information provided after the agreement has been entered into is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing, a lender should follow the Guidance in paragraphs **7.27** to **7.28** in relation to all information provided to borrowers in relation to the agreement, throughout the life of the agreement.

General communications subsequent to entering into the agreement

11.2. A lender should make certain information generally accessible (which could be through its website, at its premises, or by providing it promptly on request) throughout the life of the agreement. That information should include:

a. what to do if the borrower changes address;

b. details of the lender's internal complaints processes;

c. details of the lender's dispute resolution scheme;

d. information about the availability of relief for unforeseen hardship or repayment difficulties, and application processes for seeking changes to the credit agreement on the grounds of repayment difficulties; and

e. the potential consequences of default, including, if relevant, repossession.

11.3. A lender should be generally available for contact by borrowers. In particular, a lender should:

a. ensure that borrowers can access up-to-date information about the lender's contact details and the hours during which the lender is generally available for contact (if they differ from normal business hours); and

b. acknowledge and respond to queries from borrowers within a reasonable time.

11.4. A lender should contact the borrower where relevant, including:

a. to notify the borrower if the lender has refunded any credit balance resulting from overpayment under a credit agreement or has used that credit balance to repay another amount the borrower owes;

b. to notify a borrower when they are close to making their final repayment or as soon as practicably possible after the loan has been fully repaid to inform them that they can cancel any automatic payments or direct debits (or when they can do so). (Note that this Guidance does not apply to a credit agreement that is a revolving credit agreement or where the lender has previously agreed that the lender themselves will cancel automatic payments or direct debits);

c. to provide information in relation to the borrower's rights and potential consequences where the borrower is having repayment difficulties or where the borrower has informed the lender that it is likely that the borrower will soon be in difficulty (see paragraphs **12.4** to **12.13**); and

d. to remind a borrower that wishes to prepay an agreement if they are required to pay a prepayment fee or prepayment administration fee.

11.5. A lender should follow the Guidance set out at paragraphs **2.6** to **2.8** in relation to when and how to contact the borrower.

Variations

11.6. A lender should not increase a borrower's credit limit without the borrower's consent.

Commentary

Informed decisions

Lenders must comply with both the variation disclosure requirements of the Act and the lender responsibility to assist informed decisions.

Material changes

Where a variation is a material change under s9C(3)(a) of the Act, as well as assisting the borrower to make an informed decision, a lender must meet its obligations to be satisfied that the credit or finance is likely to continue to meet the borrower's requirements and objectives, and that the borrower will be likely to meet the new payments without suffering substantial hardship.

Informed decisions (Agreed variations)

11.7. A lender should apply the following Guidance in relation to variations which need to be agreed between the lender and borrower (as opposed to variations made by the lender exercising a power under the agreement).

11.8. To comply with the lender responsibility to assist informed decisions in all subsequent dealings, a lender should, before a borrower makes a decision as to whether or not to enter into a variation to an agreement that is to be agreed between the lender and the borrower:

a. inform the borrower of the details of the proposed variation;

b. unless the variation removes or relaxes one or more of the obligations that the borrower would otherwise have, make it clear that the borrower is not under an obligation to agree to the variation;

c. clearly inform the borrower of any changes to the key features referred to at paragraph **7.2**;

d. where relevant, inform the borrower if they may have more to repay over the term of the agreement, including more interest; and

e. respond promptly to any borrower requests for further information.

11.9. A lender should also follow the Guidance set out at paragraphs **7.9** to **7.20**. In relation to paragraphs **7.9** to **7.12**, the lender may not need to provide the same level of assistance for simple variations that do not affect the key features of the agreement.

Example

Borrower B wants to top up their home loan by $100,000 to help them pay for some renovations. The top up can be done by the lender as a variation to their current home loan. The lender should highlight to Borrower B that the change will increase the amount of each repayment and the total amount the customer needs to repay, including the total interest over the remaining loan term and give the borrower an indicative amount for each of those figures.

Example

Lender L offers to increase an existing borrower's credit card limit from $5,000 to $10,000. Lender L should highlight to the borrower that accepting the higher limit is voluntary, and that if they use all of the new credit limit they will have more to repay, which may include more interest if they do not pay off their closing balance each month.

Example

Borrower B wants to change their repayment frequency from monthly to fortnightly as their pay cycle is changing. This change is being done by the lender as a variation to their current loan. The lender should highlight to Borrower B what they will now have to pay each fortnight and the amount of any fees for making this change.

Example

Borrower B wants to change their home loan from a floating to a fixed rate. Before making the variation, the lender should highlight to Borrower B what the fixed rate is per annum, what the borrower will have to pay each fortnight, that a prepayment fee applies if the borrower repays more than 5% of the loan early, and the amount of any fees for making the change to a fixed interest rate. The lender chooses not to disclose the total amount of interest payable and the total repayments as the agreement will be paid out more than 7 years after the credit was first provided.

Plain language variation

11.10. A lender should follow the Guidance set out at paragraphs **7.24** to **7.26** to ensure that any variation to the agreement is expressed in plain language in a clear, concise and intelligible manner.

12 Repayment difficulties and other problems

Commencement

This chapter comes into force from 1 February 2022. Until that date, Chapter 12 of the previous version of the Responsible Lending Code is in force.

Legal obligations

Every lender must, at all times, exercise the care, diligence and skill of a responsible lender in dealings with a borrower or guarantor, and comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see section 9C(2) of the Act).

Lender responsibilities

A lender must, in relation to an agreement with a borrower, treat the borrower, and their property (or a property in their possession), reasonably and in an ethical manner, including—

- *when breaches of the agreement have occurred or may occur or when other problems arise; and*
- *when a debtor under a consumer credit contract suffers unforeseen hardship (see section 9C(3), (d)(i) and (d)(ii) of the Act).*

A lender must, in relation to a relevant guarantee that is taken by the lender, treat the guarantor reasonably and in an ethical manner, including when breaches of a credit contract to which the guarantee applies have occurred or may occur or when other problems arise (see section 9C(4)(c) of the Act).

A lender must assist the borrower to reach informed decisions in all subsequent dealings in relation to the agreement (see section 9C(3)(c)).

Commentary

A lender is entitled to exercise its rights to ensure that the borrower repays the loan, including exercising its right to the security given by the borrower or guarantor.

However, the lender must exercise its rights against the borrower or guarantor, or both, reasonably and in an ethical manner.

Lenders must comply with responsible lending principles at all times, including where borrowers or guarantors face actual or potential repayment difficulties.

Subpart 8 of part 2 of the Act also provides a statutory right for borrowers who are unable reasonably to meet their obligations under a loan to apply to the lender to make certain types of changes to the terms of the loan (the statutory hardship process). This framework is only available to borrowers who qualify. It imposes an obligation on the lender to consider these types of change requests, however the statutory hardship process does not limit the circumstances in which a lender can consider variations generally, nor the types of variations that can be agreed.

Some lenders are subject to regulatory or contractual requirements which may limit the range of relief which can be offered outside of the statutory hardship process.

Other statutory obligations may also be relevant when there are repayment difficulties, including requirements of the Act and Regulations:

- *regarding variation disclosure;*
- *regarding disclosure of details of financial mentoring and dispute resolution schemes, in specified circumstances; and*
- *requirements of the Act which provide that a lender cannot take repossession enforcement action while in the process of deciding on an unforeseen hardship application.*

Identification of repayment difficulties

Lenders may become aware of or identify repayment difficulties in a number of ways. Borrowers may inform the lender about current or forthcoming repayment difficulties, or a lender could become aware of difficulties indirectly during communications with the borrower or a lender could notice that the borrower's repayment activity shows potential repayment difficulties.

Some borrowers have revolving credit contracts like overdrafts, credit cards or store accounts, on which the debt does not materially reduce over time (eg where only the minimum repayment is made). This type of repayment behaviour is not necessarily a problem for the borrower, however in some cases, it may be an indicator of potential repayment difficulties.

Guidance

12.1. A lender should implement policies or procedures which set out how it identifies repayment difficulties, and manages the loans of borrowers who the lender is aware are having, or expect to have, difficulties repaying a loan.

Managing known repayment difficulties

12.2. Once a staff member or agent becomes aware that a borrower is having repayment difficulties, they should seek to:

a. explain the lender's processes regarding repayment difficulties, or in cases where this is appropriate, offer to have a conversation with the borrower about whether their repayment arrangements need to be changed, and what the borrower can afford; or

b. bring the matter to the attention of staff who can do so.

12.3. Lenders should also consider training their staff and agents to inform borrowers about financial mentoring services, where appropriate.

Example

Borrower B calls their lender (Lender L) to tell them that they have unexpectedly lost their job and struggling to meet their home loan repayments. Lender L reminds them that they can apply for changes to the repayment amount or credit agreement, what information the lender will need and any time limits for making an application. Lender L's staff member also says the following:

- *We have found that customers in your situation have benefited from speaking with a financial mentor.*
- *MoneyTalks is an independent and confidential service which is completely free. The financial mentors can help you with confidential advice, and talk you through your options for getting on top of debts and covering the essentials. I can give you the contact details or else you can look them up online.*

Potential repayment difficulties

12.4. Lenders should ensure that staff and agents who communicate with borrowers are trained to recognise key signs of potential repayment difficulties, and to manage these appropriately.

12.5. Key signs that a borrower may be experiencing repayment difficulties include:

a. information about a significant change in a borrowers' circumstances (for example serious illness or injury, recent redundancy, a relationship breakdown, or a death in the family); or

b. a pattern of:

i missed payments (including insufficient payments and late payments);

ii exceeding the credit limit; or

iii requests to change repayment dates or refinance.

Contacting borrowers who have missed payments or exceeded credit limits

12.6. A lender should implement policies or procedures which set out when and how it will contact borrowers who have missed payments or exceeded a credit limit. Policies may have regard to the frequency, duration, and risk of harm of the missed payments or exceeded credit limit, as well as the cost to the borrower if the issues are not addressed.

12.7. Policies relating to contact with borrowers should enable use of multiple methods of contact where known, and varied and spaced attempts to make contact. However a lender should only contact the borrower to the extent necessary to comply with legal obligations or to provide the information at paragraph **12.8** and **12.12**, where relevant. Where practical, some options for the borrower to respond to messages from the lender should be free of charge.

12.8. A lender's policies and training should ensure that if staff or agents directly contact a borrower who has missed payments or exceeded a credit limit, the borrower is encouraged to communicate early, openly, and honestly with the lender. This may include, where relevant:

a. clearly communicating the lender's willingness to engage with the borrower to try to find a solution for repayment issues;

b. encouraging the borrower to engage with the lender about repayment issues;

c. explaining the lender's processes regarding repayment difficulties.

12.9. For **high-cost credit agreements** a lender should ordinarily contact the borrower as soon as possible after one missed payment or occasion on which a credit limit is exceeded, to, at a minimum, notify the borrower of the issues and the risk of escalating debt. If the borrower continues to miss repayments or exceed the credit limit, the lender should contact the borrower again to discuss or otherwise communicate the other matters set out below.

12.10. All lenders should follow the Guidance set out at paragragh **2.6-2.8** about how to contact the borrower if the borrower misses payments, exceeds the credit limit or otherwise defaults.

The information to provide

12.11. The type of information that lenders should provide borrowers who have missed repayments or exceeded the credit limit should be appropriate to the amount, frequency and duration of the issue, and the nature of the credit product.

12.12. The information that lenders provide at the same time as a payment reminder or request for payment may include one or more of the following:

a. notifying the borrower of the missed payment(s)/exceeded credit limit;

b. informing the borrower of the risk of escalating debt, and any additional interest or charges (to the extent these are known at the time);

c. if relevant, reminding the borrower that they have a legal right to seek changes to the credit agreement and can discuss options with their lender (ie on grounds of unforeseen hardship);

d. reminding the borrower of the borrower's right to make a claim under a consumer credit insurance policy or repayment waiver, if applicable;

e. reminding the borrower of the borrower's option to obtain legal advice or advice from organisations that provide information about consumer rights (eg Citizen's Advice Bureau or Community Legal Centre).

f. informing the borrower that free and independent building financial capability advice is available;

g. providing the name and contact details of a building financial capability service funded by the Ministry of Social Development.

12.13. The information in paragraphs **12.12.f** and **12.12.g** must be provided if the default in payment or the exceeding of the credit limit is not rectified within 10 working days. It may be provided earlier at the lender's discretion.

Communication about repayment difficulties

12.14. Lenders should make easily available to all customers clear information about how to contact the lender if they are experiencing, or expect to experience, repayment difficulties (for example, on lender websites).

Assistance to access lenders' processes

12.15. Lenders' staff and agents may, where necessary, provide extra assistance to borrowers to access the lender's processes relating to repayment difficulties (eg assisting the borrower to complete the lender's application if the borrower has difficulty doing so).

Inquiries when repayment difficulties are identified

12.16. Where a lender is aware that a borrower is having repayment difficulties, and in order to meet their relevant obligations under sections 9C(2)(a)(ii), 9C(2)(a)(iii) and 9C(3)(a)(ii) of the Act, a lender should establish:

a. whether repayment relief is appropriate for that borrower;

b. what repayment relief may be appropriate, given the borrower's circumstances; and

c. whether the borrower may be eligible for the statutory hardship process in subpart 8 of part 2 of the CCCFA.

12.17. A lender should only request information from the borrower which is reasonably necessary for the lender to reach a decision on the matters in paragraph **12.16**.

12.18. Types of inquiries which may be relevant include:

a. asking the borrower:

i the reason for the repayment difficulties (eg whether there has been a change of circumstances vs a different reason for the difficulties);

ii current or expected changes to income or expenses (if known)

iii the amount of repayments the borrower may be able to afford;

iv how long they may be impacted for (if known);

v whether they are able to make a claim under any insurance policy or repayment waiver they may have purchased;

vi any steps the borrower is taking to address the repayment difficulties; and

vii any other information that may be relevant to a lender in relation to repayment difficulties or to support a borrower's request for repayment relief;

b. checking the borrower's credit, income and repayment history, or other information held about the lender about the borrower.

12.19. Where relevant and in cases where the borrower may be eligible to benefit, a lender should also check whether its available records indicate that the borrower has a relevant insurance contract (as defined under s9B of the Act) or repayment waiver provided by the lender.

Types of repayment relief

12.20. A lender should make genuine attempts to work with the borrower to limit the rate at which the effects of repayment difficulties escalate.

Commentary

Repayment relief will not be appropriate in all cases of repayment difficulty. For example, in cases where the borrower is in hardship and this is expected to be long term (eg. six months or longer) or otherwise such that the borrower does not expect to be able to continue meeting obligations, then repayment relief may worsen the borrower's position and action to settle the contract may be more appropriate. Potential support options lenders may consider in these cases may include, for example, debt consolidation, debt forgiveness or proactive write-off.

Where repayment relief is appropriate, different types of relief may be suitable:

- *granting relief without variation to the credit contract;*
- *variation to the credit contract under the statutory hardship process in subpart 8 of Part 2 of the Act;*
- *other variations to the credit contract.*

Relief without variation to contract

12.21. Where a lender agrees to offer relief which does not involve a variation to the contract, thee arrangement should generally be recorded in writing by the lender in a way which is accessible to the borrower, for their future reference.

Variation using the statutory hardship process

12.22. Where a borrower may be eligible to apply for relief under the statutory hardship process, the lender should encourage the borrower to apply.

12.23. For the purposes of section 55, a written application:

a. may be submitted electronically;

b. may be completed on behalf of the borrower (eg by a support person like a family member, by an authorised agent such as a person with enduring powers of attorney, by a **financial mentor** authorised to do so, or by a lender's representative transcribing or taking notes based on a borrower-lender conversation; and

c. does not require the signature of the borrower.

12.24. A lender does not need to wait to receive a formal hardship application to start working with a borrower on repayment relief options.

Other variation

12.25. Where a borrower is willing to work through repayment difficulties to find a way to meet their obligations under the agreement but does not meet the criteria in the Act for the statutory hardship process (or where different repayment relief is more suitable), a lender should, where possible, consider agreeing to an arrangement that enables the borrower to do so. This may include:

a. relief similar to that provided for in section 56 of the Act;

b. agreeing to a repayment plan;

c. accepting reduced payments for a reasonable period of time in order to allow a borrower to recover from the repayment difficulty;

d. suspending, reducing, waiving, or cancelling default interest or default fees in relation to a specific event or period of time;

e. offering the borrower one of its more affordable products, if available.

Matters that a lender should take into account when considering relief

12.26. Accommodating a repayment plan or variation is likely to meet the lender's obligation to act with the care, diligence and skill of a responsible lender, if the relief has the following characteristics:

a. fair and reasonable for both the lender and the borrower in all the circumstances; and

b. not more extensive than is necessary to enable the borrower to reasonably expect to be able to discharge their obligations while also meeting necessities and other financial commitments.

12.27. The following are matters that the lender should take into account when considering whether a form of relief is fair and reasonable and not more extensive than is necessary for the borrower's circumstances, including whether relief options in section 56 of the statutory hardship process in the Act may be appropriate:

a. whether the proposed relief:

i will allow the borrower to meet their obligations during the period of the proposed relief and over the remaining life of the credit agreement; and

ii would enable the borrower to meet their obligations during the period of unforeseen hardship or other repayment difficulty, would unnecessarily prolong the period of difficulty, or would be likely to result in the borrower experiencing financial difficulties over the remaining life of the credit agreement;

b. the nature of the goods or property against which the loan is secured (if relevant) (ie whether the additional cost to be paid by the borrower as a result of the repayment plan or variation is reasonable, having regard to the consequences of the borrower giving up their security interest (or other consequence of enforcement action)); and

c. the suggestions, if provided to the lender, of a financial mentor authorised by the borrower to liaise with the lender about the borrower's finances.

12.28. It may not be possible to determine the matters in paragraph **12.27.a** above, if the borrower's circumstances are uncertain. In such cases the lender may consider offering shorter-term relief and re-assess the customer's circumstances at a later time. When determining the duration of the short-term relief or the timing of the re-assessment a lender should take into account the date on which the borrower ceases to be eligible for the statutory hardship process, under section 57(1)(a)(ii) or (iii).

Assisting the borrower to make informed decisions about relief options

12.29. When a contract is varied to provide the borrower with relief, the total amount owing on the loan may increase. If this is the case, the lender should make this clear to the borrower.

12.30. Where more than one relief option is available to the borrower, lenders should provide the borrower with information on their options. This may be by comparing key aspects of the different options, and the relative cost impacts of those options. For example, changing the loan terms to provide for interest only payments for a period of time, or reducing the amount of the borrower's repayment for a period of time may result in less interest accruing so one advantage is that it would be less costly in the long term than an arrangement that involves deferring loan repayments altogether for a period.

12.31. More generally, lenders should follow to the greatest extent possible the Guidance in Chapters 7 and 11 of the Code.

Informing the borrower in relation to specific types of relief

12.32. Where a borrower is or will be making regular repayments that are less than the amount of interest and fees (including default interest and fees) accruing, the lender should inform the borrower that the borrower is or will be getting further into debt .

12.33. In the case of full repayment deferrals, lenders should inform the borrower:

a. that no payments will be made during the period of the deferral;

b. the period of time for which payments will be deferred; and

c. whether the borrower will be charged interest and fees on the loan during the period of the deferral (and therefore whether the loan will increase during the period of the deferral while no payments are being made).

Monitoring

12.34. When a temporary variation has been made in response to repayment difficulties because there is uncertainty about how the financial situation of the particular borrower may develop, then lenders should monitor the contract. In these cases, lenders should consider regularly communicating with the borrower to understand whether:

a. they can continue to make payments under the variation at the rate agreed; and

b. their financial situation has changed, in which case the lender should offer to have a conversation about what the borrower can afford and review the variation.

12.35. Whether regular communication is appropriate will depend on the duration of the relief and the nature of the borrowers' circumstances.

Suspending direct marketing of further credit

12.36. When a borrower has received repayment relief, the lender should suspend direct marketing or promotion of further credit to that borrower (eg loan top ups) for a reasonable period of time after repayment relief is provided (or temporary relief finishes). This does not prevent a staff member discussing credit products which would assist the customer in reducing repayment difficulties (eg a debt consolidation loan).

Example

Lender L provides repayment relief for a borrower by making a change to the contract to reduce the borrower's scheduled repayments and extending the loan's term. The lender should suspend direct marketing to the borrower for a reasonable period of time after that change is made. Example

Lender L provides temporary repayment relief by providing a loan repayment deferral for 6 months. The lender should suspend direct marketing to that borrower for the duration of the loan repayment deferral and for a reasonable period after that loan repayment deferral ends.

12.37. The length of time for which it is reasonable to suspend direct marketing will vary depending on the borrowers' circumstances, and the nature of their repayment difficulties and relief arrangements.

Suspending active pursuit of recovery

12.38. When a lender is aware that a borrower has sought repayment relief, the lender should consider suspending active pursuit of recovery of the debt (ie formal demands for payment, or referral or sale of debt to debt collection teams or agencies) until the request for relief is resolved.

12.39. The Act provides that a lender cannot take repossession enforcement action while in the process of deciding on a statutory hardship application under subpart 8 of part 2 of the Act. Lenders should take the same approach where assistance outside of the statutory regime is being considered by the lender.

Declining to offer relief

12.40. When declining relief (whether under the statutory hardship process or otherwise) the lender should inform the borrower that:

a. they can make a complaint if they are not satisfied with the lender's decision; and

b. that they have access to a free external dispute resolution scheme if the lender does not resolve the complaint to their satisfaction.[1]

12.41. Where a lender declines an application under the statutory hardship process and intends to issue a repossession notice, prior to issuing the notice, the lender should inform the borrower that they have the option to voluntarily surrender the security property.

Referring borrowers to financial mentoring or building financial capability services

12.42. Lenders should consider establishing referral protocols with **financial mentors,** for borrowers experiencing repayment difficulties.

12.43. Note however that lenders cannot rely on **financial mentors** or other borrower advice services to fulfil lenders' obligations to assist the borrower to make informed decisions.

Specific practices relating to other problems, or to repayment difficulties

12.44. A lender should not:

a. hold multiple direct debit forms signed by the borrower and lodge another form without the borrower's consent if the borrower cancels one;

b. tell or imply to the borrower that the borrower cannot cancel a direct debit;

c. continue to receive money from the borrower by direct debit after the lender should have reasonably realised that the payments are being received for a loan that has been fully paid. A lender should put in place systems that identify when such payments are being received on accounts (other than revolving credit agreements) that have been fully paid;

d. let a borrower exceed their credit limit and charge a fee when this occurs without having given the borrower information (before or after the borrower entered into that credit agreement) that explains that they may be able to exceed the limit;

e. where a borrower is having repayment difficulties and is engaging with the lender to try to resolve them, a lender should not request or arrange for the borrower's loan repayments to be automatically deducted from their benefit or wages before these are deposited into the borrower's account, unless the lender has reasonable grounds to believe that the borrower in their current circumstances could reasonably expect to be able to discharge their repayment obligations while also meeting necessities and other financial commitments;

[1] In the case of applications under the statutory hardship process, the lender must also give the borrower a clear summary of their rights under section 58 of the Act.

f. take a new guarantee or vary an existing guarantee after a borrower has defaulted under a credit agreement without informing the guarantor that the guarantee or variation is necessary because of the default;

g. require that a borrower has made an application for a KiwiSaver hardship withdrawal as a pre-requisite to considering a hardship application;

h. hold a borrower's or guarantor's passports, credit or debit cards, driver's licences or other critical personal documents. This does not affect the rights of a lender to hold or repossess a credit or debit card issued by that lender to the borrower, in accordance with the lender's terms and conditions; or

i. contact or communicate with anyone other than the borrower or their authorised representative, beyond the minimum extent necessary to reach the borrower.

Example

Lender L contacts a borrower's employer and identifies the borrower as being in default on a loan. This may be an indication that the lender is not treating the borrower reasonably and in an ethical manner.

12.45. When a borrower is facing repayment difficulties, a lender should take into account the borrower's preferred means of repaying the debt. (In some cases the borrower may prefer that the lender realise the proceeds of selling the secured good before taking further steps, and the lender should do so if that is commercially reasonable, and can be done reasonably promptly).

Example

Borrower B has a car loan and calls their lender (Lender L) to tell them they are in financial difficulties and have no way of repaying their loan. Borrower B tells Lender L that they have found someone who is willing to buy their car for an amount that is sufficient to repay the car loan in full. Lender J concludes that the assets are not currently at risk and there is only a low risk that the proceeds of sale will not be paid to the lender. Lender J then decides to allow Borrower B to voluntarily sell the car themselves.

12.46. If the lender holds an assignment of wages (ie a wage deduction authority under the Wages Protection Act 1983) and intends to forward this to the borrower's employer to obtain repayment of a loan, the lender should inform the borrower of:

a. any rights the borrower has to withdraw written consent to the deductions; and

b. the lender's intent to contact the employer, to give the borrower an opportunity to explain the situation to their employer.

Enforcement

12.47. Where the lender has attempted to work with the borrower to meet their obligations, but is at the point of exercising its enforcement rights:

a. the lender's decision about which enforcement response to take should be based on what the lender considers to be an effective way of obtaining repayment of the loan;

b. the lender may take into account whether a particular enforcement response is necessary to prevent the borrower obtaining more credit (and thus more debt) elsewhere; and

c. the lender should not take an enforcement response simply for the purpose of punishing the borrower or guarantor for the borrower's default.

12.48. A lender should consider agreeing to an alternative payment arrangement, where the lender calls on a guarantee and the guarantor is:

a. unable to comply with the guarantor's payment obligations under the guarantee within the time required; but

b. willing to find a way to comply and the lender is satisfied that an alternative payment arrangement will allow the guarantor to meet their payment obligations within a reasonable period.

12.49. To comply with the above lender responsibilities, if a lender is using debt collection agents the lender should seek to ensure that the debt collection agents it uses act at all times in a way that enables the lender to meet its legal obligations under the Act, including by:

a. requiring the debt collection agent to ensure that its staff understand and agree to comply with the lender's relevant legal obligations; and

b. confirm with the debt collection agency that it has processes to ensure that its staff understand and agree to comply with their legal obligations and act in accordance with the terms of the agreement between the lender and borrower.

Complaints

12.50. A lender should be satisfied that relevant staff and agents who have customer contact are capable of recognising when a borrower is making a complaint and understand how complaints are to be referred.

Commentary

Complaints are defined in regulation 5A of the Credit Contracts and Consumer Finance Amendment Regulations 2020.

12.51. If a borrower has complained about how the lender is dealing with the borrower, the lender should remind the borrower of the borrower's right to use the lender's internal complaints process.

12.52. A lender should have a documented internal complaints process. The process should be straightforward for borrowers and guarantors to follow and use, and information about the process should be accessible to borrowers and guarantors. The information about the complaints process should describe how complaints can be made, how they will be dealt with, by whom (if by a specific team or person), and indicative timeframes for responding to complaints.

12.53. The internal complaints process should be consistent with any requirements of the lenders' external dispute resolution scheme, including in relation to complaints registers.

12.54. A lender should consider and respond to complaints within a reasonable period of time, having regard to the circumstances including the nature of the complaint. Where the complaint has reached the end of the lender's internal complaints process without full resolution, the lender should (in accordance with the requirements of the lender's external dispute resolution scheme), inform the borrower of the borrower's rights to refer the complaint to the external scheme. The lender should provide the borrower with the contact details for the external scheme.

12.55. If requested, the lender should provide contact details for its internal dispute resolution team or contact person, and its external dispute resolution scheme.

13 Repossession

Principle

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see section 9C(2)(b) of the Act).

Lender responsibilities

A lender must, in relation to an agreement with a borrower, treat the borrower and their property (or property in their possession) reasonably and in an ethical manner, including during a repossession process (including by taking all reasonable steps to ensure that goods and property are not damaged during the process, that repossessed goods are adequately stored and protected, and that the right to enter premises is not exercised in an unreasonable manner)(see section 9C(3)(d)(iii) of the Act).

A lender must, in relation to an agreement with a borrower, meet all the lender's legal obligations to the borrower, including under this Act… which include obligations in relation to… credit repossession (see section 9C(3)(f)(i) of the Act).

A lender must, in relation to a relevant guarantee that is taken by the lender, treat the guarantor reasonably and in an ethical manner, including when breaches of a credit contract to which the guarantee applies have occurred or may occur or when other problems arise (see section 9C(4)(c) of the Act).

Guidance

Decisions to repossess

13.1. To comply with the above lender responsibilities, a lender should ensure that a decision to repossess is reasonable. In particular:

a. unless the secured goods are at risk (see below), a lender should consider all other less intrusive means of enforcing the agreement before repossessing those goods; and

b. despite a. above, a lender should also consider agreeing to repossession where reasonably requested by the borrower.

Example

Borrower B who bought their TV on credit calls the lender (Lender L) to tell them they are in financial difficulties and have no way of repaying their loan. Borrower M tells Lender L it should repossess the TV. After discussions about Borrower B's specific circumstances and other options to repay the

lending, Lender L discusses what steps it will now take, including repossessing the TV as preferred by Borrower B.

13.2. Whether a decision by the lender to repossess is reasonable will depend on the circumstances, including the borrower's level of co-operation. For instance, where the borrower remains in contact with the lender and continues to update the lender on their situation, the lender should work with the borrower to consider other less intrusive options. Where the borrower is dishonest, obstructive, or deliberately avoiding the lender, it is likely to be reasonable for the lender to proceed quickly with a repossession.

13.3. A lender's decision to repossess should be taken for the purpose of obtaining repayment of the loan and should not be undertaken simply for the purpose of punishing the borrower where repossession would not be economic given the costs involved.

Example

Lender L considers repossessing items (children's toys and old hand tools) which it has security over for debts owed by Borrower B. Lender L decides that the likely sale value of the items is less than the likely cost of repossession and sale, and the items are of little or no economic value. In deciding not to repossess in that situation, Lender L is acting responsibly.

13.4. A lender should not threaten repossession only for the purpose of intimidating borrowers into repayment where a decision to repossess would not be reasonable (as above). However, in the course of discussing the borrower's default, lenders should inform the borrower that repossession is one of the possible enforcement responses if the default is not remedied and that there may be costs incurred that the borrower will have to meet.

Commentary

Under section 83E of the Act, repossession cannot take place unless the borrower is in default under the credit agreement or the goods are "at risk". The Act provides that goods are at risk if the lender believes, on reasonable grounds, that those goods have been, or will be, destroyed, damaged, endangered, disassembled, removed, concealed, sold, or otherwise disposed of contrary to the provisions of the relevant credit agreement.

Under section 83H of the Act, a borrower may voluntarily deliver goods identified in a repossession warning notice and the lender must specify a reasonable place to which the borrower may deliver the goods.

Guidance

13.5. To comply with the lender responsibilities, lenders who rely on the "at risk" ground to repossess goods should make and retain a record of the reasonable grounds for their belief that goods were at risk.

13.6. The existence of one of following facts is unlikely on its own to provide the lender with reasonable grounds for a belief that goods are at risk:

a. the borrower is in default under the agreement;

b. the borrower has changed address without notifying the lender; or

c. insurance over the goods has lapsed.

13.7. In relation to the obligation to specify a reasonable place to which the borrower may voluntarily deliver the goods, a lender should:

a. specify the place of business that the borrower attended (if any) to obtain the loan as the place to which the borrower may deliver the goods during usual opening hours, unless:

i that place is impractical given the nature of the secured good, including due to space constraints;

ii the premises is operated by a party that has assigned the credit agreement to another party;

iii doing so would pose a safety risk to the lender's staff; or

iv some other place is more convenient to both the borrower and the lender; or

b. in a case where the loan was obtained by the borrower without attending a physical address, specify a place nominated by the lender as the place to which the borrower may deliver the goods during usual opening hours.

Use of repossession agents

13.8. To comply with the above lender responsibilities, a lender should require that the repossession agents and repossession employees who they engage, comply with the credit repossession obligations set out in Part 3A of the Act and the Guidance in this Code in relation to repossession.

13.9. Before engaging repossession agents to carry out any repossessions, a lender should:

a. be satisfied that the repossession agent holds a licence or certificate as required under the Private Security Personnel and Private Investigators Act 2010 (PSPPIA);

b. be satisfied that any individuals who carry out repossessions on behalf of the repossession agent hold a certificate of approval as a repossession employee as required under the PSPPIA;

c. require the repossession agent to ensure that its repossession employees understand and agree to comply with their obligations under Part 3A; and

d. confirm with the repossession agent that it has in place the processes to ensure employee compliance as referred to at paragraph **13.9.c**.

13.10. Before engaging any individual to carry out any repossessions, a lender should:

a. be satisfied that the individual holds a certificate of approval as a repossession employee as required under the PSPPIA; and

b. require the repossession employee to understand and agree to comply with their obligations under Part 3A.

After the repossession warning notice has been issued

Commentary

Under section 9C(3)(d)(iii) and Part 3A of the Act:

- *a lender must, in exercising the right to enter premises, act in accordance with the lender responsibility principles;*
- *the lender responsibilities provide that the lender must take all reasonable steps to ensure that goods and property are not damaged during the repossession process and that repossessed goods are adequately stored and protected; and*
- *the lender must take steps that are reasonably practicable to ensure that the premises are not left obviously open.*

13.11. In undertaking repossession, lenders or their agents should:

a. where practicable, carry out the repossession at a time when the borrower is at the premises to avoid exercising any right to enter by force when the borrower is not present;

b. when exercising a right to enter premises by force, look over the property to consider a method of entry that would cause the least amount of damage and that would reasonably enable the premises to be left not obviously open;

c. not use trickery or deception to gain access to a house or other premises, such as by misleading occupants into thinking that the repossession personnel are police officers or bailiffs;

d. take all reasonable steps to protect the borrower's privacy by only disclosing information about the borrower to other occupants of the premises or other persons where necessary to undertake the repossession. Where the borrower is present, the lender or its agent should not disclose any information about the credit agreement and repossession to any other occupants that are present. Where the borrower is not present, the lender or its agent may disclose to an occupant the fact that they are exercising a right of repossession against the borrower;

e. make and keep a record of any damage that occurs to secured goods or other property during the repossession;

f. allow adequate time to take possession, dismantle, where necessary, and carefully store easily damaged items;

g. use materials, tools, and containers (as necessary) for taking and carrying items that are fit for the purpose for which they are used;

h. provide the borrower with a reasonable opportunity to remove other items not covered by the security interest from inside the secured goods, such as children's car seats. Where the borrower is not present, the lender or its agent should:

   i where practical, take reasonable steps to remove such items: or

   ii alternatively, give the borrower a reasonable opportunity to uplift any such items from the lender following repossession;

i. check to ensure that property to be repossessed are the goods secured under the agreement; and

j. use a transportation vehicle or mechanism that is appropriate for the secured goods and minimises the risk of damage or loss to the secured goods through exposure to weather or by leaving them unsecured against theft.

13.12. A lender should not threaten, harass or use force against the borrower or other occupants.

Post repossession and sale

Commentary

Under Part 3A of the Act a lender must ensure that every aspect of the sale of repossessed goods is commercially reasonable and take reasonable care to obtain the best price reasonably obtainable for the goods as at the time of sale.

13.13. Following repossession, a lender should (and should ensure that their agents):

a. release personal property securities from the Personal Property Securities Register where lenders have repossessed and sold all items subject to the registered security;

b. take all reasonable steps to store and protect the secured goods so that they are not damaged or subject to loss, including taking steps to protect against the risk of damage by fire, theft, vandalism, or weather exposure;

c. take reasonable care to obtain the best price reasonably obtainable for the goods as at the time of sale. This may be done through:

i an auction or tender that is advertised in a way appropriate to the nature of the goods (for instance, by advertising addressed to persons most likely to have an interest in purchasing such goods or in media that such persons are likely to read); or

ii a private sale where the lender is satisfied the price is the best price reasonably obtainable for those goods. One way in which the lender may be satisfied of this is where the price is consistent with an independent valuation by a person with knowledge or experience in the relevant goods or by reference to another independent benchmark.

Example

For common consumer items, sale by auction may be a suitable method for obtaining the best price.

For unique items of high value, a lender should consider obtaining a valuation or consulting a person with experience in relation to such items to determine an appropriate sale method.

Where available, lenders could, refer to price benchmarks; in the case of used vehicles, lenders could refer to prices of second-hand cars listed on TradeMe or in other motor trade publications.

13.14. If a lender repossesses low-value goods that prove unsaleable after a reasonable period of time, it should make the goods available for collection by the borrower.

Commentary

Where the net proceeds of the sale of repossessed goods are insufficient to settle the agreement, section 83ZM provides that the amount that the lender may recover is limited to the difference between the amount required to settle the agreement as at the date of the sale and the net proceeds of the sale. After the date of sale (of the first repossessed item, where multiple consumer goods are subject to the credit contract) no interest payments or other payments accrue.

14 Oppression

Principle

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see section 9C(2)(b) of the Act).

Lender responsibilities

A lender must, in relation to an agreement with a borrower, ensure, in the case of an agreement to which Part 5 applies, that—

- *the agreement is not oppressive:*
- *the lender does not exercise a right or power conferred by the agreement in an oppressive manner:*
- *the lender does not induce the borrower to enter into the agreement by oppressive means; (see section 9C(3)(e) of the Act).*

A lender must ensure, in the case of a guarantee that is to be treated as forming part of a credit contract for the purposes of Part 5 under section 119, that—

- *the guarantee is not oppressive:*
- *the lender does not exercise a right or power conferred by the guarantee in an oppressive manner:*
- *the lender does not induce the guarantor to give the guarantee by oppressive means; (see section 9C(4)(d) of the Act).*

A lender must meet all the lender's legal obligations to the borrower including […] prohibitions on unfair contract terms under the Fair Trading Act (see section 9C(3)(f) of the Act).

Commentary

The question of whether there has been oppression is highly dependent on the circumstances of the particular credit arrangement. A responsible lender will be alert to the risk that oppression may arise in any credit arrangement by taking into consideration the below Guidance.

The Guidance is based on the factors the courts have expressed as generally relevant to the determination of what constitutes oppression and the factors which the Court must have regard to as set out in the Act. The factors in the Act include whether the borrower or guarantor is

reasonably able to protect their interests taking into account their particular characteristics (including their age or physical or mental condition). The Guidance does not limit the Court's ability to reopen a credit agreement on grounds of oppression under Part 5 of the Act.

Guidance

14.1. To comply with the lender responsibility to ensure that the lender does not induce the borrower to enter into the agreement or a guarantor to give a guarantee, by oppressive means, a lender should:

a. ensure the lender applies the rest of the Guidance in this Code in relation to assisting borrowers and guarantors to make informed decisions;

b. not pressure borrowers or guarantors to enter into an agreement or give a guarantee immediately without allowing them time to consider the information and explanations of the agreement or guarantee provided by the lender;

c. not use threats to take enforcement action in response to a borrower's default under one agreement in order to pressure the borrower to enter into another credit agreement or a guarantor to give a guarantee;

d. require lending staff and agents who interact with the borrower or guarantor to consider whether there are any matters which lead them to reasonably believe that the borrower or guarantor may not be reasonably able to protect their own interests (for example, due to their age or physical or mental condition); and

e. take particular care when dealing with borrowers that appear not to be reasonably able to protect their own interests, including considering whether the lender should recommend for those borrowers or guarantors to be provided with, or referred for, independent legal advice or other specialist expertise.

14.2. To comply with the lender responsibility to ensure that the terms of the agreement and guarantee are not oppressive, a lender should:

a. consider, when drafting terms of credit agreements and guarantees:

i how the proposed terms of any credit agreement and guarantee compare to reasonable standards of commercial practice. The mere fact that a particular term is common does not mean it is reasonable. However, consideration of common standards of commercial practice will be helpful; and

ii whether the terms are reasonably necessary to protect the interests of the lender and allow the borrower to be reasonably able to comply with their obligations;

b. require lending staff and agents who interact with the borrower or guarantor to:

i consider whether there are any matters which lead them to reasonably believe that the borrower or guarantor may not be reasonably able to protect their own interests (for example, due to their age or physical or mental condition); and

ii take particular care when dealing with borrowers or guarantors that appear not to be reasonably able to protect their own interests to avoid the possibility of entering into an unconscionable agreement. This may include recommending that the borrower or guarantor get independent legal advice or other specialist advice.

Commentary

When drafting standard form consumer contracts, lenders should consider the Commerce Commission's guidance in relation to unfair contract terms.

Guidance

14.3. To comply with the lender responsibilities to ensure that the lender does not exercise a power in an oppressive manner, a lender should ensure it applies the rest of the Guidance in this Code in relation to treating the borrower, guarantor and their property reasonably and in an ethical manner.

14.4. If a borrower is in default, a lender should only charge interest and fees for a reasonable length of time. A lender should not allow interest or fees to accrue indefinitely.

Commentary

A lender that treats the borrower, guarantor and their property reasonably and in an ethical manner in accordance with the guidance in Chapter 12 and 13 of this Code, including when breaches of an agreement have occurred in accordance with the lender responsibilities, is unlikely to be exercising a power in an oppressive manner.

15 Glossary

Lenders under **high-cost credit agreements** should follow Guidance identified as applying to those agreements. The Act defines high-cost credit agreements as agreements where:

- the annual interest rate (expressed in terms of a percentage) is 50 per cent or greater, or
- the weighted average annual interest rate applied to the unpaid balance is, or is likely to be, 50 per cent or greater on any day during the term of the contract, or
- the total rate of the interest charges (including default interest charges) that may be applied cumulatively to the same part of an unpaid balance in the event of a default in payment or the credit limit being exceeded is, or is likely to be, a rate of 50 per cent or greater.

Commentary

In general, a vulnerable consumer is someone who, due to their personal circumstances, is especially susceptible to detriment, particularly when a firm is not acting with appropriate levels of care (this is the general concept used by Financial Markets Authority, for example). However, the Responsible Lending Code defines vulnerability more specifically, with reference to those factors which make a customer especially susceptible to detriment in the context of consumer credit.

Under the Code an individual is a **vulnerable borrower** or **vulnerable guarantor** where the lender knows, or the circumstances are such that the lender ought to know, that the individual:

- is unlikely to understand the nature of the transaction or the information provided (for instance because they do not have a good understanding of English or because they do not have basic knowledge about financial matters); or
- appears to be under significant pressure to obtain credit or give a guarantee (for instance, where the credit is needed urgently or for necessities, or where the borrower or guarantor is under undue influence from another party to obtain credit or give a guarantee).

Under the Code, a **well-informed user of credit** is an individual who lenders can reasonably expect to have a good pre-existing understanding of credit agreements or guarantees of that type, which may be due to their previous experience with credit agreements or guarantees of that type, other than:

- an individual who is a vulnerable borrower or guarantor; or
- where the relevant agreement is a high-cost credit agreement.

The Code defines **financial mentor** as a person who is employed by or volunteering for a not-for-profit financial capability and budgeting service recognised by FinCap.

16 Appendix

Part A: Key definitions from the Act (As from 1 October 2021)

The definitions of consumer credit insurance, creditor, credit-related insurance, and repayment waiver are set out in section 5(1) of the Act as follows:

consumer credit insurance means insurance cover in the event of the insured's disability or death or the insured contracting a sickness, sustaining an injury, or becoming unemployed, if the liability of the insurer is to be determined by reference to the liability of the insured under a credit contract or a consumer lease

creditor—

(a) means a person who provides, or may provide, credit under a credit contract; and

(b) if the rights of that person are transferred by assignment or by operation of law, includes the person for the time being entitled to those rights; and

(c) includes a person declared by regulations to be a creditor; but

(d) does not include a person exempted by regulations from being a creditor

credit-related insurance means, in connection with a credit contract or consumer lease,—

(a) insurance over secured property or leased goods; or

(b) insurance that provides cover for the shortfall that occurs if secured property or leased goods are totally or substantially destroyed and the insurance proceeds from another insurance contract are insufficient to pay any outstanding obligations of the debtor under the credit contract or the lessee under the consumer lease; or

(c) consumer credit insurance

repayment waiver means an agreement between a creditor or lessor and a debtor or lessee under which the creditor or lessor, for an additional consideration, agrees to waive the creditor's or lessor's right to any amount payable under the credit contract or consumer lease in the event of the unemployment of, sickness of, injury to, or the disability or death of the debtor or lesser

The definitions of **buy-back transaction**, **occupier**, and **transferee** are set out in section 8 of the Act as follows:

8 Meaning of buy-back transaction

(1) In this Act, unless the context otherwise requires, **buy-back transaction** means a transaction under which—

(a) a person (the occupier) transfers, or agrees to transfer, an estate in land to another person (the transferee); and

(b) the land is the principal place of residence of the occupier at the time that the occupier enters into the transaction; and

(c) the occupier, or a person designated by the occupier, has, after the transfer, a right to occupy the whole or any part of the land; and

(d) 1 or more of the following applies:

(i) the occupier, or a person designated by the occupier, has a right to repurchase the estate in the land in whole or in part:

(ii) there is an understanding between the occupier and the transferee that the occupier, or a person designated by the occupier, has a right to repurchase the estate in the land in whole or in part:

(iii) there is an understanding between the occupier and any buy-back promoter that the occupier, or a person designated by the occupier, has a right to repurchase the estate in the land in whole or in part; and

(e) the occupier is a natural person who enters into the transaction primarily for personal, domestic, household, or investment purposes.

(2) If, by virtue of any contract or contracts (none of which by itself constitutes a buy-back transaction) or any arrangement, there is a transaction that is in substance or effect a buy-back transaction, the contract, contracts, or arrangement must, for the purposes of this Act, be treated as a buy-back transaction made at the time when the contract, or the last of those contracts, or the arrangement, was made, as the case may be.

The definition of consumer credit contract is set out in section 11 of the Act, which is set out below:

11 Meaning of consumer credit contract

(1) A credit contract is a consumer credit contract if—

(a) the debtor is a natural person; and

(b) the credit is to be used, or is intended to be used, wholly or predominantly for personal, domestic, or household purposes; and

(c) 1 or more of the following applies:

(i) interest charges are or may be payable under the contract:

(ii) credit fees are or may be payable under the contract:

(iii) a security interest is or may be taken under the contract; and

(d) when the contract is entered into, 1 or more of the following applies:

(i) the creditor, or one of the creditors, carries on a business of providing credit (whether or not the business is the creditor's only business or the creditor's principal business):

(ii) the creditor, or one of the creditors, makes a practice of providing credit in the course of a business carried on by the creditor:

(iii) the creditor, or one of the creditors, makes a practice of entering into credit contracts in the creditor's own name as creditor on behalf of, or as trustee or nominee for, any other person:

(iv) the contract results from an introduction of one party to another party by a paid adviser or broker.

(1A) For the purposes of subsection (1)(b), the predominant purpose for which the credit is to be used is

(a) the purpose for which more than 50% of the credit is intended to be used; or

(b) if the credit is intended to be used to obtain goods or services for use for different purposes, the purpose for which the goods or services are intended to be most used.

(1B) The reference to intention in subsections (1)(b) and (1A) is a reference to the debtor's intention.

(1C) An arrangement or a facility is also a consumer credit contract if regulations declare it to be a consumer credit contract.

(2) This section is subject to sections 14 and 15.

The definition of **relevant insurance contract** is set out in section 9B of the Act as follows:

relevant insurance contract means, in relation to a lender, a credit-related insurance contract entered into, or to be entered into, by a borrower if—

(a) the borrower has also entered into, or is seeking to enter into, an agreement with the lender; and

(b) the insurance is arranged by the lender.

Section 9B(2) of the Act goes on to explain when insurance is arranged by the lender in the following terms:

(2) For the purposes of this Part (Part 1A), insurance is arranged by the lender if 1 or more of the following applies:

(a) the lender is the insurer:

(b) the lender acts as the agent of the insurer in relation to the insurance:

(c) the lender receives a commission in relation to the insurance:

(d) the lender requires the borrower to obtain the insurance from a particular insurer or particular insurers:

(e) the lender has in place any arrangement that has the effect of requiring the borrower to obtain the insurance from a particular insurer or particular insurers:

(f) the insurance is financed under the agreement entered into by the borrower and the lender.

Part B: The lender responsibility principles

9C Lender responsibility principles

(1) Every lender must comply with the lender responsibility principles.

(2) The lender responsibility principles are that every lender must, at all times,—

(a) exercise the care, diligence, and skill of a responsible lender—

(i) in any advertisement for providing credit or finance under an agreement or for providing credit-related insurance under a relevant insurance contract; and

(ii) before entering into an agreement to provide credit or finance or a relevant insurance contract and before taking a relevant guarantee; and

(iii) in all subsequent dealings with a borrower in relation to an agreement or a relevant insurance contract or a guarantor in relation to a relevant guarantee; and

(b) comply with all the lender responsibilities specified in subsections (3), (4), and (5).

(3) The lender responsibilities are that a lender must, in relation to an agreement with a borrower,—

(a) make reasonable inquiries, before entering into the agreement, and before making a material change referred to in subsection (8) so as to be satisfied that it is likely that—

(i) the credit or finance provided under the agreement will meet the borrower's requirements and objectives; and

(ii) the borrower will make the payments under the agreement without suffering substantial hardship; and

(b) assist the borrower to reach an informed decision as to whether or not to enter into the agreement and to be reasonably aware of the full implications of entering into the agreement, including by ensuring that—

(i) any advertising —

(A) complies with the advertising standards set out in the regulations; and

(B) is not, or is not likely to be, misleading, deceptive, or confusing to borrowers; and

(ii) the terms of the agreement are expressed in plain language in a clear, concise, and intelligible manner; and

(iii) any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing; and

(iv) reasonable steps are taken to offer to the borrower information about the agreement in another language (language A) if—

(A) advertising that is wholly or significantly in language A is being, or within the preceding 6 months has been, distributed to the public or a section of the public; and

(B) the steps are necessary to ensure that the borrower can reach an informed decision (for example, if the borrower may not have a good understanding of the language in which the lender is otherwise providing information to the borrower under this Act); and

(c) assist the borrower to reach informed decisions in all subsequent dealings in relation to the agreement, including by ensuring that—

(i) any variation to the agreement is expressed in plain language in a clear, concise, and intelligible manner; and

(ii) any information provided by the lender to the borrower after the agreement has been entered into is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing; and

(d) treat the borrower and their property (or property in their possession) reasonably and in an ethical manner, including

(i) when breaches of the agreement have occurred or may occur or when other problems arise:

(ii) when a debtor under a consumer credit contract suffers unforeseen hardship (see section 55):

(iii) during a repossession process (including by taking all reasonable steps to ensure that goods and property are not damaged during the process, that repossessed goods are adequately stored and protected, and that the right to enter premises is not exercised in an unreasonable manner); and

(e) ensure, in the case of an agreement to which Part 5 applies, that—

(i) the agreement is not oppressive:

(ii) the lender does not exercise a right or power conferred by the agreement in an oppressive manner:

(iii) the lender does not induce the borrower to enter into the agreement by oppressive means; and

(f) meet all the lender's legal obligations to the borrower, including under this Act, the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Financial Service Providers (Registration and Dispute Resolution) Act 2008, and the Financial Advisers Act 2008, which include—

(i) obligations in relation to disclosure, credit fees, unforeseen hardship applications, and credit repossession under this Act; and

(ii) prohibitions on false or misleading representations and unfair contract terms under the Fair Trading Act 1986; and

(iii) the guarantee that the service of providing credit and any other services will be carried out with reasonable care and skill under the Consumer Guarantees Act 1993.

(4) The lender responsibilities are also that a lender must, in relation to a relevant guarantee that is taken by the lender,—

(a) make reasonable inquiries, before the guarantee is given, so as to be satisfied that it is likely that the guarantor will be able to comply with the guarantee without suffering substantial hardship; and

(b) assist the guarantor to reach an informed decision as to whether or not to give the guarantee and to be reasonably aware of the full implications of giving the guarantee, including by ensuring that—

(i) the terms of the guarantee are expressed in plain language in a clear, concise, and intelligible manner; and

(ii) any information provided by the lender to the guarantor is not presented in a manner that is or is likely to be misleading, deceptive, or confusing; and

(iii) reasonable steps are taken to offer to the guarantor information about the guarantee in another language (**language A**) if—

(A) advertising about the agreement that is wholly or significantly in language A is being, or within the preceding 6 months has been, distributed to the public or a section of the public; and

(B) the steps are necessary to ensure that the guarantor can reach an informed decision (for example, if the guarantor may not have a good understanding of the language in which the lender is otherwise providing information to the guarantor under this Act); and

(c) treat the guarantor reasonably and in an ethical manner, including when breaches of a credit contract to which the guarantee applies have occurred or may occur or when other problems arise; and

(d) ensure, in the case of a guarantee that is to be treated as forming part of a credit contract for the purposes of Part 5 under section 119, that—

(i) the guarantee is not oppressive:

(ii) the lender does not exercise a right or power conferred by the guarantee in an oppressive manner:

(iii) the lender does not induce the guarantor to give the guarantee by oppressive means; and

(e) meet all the lender's legal obligations to the guarantor, including under the Acts specified in subsection (3)(f).

(5) The lender responsibilities are also that a lender must, in relation to a relevant insurance contract,—

(a) make reasonable inquiries, before the contract is entered into, so as to be satisfied that it is likely that—

(i) the insurance provided under the contract will meet the borrower's requirements and objectives; and

(ii) the borrower will make the payments under the contract without suffering substantial hardship; and

(b) assist the borrower to reach an informed decision as to whether or not to enter into the contract and to be reasonably aware of the full implications of entering into the contract, including by ensuring that—

(i) any advertising is not, or is not likely to be, misleading, deceptive, or confusing to borrowers; and

(ii) any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing.

(5A) In subsections (3)(a), (4)(a), and (5)(a), the requirement to make **reasonable inquiries** so as to be satisfied of a matter includes a requirement to comply with regulations made under **section 138(1)(abe)**.

(6) Subsections (3)(b)(iii) and (c)(ii), (4)(b)(ii), and (5)(b)(ii) do not apply to information that is subject to section 32(1).

(8) The material changes for the purposes of subsection (3)(a) are—

(a) the parties to the agreement agree to change the agreement by increasing a credit limit under the agreement:

(b) the lender exercises a power under the agreement to increase a credit limit under the agreement:

(c) the lender makes an additional advance that the lender did not take into account when previously satisfying itself as to the matters in subsection (3)(a).

Part C: Content of Responsible Lending Code

9F Content of Responsible Lending Code

(1) In order to achieve its purpose, the Responsible Lending Code may set out any, or all, of the following:

(a) the nature and extent of inquiries a lender should make before entering into an agreement, before a relevant guarantee is given, or before a relevant insurance contract is entered into:

(b) the processes, practices, or procedures that a lender should follow—

(i) to ensure that advertising for providing credit or finance under agreements complies with the advertising standards set in the regulations and is not, or is not likely to be, misleading, deceptive, or confusing to borrowers:

(ii) when making reasonable inquiries referred to in section 9C(3)(a), (4)(a), and (5)(a) so as to be satisfied of the matters referred to in those paragraphs and to comply with the regulations relating to those requirements:

(iii) to give the assistance referred to in section 9C(3)(b) and (c), (4)(b), and (5)(b) (including where the borrower or guarantor may not have a good understanding of the language in which the lender is otherwise providing information):

(iv) to ensure that the lender treats borrowers, guarantors, and their property (or property in their possession) reasonably and in an ethical manner:

(v) in the case of an agreement or a guarantee to which Part 5 applies, to ensure that the agreement or guarantee is not oppressive, the lender does not exercise a right or power conferred by the agreement or guarantee in an oppressive manner, and the lender does not induce the borrower to enter into the agreement, or the guarantor to give the guarantee, by oppressive means:

(vi) to promote or facilitate compliance with the legal obligations referred to in section 9C(3)(f) and (4)(e) (for example, by reference to compliance programmes):

(vii) to ensure that fees are not unreasonable in terms of section 41, 80, or 82:

(c) the circumstances in which the lender should require or recommend independent legal advice to be obtained:

(d) the processes, practices, or procedures that a lender should follow for the purposes of Part 3A:

(da) the processes, practices, or procedures that a lender should follow for the purposes of debt collection:

(e) any other matter that promotes or facilitates the lender responsibility principles (set out in section 9C(2)) and that is not inconsistent with any other enactment.

(2) The Code may also contain different provisions in relation to particular—

(a) lenders or classes of lenders:

(b) borrowers or classes of borrowers:

(c) guarantors or classes of guarantors:

(d) agreements or classes of agreement.