

# Responsible Lending Code

March 2015

This Responsible Lending Code was issued by the Minister of Commerce and Consumer Affairs under section 9G and 9H of the Credit Contracts and Consumer Finance Act 2003 (as inserted by the Credit Contracts and Consumer Finance Amendment Act 2014). All provisions of the Code will come into force on 6 June 2015.

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Labour and Commercial Environment Group  
Ministry of Business, Innovation and Employment  
PO Box 1473  
Wellington  
New Zealand  
**[www.mbie.govt.nz](http://www.mbie.govt.nz)**

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# 1 — Introduction

## COMMENTARY

### LENDER RESPONSIBILITY PRINCIPLES

*The Credit Contracts and Consumer Finance Amendment Act 2014 passed into law on 6 June 2014. It makes a number of changes to the Credit Contracts and Consumer Finance Act 2003 (the Act), including the introduction of lender responsibility principles. The lender responsibility principles apply to every lender, defined as:*

- a. a creditor under a consumer credit contract;*
- b. a creditor under a credit contract to which Part 3A of the Act applies (i.e. a credit contract which provides for the repossession of consumer goods<sup>1</sup>); or*
- c. a transferee under a buy back transaction of land.*

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

*The lender responsibility principles require 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<sup>2</sup> and taking a relevant guarantee; and*
- b. comply with specific lender responsibilities.*

*The lender responsibilities are set out in section 9C(3) to 9C(5) of the Act and are set out in full in the appendix.*

### PURPOSE OF THE 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) may be implemented by lenders (see section 9E(1) of the Act).*

*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) and 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.*

<sup>1</sup> Defined in the Act as “goods that are used or acquired for use primarily for personal, domestic or household purposes”.

<sup>2</sup> Unless the context indicates otherwise, references to “credit” in this Code are intended to be read as references to credit provided under a consumer credit contract or a credit contract to which Part 3A applies, or finance provided under a buy-back transaction.

*This document contains the following:*

- a. **Statements** of lender responsibility principles and lender responsibilities from the Act.*
- b. **Guidance** – The numbered provisions of the Code (which are issued under the authority of various provisions in section 9F of the Act) sets out processes, practices and procedures which a lender should follow to comply with the lender responsibility principles and also “elaborate on” certain of the 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 **guidance** provisions of the Code is to be treated as evidence of compliance with the lender responsibility principles. The **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.*

#### 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 sections:*

- a. Obligations that apply before and throughout the agreement*
- b. Advertising*
- c. Inquiries into and assessment of borrowers' requirements and objectives*
- d. Inquiries into and assessment of substantial hardship*
- e. Assisting borrowers to make an informed decision*
- f. Assisting guarantors to make an informed decision*
- g. Credit related insurance and repayment waivers*
- h. Fees*
- i. Subsequent dealings*
- j. Default and other problems*
- k. Repossession*
- l. Oppression*

#### DIFFERENT PRODUCTS AND CIRCUMSTANCES

*The Code provides that:*

- 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.*

*Whether credit is provided online or in-person is not one of the factors which affects the extent of inquiries or extent of assistance. 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.*

#### 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 code was issued in March 2015. 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<sup>3</sup>

### PRINCIPLE

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

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

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

### COMMENTARY

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

*To comply with these principles, a lender should comply with all of the specific lender responsibilities and the elaboration and guidance contained in the Code. 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. 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.*

### GUIDANCE

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#### 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. A lender's policies, procedures and training may relate to:
  - a.** approving advertising material (and may incorporate the processes set out at **3.7–3.8**);
  - b.** approving or declining a credit application (and may incorporate the processes set out at sections **4** to **6**);
  - c.** contacting or communicating with borrowers and guarantors, particularly borrowers in financial difficulty or in breach of their credit agreement (and may incorporate the guidance set out at **2.5–2.7**, and **12.2–12.8**);

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<sup>3</sup> The Guidance set out in this section is issued under subsections 9F(1)(b)(vi) and (e) of the Act.

- d. dealing with unforeseen hardship applications (and may incorporate the guidance set out at **12.9–12.11**);
- e. recovering debt and enforcing credit agreements, including, if relevant, repossession (and may incorporate the guidance set out at sections **12** and **13**); and
- f. handling complaints (and may incorporate the guidance set out at **12.19–12.24**).

#### 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 considering complaints received through the lender’s internal complaints process or external dispute resolution scheme to assess whether they indicate problems that should be addressed.

#### RECORD-KEEPING

- 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. 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.

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 **2.4** 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.*



## COMMENTARY

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### AGENTS AND OTHER LENDERS

*Under the Act, lenders are responsible for the conduct of their agents acting within the scope of their authority. Agents of a lender can include third party debt collection or repossession businesses, or retailers or motor vehicle dealers that facilitate access to credit at the point of sale.*

*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 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.*

## GUIDANCE

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### CONTACTING BORROWERS AND GUARANTORS

- 2.5.** When contacting a borrower or guarantor by phone or in person, 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 2.5.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 1993, 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.
- 2.6.** 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.
- 2.7.** Where possible, a lender should contact a borrower or guarantor at reasonable hours (i.e. between 8am and 9pm), taking into account all the circumstances and the borrower's reasonable wishes.

# Legal obligations

## PRINCIPLE

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

### LENDER RESPONSIBILITIES

*A lender must, in relation to an agreement with a borrower, meet all the lender's legal obligations to the borrower, including under the 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 (see s 9C(3)(f) of the Act).*

*A lender must, in relation to a relevant guarantee that is taken by the lender, meet all the lender's legal obligations to the guarantor (see s 9C(4)(e) of the Act).*

## GUIDANCE

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- 2.8.** To promote or facilitate compliance with their legal obligations, a lender should put in place, monitor and review policies, procedures and training for complying with legal obligations, similar to those referred to at **2.1–2.3**.

### COMMENTARY

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*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 section 3 in relation to processes for compliance with the Fair Trading Act 1986 and section 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 or 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 personalised financial advice under the Financial Advisers Act 2008 in order to comply with that guidance. However, lenders must comply with the Financial Advisers Act when financial advice is given (whether personalised or class advice). Lenders need to be familiar with the requirements of the Financial Advisers Act and understand when financial advice is given, when financial advice is personalised or class advice, and the restrictions on who may provide financial advice.*

# 3 — Advertising<sup>4</sup>

## PRINCIPLE

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*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 (see s 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 s 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:*

- i. any advertising is not, or is not likely to be, misleading, deceptive, or confusing to borrowers [...] (see s 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 Advisers Act 2008 (see s 9(3)(f) of the Act).*

## GUIDANCE

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### "ADVERTISING"

- 3.1.** A lender should apply the Guidance below to advertising of agreements of all kinds across all media, including television, radio, outdoor, online and print advertising, and including websites, emails, SMS (short message service) messages, social media, pamphlets, billboards, addressed or unaddressed mail.

### COMMENTARY

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#### CONTENT OF ADVERTISING – "MISLEADING" AND "DECEPTIVE"

*Existing provisions under the Fair Trading Act prohibit:*

- » *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:*

- » *have reasonable grounds for making any claim (other than puffery (i.e. 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).*

<sup>4</sup> The Guidance set out in this section is issued under subsections 9F(1)(b)(i), and (e) of the Act.

## “CONFUSING”

- 3.2.** A lender should comply with the following general practices to ensure that advertising is not confusing:<sup>5</sup>
- 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

*Note that the guidance in 3.2 is based, in part, on the Advertising Standards Authority’s Code for Financial Advertising.*

## GUIDANCE

### SPECIFIC PRACTICES

- 3.3.** A lender should comply with the following specific practices for advertisements about credit products:
- a.** When referring to fees or costs, avoid giving an unrealistic impression of the overall levels of fees and costs.
  - b.** When referring to an interest rate or an amount of interest:
    - i** display an **annual percentage interest rate** at least as prominently as any other interest rate or amount of interest;
    - ii** note prominently if that rate is fixed, variable or capped; and
    - iii** state whether fees apply, and, if ascertainable, provide the amount of any establishment fees and any other mandatory fees the borrower must pay when entering the agreement.

### EXAMPLE

*An advertisement states that a loan is interest free. The lender charges an establishment fee, but no other mandatory fees when entering into the agreement. The advert should also state the amount of the establishment fee (if ascertainable).*

- c.** When referring to the amount of regular repayments for a particular term loan:
  - i** Include **the total amount payable under the agreement** if ascertainable (but the lender may choose not to do so if the agreement would not, on the assumptions prescribed in the regulations under the Act, be paid out within 7 years of the date on which credit is first provided under the agreement); or

<sup>5</sup> The Courts have stated (in a different context) that “mislead” or “deceive” implies the creation of an incorrect belief, whereas “confusing” may go no further than perplexing or mixing up the minds of the public. See *New Zealand Breweries Ltd v Heineken’s Bier Browerij Maatschappij N.V* [1964] NZLR 115, 142.

- ii where the total amount payable under the agreement is not ascertainable (or the lender chooses not to include the amount in accordance with the proviso in i. above), state how the total amount payable under the agreement will be calculated, which may be by:
  - › including an annual percentage interest rate; and
  - › stating whether fees apply, and, if fees apply, provide details of the amount of any establishment fees and any other mandatory fees payable at the beginning of the agreement.

EXAMPLE (SEE (I) ABOVE)

*An advertisement states that a borrower can purchase an appliance worth \$400 on credit and pay only \$10 per week. It should also state the amount of total repayments will be \$520 (where the borrower will pay \$10 per week for a year).*

EXAMPLE (SEE (II) ABOVE)

*An advertisement states that a borrower can borrow an amount up to \$500 and pay back only \$8 per week. It should also state that the annual percentage interest rate is [to insert]%. The lender also charges an establishment fee, but no other mandatory fees when entering into the agreement. The advert should also state the amount of the establishment fee (if ascertainable).*

- d. When advertising goods to buy on credit, make it clear that the advertising is promoting a credit agreement.
- e. When including 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, the fact that a higher interest rate may apply or how the subsequent interest rate will be calculated.

EXAMPLE

*An advertisement states “8% interest only for a limited period”. It should also add “the 8% interest applies only for the first 3 months of the loan”.*

*And either*

*“The interest rate payable after the end of that period will be [specify percentage]”*

*or*

*Where the subsequent interest rate is not ascertainable “The interest rate payable after the end of that period may be higher” or how the subsequent interest rate will be calculated.*

- 3.4. A lender should *not* undertake the following advertising practices:
  - a. Making claims along the lines of “\$500 credit available in your account” without making it clear that the \$500 is the amount the lender is prepared to lend to the borrower rather than that the borrower has a \$500 credit balance.

EXAMPLE

*Borrower A has recently paid off their loan to Lender B. Lender B would like to offer Borrower A a further loan of \$500. If Lender B sent Borrower A an advertisement stating “\$500 credit available in your account”, it could mislead Borrower A into believing that Lender B holds \$500 of Borrower A’s money (for instance, because Borrower A overpaid their first loan).*

- b. Making claims that suggest that the lender will not inquire into the borrower’s circumstances in making a lending decision in advertisements addressed to the public or a section of the public, such as using claims along the lines of “no credit checks”, “pre-approved”, “instant approval”, “guaranteed acceptance”. This guidance does not apply to advertisements promoting a borrower’s ability to obtain a “pre-approval” for a loan (such as a home loan), where the lender makes the inquiries set out in sections 4 and 5 of the Code.

#### COMMENTARY

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*While the lender responsibility principles do not necessarily preclude lenders differentiating themselves based on the speed of their approval process, claims along the lines of 3.4.b above are likely to be either misleading or reflect practices that may not comply with the lender responsibilities (in particular, the responsibility to make reasonable inquiries before entering into the agreement to be satisfied that it is likely that the borrower will make the repayments without suffering substantial hardship (refer to section 5)).*

*However, lenders may make pre-approved offers of credit to specific customers provided they comply with the lender responsibility principles, in particular those subject to sections 4, 5 and 7 of the Code.*

#### GUIDANCE

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- 3.5. A lender should *not* imply that the lender will not take into account a borrower’s circumstances in making a lending decisions, such as claims along the lines of “bankrupt – OK”, “bad credit history – OK”.

#### COMMENTARY

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*While the lender responsibility principles do not necessarily preclude lending to bankrupt persons or those with bad credit history, advertising that implies such circumstances will not be taken into account is likely to be either misleading or reflect practices that may not comply with the lender responsibilities (in particular, the responsibility to make reasonable inquiries before entering into the agreement to be satisfied that it is likely that the borrower will make the repayments without suffering substantial hardship (refer to section 5)).*

## GUIDANCE

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### HIGH-COST CREDIT AGREEMENTS<sup>6</sup>

- 3.6. To comply with the above lender responsibility principles and lender responsibilities, a lender should:
- a. when advertising **high-cost credit agreements**, include a prominent risk warning that makes it clear a **high-cost credit agreement** should not be used for long-term or regular borrowing and is suitable only to improve short-term cash flows. For instance, “Loan only suitable for short-term needs. Not suitable for long-term or regular borrowing.”; and
  - b. when using a celebrity to advertise high-cost credit, include the above risk warning as part of the message conveyed by the celebrity.

### PROCESSES

- 3.7. To comply with the above lender responsibility principle and lender responsibilities, a lender should have policies or procedures in place to ensure that advertising complies with legal obligations and is not misleading, deceptive, or confusing. Such policies or procedures can also include complying with relevant industry codes.
- 3.8. 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, Fair Trading Act 1986 and the Guidance in this Code and the lender is satisfied they understand how to do so;
  - 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.

### COMMENTARY

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*A lender should refer to the Commerce Commission’s Fair Trading sample compliance policy for further guidance on an appropriate compliance process.*

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<sup>6</sup> See definition in [glossary](#).

# 4 — Inquiries into and assessment of borrowers' requirements and objectives<sup>7</sup>

## PRINCIPLE

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

## LENDER RESPONSIBILITY

*A lender must, in relation to an agreement with a borrower, make reasonable inquiries, before entering into the agreement, 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 s 9C(3)(a)(i) of the Act).*

## GUIDANCE

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**4.1.** To meet this lender responsibility, the lender's inquiries and assessment can 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.

## INQUIRIES

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

### Scope of inquiries

- 4.3.** A lender's inquiries into the borrower's requirements and objectives may include inquiries into:
- a.** the amount of credit sought or the maximum amount of credit sought by the borrower (such as the credit limit for a credit card)
  - b.** the purpose for which credit is sought
  - c.** whether the credit is required on a one-off basis for a specific need at that time, or over a longer timeframe for expenditure on an ongoing basis
  - d.** the timeframe for which the credit required (e.g. the term of the loan agreement that the borrower is seeking if any particular term is sought)
  - e.** whether the borrower requires particular product features or flexibility, the relative importance of different features to the borrower, and whether the borrower is prepared to accept any additional costs or risks associated with these features
  - f.** whether the borrower requires the amount financed to include any additional expenses, such as premiums for insurance related to the credit or payment for extended warranties or repayment waivers, and whether the borrower is aware of the additional costs of these expenses being financed.
- 4.4.** 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.

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<sup>7</sup> The Guidance set out in this section is issued under subsections 9F(1)(a), (b)(ii) and (e) of the Act.



## Method of inquiries

- 4.5. In making the 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.

## Extent of inquiries

- 4.6. The scope and method of inquiries (as referred to at 4.3–4.5) 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**<sup>8</sup>.
- 4.7. A lender may undertake less extensive inquiries 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 a credit card or overdraft; or
  - b. the borrower is a **well-informed user of credit**<sup>9</sup>.

### EXAMPLE

*Lender A wishes to provide personal loans online. Lender A considers that it is reasonable to inquire into the timeframe for which credit is sought. One way that Lender A could inquire into the timeframe 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.*

- 4.8. For **reverse equity mortgages**, a lender’s inquiries should include (as part of the inquiry into product features or flexibility) whether the borrower wishes to leave some equity in the home for the borrower’s estate or whether the borrower may wish to sell the home prior to their death.
- 4.9. 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.
- 4.10. A lender may ask for or receive information from brokers or other intermediaries acting on behalf of the borrower. Where that is the case:
- a. A lender may rely on information provided to it by a broker or intermediary as though it had been provided to it by the borrower.
  - b. A lender should require brokers to implement and maintain appropriate policies and procedures to collect information from the borrower and verify it, and for the broker to train their staff on the Code and the lender responsibility principles.

<sup>8</sup> See definition in [glossary](#).

<sup>9</sup> See definition in [glossary](#).

# 5 — Inquiries into and assessment of substantial hardship (borrowers)<sup>10</sup>

## PRINCIPLE

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

### LENDER RESPONSIBILITY

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

## GUIDANCE

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- 5.1. To meet this lender responsibility, a lender should be satisfied that it is likely that the borrower will make the payments under the agreement without undue difficulty as well as:
  - a. meet necessities (such as accommodation, food, utilities, transport, required medical expenses); and
  - b. meet other financial commitments (such as repayments on existing debts), without having to realise security or assets (other than any security or assets that the borrower is, at the time of approval, willing and intending to dispose of or realise the value of).<sup>11</sup>
- 5.2. Where the interest rate under the agreement can vary, a lender should take account of the risk that interest rates may rise.
- 5.3. For revolving credit contracts, a lender should take into account that a borrower may wish to make payments that are greater than any minimum required payments. This may include applying a reasonable buffer to any minimum required payment.
- 5.4. For revolving credit contracts, a lender should take into account that a borrower may use credit up to the credit limit.

### INQUIRIES

- 5.5. To meet this lender responsibility, a lender should make reasonable inquiries into a borrower's **income, expenses and likelihood of repayment**.
- 5.6. A lender should be satisfied that the scope and methods of inquiry are reasonable and will provide a sufficient basis for the lender to be satisfied that it is likely that the borrower will make payments under the agreement without suffering substantial hardship.

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<sup>10</sup> The Guidance set out in this section is issued under subsections 9F(1)(a), (b)(ii) and (e) of the Act.

<sup>11</sup> Subject to 5.14 in relation to pawnbroking.

## Scope of inquiries

- 5.7. A lender's inquiries into the borrower's **income** may include inquiries into:
- the borrower's current income level
  - the sources and stability of the borrower's income, including likely changes
  - where relevant to the type of credit agreement (for instance, bridging finance), the likely proceeds from the borrower's intended sale of assets.
- 5.8. A lender's inquiries into the borrower's **expenses** may include inquiries into:
- the borrower's expenses to meet necessities (such as accommodation, food, utilities, transport, required medical expenses)
  - the borrower's other financial commitments, including repayments on existing debts and the extent to which existing debts are to be repaid from the credit advanced
  - other regular expenditure that the borrower intends to make (such as tithing, pay TV subscriptions)
  - likely changes in the borrower's expenditure.
- 5.9. A lender's inquiries into the borrower's **likelihood of repayment** may include inquiries into:
- the borrower's credit history, which may be obtained through the results of a credit check
  - other information that the lender considers reliable to assess the likelihood of repayment.
- 5.10. 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 borrower will make payments without suffering substantial hardship.

## Method of inquiries

- 5.11. In making the reasonable inquiries, a lender may obtain information:
- directly from the borrower (including any supporting documents);
  - that it holds about the borrower, provided the lender is satisfied that the information is current;
  - about the borrower from reliable third parties such as government departments, credit reference agencies or valuers; or
  - which is generated based on statistical information relating to an appropriate class of borrowers, provided that:
    - the statistical information is reliable and current; and
    - 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 borrower's expenditure).

## Extent of inquiries

- 5.12. The scope and method of inquiries (as referred to at 5.7–5.11) that are reasonable for a lender to make to be satisfied of the matters set out in 5.1 may differ depending on the circumstances. A lender should make more extensive inquiries where:
- there is a greater risk that the borrower will not be able to make payments under the agreement. This includes where:
    - the size of the loan is large relative to the borrower's ability to repay;
    - the borrower is a **vulnerable borrower**; or
    - the credit agreement is a **high-cost credit agreement**; or
  - the consequences of the borrower not being able to make payments under the agreement may be serious. This includes where:
    - the potential consequences include the loss of a significant asset; or
    - the default interest plus default fees are high relative to the amount of the loan or the credit limit.

## COMMENTARY

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### PAWNBROKING

*Pawnbroking transactions are subject to and must comply with both the Act and the Secondhand Dealers and Pawnbrokers Act 2004 (SDPA). If a borrower is unable to pay the redemption price at the end of the redemption period, the consequence is that the lender is able to sell the pledged good.*

## GUIDANCE

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### PAWNBROKING

- 5.13.** For a pawnbroking transaction, a borrower can make payments under the agreement in the form of either:
- a.** monetary payment of the redemption price (as defined under the SDPA); or
  - b.** the sale of the pledged item by the lender on behalf of the borrower.
- 5.14.** In assessing whether it is likely the borrower can make payments without substantial hardship, the lender can inquire into and assess:
- a.** whether the borrower can pay the redemption price through monetary payments without substantial hardship by making reasonable inquiries in accordance with the guidance set out at **5.5–5.12** above; or
  - b.** whether the borrower can make the payments through a sale of the pledged item without substantial hardship (instead of making the reasonable inquiries in accordance with the guidance set out at **5.5–5.12** above). Sale of the pledged item may cause substantial hardship to the borrower if the item is essential to the borrower.
- 5.15.** If the lender makes an assessment under **5.14.b**, the lender should be satisfied that an item is not essential, taking into account the borrower's circumstances.

## COMMENTARY

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### VERIFICATION

*Section 9C(7) of the Act provides that lenders may rely on the information provided by the borrower unless the lender has reasonable grounds to believe the information is not reliable.*

## GUIDANCE

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### VERIFICATION

- 5.16.** In conducting inquiries, information (including supporting documents) may be obtained from the borrower. It will usually be reasonable for a lender to rely on the information provided to them by the borrower where this information is:
- a.** consistent with information the lender already holds about the borrower (for instance, because the borrower is an existing customer);
  - b.** within the usual range of information for that type of borrower (for instance, if a borrower with two children provides information about their rent that is within the standard range for the rental of a three bedroom house); or
  - c.** supported by documents from a reliable third party, such as Inland Revenue.
- 5.17.** 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.
- 5.18.** A lender may ask for or receive information from brokers or other intermediaries acting on behalf of the borrower. Where that is the case:
- a.** A lender may rely on information provided to it by a broker or intermediary as though it had been provided to it by the borrower.
  - b.** A lender should require brokers to implement and maintain appropriate policies and procedures to collect information from the borrower and verify it, and for the broker to train their staff on the Code and the lender responsibility principles.

# 6 — Inquiries into and assessment of substantial hardship (guarantors)<sup>12</sup>

## PRINCIPLE

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

## GUIDANCE

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### GENERAL

- 6.1.** The Guidance below cross-references Guidance under section 5. When applying the Guidance in section 5 to a guarantor, lenders should read the references in those provisions to a “borrower” as if they were references to a “guarantor”, where appropriate.
- 6.2.** A lender should follow the Guidance set out at **5.1–5.2** (where applicable) when making reasonable inquiries so as to be satisfied it is likely that the guarantor will be able to comply with the guarantee without suffering substantial hardship. 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 in some way.

### INQUIRIES

- 6.3.** To meet this lender responsibility, a lender should make reasonable inquiries into a guarantor’s **income, expenses and likelihood of making payment.**
- 6.4.** 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 and method of inquiries

- 6.5.** A lender’s inquiries may include those matters set out at **5.7–5.10.**
- 6.6.** 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 current;
  - c.** about the guarantor from reliable third parties such as government departments, credit reference agencies or valuers; or

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<sup>12</sup> The Guidance set out in this section is issued under subsections 9F(1)(a), (b)(ii) and (e) of the Act.

- d. which is generated based on statistical information relating to an appropriate class of guarantors, provided that:
  - i the statistical information is reliable and current; 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

**6.7.** The scope and method of inquiries (as referred to at **6.5** and **6.6**) that are reasonable for a lender to make to be satisfied of the matters set out in **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.

**6.8.** A lender could undertake less extensive inquiries where the consequences of the guarantor not being able to comply with the guarantee are limited. This includes where a guarantor is acting in their capacity as an independent or professional trustee, does not have a direct or indirect interest in the trust, and the lender has agreed to limit the personal liability of that guarantor to the trust's assets.

### COMMENTARY

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#### VERIFICATION

*Section 9C(7) of the Act provides that lenders may rely on the information provided by the guarantor unless the lender has reasonable grounds to believe the information is not reliable.*

### GUIDANCE

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#### VERIFICATION

**6.9.** A lender should follow the Guidance set out at **5.16–5.18** in relation to verification of information provided by the guarantor.

# 7 — Assisting borrowers to make an informed decision<sup>13</sup>

## PRINCIPLE

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*Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 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:*

- i. any advertising 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 (see s 9C(3)(b) of the Act).*

## COMMENTARY

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*The lender responsibility to assist informed decisions is separate from, and additional to, the lender's obligation 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

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### ADVERTISING

**7.1.** See the earlier Guidance in section 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 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.** 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;

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<sup>13</sup> The Guidance set out in this section is issued under subsections 9F(1)(b)(iii), (b)(vi), (c), and (e) of the Act.



- 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 **high-cost credit agreements**, that this form of credit should not be used for long-term borrowing or ongoing financial difficulties, as it is unlikely to be suitable for that purpose, and that it is likely to be more expensive than other forms of credit
- vi. for **reverse equity mortgages**:
  - › how the reverse equity mortgage agreement works;
  - › how the amount of any loan being considered, changes in the value of the home, and life expectancy can affect the borrower's net equity in the home (including 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;
- vii. for **buy-back transactions**:
  - › how the buy-back transaction works;
  - › whether the borrower has a right to occupy the home for the rest of their life;
  - › the amount and frequency of rental payments;
  - › the terms of the borrower's right to repurchase, including the purchase price or how and when it will be calculated; and
  - › the borrower's obligations to maintain the home;
- b. the term of the agreement, if any;
- c. 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;
- d. interest rates expressed as annual rates, 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):
- e. where relevant, repayments, periodically and in total, 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); and
- f. the cancellation period under section 27 of the Act and any other cancellation rights that the lender may offer.

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

**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 borrowers are provided with a simple, clear and timely way to seek further information from the lender.

#### EXAMPLE

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

- 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 **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 C at Lender C's premises. One way that Lender C 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 circling the parts of the agreement relating to those key features.*

##### EXAMPLE

*Borrower B is seeking credit from Lender C through Lender C's website. One way that Lender C 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.*

- 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 **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; or
  - 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
- 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 loan is large relative to the borrower's ability to repay; or
- c. 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 a credit card or overdraft;
- 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).

The amount of time the lender should provide to the borrower may differ according to the circumstances.

**7.14.** Where a lender reasonably suspects that the borrower does not have a good understanding of the English language, a lender should provide, or refer the borrower to, alternative methods or mechanisms for receiving the relevant information. This could involve the lender providing access to, or referring the borrower to, an interpreter or a 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.

**7.15.** Where a lender advertises its credit product(s) in a language other than English and a borrower who speaks that language but who the lender reasonably suspects does not have a good understanding of the English language applies for credit from that lender, the lender should communicate the information about key features referred to in 7.2 in that language or refer the borrower to an interpreter who can translate English into that language, at the lender's cost.

**7.16.** 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:

- a. recommending that the borrower takes away a copy of the 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; or
- b. for online transactions (where the borrower’s lack of understanding could be apparent to the lender based on their online answers on the electronic application form), recommending the borrower contact the lender in another way before they make a decision to enter into a credit agreement.

**7.17.** However, 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 English, or may not have understood the information provided in circumstances where lenders otherwise have no reason to suspect this to be the case.

#### PLAIN LANGUAGE AGREEMENT

**7.18.** 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.

**7.19.** “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.

**7.20.** “Intelligible” involves an overall assessment of whether the terms are understandable and comprehensible to borrowers in the target market.

#### EXAMPLE

*Lender A is putting together terms for a new credit product. One step they could take to ensure that the agreement is in plain language in a clear, concise, and intelligible manner is by 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 budget advisor. 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.*

#### COMMENTARY

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*Lenders should refer to the Financial Markets Authority’s Guidance note on “Client Communications and Record-keeping”, which elaborates on the meaning of ‘clearly, concisely and effectively’ when communicating with clients under the Financial Advisers Act 2008.*

## GUIDANCE

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### MANNER OF PRESENTING INFORMATION

- 7.21.** 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.
- 7.22.** 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; and
  - f.** 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.

## GUIDANCE

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### PROCESSES

- 7.23.** 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.
- 7.24.** 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, 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 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 checking by a staff member with necessary product knowledge to ensure that the description is accurate.

### COMMENTARY

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#### EXTENDED WARRANTIES

*Section 9B(4) of the Act provides that "if an agreement involves a repayment waiver or an extended warranty [provided by the lender], 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 in relation to assisting informed decisions for extended warranties is set out below. Guidance in relation to assisting informed decisions for repayment waivers is set out in section 9 of this Code, together with Guidance relating to credit-related insurance.*

## GUIDANCE

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### EXTENDED WARRANTIES

- 7.25.** 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.

# 8 — Assisting guarantors to make an informed decision<sup>14</sup>

## PRINCIPLE

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*Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 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:*

- 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 (see s 9C(4)(b) of the Act).*

## GUIDANCE

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### 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 that 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.** 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
  - e.** the key features relating to the credit agreement as set out at **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 **8.1** above directly to the guarantor, rely on the guarantor's lawyer's explanation of that information if the lender is reasonably satisfied that the guarantor's lawyer has done so (for instance, because the lawyer has confirmed that they have done so – which could be through a Solicitor's Certificate confirming that the lawyer has explained the information requested).

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<sup>14</sup> The Guidance set out in this section is issued under subsections 9F(1)(b)(iii), (b)(vi), (c), and (e) of the Act.

- 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 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 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 guarantor of the key features identified at 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
- 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 **7.13–7.17** 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.

#### PLAIN LANGUAGE GUARANTEE

**8.14.** 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 **7.18–7.20**.

# 9 — Credit-related insurance and repayment waivers<sup>15</sup>

## PRINCIPLE

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

### LENDER RESPONSIBILITIES

*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. (see s 9C(5)(a) of the Act).*
  
- 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 distributed by the lender 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 (see s 9C(5)(b) of the Act).*

## COMMENTARY

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### 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, 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.*

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<sup>15</sup> The Guidance set out in this section is issued under subsections 9F(1)(b)(ii) and (iii), and (e) of the Act.

## REPAYMENT WAIVERS

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

## GUIDANCE

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### REPAYMENT WAIVERS

- 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, in order to comply with the lender responsibilities set out in sections 9C(3)(a) and 9C(3)(b) of the Act.

### BORROWER'S REQUIREMENTS AND OBJECTIVES

- 9.2.** To meet the lender responsibilities, the lender's inquiries into and assessment of the borrower's requirements and objectives can 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.** the risks that the borrower wishes to obtain cover against (or where the lender requires the borrower to obtain cover (subject to section 69 of the Act), the risks which the lender is seeking cover against);
  - b.** the length of time for which the borrower wishes to obtain cover (or where the lender requires the borrower to obtain cover (subject to section 69 of the Act), the length of time for which the lender is seeking 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;
  - c.** **for insurance over secured property or leased goods**, whether the borrower has existing cover which may protect against some or all of the risks that the borrower is seeking cover for (such as general contents or other insurance) or whether the insurance is intended to cover any potential shortfall in that existing insurance;
  - d.** for **consumer credit insurance**, whether the borrower's employment status may make them ineligible to claim most of the benefits under the proposed policy; and
  - e.** 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 is entitled to (but does not have to) 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 A is currently unemployed. The consumer credit insurance contract that lender B can arrange provides cover primarily for loss of employment. That may be an indication (without other relevant factors, such as that the borrower 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.*

## GUIDANCE

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### SUBSTANTIAL HARDSHIP

- 9.6. The lender should apply the guidance in section 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 can 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 did not know that an insurance contract would be entered into or otherwise was not able to adequately take into account the premiums payable under the relevant insurance contract in an assessment of whether the borrower can make repayments under the credit agreement without substantial hardshipthe lender should separately assess whether the borrower can 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
  - 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 can 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 **9.10–9.16** 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.** the cover provided (including the risks insured against and the amount of the cover) and the excess(es) that apply;
  - d.** that exclusions apply (if applicable), together with clear information about where to find the exclusions in the relevant insurance policy;
  - e.** the duration of the cover, if the period of cover is limited; and
  - f.** 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 **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:
- a.** 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; or
  - b.** for simple insurance over secured property or leased goods.

- 9.16.** A lender should also follow the guidance at **7.13–7.17** 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 section **3**, where relevant.

# 10 — Fees<sup>16</sup>

## PRINCIPLE

Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 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 s 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 sections 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 recent High Court judgment in **Commerce Commission v Sportzone/MTF** [2013] NZHC 2531. The case has been appealed to the Court of Appeal. As the final outcome of the Sportzone case is yet to be decided as at the time of publication, this Code does not address the matters at the centre of the Sportzone case. Once the application of the law has been settled, this section of the Code will be reviewed to consider what changes are necessary to reflect the outcome of that case. A lender should in the meantime refer to the case law interpreting the relevant provisions together with the Commerce Commission's draft guidelines for credit fees.

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.

**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.

<sup>16</sup> The Guidance set out in this section is issued under subsections 9F(1)(b)(vii), and (e) of the Act.

**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 legislation (see section 44 of the Act) 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 legislation (see section 44A of the Act) 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 legislation (see section 80(1) of the Act) provides that a buy-back transaction must not provide for a buy-back fee or buy-back default fee that is unreasonable.

## GUIDANCE

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### 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. The assessment should 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.** 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;
- b.** ensure that the credit fee only seeks to compensate the lender for those likely costs; and
- c.** have regard to any reasonable standards of commercial practice in relation to whether a proposed credit fee “reasonably compensates” the lender for the costs incurred. A lender should note that a common commercial practice is not necessarily a reasonable standard of commercial practice:
  - i.** If the proposed fees are materially higher than similar fees charged by lenders of a similar size with a similar lending profile, the lender should inquire further into whether its proposed fees over-compensate for costs incurred or whether some of the costs are not costs which the lender should reasonably be compensated for.
  - ii.** The reasonable standards of commercial practice consideration should not override the principle that credit fees should only reasonably compensate the lender. Reasonable standards of commercial practice should not be used by a lender as a basis to increase its credit fees beyond a level that reasonably compensates the lender for their costs.

**10.4.** For those credit fees which are insurance premiums (i.e. 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.** The lender should have regard to any reasonable standards of commercial practice in relation to whether a proposed default fee “reasonably compensates” the lender for the costs and losses incurred. A lender should note that a common commercial practice is not necessarily a reasonable standard of commercial practice. Lenders should apply the following guidance:

- a.** If the proposed fees are materially higher than similar fees charged by lenders of a similar size with a similar lending profile, the lender should inquire further into whether its proposed fees over-compensate for costs and losses incurred or whether some of the costs or losses incurred are not costs or losses which the lender should reasonably be compensated for.
- b.** The reasonable standards of commercial practice consideration should not override the principle that default fees should only reasonably compensate the lender. Reasonable standards of commercial practice should not be used by a lender as a basis to increase its default fees to a beyond a level that reasonably compensates the lender for their costs or losses.

## BUY-BACK FEES

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

## FEES GENERALLY

**10.9.** In setting any of the above fees, lenders may average costs across a class of credit contracts.

**10.10.** 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.

**10.11.** A lender should *consider* reviewing 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 changes to the product itself or to the way the lender provides that credit product or because of 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.

**10.12.** A lender should make and keep records of how they calculated the fees payable.

# 11 — Subsequent dealings<sup>17</sup>

## PRINCIPLE

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*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 guarantor in relation to a relevant guarantee (see s 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 s 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*

- 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. (see s 9C(3)(c) of the Act)*

## GUIDANCE

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### 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 **7.21–7.24** 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, and application processes for seeking changes to the credit agreement on the grounds of unforeseen hardship; 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.

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<sup>17</sup> The Guidance set out in this section is issued under subsections 9F(1)(b)(iii) and (e) of the Act.

- 11.4.** A lender should contact the borrower where relevant, including:
- a.** to notify the borrower if it 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 in default or where the borrower has informed the lender that it is likely that the borrower will soon be in default (**12.2–12.8**); 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 **2.5–2.7** 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.
- 11.7.** A lender should apply the following Guidance to variations to be agreed between a lender and a borrower under which the lender will advance further credit to the borrower or increase the borrower's credit limit.
- 11.8.** Before agreeing to a variation referred to at **11.7** above, a responsible lender exercising care, diligence, and skill should consider whether the lender's assessment before the beginning of the agreement that it is likely the borrower can make the payments under the agreement without substantial hardship, will change materially due to the variation.

#### COMMENTARY

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##### INFORMED DECISIONS

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

#### GUIDANCE

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##### INFORMED DECISIONS (AGREED VARIATIONS)

- 11.9.** 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).
- 11.10.** 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.

**11.11.** A lender should also follow the Guidance set out at **7.9–7.17**. In relation to paragraphs **7.9–7.12**, 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 A 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 A 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 A offers to increase an existing borrower's credit card limit from \$5000 to \$10,000. Lender A should highlight to the borrower that accepting the higher limit is voluntary, and that if they use all of the new credit limit they'll have more to repay, which may include more interest if they do not pay off their closing balance each month.*

PLAIN LANGUAGE VARIATION

**11.12.** A lender should follow the Guidance set out at **7.18–7.20** to ensure that any variation to the agreement is expressed in plain language in a clear, concise and intelligible manner.

# 12 — Default and other problems<sup>18</sup>

## PRINCIPLE

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*Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 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*

- i. when breaches of the agreement have occurred or may occur or when other problems arise; and*
- ii. when a debtor under a consumer credit contract suffers unforeseen hardship (see s 9C(3)(d)(i) and (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 9C(4)(c) of the Act).*

## GUIDANCE

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### SPECIFIC PRACTICES

#### 12.1. 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.** 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; or
- f.** 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.

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<sup>18</sup> The Guidance set out in this section is issued under subsections 9F(1)(b)(iv) and (e) of the Act.

## COMMENTARY

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### REPAYMENT DIFFICULTIES

*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 should exercise its rights against the borrower or guarantor, or both, reasonably and in an ethical manner.*

*A lender must comply with its obligations in the Act in respect of unforeseen hardship applications.*

*Lenders must also comply with 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.*

## GUIDANCE

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### INFORMING THE BORROWER

- 12.2.** A lender should implement policies or procedures which set out when and how it will contact borrowers if the borrower misses repayments and manages the loans of borrowers who notify the lender that they are having, or are likely to have, difficulties repaying the loan.
- 12.3.** The information that lenders should provide borrowers who have missed repayments will differ depending on the amount, nature and time of default. The information that lenders provide may include:
- a.** notifying the borrower of the missed payment(s);
  - b.** informing the borrower of the risk of escalating debt as a result of missed payments, and any additional interest or charges;
  - c.** finding out the reason for the missed payment(s);
  - d.** reminding the borrower of the borrower's right, if relevant:
    - i.** to seek changes to the credit agreement on grounds of unforeseen hardship; and
    - ii.** to make a claim under a consumer credit insurance policy or repayment waiver, if the lender arranged these policies; and
  - e.** reminding the borrower of the borrower's ability to obtain legal advice, advice from organisations that provide information about consumer rights, or advice from free and independent budgeting services.
- 12.4.** However, despite anything in a lender's policy, for **high-cost credit agreements**, a lender should ordinarily contact the borrower after one missed payment to notify the borrower of the missed payment and the risk of escalating debt. This can be (but does not have to be) by text message where the borrower has agreed to that method of contact. If the borrower misses further repayments, the lender should contact the borrower again to discuss the other matters set out above.

### EXAMPLE

*Borrower H calls their lender (Lender G) to tell them that they have unexpectedly lost their job and are struggling to meet their home loan repayments. Lender G reminds them that they can apply for changes to the credit agreement on grounds of unforeseen hardship, what information the lender will need and the time limits for making an application. Lender G also recommends that the borrower speak with a local budget advisor who may be able to help them budget for their reduced income.*

- 12.5.** A lender should follow the Guidance set out at **2.5–2.7** (as well as the Guidance in **12.3** above) about how to contact the borrower (or guarantor) if the borrower defaults.
- 12.6.** If the lender holds an assignment of wages and intends to forward this to the borrower's employer to obtain repayment of a loan, the lender should inform the borrower of its intent to contact the employer to give the borrower an opportunity to explain the situation to their employer.

- 12.7.** A lender should encourage early, open, and honest communication when a borrower is experiencing financial difficulties. However, a lender should only contact the borrower to the extent necessary and not for the purpose of harassing or embarrassing the borrower.

EXAMPLE

*A lender publishes a borrower's photo in local newspapers and identifies the borrower as being in default. This may be an indication that the lender is not treating the borrower reasonably and in an ethical manner.*

- 12.8.** Where, following a default, 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.

CONSIDERATION OF PROPOSED REPAYMENT PLANS – UNFORESEEN HARDSHIP

- 12.9.** When the lender is aware that a borrower is or will be preparing an unforeseen hardship application, a lender should:
- a.** inform the borrower what information the lender will need to assess the application and the lender's likely timeframe for assessing the application;
  - b.** tell the borrower there are free and independent budgeting services that may be able to help them develop a repayment plan; and
  - c.** consider suspending the active pursuit of recovery of a debt for a reasonable period where the lender is satisfied the borrower, or someone acting on their behalf, is developing a repayment plan that will be presented to the lender within a reasonable period of time.
- 12.10.** When a lender is considering a proposed repayment plan as part of an unforeseen hardship application, the lender should have regard to:
- a.** the likely duration of the unforeseen hardship and what steps, if any, the borrower is taking to address it;
  - b.** the borrower's credit history and any of the other matters relevant to an assessment of whether the borrower can make repayments without substantial hardship;
  - c.** whether the repayment plan will allow the borrower to meet its obligations during the period of the proposed repayment plan and over the remaining life of the credit agreement; and
  - d.** whether the repayment plan would fail to enable the borrower to meet their obligations during the period of unforeseen hardship, 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.
- 12.11.** A lender should not decline unforeseen hardship applications for spurious reasons.

CONSIDERATION OF PROPOSED REPAYMENT PLANS – OTHER REPAYMENT DIFFICULTIES

- 12.12.** A lender should make genuine attempts to work with the borrower to limit the rate at which the effects of the default escalate.
- 12.13.** 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).



## EXAMPLE

*Borrower I with a car loan calls their lender (Lender J) to tell them they are in financial difficulties and have no way of repaying their loan. Borrower I tells Lender J 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 I to voluntarily sell the car themselves.*

- 12.14.** Where a borrower does not meet the criteria in the Act for relief on the grounds of unforeseen hardship but is willing to work through repayment difficulties to find a way to meet their obligations under the agreement, a lender should, where possible, consider agreeing to an arrangement that enables the borrower to do so, which arrangement may include:
- a.** agreeing to a repayment plan;
  - b.** accepting reduced payments for a reasonable period of time in order to allow a borrower to recover from the repayment difficulty, if the borrower can demonstrate that meeting their existing debts would mean not being able to meet necessities and other financial commitments; and
  - c.** suspending, reducing, waiving, or cancelling any further default interest or default fees.
- 12.15.** In considering the above, the lender should take into account:
- a.** the likely duration of the borrower's financial difficulties and what steps, if any, the borrower is taking to address them;
  - b.** the borrower's credit history and any of the other matters relevant under an assessment of whether the borrower can make repayments without substantial hardship;
  - c.** whether a repayment plan will allow the borrower to meet their obligations during the period that the proposed repayment plan covers and over the remaining life of the credit agreement; and
  - d.** whether a repayment plan would still fail to enable the borrower to meet their obligations during the period of financial difficulties, would unnecessarily prolong the period of difficulty, or would likely result in the borrower experiencing other financial difficulties over the remaining life of the credit agreement.

## LENDERS EXERCISING ENFORCEMENT RIGHTS

- 12.16.** 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 the most 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, such as by bankrupting a borrower; 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.
- 12.17.** 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.

**12.18.** To comply with the above lender responsibilities, a lender should:

- a.** require that debt collection agents it uses agree to comply with relevant legal obligations, including those under the Act;
- b.** require the debt collection agent to ensure that its staff understand and agree to comply with the relevant legal obligations; and
- c.** 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

**12.19.** 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.

**12.20.** If a borrower has indicated concerns about how the lender is dealing with the borrower, a lender should remind the borrower of the borrower's right to use the lender's internal complaints process, and access the lender's free external dispute resolution scheme. If requested, the lender should provide contact details for its internal dispute resolution team or contact person, and its external dispute resolution scheme.

**12.21.** 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 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 the timeframes for dealing with complaints.

**12.22.** The internal complaints process should be consistent with any requirements of the lenders' external dispute resolution schemes.

**12.23.** During its internal complaints process, 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.

**12.24.** 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.

# 13 — Repossession<sup>19</sup>

## PRINCIPLE

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*Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 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 s 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 s 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*

## GUIDANCE

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### 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 M who bought their TV on credit calls the lender (Lender N) to tell them they are in financial difficulties and have no way of repaying their loan. Borrower M tells Lender N it should repossess the TV. After discussions about Borrower M's specific circumstances and other options to repay the lending, Lender N discusses what steps it will now take, including repossessing the TV as preferred by Borrower M.*

- 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.

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<sup>19</sup> The Guidance set out in this section is issued under subsections 9F(1)(b)(iv), (vi), (d), and (e) of the Act.

## EXAMPLE

*Lender Q considers repossessing items (children's toys and old hand tools) which it has security over for debts owed by Borrower R. Lender Q 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 Q 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 new 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 new 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 **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.

### COMMENTARY

#### AFTER THE REPOSSESSION WARNING NOTICE HAS BEEN ISSUED

*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.*

### GUIDANCE

#### AFTER THE REPOSSESSION WARNING NOTICE HAS BEEN ISSUED

**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.

#### **COMMENTARY**

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##### POST REPOSSESSION AND SALE

*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.*

#### **GUIDANCE**

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##### POST REPOSSESSION AND 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 can 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 can 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.*

- d.** 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

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*Where the net proceeds of the sale of repossessed goods are insufficient to settle the agreement, new 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<sup>20</sup>

## PRINCIPLE

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*Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 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*

- 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; (see s 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*

- 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; (see s 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 s 9C(3)(f) of the Act ).*

## COMMENTARY

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*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

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- 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;

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<sup>20</sup> The Guidance set out in this section is issued under subsections 9F(1)(b)(v) and (e) of the Act.



- c. not use threats to take enforcement action in response to a borrower's default under one agreement 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; and
- 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**

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*When drafting standard form consumer contracts, lenders should consider the Commerce Commission's guidance in relation to unfair contract terms.*

#### **GUIDANCE**

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**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.

#### **COMMENTARY**

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*A lender that treats the borrower, guarantor and their property reasonably and in an ethical manner in accordance with the Guidance in sections 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 Code treats as high-cost credit agreements those agreements where the annual interest rate (expressed in terms of a percentage) is 50% or greater.

The Code treats an individual as a **vulnerable borrower** or **vulnerable guarantor** where the lender knows, or the circumstances are such that the lender ought to know, that the individual:

- i. 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
- ii. 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).

The Code treats as a **well-informed user of credit** those individuals 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:

- i. an individual who is a **vulnerable borrower** or guarantor; or
- ii. where the relevant agreement is a **high-cost credit agreement**.

# 16 — Appendix

## PART A: KEY DEFINITIONS FROM THE ACT (AS FROM 6 JUNE 2015)

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THE DEFINITIONS OF CONSUMER CREDIT INSURANCE, CREDITOR, CREDIT-RELATED INSURANCE, AND REPAYMENT WAIVER ARE SET OUT IN SECTION 5 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** means a person who provides, or may provide, credit under a credit contract; and, 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.

**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 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.
2. This section is subject to sections 14 and 15.

THE DEFINITION OF RELEVANT INSURANCE CONTRACT IS SET OUT IN NEW 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.

*New* 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 (*New 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**

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### **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; and
    - ii. before entering into an agreement to provide credit or finance and before taking a relevant guarantee; and
    - iii. in all subsequent dealings with a borrower in relation to an agreement 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, 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 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
  - 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
  - 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 distributed by the lender 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.
- 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).
- 7. For the purposes of the inquiries required under subsections (3)(a), (4)(a), and (5)(a), the lender may rely on information provided by the borrower or guarantor unless the lender has reasonable grounds to believe the information is not reliable.

## **PART C: CONTENT OF RESPONSIBLE LENDING CODE**

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### **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 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:
    - iii. to give the assistance referred to in section 9C(3)(b) and (c), (4)(b), and (5)(b) (including where the borrower's or guarantor's first language is not English):
    - 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:
  - 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 agreements.

