

Credit Contracts Legislation Amendment Bill

Government Bill

As reported from the Finance and Expenditure Committee

Commentary

Recommendation

The Finance and Expenditure Committee has examined the Credit Contracts Legislation Amendment Bill and recommends by majority that it be passed with the amendments shown.

Introduction

This bill seeks to amend the Credit Contracts and Consumer Finance Act 2003 to protect vulnerable consumers from harm arising from problem debt.

If enacted, the bill would introduce new obligations for creditors to ensure they lend responsibly. This includes:

- new requirements for assessing potential borrowers' suitability for and ability to repay loans
- a cap on the amount of interest and fees that can be charged on high-cost loans
- new penalties for lenders that do not comply with the requirements, and stronger enforcement provisions.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Commencement dates

Clause 2 in the bill as introduced specifies five different commencement dates for the different provisions.

During our consideration, we heard that some of the commencement dates would be difficult to implement and should be extended. This is because some creditors would

need to make significant changes to their systems and processes, and to retrain their staff to meet the new obligations.

However, we heard that the provisions related to enforcement, penalties, and remedies for existing responsible lending obligations could come into force immediately. This is because lenders should have been complying with these obligations since 2015, and it would be beneficial to provide consumers with protections sooner.

We therefore recommend amendments so that the majority of provisions would come into force by Order in Council at the time of the Government's choosing. We also recommend introducing a backstop date of 1 April 2021 for any provisions that have not been brought into force by Order in Council.

Interpretation provisions

We recommend several amendments throughout the bill to clarify the meaning of certain terms. In particular, we recommend:

- amending clause 9, new section 9B(1), to clarify the meaning of “advertising” and “distribute” for the purposes of the bill
- amending clause 42, new clause 132A, to clarify the meaning of “payment reminder” and “payment that is overdue”.

Cap of 100 percent on fees and interest

Clause 22 of the bill as introduced proposes that the total amount of interest and fees charged on high-cost consumer credit contracts and related consumer credit contracts cannot be higher than the first advance. This would effectively impose a cap amounting to 100 percent of the principal on the amount of interest and fees that lenders could charge.

We recommend a number of amendments to clause 22 to clarify and extend some of the requirements around the 100 percent cap.

Rate cap

Following feedback from submitters, we recommend inserting new section 45D to introduce a daily cap of 0.8 percent on charges for high-cost credit contracts. The maximum rate of 0.8 percent would need to be calculated in accordance with the regulations, as a proportion of the amount of credit that is provided to the borrower. This would align with the legislative model in the United Kingdom.

The 0.8 percent limit would include interest, credit fees, and interest charges, but would exclude default fees. Default fees on high-cost consumer credit contracts would be limited to either \$30 or an amount set by regulations, unless the creditor were to prove that the fees are reasonable.

We also recommend inserting new sections 45E through 45G to prohibit creditors from charging compound interest and entering into any scheme that is designed to avoid the rate cap.

Finally, we recommend the insertion of new clause 45H to require a review of this regime after three years, and consequential amendments to clauses 43, 45, and 59 to align the remainder of the bill with these provisions.

Review of definition of “high-cost” consumer credit contract

Proposed new section 45A(6) would define a “high-cost consumer credit contract” as a loan that provides for an annual interest rate of 50 percent or more, or where the weighted average annual interest rate applied to the unpaid balance is 50 percent or more on any day during the contract’s life.

Several submitters argued that the rate should be reduced from 50 to 30 percent. They maintained that this would provide further protections to borrowers by reducing the likelihood of them being saddled with unaffordable repayments.

However, there are some types of credit contracts that may not warrant restriction, where the interest rate falls in the range of 30 to 50 percent (for instance, some long-term vehicle loans, and some long-term revolving credit facilities). If the rate for high-cost consumer credit contracts was reduced from 50 percent to 30 percent, those lenders would need to reduce the term of the loans and increase the cost of each repayment to keep the total cost of the loans below the 100 percent cap. This could restrict some consumers’ access to some forms of credit, which may not be appropriate.

Therefore, we recommend that the 50 percent limit be kept, but that clause 22 be amended to require a statutory review after three years. The review would focus on whether the total interest and fees cap should be extended to loans with interest rates of 30 to 49 percent. We also recommend extending the definition of high-cost consumer credit contract in new section 45AAC(c). It would now include contracts where the total interest charged (including default interest) is or is likely to be 50 percent or more on an unpaid balance in the event of default or the credit limit being exceeded.

Prohibition on “lender-hopping”

Clause 22, new section 45A, proposes measures to prevent people from repeatedly refinancing a high-cost loan with another high-cost loan. If enacted, creditors would not be allowed to charge borrowing costs on any related high-cost consumer credit contracts that are higher than the amount of the first high-cost loan advance.

A “related consumer credit contract” is a contract where:

- the debtors and creditors are the same as in a previous credit contract
- it is entered into following the non-payment of all or part of an earlier high-cost loan.

We note that some borrowers could use workarounds to avoid the restrictions. This could include seeking additional loans from new creditors to repay earlier loans, or repaying a loan and then immediately taking out another loan.

To avoid this, we recommend amending clause 22, proposed section 45A(6), to extend the definition of “related consumer credit contract”. We recommend that it include loans entered into with the same lender or an associated lender within 15 days of a previous loan being paid off.

We also recommend inserting new sections 45B and 45C to prohibit creditors from providing further high-cost loans to borrowers who have held a high-cost loan with a different creditor within the past 15 days, or who have entered into two or more high-cost consumer credit contracts within the past 90 days.

Lender responsibility principles

Clause 10 would extend the lender responsibility principles in section 9C of the principal Act, particularly regarding advertising, and verifying the affordability and suitability of a loan. We propose several amendments to ensure these provisions are clear and work well in practice.

Advertising standards

The bill intends to make it possible to set binding, enforceable advertising standards. Clause 43 would provide the Government with a regulation-making power to enable it to set advertising standards for consumer credit contracts. Clause 10 would require creditors’ advertising to meet the standards set in the regulations in order to meet lender responsibility principles.

We agree with the need for stricter advertising requirements for high-cost lending. We note that during our consideration of this bill, some of us partially completed online applications for high-cost credit contracts. Despite not providing financial information, some of us were informed we were pre-approved, had our details passed onto other lenders, and were contacted on up to 19 occasions.

Advertising in other languages

In the bill as introduced, clause 14 would insert new section 17A to set out requirements for creditors that advertise in a language other than English. This was included to ensure that when credit contracts are advertised in one language the disclosure statement must be in the same language.

While we support the intent of the provision, we consider the drafting of proposed section 17A so complex that it risks creating confusion. We therefore recommend deleting clause 14 and instead amending clause 10(1), which deals with the lender responsibility principles in section 9C.

Our amendment would state the requirements for lenders more simply. They would be required to take reasonable steps to provide information that will assist borrowers to make an informed decision, and must do so in any language in which they have advertised.

Affordability and suitability tests

Clause 11 would introduce new section 9CA into the principal Act. This would require lenders to substantiate that they have made the required inquiries about the loan's affordability and suitability for the borrower.

This clause would require lenders to keep records to show they have made reasonable inquiries about a loan's affordability or suitability for a given borrower. In the bill as introduced, this evidence could be requested by the Commerce Commission, guarantors, dispute resolution schemes, and borrowers. It must be provided within 20 working days of receiving the request.

We note that, in some circumstances, the 20-day requirement may be too short—for example, if the Commerce Commission requests a substantial amount of information spanning a number of products. We therefore recommend amending clause 11 so the Commerce Commission could permit lenders to provide records in a period longer than 20 days.

Obligations for existing consumer credit contracts

Section 9C of the Credit Contracts and Consumer Finance Act requires lenders to make reasonable inquiries into borrowers' suitability for loans, and the affordability. However, there is no existing obligation to conduct these checks if the credit limit is raised or a further advance is made.

We therefore recommend amendments to clause 10 so that creditors would be required to conduct the same assessments in section 9C when making "material changes" to a consumer credit contract as defined in new section 9C(7).

Providing contact details for dispute resolution schemes and financial mentoring services

We recommend inserting clause 17B, new section 26B into the principal Act. This would introduce new obligations for creditors when they receive hardship applications, have a debtor who falls into arrears, or decline an application for a high-cost credit contract. This is intended to ensure that borrowers are fully aware of all avenues available should they run into financial hardship.

In particular, we recommend requiring creditors to tell these consumers that they can approach a dispute resolution scheme or the court if they have a complaint or concern. They must also provide information about financial mentoring services.

Evidence about how fees are calculated

Clause 21, inserting new section 41A, would require creditors to demonstrate, at the request of the Commerce Commission, that their credit fees and default fees were not unreasonable at the time they were set.

We note that it is possible that a fee could be fair and reasonable at the time it was set, but not at the time a contract is entered into. This could be due to a change in the creditor's business or costs.

Considering this, we recommend inserting new section 41A(2A) to introduce a requirement for lenders to reset their fees when they know, or reasonably ought to know, that there has been a change in the creditor's business or costs that is likely to affect the reasonableness of the fee.

Insurance provisions

Section 88 of the Credit Contracts and Consumer Finance Act entitles debtors (people who owe debt on loans, including both guarantors and borrowers) to recover money when creditors breach their obligations under Part 3A. Section 89 sets out the amount that can be recovered.

Clause 25 would allow debtors to recover an amount equal to the interest charges, credit fees, and default fees when a creditor fails to make reasonable inquiries before entering into a credit contract. This would effectively codify the approach to resolving complaints used by the dispute resolution scheme Financial Services Complaints Ltd.

We agree that these provisions should also provide remedies for breaches associated with credit-related insurance or guarantees. Specifically, we recommend amendments to clause 25 to require creditors to refund insurance premiums if they have breached their obligations to make reasonable inquiries before an insurance contract is entered into under section 9C(5)(a). They would also be required to release consumers from guarantees where they have breached their obligations to make reasonable inquiries before a guarantee is given under section 9C(4)(a).

Disclosure of information and advertisements

Clause 31 would allow the court to issue compliance orders to persons for breaches under section 96. A compliance order could only be issued following an application by the Commerce Commission.

We recommend amendments to clause 31 so the court could also order persons to disclose information or advertisements which they have published. The order would also require an application by the Commerce Commission and the court would need to be of the opinion that there had been a breach of section 96.

Requirement to provide annual returns

We see a need for creditors to provide data on their lending to the Commerce Commission to support monitoring and enforcement.

To this end, we recommend inserting clause 39A, new section 116AAA, to require creditors to provide annual returns to the Commerce Commission. A corresponding regulation-making power, inserted in clause 43, would allow the Government to prescribe the manner in which the return would be provided. In particular, new section 116AAA(2) specifies that the "prescribed manner" could include statistical information relating to a creditor's business.

Fit and proper person requirements

Clause 41 would introduce new Part 5A into the principal Act. This would require directors, senior managers, and controlling owners of businesses that provide credit contracts, as well as mobile traders, to be certified by the Commerce Commission as fit and proper persons.

We see no need for controlling owners to be subject to a fit and proper person test. This is because controlling owners may not always occupy a position that allows them to exercise significant influence over the management or administration of a company. When they do, they would need to be assessed by the certification process as a senior manager. Moreover, it would be possible for someone to avoid being defined as a controlling owner (that is, having beneficial ownership of 50 percent or more) through careful structuring of company ownership. Finally, it would be possible for a person to hold less than 50 percent of a company's shares but still exercise significant influence.

We therefore recommend amending clause 41 (new sections 131A and 131G) to exclude controlling owners from the requirement to be assessed as fit and proper persons. The test would still apply to directors and senior managers of lending and mobile trading companies.

Securitisation requirements

Securitisation and covered bonds are alternative funding arrangements where creditors transfer assets, including credit contracts, to a trustee who holds them separately for investors. Typically, the creditor remains the contract manager.

We note that clause 23 of the bill as introduced would impose due diligence requirements on directors and senior managers of trustees in the context of a securitisation or covered bond arrangement. We see this as unnecessary, as directors and senior managers of trustees would not be performing the functions of the creditor.

We therefore recommend amending proposed section 59B(4) so the due diligence requirements could be applied to the directors and senior managers of the contract manager, and not to directors or senior managers of the trustee. Further, we recommend, in clause 43, replacing section 138(1)(da) to align the regulation-making powers with these changes.

Defence costs

Clause 36 would insert Subpart 5A (new sections 107A to 107E) into Part 4 of the Act. These provisions would allow the courts to impose pecuniary penalties on creditors, at the application of the Commerce Commission, when they breached certain obligations under the Act.

New section 107E would prohibit insurance policies that indemnify (or purport to indemnify) a person against pecuniary penalties or the costs of defending themselves in civil proceedings in which pecuniary penalties are imposed.

We note that this provision would prevent third party professional advisers, such as lawyers, from insuring their partners and employees for the costs they may incur if they are accused of being party to another person's contravention of the Act. We note that this insurance prohibition is narrower than those in other legislation. Further, we agree that insurance and indemnification should be permitted for defence costs arising from proceedings if the individual has been found not to be liable for a civil penalty. We therefore recommend amendments relating to individual pecuniary penalties so they align with provisions in section 80A of the Commerce Act 1986 in relation to indemnity.

Regulations to allow declarations about credit contracts

We recommend inserting clause 42A, new sections 137A to 137C, to deal with the Government's powers to carve arrangements out of being credit contracts, and call arrangements into being consumer credit contracts for the purposes of the Act.

The provisions would only allow declarations to be made by Order in Council at the recommendation of the Minister. The Minister would need to be satisfied, when using a carve-out power, that the declaration:

- is necessary or desirable to promote certainty about whether the Act applies
- is not inconsistent with the purposes of the Act
- would not cause significant detriment to consumers.

The Minister would also need to have regard to the economic substance of the relevant arrangement and to have consulted with key stakeholders who would be substantially affected by it.

National Party minority view

National Party members are concerned at the late insertion of an interest rate cap (0.8 percent per day) into this bill.

Officials recommended against an interest rate cap prior to the introduction of the bill. This is noted in the initial briefing document. They recommended against an interest rate cap "...due to a high level of uncertainty about the impact...on borrowers, and the risk that a significant number of borrowers could be unintentionally harmed by losing access to credit." (page 19)

In response to a question from a National Party committee member following the Minister's announcement of an interest rate cap, officials confirmed that they had not been asked for further advice as to the suitability of an interest rate cap beyond that given prior to the bill's introduction.

National Party members consider this change to be policy made "on the hoof", without sufficient analysis by officials, and recommend that the interest rate cap provisions be removed from the bill.

Appendix

Committee process

The Credit Contracts Legislation Amendment Bill was referred to the committee on 30 April 2019. The closing date for submissions was 14 June 2019.

We received and considered 173 submissions from interested groups and individuals. We heard oral evidence from 50 submitters at hearings in Auckland and Wellington.

We received advice from the Ministry of Business, Innovation and Employment. The Regulations Review Committee reported to us on the powers contained in clause 43.

Committee membership

Dr Deborah Russell (Chairperson, from 24 July 2019)

Michael Wood (Chairperson until 23 July 2019, member until 24 July 2019)

Hon Amy Adams (until 24 July 2019)

Kiritapu Allan

Andrew Bayly

Rt Hon David Carter

Tamati Coffey

Hon Judith Collins

Hon Paul Goldsmith (from 24 July 2019)

Ian McKelvie

Greg O'Connor (from 24 July 2019)

Willow-Jean Prime

David Seymour

Fletcher Tabuteau

Dr Duncan Webb

Brett Hudson participated in our consideration of this bill.

Key to symbols used in reprinted bill

As reported from a select committee

text inserted by a majority

text inserted unanimously

~~text deleted unanimously~~

Hon Kris Faafoi

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Government Bill

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Credit Contracts Legislation Amendment Act **2019**.

2 Commencement

- (1) This Act comes into force on ~~1 March 2020~~, except as provided in ~~subsections (2) to (5)~~. 5
- (2) The following provisions come into force on the day after the date on which this Act receives the Royal assent:
- (a) ~~section 29~~ (new **sections 95A and 95B** inserted):
- (b) ~~section 39~~ (section 113 amended (application of Commerce Act 1986)): 10
- (c) ~~section 43~~ (section 138 amended (regulations)).
- (3) ~~Section 41~~ (new **Part 5A** inserted (certification and fit and proper person requirements)) comes into force on ~~1 June 2020~~, except to the extent that it inserts new ~~sections 131B and 131C~~ (which relate to when a provider of services needs to be certified and exemptions). 15
- (4) The following provisions come into force on ~~1 September 2020~~:
- (a) ~~section 14~~ (new **section 17A** inserted (when creditor advertises in another language)):
- (b) ~~section 18~~ (section 29 amended (right of cancellation does not apply in certain situations)): 20
- (c) ~~section 19~~ (section 32 amended (disclosure standards)):
- (d) ~~subpart 1 of Part 2~~ (amendments to Fair Trading Act 1986).
- (5) The following provisions come into force on ~~1 April 2021~~:

- (a) ~~section 41~~ to the extent that it inserts new ~~sections 131B and 131C~~ (which relate to when a provider of services needs to be certified and exemptions);
- (b) ~~subpart 2 of Part 2~~ (amendments to Financial Service Providers (Registration and Dispute Resolution) Act 2008). 5

2 Commencement

- (1) Sections 15(1), 16(1), 17(1), 17A, 19, 20, 23A, 24 to 26, 28(2), 29, 31A, 34 to 36, 39, 42A, 43, and 44 come into force on the day after the date on which this Act receives the Royal assent.
- (2) Sections 13A, 22, and 45(1) and (3) come into force on **1 June 2020**. 10
- (3) The rest of this Act comes into force on a date appointed by the Governor-General by Order in Council, and 1 or more orders may be made appointing different dates for different provisions and for different purposes.
- (4) To the extent that it is not previously brought into force under **subsections (1) to (3)**, the rest of this Act comes into force on **1 April 2021**. 15
- (5) In this section, **provision** includes any item, or any part of an item, in any of the schedules.

Part 1

Amendments to Credit Contracts and Consumer Finance Act 2003

- 3 Amendments to Credit Contracts and Consumer Finance Act 2003** 20
This Part amends the Credit Contracts and Consumer Finance Act 2003.
- 4 Section 3 amended (Purposes)**
After section 3(3)(h), insert:
- (i) requires creditors under consumer credit contracts and mobile traders to be certified; and 25
- (j) provides for the disclosure of adequate certain information about debt collection to debtors under credit contracts ~~before debt collection starts~~.
- 5 Section 4 amended (Overview)**
- (1) In section 4(d), after “a defence,”, insert “enforceable undertakings, pecuniary penalties,”. 30
- (2) After section 4(e), insert:
- (ea) **Part 5A** requires creditors under consumer credit contracts and mobile traders to be certified:
- (3) In section 4(f), after “relating to”, insert “disclosure before debt collection starts about debt collection,”. 35

6 Section 5 amended (Interpretation)

- (1) In section 5, insert in their appropriate alphabetical order:

certified means certified under **Part 5A**

debt collection has the meaning set out in **section 132A**

director has the same meaning as in section 6(1) of the Financial Markets Conduct Act 2013 5

high-cost consumer credit contract has the meaning set out in **section 45AAC**

layby sale agreement has the same meaning as in section 36B of the Fair Trading Act 1986 10

mobile trader means a person who carries on a business of offering or agreeing to supply, in person and outside of fixed premises, consumer goods to a natural person—

(a) under a credit sale (regardless of whether the contract is a consumer credit contract); or 15

(b) where all or a part of the supply of the consumer goods is to be financed by a consumer credit contract under which a creditor is an associated person of that person—

(whether or not the business is the provider's only business or the provider's principal business) 20

mobile trader service means the financial service of being a mobile trader under section 5(1) of the Financial Service Providers (Registration and Dispute Resolution) Act 2008

payment reminder has the meaning set out in **section 132A**

senior manager has the same meaning as in section 6(1) of the Financial Markets Conduct Act 2013 25

weighted average annual interest rate has the meaning given in the regulations

- (2) In section 5, definition of **credit fees**, after paragraph (b)(v), insert:

(vi) cancellation charges as referred to in section 36F of the Fair Trading Act 1986 30

- (3) In section 5, replace the definition of **creditor** with:

creditor—

(a) means a person who provides, or may provide, credit under a credit contract; and 35

(b) if the rights of that person are transferred by assignment or by operation of law, includes the person for the time being entitled to those rights; and

(c) includes a person declared by regulations to be a creditor; but

(d) does not include a person exempted by regulations from being a creditor

7 New section 8C inserted (Status of examples)

After section 8B, insert:

8C Status of examples

- (1) An example used in this Act is only illustrative of the provision to which it relates. It does not limit the provision. 5
- (2) If an example and the provision to which it relates are inconsistent, the provision prevails.

8 Section 9A amended (Outline of Part)

- (1) In section 9A(2)(a), replace “and 96(1)(aa)” with “96(1)(aa), **98A**, **98B**, and **107A**”. 10
- (2) After section 9A(2)(a), insert:
 - (aa) the debtor to be entitled to recover statutory damages if the creditor breaches certain of the principles (*see* section 88):
- (3) In section 9A(2)(d), delete “, more than once,”. 15

9 Section 9B amended (Interpretation)

- (1) In section 9B(1), insert in their appropriate alphabetical order:

advertising means any form of communication—

 - (a) that is to be, or has been, distributed to a person; and
 - (b) that is reasonably likely to induce a person to inquire about or apply for an agreement; and 20
 - (c) that is authorised or instigated by, or on behalf of, the lender or an associated person of the lender, or prepared with the co-operation of any of those persons

distribute includes— 25

 - (a) make available, publish, and circulate; and
 - (b) communicate by letter, newspaper, an Internet site, broadcasting, an audio or visual service, sound recording, television, film, video, or any form of electronic or other means of communication
- (2) In section 9B(1), replace the definition of **relevant guarantee** with: 30

relevant guarantee—

 - (a) ~~means a guarantee given, or proposed to be given, in respect of—~~
 - (i) a consumer credit contract; or
 - (ii) a credit contract to which Part 3A applies; but

~~(b) does not include a guarantee under which the guarantor is a trustee acting in their capacity as a trustee of a family trust~~

relevant guarantee means a guarantee given, or proposed to be given, by a natural person in respect of a consumer credit contract, but does not include a guarantee under which the guarantor is a trustee acting in their capacity as a trustee of a family trust or as a partner of a partnership under the Partnership Act 1908

10 Section 9C amended (Lender responsibility principles)

(1AAA) In section 9C(3)(a), after “before entering into the agreement,”, insert “and before making a material change referred to in **subsection (8)**.”.

(1) Replace section 9C(3)(b)(i) with:

~~(i) any advertising complies with the advertising standards set in the regulations and is not, or is not likely to be, misleading, deceptive, or confusing to borrowers; and~~

(i) any advertising—

(A) complies with the advertising standards set out in the regulations; and

(B) is not, or is not likely to be, misleading, deceptive, or confusing to borrowers; and

(1A) After section 9C(3)(b)(iii), insert:

(iv) reasonable steps are taken to offer to the borrower information about the agreement in another language (**language A**) if—

(i) advertising that is wholly or significantly in language A is being, or within the preceding 6 months has been, distributed to the public or a section of the public; and

(ii) the steps are necessary to ensure that the borrower can reach an informed decision (for example, if the borrower may not have a good understanding of the language in which the lender is otherwise providing information to the borrower under this Act); and

(1B) After section 9C(4)(b)(ii), insert:

(iii) reasonable steps are taken to offer to the guarantor information about the guarantee in another language (**language A**) if—

(i) advertising about the agreement that is wholly or significantly in language A is being, or within the preceding 6 months has been, distributed to the public or a section of the public; and

(ii) the steps are necessary to ensure that the guarantor can reach an informed decision (for example, if the guarantor

may not have a good understanding of the language in which the lender is otherwise providing information to the guarantor under this Act); and

- (1C) In section 9C(5)(b)(i), delete “distributed by the lender”.
- (2) After section 9C(5), insert: 5
- (5A) In subsections (3)(a), (4)(a), and (5)(a), the requirement to make **reasonable inquiries** so as to be satisfied of a matter includes a requirement to comply with regulations made under **section 138(1)(abe)** that specify inquiries that must be made and the way in which the results of inquiries must be taken into account. 10
- (3) Repeal section 9C(7).
- (4) After section 9C(7), insert:
- (8) The **material changes** for the purposes of subsection (3)(a) are—
- (a) the parties to the agreement agree to change the agreement by increasing a credit limit under the agreement: 15
- (b) the lender exercises a power under the agreement to increase a credit limit under the agreement:
- (c) the lender makes an additional advance that the lender did not take into account when previously satisfying itself as to the matters in subsection (3)(a). 20

11 New section 9CA inserted (Records about inquiries made)

After section 9C, insert:

9CA Records about inquiries made

- (1) The lender must keep records about the inquiries made by the lender under section 9C (including the results of those inquiries). 25
- (2) Those records must demonstrate how the lender has satisfied itself as to the matters in section 9C(3)(a), (4)(a), and (5)(a).
- (3) The lender must make those records available to the Commission, on request by the Commission.
- (4) The lender must make available to a person responsible for an approved dispute resolution scheme, on request by that person, the records that relate to an agreement or a relevant insurance contract that is the subject of a dispute under that scheme. 30
- (5) The lender must make available to a borrower, on request by that borrower and free of charge, the records about the inquiries made by the lender under section 9C(3)(a) and (5)(a) that relate to an agreement or a relevant insurance contract to which the borrower is a party. 35

- (6) The lender must make available to a guarantor, on request by that guarantor and free of charge, the records about the inquiries made by the lender under section 9C(4)(a) that relate to a relevant guarantee to which the guarantor is a party.
- (7) The lender must provide the records within 20 working days of the date on which the request is received by the lender or, in the case of records being provided to the Commission, within any longer period of time specified by the Commission. 5
- (8) The Commission does not need to use its powers under section 98 of the Commerce Act 1986 to make a request under **subsection (3)**. 10
- (9) The lender must keep the records for a period of at least 7 years after the date on which the inquiry was made.

12 Section 9F amended (Content of Responsible Lending Code)

- (1) In section 9F(1)(b)(i), after “agreements”, insert “complies with the advertising standards set in the regulations and”. 15
- (2) In section 9F(1)(b)(ii), after “those paragraphs”, insert “and to comply with the regulations relating to those requirements”.
- (3) In section 9F(1)(b)(iii), replace “(including where the borrower’s or guarantor’s first language is not English)” with “(including where the borrower or guarantor ~~does not have a good understanding of the language mostly used by the creditor~~ may not have a good understanding of the language in which the lender is otherwise providing information)”. 20
- (4) After section 9F(1)(d), insert:
 (da) the processes, practices, or procedures that a lender should follow for the purposes of debt collection: 25

12A Section 9J amended (Publication of standard form contract terms)

Repeal section 9J(5).

13 Section 11 amended (Meaning of consumer credit contract)

After section 11(1B), insert:

- (1C) An arrangement or a facility is also a consumer credit contract if regulations declare it to be a consumer credit contract. 30

13A New section 16A inserted (Mobile trader credit sales treated as consumer credit contract)

After section 16, insert:

16A Mobile trader credit sales treated as consumer credit contract

- (1) For the purposes of this Act, a credit sale under which a mobile trader supplies consumer goods to a natural person is to be treated as a credit contract and a consumer credit contract.
- (2) If **subsection (1)** applies,—
- (a) the mobile trader under the credit sale is to be treated as a creditor; and
- (b) the person to whom the goods are supplied is to be treated as a debtor; and
- (c) this Act applies with all other necessary modifications as if the credit sale were a credit contract and a consumer credit contract.
- (3) This section prevails over section 15.

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14 ~~New section 17A inserted (When creditor advertises in another language)~~

After section 17, insert:

17A ~~When creditor advertises in another language~~

- (1) ~~This section applies if—~~
- (a) ~~a creditor is required by section 17 to make a disclosure in respect of a consumer credit contract and the creditor mostly uses a language (**language 1**) in its disclosure statements required by section 17(1); and~~
- (b) ~~the creditor distributes any advertising, or provides other information to a debtor, about the consumer credit contract in another language (the **advertising language**) within the period of 12 months immediately before the contract was entered into; and~~
- (c) ~~the creditor suspects, or ought reasonably to suspect, that a debtor does not have a sufficient understanding of language 1 to be reasonably aware of the implications of the contract, but has a better understanding of the advertising language.~~
- (2) ~~The creditor must ensure that disclosure is made in the advertising language of as much of the key information set out in Schedule 1 as is applicable to the contract to the debtor under the contract before the contract is entered into.~~
- (3) ~~This section does not limit section 17 or the requirements under Part 1A (for example, under sections 9C and 9F(1)(b)(iii) where the borrower does not have a good understanding of the language mostly used by the creditor).~~

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Example

A creditor (**C**) advertises credit contracts in Samoan. C enters into a contract with Mr A. C mostly makes initial disclosure of the key information about the contract (**Schedule 1 disclosure**) in English. C suspects that Mr A does not have a sufficient understanding of English to be reasonably aware of the implications of the contract, but has a better understanding of Samoan.

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	C must make Schedule 1 disclosure in Samoan. If it is complete and correct, it satisfies the requirement in both section 17(1) and this section. If some or all of the Schedule 1 disclosure is missing or incorrect, it is a breach of both this section and section 17.	
	If C makes complete Schedule 1 disclosure in English, but not in Samoan, it is a breach of this section but not of section 17.	5
	Section 17(2) also requires C to send Mr A a copy of all of the terms of the contract, but this can be done in English or Samoan.	
15	Section 22 amended (Disclosure of agreed changes)	
(1)	In section 22(3)(d), after “increases”, insert “or decreases”.	10
(2)	After section 22(4), insert:	
(5)	Subsection (4) does not apply to a high-cost consumer credit contract within the meaning of section 45A.	
16	Section 23 amended (Disclosure of changes following exercise of power)	
	After section 23(6), insert:	15
(7)	Subsection (6) does not apply to a high-cost consumer credit contract within the meaning of section 45A.	
(8)	Disclosure under this section is not required in relation to a particular debtor if the creditor cannot reasonably locate the debtor.	
(1)	After section 23(6), insert:	20
(7)	<u>Disclosure under this section is not required in relation to a particular debtor if the creditor cannot reasonably locate the debtor.</u>	
(2)	After section 23(7) , insert:	
(8)	<u>Subsections (4) and (6) do not apply to a high-cost consumer credit contract.</u>	
17	Section 26 amended (Disclosure of changes to guarantors)	25
	After section 26(4), insert:	
(5)	Subsection (4) does not apply to a high-cost consumer credit contract within the meaning of section 45A.	
(6)	Disclosure under this section is not required in relation to a particular guarantor if the creditor cannot reasonably locate the guarantor.	30
(1)	After section 26(4), insert:	
(5)	<u>Disclosure under this section is not required in relation to a particular guarantor if the creditor cannot reasonably locate the guarantor.</u>	
(2)	After section 26(5) , insert:	
(6)	<u>Subsection (4) does not apply to a high-cost consumer credit contract.</u>	35

17A Section 26A amended (Disclosure of transfer of rights of creditor under consumer credit contract)

After section 26A(3), insert:

- (4) Disclosure under this section is not required in relation to a particular debtor or guarantor if the creditor cannot reasonably locate the debtor or guarantor, as the case may be. 5

17B New section 26B inserted (Disclosure about dispute resolution schemes and financial mentoring services: hardship applications, arrears, credit declined, and complaints)

After section 26A, insert: 10

26B Disclosure about dispute resolution schemes and financial mentoring services: hardship applications, arrears, credit declined, and complaints

- (1) Information about the creditor's dispute resolution scheme must be disclosed as follows:

(a) by a creditor in every notice required under section 57A(1)(a) (obligations of creditor in relation to hardship applications): 15

(b) by the creditor to the debtor, when the creditor receives a written complaint in relation to any enforcement action under Part 3A:

(c) by the creditor to the debtor, when the creditor receives any other type of complaint described in the regulations. 20

- (2) Information about financial mentoring services must be disclosed as follows:

(a) by a creditor, to a debtor who has made a default in payment or has caused the credit limit under the contract to be exceeded:

(b) by a creditor in every notice required under section 57A(1)(a) (obligations of creditor in relation to hardship applications): 25

(c) by a creditor who declines an application for a high-cost consumer credit contract, to the applicant.

- (3) The disclosure must be made—

(a) in a prominent manner; and

(b) in accordance with regulations made under section 138(1)(dba). 30

- (4) Subpart 4 does not apply to disclosure required under this section.

18 Section 29 amended (Right of cancellation does not apply in certain situations)

After section 29(2), insert:

- (3) Section 27 does not apply to a layby sale agreement. 35

19 Section 32 amended (Disclosure standards)

- (1) In section 32(4), after “giving”, insert “or making available”.
- (2) ~~After section 32(5), insert:~~
- (6) ~~See also **section 17A** (when creditor advertises in another language).~~

20 Section 35 amended (How disclosure is made)

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- (1) Replace section 35(1)(c) with:
- (c) sending the disclosure statement to the information system specified by the person for that purpose; or
- (d) sending an electronic communication to the information system specified by the person for that purpose that allows the disclosure statement to be accessed; or
- (e) otherwise making the disclosure statement available in electronic form, and sending an electronic communication to the information system specified by the person notifying the person how to access the disclosure statement.
- (2) After section 35(1), insert:
- (1A) However, **subsection (1)(d) and (e)** is subject to the conditions that—
- (a) the statement must be readily accessible at that time the electronic communication is sent, and at all reasonable times over the life of the contract, in accordance with the communication; and
- (b) that statement can, at that time the electronic communication is sent, and at all reasonable times over the life of the contract, be stored in a permanent and legible form (for example, saved to an electronic file and printed).
- (3) ~~In section 35(2), replace “the place of residence referred to in subsection (1)(b)” with “the place of residence or address referred to in subsection (1)(b), or the information system referred to in **subsection (1)(c)**.”~~
- (3) Replace section 35(2) with:
- (2) If the place of residence referred to in subsection (1)(b) is the same for 2 or more persons, or if 2 or more persons have specified the same information system for the purposes of **subsection (1)(c) to (e)**, the disclosure statement given or sent to any of those persons is to be treated as having been given or sent to all of those persons.
- (3A) Replace section 35(4) with:
- (4) For the purposes of sections 27 and 99 to 102, when disclosure is made—
- (a) by sending the disclosure statement to the information system specified by the person for that purpose under **subsection (1)(c)**, the disclosure is to be treated as having been made on the second working day after the day on which the statement is sent:

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- (b) under **subsection (1)(d) or (e)**, the disclosure is to be treated as having been made on the second working day after the day on which the electronic communication is sent.
- (4) Replace section 35(5) and (6) with:
- (5) For all other purposes, the disclosure is to be treated as having been made to a person—
- (a) on the day on which the statement is posted to the person; or
- (b) on the day on which the disclosure statement is sent to the information system specified by the person; or
- (c) if **subsection (1)(d) or (e)** applies, on the day on which the electronic communication referred to in that paragraph is sent to the person.

21 New section 41A inserted (Records and reviews about how fees calculated)

After section 41, insert:

41A Records and reviews about how fees calculated

- (1) The creditor under a consumer credit contract must keep records about how the creditor calculated each credit fee and default fee for the purposes of section 41.
- (2) Those calculations must demonstrate that each credit fee and default fee is not unreasonable at the time at which the fee was set calculated or reviewed.
- (2A) A creditor must—
- (a) review a credit fee or a default fee if the creditor knows, or ought reasonably to know, that there has been a change that is likely to materially affect the reasonableness of the fee (for example, a change in the creditor's business or costs); and
- (b) reduce the fee if the result of the review is that the fee is now unreasonable.
- (3) The creditor must make ~~those records~~ the records required by this section available to the Commission, on request by the Commission.
- (4) The creditor must make available to a dispute resolution scheme, on request by that scheme, the records that relate to a contract that is the subject of a dispute under that scheme.
- (5) The creditor must provide the records within 20 working days of the date on which the request is received by the creditor or, in the case of records being provided to the Commission, within any longer period of time specified by the Commission.
- (6) The Commission does not need to use its powers under section 98 of the Commerce Act 1986 to make a request under **subsection (3)**.

- (7) The creditor must keep the records for a period of at least 7 years after the date on which the fee is set calculated or reviewed.

22 New subpart 6A of Part 2 inserted

After section 45, insert:

Subpart 6A—~~Other provisions relating to consumer credit contracts~~ 5
Provisions relating to debtors under high-cost consumer credit contracts

Purpose, outline, and interpretation

45AAA Purpose of this subpart

The purpose of this subpart is—

- (a) to protect consumers from the harm caused by accumulating excessive debts from default on high-interest loans or from rolling over or extending payment terms of high-interest loans; and 10
- (b) to protect consumers from the harm caused by excessive interest and fees from repeat borrowing under high-interest loans.

45AAB Outline of this subpart

- (1) This subpart provides for rules about the following matters: 15
- (a) the maximum costs of borrowing that are recoverable under certain high-cost consumer credit contracts and related consumer credit contracts:
- (b) restrictions on entry into further high-cost consumer credit contracts:
- (c) the maximum rate of charge that is recoverable under a high-cost consumer credit contract: 20
- (d) no compound interest under high-cost consumer credit contracts.
- (2) In relation to those matters, this Act provides for—
- (a) compensation, other orders, or injunctions (see sections 93(a) and 96(1)(a)): 25
- (b) statutory damages (see section 88):
- (c) other court orders (see section 94):
- (d) pecuniary penalties (see **subpart 5A** of Part 4).
- (3) In addition,—
- (a) section 48 applies in some cases: 30
- (b) see **section 124(1)(ea)** (guidelines for reopening credit contracts).

45AAC Meaning of high-cost consumer credit contract

In this Act, unless the context otherwise requires,—

high-cost consumer credit contract means a consumer credit contract of any of the following types:

- (a) a contract that provides for an annual interest rate of 50% or greater:
- (b) a contract under which the weighted average annual interest rate applied to the unpaid balance is, or is likely to be, 50% or greater on any day during the term of the contract: 5
- (c) a contract under which the total rate of the interest charges (including default interest charges) that may be applied cumulatively to the same part of an unpaid balance in the event of a default in payment or the credit limit being exceeded is, or is likely to be, a rate of 50% or greater: 10

Example

A creditor's normal annual interest rate is 40% pa, and an additional default interest charge of 20% pa is applied to the part of the unpaid balance that is in default. The annual interest rate and any default interest charge rate are together 60% pa on the part of the unpaid balance in default. The contract is therefore a high-cost consumer credit contract. 15

- (d) a contract declared by regulations to be a type of contract that is a high-cost consumer credit contract

interest rate that defines a high-cost consumer credit contract means the interest rate set out in **paragraphs (a) to (c)** of the definition of high-cost consumer credit contract. 20

45AAD Power to increase interest rate that defines high-cost consumer credit contract

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, increase the interest rate that defines a high-cost consumer credit contract (the **increase**). 25
- (2) However, the Minister may make a recommendation only if he or she—
 - (a) is satisfied that the increase is no greater than is necessary to take account of a rise in market interest rates; and
 - (b) is satisfied that the increase is necessary or desirable in order to avoid harm or disruption to credit markets that would otherwise be caused by the rise in market interest rates (that is, because more credit contracts would be within the bracket than would be the case if the rise in market rates had not occurred); and 30
 - (c) is satisfied that the increase is not inconsistent with the purpose of this subpart; and 35
 - (d) has consulted the Reserve Bank of New Zealand and the Commission.

*Rules***45A Costs of borrowing must not exceed loan advance**

- (1) The maximum costs of borrowing that are recoverable under a high-cost consumer credit contract and all related consumer credit contracts is an amount equal to the first advance. 5
- (2) A consumer credit contract must not provide for an amount to be recoverable that will result in that maximum amount being exceeded or that is capable of resulting in that maximum amount being exceeded.
- (3) ~~The creditor must not enter into a contract that contravenes **subsection (2)**.~~
- (4) ~~The creditor is not entitled to receive a payment, or debit a fee or charge to the debtor's account, that results in that maximum amount being exceeded.~~ 10
- (5) ~~Section 48 applies if the debtor makes a payment to a creditor that results in that maximum amount being exceeded.~~
- (3) No person may be a creditor under a contract that contravenes this section or accept a payment, or debit a fee or charge to the debtor's account, that will result in that maximum amount being exceeded. 15
- (4) Section 48 also applies if a payment results in that maximum amount being exceeded.
- (6) In this section, ~~unless the context otherwise requires, —~~
- costs of borrowing**, in relation to a consumer credit contract, means any or all of the following costs: 20
- (a) a credit fee:
- (b) a default fee:
- (c) interest charges:
- (d) charges for an optional service: 25
- (e) fees or charges passed on by the creditor (other than default fees)
- fees or charges passed on by the creditor** means fees and charges payable as referred to in section 45 regardless of whether the other person, body, or agency referred to in that section is an associated person of the creditor
- first advance** means, — 30
- (a) in respect of a high-cost consumer credit contract that has no related consumer credit contracts, the first advance (excluding any credit fees, charges for optional services, and fees or charges passed on by the creditor) under that high-cost consumer credit contract:
- (b) in respect of a high-cost consumer credit contract that has 1 or more related consumer credit contracts, the first advance (excluding any credit fees, charges for optional services, and fees or charges passed on by the 35

creditor) under the earliest high-cost consumer credit contract in the series

high-cost consumer credit contract—

- (a) means a consumer credit contract—
- (i) that provides for an annual interest rate of 50% or more; or 5
 - (ii) under which the weighted average annual interest rate applied to the unpaid balance is, or is likely to be, 50% or more on any day during the life of the contract; and
- (b) includes a contract declared by regulations to be a type of contract that is a high-cost consumer credit contract 10

related consumer credit contract, in respect of a high-cost consumer credit contract (**contract A**), means all other consumer credit contracts where—

- (a) a debtor is the same person as a debtor under contract A; and
- (b) a creditor is the same person as, or an associated person of, a creditor under contract A; and 15
- (c) the consumer credit contracts (including contract A) are entered into during a period— 25
 - (i) that begins with a high-cost consumer credit contract being entered into; and
 - (ii) that ends with the expiry of 15 continuous days during which there was no unpaid balance on any of the consumer credit contracts entered into since the start of the period,— 30

and includes a contract declared by regulations to be a type of contract that is a related consumer credit contract.

Example

On 2 February, Ms D borrows \$100 from a creditor (**C**) under a consumer credit contract that has an annual interest rate of 500% pa and a term of 6 weeks. The maximum amount of interest, credit fees, and default fees costs of borrowing that Ms D will have to pay under that contract and any contract that replaces that contract is \$100. 35

On 2 March, Ms D has paid \$92, consisting of \$32 in interest and fees and \$60 of the principal. Her unpaid balance is \$40. 40

Ms D refinances by entering into a further high-cost consumer credit contract with C to repay the remaining \$40, and will receive a further advance of \$50, ie, \$90 in total. The first advance of \$100 caps the maximum costs of borrowing. The maximum amount in interest, credit fees, and default fees costs of borrowing that Ms D will have to pay under the new contract is $\$100 - \$32 = \$68$ (ie, the amount in interest and fees charged on the first contract (\$32) is subtracted from the first advance of \$100 to give a remaining cap of \$68).

C is not entitled to receive more than \$68. If Ms D does pay \$120 (instead of \$68), C must refund \$52 to Ms D, or give Ms D a credit for \$52 against other money owing (see section 48).

In addition, C is liable in other ways, for example, to a pecuniary penalty, statutory damages, and other court orders.

45B Certain high-cost consumer credit contracts with other creditors prohibited

(1) No creditor (C) may enter into a high-cost consumer credit contract with—

(a) a debtor who has an unpaid balance on any high-cost consumer credit contract under which the creditor is a person other than C; or

(b) a person who has had, at any time within the preceding 15 days, an unpaid balance on any high-cost consumer credit contract under which the creditor is a person other than C.

Example

In the example above, Ms D would not be able to refinance on 2 March by entering into a further high-cost consumer credit contract with another creditor.

(2) A creditor (C) has a defence in connection with a breach of this section, if C proves that, before entering into the contract,—

(a) C complied with section 9C in respect of the requirement to make reasonable inquiries; and

(b) C had reasonable grounds to believe that during the relevant period the person did not have an unpaid balance on any high-cost consumer credit contract under which the creditor is a person other than C.

45C High-cost consumer credit contracts with certain repeat debtors prohibited

(1) No creditor (C) may enter into a high-cost consumer credit contract with a debtor who has entered into 2 or more high-cost consumer credit contracts at any time within the preceding 90 days.

(2) A creditor (C) has a defence in connection with a breach of this section, if C proves that, before entering into the contract,—

(a) C complied with section 9C in respect of the requirement to make reasonable inquiries; and

- (b) C had reasonable grounds to believe that the debtor had not entered into 2 or more high-cost consumer credit contracts during the relevant period.

45D Rate cap

- (1) The maximum rate of charge that is recoverable under a high-cost consumer credit contract is 0.8% per day, calculated in accordance with the regulations as a proportion of the amount of credit provided. 5
- (2) A high-cost consumer credit contract must not provide for an amount to be recoverable that will result in that maximum rate being exceeded or that is capable of resulting in that maximum rate being exceeded.
- (3) No person may be a creditor under a high-cost consumer credit contract that contravenes this section or accept a payment, or debit a fee or charge to the debtor's account, in a way that results in that maximum rate being exceeded. 10
- (4) Section 48 also applies if a payment results in that maximum rate being exceeded.
- (5) In this section,— 15
charge means the costs of borrowing within the meaning of **section 45A**, excluding default fees
credit provided means the unpaid balance excluding any amount that the regulations state must be excluded.
- (6) A contract or creditor does not contravene this section if the maximum rate is exceeded only because of a part prepayment or full prepayment. 20

45E Compound interest prohibited

- (1) A high-cost consumer credit contract must not provide for compound interest.
- (2) No person may be a creditor under a high-cost consumer credit contract that provides for compound interest or accept a payment, or debit a fee or charge to the debtor's account, in respect of compound interest. 25
- (3) Section 48 also applies if a payment is in respect of compound interest.
- (4) In this section, **compound interest**, to avoid doubt, includes interest on any amount of additional credit that has been provided to repay accrued interest.

45F Default fees

- (1) This section applies, for the purposes of sections 41, **41A**, and 44A and this subpart, in respect of a high-cost consumer credit contract. 30
- (2) **Subsection (3)** applies if—
 (a) the contract provides for a default fee that is more than the prescribed amount; or 35
 (b) the creditor accepts a payment, or debits a fee or charge to the debtor's account, in respect of a default fee that, taken together with any previous default fees charged under the contract or any related consumer credit

	<u>contract (within the meaning of section 45A) is more than the prescribed amount.</u>	
(3)	<u>The fee must be presumed to be unreasonable, and to be in breach of this section and section 41, unless the creditor rebuts the presumption by proving, on the balance of probabilities, that the fee is reasonable.</u>	5
(4)	<u>The requirement to rebut in subsection (3) includes proving the things in section 44A, including that it was reasonable to take the action that incurred the cost to which the fee relates (for example, sending the default to a debt collection agency).</u>	
(5)	<u>The Governor-General may, by Order in Council, make regulations prescribing the amount for the purpose of this section.</u>	10
(6)	<u>The power in subsection (5) to make regulations may be used only on the recommendation of the Minister, and the Minister may make a recommendation only if the Minister—</u>	
	<u>(a) has had regard to the purpose of this subpart; and</u>	15
	<u>(b) has consulted the Commission and the persons or representatives of the persons who the Minister considers will be substantially affected by the regulations.</u>	
(7)	<u>If no regulations have been made, the prescribed amount is \$30.</u>	
45G	<u>Prohibition on avoidance</u>	20
(1)	<u>A person must not enter into a scheme if it is reasonable to conclude that a purpose of the scheme is to defeat, evade, or circumvent the operation of a provision in this subpart.</u>	
(2)	<u>In this section, scheme means any contract, arrangement, or other act that has the effect of, or any contracts, arrangements, or other acts that together have the effect of, in any way, directly or indirectly,—</u>	25
	<u>(a) resulting in a transaction that is in substance or economic effect a high-cost consumer credit contract or related contract being, instead, a transaction to which this subpart does not apply; or</u>	
	<u>(b) otherwise avoiding the application of a provision of this subpart.</u>	30
	<i>Review of subpart</i>	
45H	<u>Review of subpart</u>	
(1)	<u>The Minister must, as soon as practicable after the expiry of 3 years from the commencement of this section,—</u>	
	<u>(a) review the operation and effectiveness of this subpart; and</u>	35
	<u>(b) prepare a report on that review.</u>	

- (2) The review must consider, in particular, whether the interest rate that defines a high-cost consumer credit contract should be reduced to a rate between 30% and 50%.
- (3) The Minister must present the report to the House of Representatives as soon as practicable after it has been completed.

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22A Section 57A amended (Obligations of creditor in relation to application)

In section 57A(1)(a), after “the debtor”, insert “(see **section 26B(1)(a) and (2)(b)**)”.

23 New subpart 9 of Part 2 inserted

After section 59A, insert:

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Subpart 9—Duty of directors and senior managers of creditors under consumer credit contracts

59B Duty of directors and senior managers of creditors

- (1) Every director and senior manager of a creditor under a consumer credit contract must exercise due diligence to ensure that the creditor complies with its duties and obligations under this Act.
- (2) For the purposes of **subsection (1)**, the director or senior manager must exercise the care, diligence, and skill that a reasonable director or senior manager (as the case may be) would exercise in the same circumstances, taking into account (without limitation)—
- (a) ~~the nature of the business or undertaking; and (for example,—~~
- (i) its size;
- (ii) the nature of the credit provided); and
- (b) the position of the director or senior manager and the nature of the responsibilities undertaken by the director or senior manager.
- (3) In this section, **due diligence** includes taking reasonable steps to ensure that the creditor—
- (a) requires its employees and agents to follow procedures, or has implemented automated procedures, that are designed to ensure compliance with this Act and the regulations; and
- (b) has in place methods for systematically identifying deficiencies in the effectiveness of the procedures for compliance; and
- (c) promptly remedies any deficiencies discovered.
- (4) In any circumstances prescribed under section 138(1)(da) (being circumstances that relate to securitisation or covered bond arrangements or similar arrangements), this section applies as stated in the regulations.

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Compare: 2015 No 70 s 44

23A Section 83J amended (Effect of debtor’s complaint or application on grounds of unforeseen hardship on creditor’s rights to enforce credit contract)

After section 83J(8), insert:

- (9) Despite subsections (1) and (2), the creditor may take an enforcement action referred to in subsection (6)(a) to (c) (but not an action referred to in subsection (6)(d)) if— 5
- (a) the person responsible for the dispute resolution scheme to which a complaint has been referred under this section has given notice (which may include a preliminary view) to the effect that the enforcement action would be in the best interests of the debtor; and 10
- (b) the debtor and the creditor have agreed in writing to the enforcement action.

23B Section 83ZH replaced (Extinguishment of creditor’s security interest and subordinate security interests on sale) 15

Replace section 83ZH with:

83ZH Extinguishment of creditor’s security interest and subordinate security interests on sale

- (1) If consumer goods have been sold under section 83Z or 83ZF, the following interests are extinguished on the sale of the consumer goods: 20
- (a) the security interest in the consumer goods of the creditor who sold the consumer goods;
- (b) all security interests in the consumer goods that are subordinate to the security interest of the creditor who sold the consumer goods.
- (2) See the Personal Property Securities Act 1999 in respect of security interests in the proceeds of the consumer goods. 25

24 Section 88 amended (Creditors, creditors’ agents, lessors, transferees, and buy-back promoters liable for statutory damages)

- (1) Replace section 88(1) with:
- (1) The debtor under a consumer credit contract is entitled to recover from the creditor under the contract the amount of the statutory damages set out in section 89 if the creditor breaches, in connection with the contract, any of the following provisions: 30
- (a) section 9C(1) with respect to the lender responsibility principles responsibilities in section 9C(3)(a) to (e) or (5): 35
- (b) sections 17 to 24, 32 to 40, and 70:
- (c) ~~section 45A (costs of borrowing must not exceed loan advance):~~

- (c) **subpart 6A of Part 2** (provisions relating to debtors under high-cost consumer credit contracts):
- (d) **section 131B** (when person needs to be certified):
- (e) **section 132A** (disclosure ~~before debt collection starts~~ about debt collection). 5
- (1AA) In the case of a breach of **section 131B** (when person needs to be certified), references in this Part to—
- (a) the creditor include references to a mobile trader:
- (b) the debtor under a consumer credit contract include references to a person to whom a mobile trader service is provided. 10
- (2) In section 88(2), replace “24 to 26” with “9C(4)(a) to (d), 24 to 26,”.
- 25 Section 89 amended (Amount of statutory damages)**
- Before section 89(1)(a), insert:
- (aaa) in the case of a breach of section 9C(3)(a) (failure to make reasonable inquiries before entering into an agreement), an amount equal to the interest charges, credit fees, and default fees that have become payable under the agreement or, in the case of a breach of section 9C(3)(a) that relates to a material change, an amount equal to the interest charges, credit fees, and default fees that have become payable as a result of the change; and 15 20
- (aab) in the case of a breach of section 9C(4)(a) (failure to make reasonable inquiries before a guarantee is given), the amount paid by the guarantor in order to comply with the guarantee; and
- (aac) in the case of a breach of section 9C(5)(a) (failure to make reasonable inquiries before entering into a relevant insurance contract), the amount paid by the borrower under the contract; and 25
- (aad) in the case of a breach of **section 45B or 45C**, an amount equal to the interest charges, credit fees, and default fees that have become payable under the contract that was entered into in breach of the relevant section; and 30
- 26 Section 92 amended (Guidelines for reducing statutory damages)**
- In section 92(b), replace “has” with “had”.
- 27 Section 93 amended (Court’s general power to make orders)**
- In section 93(a), replace “or 3A” with “, 3A, or **5A**”.
- 28 Section 94 amended (Court orders)** 35
- (1) After section 94(1)(c), insert:

(caa)	in the case of a breach of section 9C(3)(a) to (e) or (5) (lender responsibility principles) or 45A (costs of borrowing must not exceed loan advancee) subpart 6A of Part 2 (provisions relating to debtors under high-cost consumer credit contracts),—	
(i)	an order that allows for the affordable repayment of any unpaid debt, including the amount and timing of payments:	5
(ii)	an order that prohibits the creditor from charging additional <u>further</u> interest, fees, or other charges under the contract:	
(iii)	any other order that the court thinks necessary to remedy the breach (which may include any of the orders referred to in section 127(2) as if the court were reopening the consumer credit contract):	10
(2)	After section 94(2), insert:	
(3)	In determining an order under subsection (1)(c), the court must have regard to whether a penalty has been imposed against the person in relation to the same conduct under section 107A .	15
29	New sections 95A and 95B inserted	
	After section 95, insert:	
95A	Court may reduce effect of failure to make initial or variation disclosure	
(1)	The court may, on the application of a creditor under a class of consumer credit contracts, order that the effect under section 48 or 99(1A) of a failure to make initial disclosure under section 17, or variation disclosure under section 22, be extinguished or reduced to an amount specified by the court if the court considers that it is just and equitable that an order be made.	20
<u>(1A)</u>	<u>The court may, on the application of a lessor under a class of consumer leases, order that the effect under section 101(2) of a failure to make disclosure under section 64 or 65 be extinguished or reduced to an amount specified by the court if the court considers that it is just and equitable that an order be made.</u>	25
<u>(1B)</u>	<u>The court may, on the application of a transferee under a class of buy-back transactions, order that the effect under section 102(2) of a failure to make disclosure under section 72 or 77 be extinguished or reduced to an amount specified by the court if the court considers that it is just and equitable that an order be made.</u>	30
(2)	The order may be made on the terms and conditions that the court thinks fit.	
95B	Guidelines for reducing effect of failure to make initial or variation disclosure	35
	In deciding whether to make an order under section 95A and the terms and conditions applying to the order, the court must have regard to the following matters:	

- (a) ~~the role that section 99(1A) has in providing incentives for compliance with this Act:~~
- (b) ~~whether the creditor had an appropriate compliance programme:~~
- (c) ~~the extent of, and the reasons for, the breach or breaches:~~
- (d) ~~the extent to which any person has been prejudiced by the breach or breaches:~~ 5
- (e) ~~whether the breach was due to a reasonable mistake or due to events outside the creditor's control:~~
- (f) ~~whether the breach was remedied (to the extent that it could be remedied) as soon as practicable after the breach was discovered by the person or brought to the creditor's notice:~~ 10
- (g) ~~the extent to which the creditor has compensated or offered to compensate any person who has suffered loss or damage by that breach:~~
- (h) ~~any other matters as the court thinks fit.~~

In deciding whether to make an order under **section 95A** and the terms and conditions applying to the order, the court must have regard to the following matters: 15

- (a) the role that sections 99(1A), 101(2), and 102(2) have in providing incentives for compliance with this Act:
- (b) whether the person applying for the order had an appropriate compliance programme: 20
- (c) the extent of, and the reasons for, the breach or breaches:
- (d) the extent to which any person has been prejudiced by the breach or breaches:
- (e) whether the breach was due to a reasonable mistake or due to events outside the control of the person applying for the order: 25
- (f) whether the breach was remedied (to the extent that it could be remedied) as soon as practicable after the breach was discovered by the person or brought to the notice of the person applying for the order:
- (g) the extent to which the person applying for the order has compensated or offered to compensate any person who has suffered loss or damage by that breach: 30
- (h) any other matters as the court thinks fit.

30 Section 96 amended (Injunctions)

- (1) In section 96(1)(a), replace “and 3A” with “3A, and **5A**”. 35
- (2) In section 96(1)(b), replace “or 3A” with “3A, or **5A**”.

31 ~~New section 98A~~ sections 98A and 98B and cross-heading inserted

After section 98, insert:

*Compliance and similar orders***98A Compliance orders**

- (1) The court may, on the application of the Commission, make an order to do 1 or more of the things in **subsection (2)** if, in the opinion of the court, a person has engaged in conduct, or is likely to engage in conduct, that constitutes, or would constitute, any of the things referred to in section 96 (a **breach**). 5
- (2) An order may—
- (a) direct a person to comply with a provision referred to in section 96:
 - (b) require a person to remedy or mitigate any adverse effect arising from the breach: 10
 - (c) require a person to do something that, in the opinion of the court, is necessary or desirable in order to comply with that provision or to avoid, remedy, or mitigate any actual or likely adverse effect arising from the breach.
- (3) A compliance order may be made on any terms and conditions as the court thinks fit. 15
- Compare: 2003 No 114 s 110A; 2013 No 69 s 469

98B Order to disclose information or publish advertisement

- (1) The court may, on the application of the Commission, make an order that a person do 1 or more of the things in **subsection (2)** if, in the opinion of the court, the person has engaged in conduct, or is likely to engage in conduct, that constitutes, or would constitute, any of the things referred to in section 96 (a **breach**). 20
- (2) An order may—
- (a) require that person, or any other person involved in the contravention, to disclose, at that person's own expense, to the public, or to a particular person or to persons included in a particular class of persons, in the manner specified in the order, the information, or information of a kind, that is specified, being information that is in the possession of the person to whom the order is directed or to which that person has access: 25
 - (b) require that person, or any other person involved in the contravention, to publish, at that person's own expense, in the manner and at the times that are specified in the order, corrective statements the terms of which are specified in, or are to be determined in accordance with, the order. 30
- (3) The court may hear and determine an application under **subsection (1)** in conjunction with any other proceedings under this Act. 35
- Compare: 1986 No 121 s 42

31A Section 100 amended (Enforcement of guarantee prohibited)

- (1) Before section 100(1), insert:

(1AAA) In the case of a breach of section 9C(4)(a) (failure to make reasonable inquiries before a guarantee is given), in addition to statutory damages, no person may enforce the guarantee unless the court considers it fair and reasonable in the circumstances after having had regard to all relevant matters, including the seriousness of the breach and the ability of the guarantor to make payments under the guarantee without substantial hardship. 5

(2) In section 100(2), after “Failure to comply with”, insert “section 9C(4)(a) or”.

32 Section 102A amended (Infringement offences)

(1) In section 102A(1)(a)(i), after “or section 19(1) requires”, insert “, or regulations prescribing key information that must be disclosed under **section 132A** require,”. 10

(1A) After section 102A(4), insert:

(4A) Every person commits an offence if the person is subject to a disclosure requirement under **section 26B** and the person breaches the requirement.

(1B) After section 102A(7), insert: 15

(7A) Every person commits an offence if the person is subject to **section 116AAA** (requirement for annual return) and the person breaches the requirement.

(2) In section 102A(11), replace the definition of **disclosure section** with:
disclosure section means any of sections 17, ~~17A~~, 18, 25, 64, 70, 72, and **132A** 20

33 Section 103 amended (Other offences)

(1) In section 103(1), after “to 74”, insert “(except sections 41, **41A**, **45A**, ~~subpart 6A of Part 2~~, and **59B**)”.

(2) In section 103(1), replace “and 83ZN” with “, 83ZN, and **132A**”.

(3) After section 103(5), insert: 25

(6) Every person commits an offence ~~who~~ if, with respect to a document required by or for the purposes of **section 116AAA** or **Part 5A**, the person makes, or authorises the making of, a statement in the document that is false or misleading in a material particular if the person knows it to be false or misleading, and is liable on conviction, — 30

(a) in the case of an individual, to a fine not exceeding \$200,000; and

(b) in the case of a body corporate, to a fine not exceeding \$600,000.

34 Section 106 amended (Reasonable mistake defence)

In section 106(1), replace “or a prosecution under section 103(1)” with “a prosecution under section 103(1), or proceedings for pecuniary penalties under **subpart 5A**”. 35

35 Section 107 amended (Relevance of compliance programme)

In section 107, replace “has” with “had”.

36 New subpart 5A of Part 4 inserted

After section 107, insert:

Subpart 5A—Pecuniary penalties	5
107A Pecuniary penalties	
(1) The court may, on the application of the Commission, order a person to pay to the Crown the pecuniary penalty that the court determines to be appropriate if the court is satisfied that the person—	
(a) has contravened any of the following provisions:	10
(i) section 9C(1) (lender responsibility principles), except to the extent <u>that that provision relates to section 9C(3)(f)</u> :	
(ii) section 9CA (failure to keep records about reasonable inquiries and provide records on request):	
(iia) <u>section 41 (unreasonable credit fee or default fee)</u> :	15
(iii) section 41A (failure to keep records about credit fee or default fee and provide records on request) <u>(duties in respect of records and reviews about how fees calculated)</u> :	
(iv) section 45A (costs of borrowing must not exceed loan advance) :	
(iiv) <u>subpart 6A of Part 2 (provisions relating to debtors under high-cost consumer credit contracts)</u> :	20
(v) section 59B(1) (duty of directors and senior managers of creditors):	
(vi) section 131B (when person needs to be certified):	
(vii) section 131D (prohibitions on holding out that person is certified):	25
(viii) section 131R (duty to notify changes):	
(ix) an order made under section 98A (compliance orders) <u>or section 98B (order to disclose information or publish advertisement)</u> ; or	30
(b) has attempted to contravene such a provision; or	
(c) has aided, abetted, counselled, or procured any other person to contravene such a provision; or	
(d) has induced, or attempted to induce, any other person, whether by threats or promises or otherwise, to contravene such a provision; or	35
(e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of such a provision; or	

- (f) has conspired with any other person to contravene such a provision.
- (2) In determining an appropriate penalty under this section, the court must have regard to all relevant matters, in particular,—
- (a) any exemplary damages awarded under section 94(1)(c); and
 - (b) the nature and extent of the contravention; and
 - (c) the nature and extent of any loss or damage suffered by any person because of the contravention; and
 - (d) any gains made or losses avoided by the person in contravention; and
 - (e) the circumstances in which the contravention took place (including whether the contravention was intentional, inadvertent, or caused by negligence).
- (3) The amount of any pecuniary penalty must not, in respect of each act or omission, exceed,—
- (a) in the case of an individual, \$200,000; or
 - (b) in any other case, \$600,000.
- (4) Proceedings under this section may be commenced within 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered.
- (5) Where conduct by any person constitutes a contravention of 2 or more provisions referred to in **subsection (1)(a)**, proceedings may be instituted under this Act against that person in relation to the contravention of any 1 or more of the provisions; but no person is liable to more than 1 pecuniary penalty under this section in respect of the same conduct.
- Compare: 1986 No 5 s 80
- 107B Proceedings for pecuniary penalties**
- In any proceedings under this subpart for a pecuniary penalty,—
- (a) the standard of proof is the standard of proof that applies in civil proceedings; and
 - (b) the Commission may, by order of the court, obtain discovery and administer interrogatories.
- Compare: 1986 No 5 s 79A
- 107C Relationship between pecuniary penalties and criminal liability**
- (1) Once criminal proceedings against a person for an offence under this or any other Act are determined, the High Court may not order the person to pay a pecuniary penalty under this subpart in respect of the conduct, events, transactions, or other matters that were the subject of the criminal proceedings.
 - (2) Once civil proceedings against a person for a pecuniary penalty under this subpart are determined, the person may not be convicted of an offence under this

or any other Act in respect of the conduct, events, transactions, or other matters that were the subject of the civil proceedings.

- (3) Any uncompleted proceedings for an order under this Act that a person pay a pecuniary penalty must be stayed if criminal proceedings are started or have already been started against the person for the same act or omission, or substantially the same act or omission, in respect of which the pecuniary penalty order is sought. 5

Compare: 1986 No 5 s 79B

107D Restriction on indemnities

- ~~(1) A body corporate must not indemnify any director, employee, or agent, or former director, employee, or agent, of the body corporate or of any related body corporate in respect of the person's liability to pay pecuniary penalties imposed under this Act or costs incurred in defending any proceedings in which pecuniary penalties are imposed under this Act.~~ 10

- (1) A body corporate must not indemnify any director, employee, or agent, or former director, employee, or agent, of the body corporate or of any related body corporate (**person A**) in respect of— 15

(a) any pecuniary penalty imposed on person A under this Act; or

(b) any costs incurred by person A in defending any civil proceedings in which the pecuniary penalty referred to in **paragraph (a)** is imposed. 20

- (2) An indemnity given in contravention of **subsection (1)** is void.

- (3) In this section and **section 107E**, **indemnify** includes relieve or excuse from liability, whether before or after the liability arises, and **indemnity** has a corresponding meaning.

Compare: 1986 No 5 s 80A 25

107E Restriction on insurance

- ~~(1) No person may enter into an insurance policy or a contract of insurance that indemnifies or purports to indemnify a person for the person's liability to pay pecuniary penalties imposed under this Act or costs incurred in defending any proceedings in which pecuniary penalties are imposed under this Act.~~ 30

- (1) No person may enter into a contract of insurance that indemnifies or purports to indemnify a person (**person A**) in respect of—

(a) any pecuniary penalty imposed on person A under this Act; or

(b) any costs incurred by person A in defending any civil proceedings in which the pecuniary penalty referred to in **paragraph (a)** is imposed. 35

- (2) Any contract that does so is void.

Compare: 2015 No 70 s 29

37 Section 108 amended (Power to order certain persons not to act as creditors, lessors, transferees, or buy-back promoters)

- (1) In section 108(1)(a)(v), delete “, more than once,”.
- (2) After section 108(1)(a)(v), insert:
- (va) has failed to comply with any of the provisions of any of the following Acts or of any equivalent overseas legislation: 5
- (i) the Fair Trading Act 1986;
- (ii) the Financial Service Providers (Registration and Dispute Resolution) Act 2008;
- (iii) the Secondhand Dealers and Pawnbrokers Act 2004; or 10
- (3) In section 108(1)(a)(vi), replace “to (v)” with “to **(va)**”.
- (4) Repeal section 108(1A).

38 Section 111 amended (Role and functions of Commission under this Act)

After section 111(2)(c), insert:

- (ca) exercise the powers in **Part 5A** (certification); and 15

39 Section 113 amended (Application of Commerce Act 1986)

After section 113(a), insert:

- (aa) sections 74A to 74C (enforceable undertakings):

39A New section 116AAA inserted (Requirement for annual return)

After section 116, insert: 20

116AAA Requirement for annual return

- (1) Every creditor under a consumer credit contract must provide an annual return to the Commission in the prescribed manner.
- (2) The prescribed manner may include a requirement to provide statistical information in relation to the creditor’s business (including its loan book). 25
- (3) The annual return must be provided before the prescribed date and relate to the prescribed 12-month period.
- (4) Nothing in this section requires the creditor to provide—
- (a) information about an identifiable individual; or
- (b) information that is neither in the possession or control of the creditor nor reasonably ascertainable from information that is in the possession or control of the creditor. 30

40 New subpart 8 of Part 4 inserted

After section 116, Before Part 5, insert:

Subpart 8—Miscellaneous

116A Directors and senior managers may also be liable for statutory damages or compensation

- (1) This section applies if, in a proceeding under subpart 2 or 3, the court is satisfied that there has been— 5
- (a) a breach of any provision of this Act in respect of which the debtor is entitled to recover from the creditor an amount of statutory damages under section 88; or
- (b) a breach referred to in section 93.
- (2) If the court is satisfied that a director or senior manager has breached **section 59B** in respect of the matter, the court may order that the director or manager is liable to pay statutory damages under section 90 in respect of the matter or to pay an amount under section 94 (as the case may be). 10
- (3) *See* section 106, which provides a defence to a claim for statutory damages under section 88. 15
- (4) *See* also **section 107A(1)(v)** (civil pecuniary penalties).
- (5) The liability of the director or manager is a joint and several liability with that of the creditor or any other person against whom an order under section 90 or 94 is made.
- (6) If this section applies, a director or senior manager may apply to the court under section 91 and the court must take directors and senior managers into account under section 92(e). 20

Compare: 2013 No 69 s 534

40A Section 124 amended (Guidelines for reopening credit contracts, consumer leases, and buy-back transactions) 25

After section 124(1)(e), insert:

- (ea) in the case of a contract to which **subpart 6A** of Part 2 applies, the need to protect consumers in accordance with the purpose of that subpart; and

41 New Part 5A inserted

After section 131, insert: 30

Part 5A**Certification and fit and proper person requirements****131A Interpretation for this Part**

In this Part, unless the context otherwise requires,—

- ~~**controlling owner** has the same meaning as in section 4 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008~~ 35

licensed provider has the same meaning as in section 4 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008

Registrar has the same meaning as in section 4 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

Requirement for certification

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131B When person needs to be certified

(1) A person must not provide any of the following services without holding a certification that covers that service:

- (a) being a creditor under a consumer credit contract:
- (b) being a mobile trader.

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(2) **Subsection (1)** applies unless an exemption applies under **section 131C**.

Compare: 2013 No 69 s 388

131C Exemptions from need for certification

(1) A person is exempt from the certification requirement under **section 131B** to the extent that the person—

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- (a) is a licensed provider that is licensed, registered, authorised, or otherwise approved to provide a licensed service by a licensing authority listed in Schedule 2 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008; or
- (b) is a prescribed exempt person.

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(2) A person is also exempt from the certification requirement in respect of a service to the extent that a service is a prescribed exempt service.

Compare: 2013 No 69 s 389

131D Prohibitions on holding out that person is certified

A person must not hold out that the person is certified under this Part if that is not the case.

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Compare: 2013 No 69 s 391

Issue of certifications

131E Commission may issue certification

The Commission may issue a certification in accordance with this Part.

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Compare: 2013 No 69 s 394

131F Application for certification

(1) A person may apply for certification in the manner that is specified by the Commission.

- (2) The application may be for a certification in respect of being a creditor under a consumer credit contract, or being a mobile trader, or both.
- (3) An applicant must provide to the Commission the information that is required by the Commission to assist it in determining the application.
- (4) An applicant may request that 1 or more conditions be imposed on their certification. 5
Compare: 2013 No 69 s 395
- 131G When certification must be issued**
- (1) The Commission must, after receiving an application under **section 131F**, issue a certification if the Commission is satisfied that the applicant's ~~control-~~ing owners, directors, senior managers, and proposed directors and senior managers, are fit and proper persons to hold their respective positions. 10
- (2) *See section 131L* for the Commission's power to impose conditions when it issues a certification. 15
Compare: 2013 No 69 s 396
- 131H Procedural requirements**
- (1) This section applies to a decision of the Commission as to whether to issue certification under **section 131G** or to impose conditions under **section 131L(1)(a)**.
- (2) The Commission must have regard to the prescribed matters (if any) before making a decision. 20
- (3) The Commission must make the decision in the prescribed manner (if any).
- (4) **Subsections (5) and (6)** apply if the Commission proposes to—
- (a) refuse to issue a certification; or
- (b) impose a condition when the applicant has not requested a condition; or 25
- (c) impose a condition that is materially more restrictive than that requested in the application.
- (5) The Commission must give the applicant no less than 10 working days' written notice of the following matters before it exercises the power:
- (a) that the Commission may refuse to issue the certification or impose the condition; and 30
- (b) the reasons why it may exercise that power.
- (6) The Commission must give the applicant or the applicant's representative an opportunity to make written submissions on the matter within that notice period. 35
- (7) In this section, **applicant** means—
- (a) the person applying for certification (for example, the entity that will provide the service); and

- (b) any ~~controlling owner~~, director, senior manager, or proposed director or senior manager who the Commission is not satisfied is a fit and proper person to hold their respective position.

Compare: 2013 No 69 ss 319, 397

131I Notice of decision

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- (1) The Commission must give written notice of a decision referred to in **section 131H** to—
- (a) the applicant; and
 - (b) every other prescribed person.
- (2) If the Commission refuses to issue a certification or imposes a condition referred to in **section 131H(4)**, the written notice must include a statement of the Commission's reasons for exercising the power.

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Compare: 2013 No 69 s 398

131J Commission must send certification details to Registrar

- (1) The Commission must send the details specified in **subsection (2)** to the Registrar after making a decision referred to in **section 131H**.
- (2) The details, for each certification, are—
- (a) the name of the certified person; and
 - (b) any conditions of the certification; and
 - (c) any other prescribed information.
- (3) The Commission may publicly notify any details about a certification as it thinks fit.

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Compare: 2013 No 69 s 401

Conditions of certification

131K Conditions of certification

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- (1) The certification is subject to the conditions imposed by the Commission under **section 131L** and any conditions imposed by regulations (if any).
- (2) The certified person must comply with the conditions imposed on the person's certification.

Compare: 2013 No 69 s 402

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131L When Commission may impose conditions

- (1) The Commission may, by written notice to the applicant or certified person,—
- (a) impose conditions on a certification when the certification is issued; and
 - (b) vary, revoke, add to, or substitute any conditions of certification imposed under this section at any time after the certification is issued.
- (2) A condition referred to in **subsection (1)** may only—

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<ul style="list-style-type: none"> (a) relate to the requirements referred to in section 131G (for example, to ensure that those requirements continue to be satisfied and to require verification that those requirements continue to be satisfied); or (b) specify a date of expiry of the certification. 	5
<p>(3) This section is subject to any regulations made under section 138(1)(hb).</p> <p>Compare: 2013 No 69 s 403</p>	5
131M Certified person may apply for variation of conditions	
<p>(1) A certified person may apply, in the manner that is specified by the Commission, for the Commission to exercise a power under section 131L(1)(b).</p>	10
<p>(2) A certified person must provide to the Commission the information that is required by the Commission to assist it in determining the application.</p> <p>Compare: 2013 No 69 s 404</p>	10
131N Procedure for variation of conditions	
<p>The Commission must not exercise a power under section 131L(1)(b) (except on an application under section 131M), or refuse an application for a variation under section 131M, unless—</p>	15
<ul style="list-style-type: none"> (a) the Commission gives the certified person no less than 10 working days' written notice of the following matters before it exercises the power: <ul style="list-style-type: none"> (i) that the Commission may exercise the power; and (ii) the reasons why it may exercise the power; and (b) the Commission gives the certified person or their representative an opportunity to make written submissions on the matter within that notice period. <p>Compare: 2013 No 69 s 405</p>	20
<i>Expiry, suspension, or cancellation of certifications</i>	
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131O Duration of certification	
<p>(1) A certification continues in force (unless it is cancelled before then) until the earlier of the following dates (the termination date):</p> <ul style="list-style-type: none"> (a) the date that is 3 <u>5</u> years after the date on which it is issued; (b) its expiry date (if any). 	30
<p>(2) Subsection (3) applies if—</p> <ul style="list-style-type: none"> (a) a certified person applies for a new certification no later than 2 months before the termination date of an existing certification that the new certification is intended to supersede; and (b) the application is not disposed of before the termination date. 	35
<p>(3) The existing certification continues in force until the application is disposed of.</p> <p>Compare: 2013 No 69 s 407</p>	35

131P When Commission may suspend or cancel certification

The Commission may suspend (for a specified period or until a specified requirement is met) or cancel a certification—

- (a) if the certified person, by written notice, requests the Commission to do so; or 5
- (b) if the certified person does not meet, or no longer meets, the requirements referred to in **section 131G**; or
- (c) if the Commission is satisfied that the certified person is incapacitated, has ceased to exist, or has become subject to an insolvency event within the meaning of section 6(4) of the Financial Markets Conduct Act 2013; or 10
- (d) if the Commission is satisfied that the certified person has materially contravened a condition of the certification.

Compare: 2013 No 69 s 408

131Q Procedural requirements on suspension or cancellation of certification 15

- (1) The Commission must not suspend or cancel a certification unless—
 - (a) the Commission gives the certified person no less than 10 working days' written notice of the following matters before it exercises the power:
 - (i) that the Commission may suspend or cancel the certification; and
 - (ii) the reasons why it may exercise that power; and 20
 - (b) the Commission gives the certified person or their representative an opportunity to make written submissions on the matter within that notice period.
- (2) In this section, **certified person** includes any ~~controlling owner, director, director or senior manager~~, or proposed director or senior manager, who the Commission is not satisfied is a fit and proper person to hold their respective position and who is the reason why the Commission proposes to suspend or cancel the certification. 25

Compare: 2013 No 69 s 397

Changes relating to certified persons 30**131R Duty to notify changes**

- (1) A certified person must notify the Commission about any prescribed change in circumstances (for example, a change in ~~controlling owners, directors, directors~~ or senior managers) relating to a certified person.
- (2) The time within which a person must notify the Commission under **subsection (1)** is 10 working days from the date on which the person comes to know about the change. 35

- (3) A certified person must provide to the Commission the information that is required by the Commission to assist it in determining whether the certified person continues to meet, or no longer meets, the requirements referred to in **section 131G**.

Compare: 2008 No 97 s 17

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Other provisions about certifications

131S Appeals against certification decisions

A person may appeal to the District Court against a decision of the Commission under this Part to—

- (a) refuse to issue a certification to the person; or
- (b) impose conditions on the person's certification or proposed certification or vary, revoke, add to, or substitute any conditions on the person's certification; or
- (c) refuse an application to vary the conditions of the person's certification; or
- (d) suspend or cancel the person's certification.

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Compare: 2013 No 69 s 531

131T Fees, changes, and costs in connection with this subpart

- (1) The Commission may refuse to perform or exercise a function, power, or duty until any fee, charge, or cost prescribed under section 138(1)(hb) is paid.
- (2) Any fee, charge, or cost payable to the Commission is recoverable by the Commission in any court of competent jurisdiction as a debt due to the Commission.

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Compare: 2011 No 5 s 67(3), (4)

42 New section 132A inserted (~~Disclosure before debt collection starts about debt collection~~)

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After section 132, insert:

132A ~~Disclosure before debt collection starts~~

- (1) ~~This section applies to any credit contract under which—~~
 - (a) ~~the debtor is a natural person; and~~
 - (b) ~~debt collection is, or is to be, carried out in the course of a business.~~
- (2) ~~Every debt collector under the credit contract must ensure that disclosure of as much of the key information set out in the regulations as is applicable to the contract is made to every debtor under the contract before debt collection starts under the contract.~~
- (3) ~~In this section, unless the context otherwise requires,—~~

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debt collection—

- (a) means actions to recover (or attempt to recover) any money that is owing by a debtor under a credit contract in breach of the contract; and
- (b) includes any action taken with a view to collection of that money by a person other than the creditor to whom it is owed or, where it has been assigned, to whom it was originally owed; but
- (c) excludes the sending of a payment reminder by the creditor to whom that money is owed or, where it has been assigned, to whom that money was originally owed

debt collector means a creditor or any other person engaging in debt collection

payment reminder—

- (a) means a communication that—
 - (i) is made by the creditor who made the advance; and
 - (ii) is made within 6 months of a default in payment; and
 - (iii) only requests payments that are overdue; but
- (b) excludes—
 - (i) a notice demanding payment of any amount in addition to the overdue payments (for example, a notice demanding that the unpaid balance be repaid in full);
 - (ii) in-person visits to the debtor, the debtor's residence, or the debtor's place of work;
 - (iii) communications with any person other than the debtor (other than inadvertent communications in the course of attempting to contact the debtor);
 - (iv) requesting the debtor to consent to deductions from wages (under section 5 of the Wages Protection Act 1983), from a benefit (as defined in Schedule 2 of the Social Security Act 2018), or from a student allowance established by regulations made under section 303 of the Education Act 1989;
 - (v) filing enforcement proceedings or lodging a claim with a dispute tribunal.

(4) Subpart 4 of Part 2 applies with necessary modifications.

132A Disclosure about debt collection*Application*

(1) This section applies to any credit contract under which—

- (a) the debtor is a natural person; and

- (b) when the contract was entered into, the credit was to be used, or was intended to be used, wholly or predominantly for personal, domestic, or household purposes; and
- (c) debt collection is, or is to be, carried out in the course of a business.
- Duty to make disclosure* 5
- (2) Before debt collection starts, the debt collector must ensure that disclosure of all the information set out in the regulations that applies to the contract is made to every debtor under the contract.
- (3) A person who becomes a debt collector after debt collection has started must also make the disclosure required by **subsection (2)** within 10 working days of the day on which the person becomes a debt collector. 10
- (4) In this section, unless the context otherwise requires,—
debt collection means an act to recover (or attempt to recover) any money that is owing by a debtor under a credit contract as a result of the debtor’s breach of the contract 15
debt collector, in respect of a contract, means a creditor or any other person engaging in debt collection in respect of the contract.
- Exceptions*
- (5) However, this section does not apply— 20
- (a) if the act to recover (or attempt to recover) money is either of the following:
- (i) a payment reminder provided by the creditor who made the advance under the credit contract:
- (ii) a payment reminder provided by a person to whom the rights of a creditor have been transferred by assignment or operation of law (the **assignee**), if the assignment did not occur for the purpose of the assignee undertaking debt collection: 25
- (b) if the creditor has complied with section 119 of the Property Law Act 2007 (notice must be given to current mortgagor of mortgaged land of exercise of powers, etc): 30
- (c) if the creditor has served a repossession warning notice in accordance with section 83G:
- (d) if the action is in respect of a repossession of goods that are at risk (see section 83E(2)).
- (6) In this section, unless the context otherwise requires,— 35
payment reminder—
- (a) means a communication that—
- (ii) is made within 6 months of a default in payment; and
- (iii) only requests a payment that is overdue; but

- (b) excludes—
- (i) a notice demanding payment of any amount in addition to the overdue payments (for example, a notice demanding that the unpaid balance be repaid in full):
 - (ii) in-person visits to the debtor, the debtor’s residence, or the debtor’s place of work: 5
 - (iii) communications with any person other than the debtor (other than incidental communications in the course of attempting to contact the debtor):
 - (iv) requesting the debtor to consent to deductions from wages (under section 5 of the Wages Protection Act 1983), from a benefit (as defined in Schedule 2 of the Social Security Act 2018), or from a student allowance established by regulations made under section 303 of the Education Act 1989: 10
 - (v) filing enforcement proceedings or lodging a claim with the Disputes Tribunal 15

payment that is overdue—

- (a) includes default fees and default interest charges in respect of an overdue amount:
- (b) does not include an amount payable under an acceleration clause (being an express or implied term in a credit contract which provides that, if there is a default, any amounts become payable (or may be called up as becoming payable) earlier than would be the case if there had not been a default). 20

How it works 25

- (7) Subpart 4 of Part 2 applies with necessary modifications.
- (8) The rules in sections 11(1A) and (1B), 12 to 14, 15(1)(ca), and 16 apply with necessary modifications for the purposes of **subsection (1)**.

42A New sections 137A to 137C and cross-heading inserted

After section 137, insert: 30

Declarations about credit contracts and consumer credit contracts

137A Class declarations about credit contracts and consumer credit contracts

- (1) The Governor-General may, by Order in Council, make regulations for all or any of the following purposes:
- (a) declaring that any class of arrangements or facilities are not credit contracts: 35

- (b) declaring any class of arrangements or facilities that has, or is intended to have, the effect of a person receiving a loan, or goods or services with deferred payment, to be consumer credit contracts:
- (c) declaring any class of consumer credit contracts to be high-cost consumer credit contracts or related consumer credit contracts for the purposes of **subpart 6A of Part 2** (provisions relating to debtors under high-cost consumer credit contracts). 5
- (2) A power in this section to make regulations may be used only on the recommendation of the Minister, and the Minister may make a recommendation only if the Minister— 10
- (a) is satisfied, in the case of **subsection (1)(a)**, that the declaration—
- (i) is necessary or desirable to promote certainty about whether this Act applies; and
- (ii) is not inconsistent with the purposes of this Act set out in section 3; and 15
- (iii) would not cause significant detriment to consumers; and
- (b) is satisfied, in the case of **subsection (1)(b)**, that the regulations are necessary or desirable in order to promote the purposes of the Act set out in section 3; and
- (c) is satisfied, in the case of **subsection (1)(c)**, that the regulations are necessary or desirable in order to promote the purpose of **subpart 6A of Part 2**; and 20
- (d) has had regard to the economic substance of the relevant arrangement or facility; and
- (e) has consulted the persons or representatives of the persons who the Minister considers will be substantially affected by the regulations. 25
- (3) If the Minister makes a recommendation, the Minister’s reasons for making the recommendation (including why the declaration is appropriate) must be published together with the regulations.
- (4) If a declaration is made under **subsection (1)(b) or (c)**, this Act applies with any modifications specified in the regulations and with all other necessary modifications. 30
- 137B Declarations about particular arrangements or facilities**
- (1) The Minister may declare that the following are not credit contracts:
- (a) a particular arrangement or facility; 35
- (b) a class of arrangements or facilities associated with or involving 1 or more particular persons (for example, a type of product offered by a particular person or group of companies).
- (2) A power in this section may be exercised only if the Minister—

- (a) is satisfied that the declaration—
- (i) is necessary or desirable to promote certainty about whether this Act applies; and
 - (ii) is not inconsistent with the purposes of this Act set out in section 3; and 5
 - (iii) would not cause significant detriment to consumers; and
- (b) has had regard to the economic substance of the relevant arrangement or facility; and
- (c) has consulted—
- (i) the Commission; and 10
 - (ii) the persons or representatives of the persons who the Minister considers will be substantially affected by the declaration.
- (3) A declaration under this section—
- (a) is a disallowable instrument, but not a legislative instrument, for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under section 41 of that Act; and 15
 - (b) must, as soon as practicable after it is made, be—
 - (i) published on an Internet site maintained by or on behalf of the Ministry; and
 - (ii) notified in the *Gazette*. 20
- (4) The Minister’s reasons for making a declaration under this section (including why the declaration is appropriate) must be published together with the declaration.
- 137C General provisions about all declarations**
- (1) A declaration under **section 137A or 137B** may be made subject to terms and conditions, including (without limitation) terms and conditions relating to— 25
 - (a) the circumstances in which the declaration applies, whether by reference to any persons, arrangements, or facilities, or any other circumstances;
 - (b) transitional matters. 30
 - (2) Nothing in this section prevents the granting of an exemption under section 138 that applies to a matter that is the subject of a declaration.
 - (3) A failure to consult as required by **section 137A or 137B** does not affect the validity of a declaration.
 - (4) A declaration under **section 137A** that something is a consumer credit contract prevails over a statement to the contrary in section 15. 35

43 Section 138 amended (Regulations)

(1) After section 138(1)(ab), insert:

- (aba) exempting any person or class of persons from being a creditor under a consumer credit contract or class of consumer credit contracts for the purpose of ~~the application of this Act or applying~~ any provision or provisions of this Act, and prescribing the terms and conditions (if any) of the exemption: 5
- (abb) ~~declaring any arrangement or facility, or class of arrangements or facilities, that has, or is intended to have, the effect of a person receiving a loan, or goods or services with deferred payment, to be consumer credit contracts:~~ 10
- (abc) ~~declaring any person or class of persons to be creditors under a consumer credit contract or class of consumer credit contracts:~~
- (abd) setting advertising standards for the purposes of **section 9C(3)(b)(i)** (lender responsibility principles); ~~which may include—~~ 15
- (i) ~~what advertisements must or must not contain:~~
- (ii) ~~the manner in which advertising must or may be done:~~
- (iii) ~~circumstances in which advertising must not be distributed to a person (including prohibitions on advertising):~~
- (abe) ~~prescribing, for the purpose of **section 9C(5A)**, inquiries that must be made, and the way in which the results of the inquiries must be taken into account, before entering into an agreement, guarantee, or insurance contract:~~ 20
- (abe) ~~prescribing, for the purposes of **section 9C**,—~~
- (i) ~~inquiries that must be made before entering into, or making a material change to, an agreement, a guarantee, or an insurance contract:~~ 25
- (ii) ~~processes, practices, and procedures that a lender should follow when making reasonable inquiries:~~
- (iii) ~~the way in which the results of the inquiries must be taken into account:~~ 30
- (iv) ~~circumstances that would prevent a lender from being satisfied as to a matter:~~

(1A) Replace section 138(1)(da) with:

- (da) in the case of circumstances that relate to securitisation or covered bond arrangements or similar arrangements,— 35
- (i) prescribing circumstances for the purposes of section 26A(3) and how Part 3A applies in those circumstances (which may include treating a contract manager as if they were a creditor for all or any purposes of Part 3A): 40

- (ii) prescribing circumstances for the purposes of **section 59B(4)** and how **section 59B** applies in those circumstances (which may include requiring the directors and senior managers of a contract manager to exercise due diligence to ensure that a creditor complies with its duties under this Act): 5
- (iii) prescribing modifications to other provisions that relate to the application, effect, or enforcement of those provisions:
- (1B) After section 138(1)(db), insert:
- (dba) prescribing for the purposes of **section 26B** (disclosure about dispute resolution scheme and financial mentoring services),— 10
- (i) when information needs to be provided:
- (ii) what information needs to be provided:
- (iii) the manner in which that information needs to be provided:
- (2) After section 138(1)(f), insert:
- (fa) declaring any consumer credit contract, or class of consumer credit contracts, to be high-cost consumer credit contracts or related consumer credit contracts for the purposes of **section 45A** (costs of borrowing must not exceed loan advance): 15
- (fb) providing for the calculation of the weighted average annual interest rate for a given day for the purposes of **section 45A**: 20
- (fb) providing for the calculation of matters in **paragraph (b) or (c)** of the definition of **high-cost consumer credit contract**:
- (fc) prescribing a procedure or procedures for calculating the maximum rate of charge for the purposes of **section 45D** (rate cap):
- (fd) prescribing, for the purposes of **section 45D**, the assumptions that may be made when calculating the maximum rate of charge and the terms and conditions (if any) that apply to those assumptions: 25
- (3) After section 138(1)(ha), insert:
- (hb) prescribing matters relating to **Part 5A** (certification and fit and proper person requirements), including— 30
- (i) persons who, or services that, are exempt for the purposes of **section 131C**:
- (ii) matters that the Commission must have regard to for the purposes of **section 131H(1)(2)**:
- (iii) conditions that certifications are subject to, the kinds of conditions that the Commission may impose on those certifications, or matters to which conditions imposed by the Commission may relate, for the purposes of **sections 131K and 131L**: 35
- (iv) persons for the purposes of **section 131I** (notice of decisions):

- (v) information for the purposes of **section 131J(2)(c)** (Commission must send certification details to Registrar):
- (vi) changes in circumstances for the purposes of **section 131R(1)**:
- (vii) requiring the payment to the Commission of fees and charges in connection with applications and notices under **Part 5A** and the amounts of those fees and charges or the manner in which those fees and charges are to be calculated: 5
- (viii) authorising the Commission to require payment of any costs incurred by the Commission in connection with an application or a notice referred to in **subparagraph (vii)**: 10
- (ix) authorising the Commission, in its discretion or on any grounds that are prescribed, to refund or waive all or any part of a prescribed fee, charge, or cost payable in connection with an application or a notice referred to in **subparagraph (vii)**: 15
- (4) After section 138(1)(ja), insert: 15
- (jaaa) prescribing requirements in relation to annual returns for the purposes of **section 116AAA**, including the date by which the return must be provided and the 12-month period to which it must relate (by reference to annual dates):
- (jb) prescribing key information that must be disclosed under **section 132A** (~~disclosure before debt collection starts~~ about debt collection): 20
- (jc) prescribing, for the purposes of any provision of this Act that requires a thing to be done in a prescribed manner (or for the purposes of any other regulations empowered to prescribe the manner in which something must be done), the manner in which the thing must be done, including prescribing— 25
- (i) by whom, when, where, and how the thing must be done:
- (ii) the form that must be used in connection with doing the thing:
- (iii) what information or other evidence or documents must be provided in connection with the thing: 30
- (iv) requirements with which information, evidence, or documents that are provided in connection with the thing must comply:
- (v) that fees or charges must be paid in connection with doing the thing:
- (vi) that the Commission may determine or prescribe any of the matters under **subparagraphs (i) to (iv)**: 35
- (5) In section 138(1A), replace “or (ab)” with “to **(aba)**”.
- (6) In section 138(1A)(c)(i), after “subsection (1)(a)”, insert “or **(aba)**”.
- (7) In section 138(1B), replace “or (ab)” with “to **(aba)**”.

(8) After section 138(1B), insert:

~~(1BA) Regulations may be made under **subsection (1)(abb)** (declaring any arrangement or facility to be consumer credit contracts) only on the recommendation of the Minister, and the Minister may make a recommendation only if the Minister—~~ 5

~~(a) is satisfied that the regulations are necessary or desirable in order to promote the purposes of the Act set out in section 3; and~~

~~(b) has had regard to the economic substance of the relevant arrangement or facility; and~~

~~(c) has consulted the persons or representatives of the persons who the Minister considers will be substantially affected by the regulations.~~ 10

(1BC) Regulations may be made under **subsection (1)(abc)** (declaring any person or class of persons to be creditors) or **(abd)** (advertising standards) or **(abe)** (inquiries) only on the recommendation of the Minister, and the Minister may make a recommendation only after consulting the persons or representatives of the persons who the Minister considers will be substantially affected by the regulations. 15

(1BCA) Regulations may be made under **subsection (1)(jaaa)** only on the recommendation of the Minister, and the Minister may make a recommendation only after consulting the Commission and representatives of the creditors that would be affected. 20

(1BD) A failure to consult as required by this section does not affect the validity of any regulation.

(9) After section 138(3), insert:

(4) Regulations may also contain different provisions in relation to different— 25

(a) classes of lenders or creditors:

(b) classes of borrowers or debtors:

(c) classes of guarantors:

(d) classes of agreements or contracts.

44 Schedule 1AA amended 30

In Schedule 1AA, ~~after clause 3,~~ insert the cross-headings and clauses set out in **Schedule 1** of this Act as the last provisions in Schedule 1AA and make all necessary consequential amendments.

45 Schedule 1 amended

(1) In Schedule 1, after paragraph (n), insert: 35

(naaa) if the contract is a high-cost consumer credit contract, a statement to that effect:

- (na) if the contract is a high-cost consumer credit contract or a related consumer credit contract, a statement of the effect of **section 45A**, which must include the maximum costs of borrowing, how the costs are calculated, and the total amount that is recoverable:
- Example** 5
- On 1 February 2023, Ms D borrows \$100 from a creditor (C). By 1 March 2023, Ms D has paid \$32 in interest and fees and \$60 of the principal. Ms D refinances by entering into a further high-cost consumer credit contract with C to repay the remaining \$40, and will receive a further advance of \$160, ie, \$200 in total. C includes the following in the initial disclosure statement: 10
- ~~“The maximum amount of interest charges, credit fees, or default fees costs of borrowing that you can be charged under this contract is \$68. No other amount of interest charges, credit fees, or default fees costs of borrowing may be charged or debited to your account.~~
- “The maximum amount is calculated as follows: 15
- your first advance under this contract or a related contract – previous interest and fees charged on related contracts
- “Your first advance was \$100 under the contract dated 1 February 2023.
- “Your previous interest and fees were \$32, paid under that contract.
- “The total amount that you can be required to pay under this contract is \$268. This is the \$200 advanced to you plus the \$68 maximum amount.” 20
- (nab) if the contract is a high-cost consumer credit contract, a statement of the rate of charge under the contract, as required to be calculated in accordance with **section 45D** and the regulations:
- (2) In Schedule 1, after paragraph (s), insert: 25
- (saa) if the consumer credit contract is also a layby sale agreement,—
- (i) a statement of the debtor’s cancellation rights under section 36F(1) of the Fair Trading Act 1986; and
- (ii) whether or not a cancellation charge under section 36F(3) of that Act will be imposed; and 30
- (iii) if a cancellation charge will be imposed, the amount of the charge (if a fixed charge will be imposed) or a clear description of how the charge will be calculated:
- (3) In Schedule 1, after paragraph (ua), insert: 35
- (uaa) a statement that the scheme will not charge a fee to any complainant to investigate or resolve a complaint, if the consumer credit contract is a high-cost consumer credit contract or a related consumer credit contract:

Part 2 Amendments to other Acts and legislative instruments

Subpart 1—Amendments to Fair Trading Act 1986

- 46 Amendments to Fair Trading Act 1986** 5
This subpart amends the Fair Trading Act 1986.
- 47 Section 36B amended (Meaning of layby sale agreement)**
Repeal section 36B(4) and (5).
- 48 Section 36C amended (Disclosure requirements relating to layby sale agreement)** 10
After section 36C(2), insert:
- (3) This section and section 36D do not apply to a layby sale agreement that is a consumer credit contract to which subpart 2 of Part 2 of the Credit Contracts and Consumer Finance Act 2003 applies (which relates to required disclosure).

Subpart 2—Amendments to Financial Service Providers (Registration and Dispute Resolution) Act 2008 15

- 49 Amendments to Financial Service Providers (Registration and Dispute Resolution) Act 2008**
This subpart amends the Financial Service Providers (Registration and Dispute Resolution) Act 2008.
- 50 Section 4 amended (Interpretation)** 20
(1) In section 4, replace the definitions of **credit contract** and **creditor** with:
- credit contract—**
- (a) has the meaning given by section 7 of the Credit Contracts and Consumer Finance Act 2003:
- (b) includes a credit sale that is treated as a credit contract under **section 16A** (mobile trader credit sales) of that Act: 25
- (c) includes a contract that is declared to be a consumer credit contract under Part 6 of that Act:
- (d) does not include something that would otherwise be covered by **paragraph (a)**, but that is not covered by **paragraph (b) or (c)**, that— 30
- (i) is specified in section 15(1)(a) or (b) of that Act; or
- (ii) is a contract under which no interest charges, and no credit fees, as defined in section 5 of that Act, are payable; or
- (iii) is declared not to be a credit contract under Part 6 of that Act

- creditor** has the same meaning as in section 5 of the Credit Contracts and Consumer Finance Act 2003 except that it also includes a person who is treated as a creditor under that Act in respect of a credit contract
- (2) In section 4, insert in its appropriate alphabetical order:
mobile trader has the same meaning as in section 5 of the Credit Contracts and Consumer Finance Act 2003 5
- 51 Section 5 amended (Meaning of financial service)**
 After section 5(1)(e), insert:
 (ea) being a mobile trader:
- 52 Section 13 amended (Qualifications for registration as financial service provider) 10**
 In section 13, insert as subsections (2) and (3):
- (2) However, **subsection (3)** applies to a person to whom **section 131B** of the Credit Contracts and Consumer Finance Act 2003 applies (which relates to when a person needs to be certified). 15
- (3) The person is not qualified to be registered as a financial service provider for the service of being a creditor under a credit contract or a mobile trader unless the person is certified under **Part 5A** of that Act.
- 53 Section 18 amended (Deregistration of financial service provider) 20**
 After section 18~~(1B)~~(2), insert:
- ~~(1C)~~2A) The Registrar must deregister a financial service provider in respect of a particular service after a notice period in accordance with sections 19 and 20 if the Registrar is satisfied that the provider is disqualified from being registered in respect of that service.
- 54 New section 23 and cross-heading inserted 25**
 After section 22, insert:
- Information-sharing provisions*
- 23 Information-sharing provisions between Registrar and Commission 30**
 Sections 17(1)(b), 18(2), 19(1), 21(b), and 22(3)(b) apply as if the Commerce Commission were identified in Schedule 2 as a body that is a licensing authority in respect of creditors and mobile traders.
- 55 Section 27 amended (Contents of register) 35**
 After section 27~~(1)(e)~~, Before section 27(1)(d), insert:
 (each) in relation to a person that is certified under **Part 5A** of the Credit Contracts and Consumer Finance Act 2003,—

- (i) whether the person is a creditor or a mobile trader:
- (ii) the name and business address of the Commerce Commission, as the certifying authority:

56 ~~Section 67 amended (Duty to co-operate and communicate information in certain circumstances)~~ 5

In section 67(1)(ca), after “creditors”, insert “or about mobile traders”.

56 New section 67A inserted (Duty to communicate information about mobile traders)

After section 67, insert:

67A Duty to communicate information about mobile traders 10

(1) The person responsible for an approved dispute resolution scheme (A) must, if A has reasonable grounds to believe that a member that is a mobile trader has contravened or is likely to contravene the Credit Contracts and Consumer Finance Act 2003 in a material respect, communicate that fact to the Commerce Commission. 15

(2) Communication under this section is treated as if it were communicated under section 67.

57 **Schedule 1AA amended**

In Schedule 1AA, after clause 2, insert the **Part 2** set out in **Schedule 2** of this Act as the last Part in Schedule 1AA and make all necessary consequential amendments. 20

Subpart 3—Amendments to legislative instruments

58 **Amendment to Financial Service Providers (Registration) Regulations 2010**

(1) This section amends the Financial Service Providers (Registration) Regulations 2010. 25

(2) In Schedule 2, after clause 4, insert:

4A If the registered financial service provider is a creditor or a mobile trader,—

- (a) whether that person is a creditor under consumer credit contracts:
- (b) whether that person is certified under **Part 5A** of the Credit Contracts and Consumer Finance Act 2003 and, if so,— 30
 - (i) the termination date of that certification:
 - (ii) any conditions of certification:
 - (iii) whether the certification is suspended:
- (c) whether an exemption from certification applies. 35

59 Amendments to Credit Contracts and Consumer Finance Regulations 2004

(1) This section amends the Credit Contracts and Consumer Finance Regulations 2004.

(1A) Before the cross-heading above regulation 4A, insert:

Advertisements for high-cost consumer credit contracts

4AAA Advertisements for high-cost consumer credit contracts: financial mentoring services

(1) This regulation applies to the following types of advertisement for a high-cost consumer credit contract:

- (a) the home page of the creditor's Internet site;
- (b) any pages on an Internet site to which an advertisement links other than an advertisement on that Internet site;
- (c) print advertisements (for example, in newspapers, magazines).

(2) The advertisement must disclose in a prominent manner the information about financial mentoring services described in **regulation 5A(6)** (disclosure about dispute resolution and financial mentoring services).

4AAB Advertisements for high-cost consumer credit contracts: risk statements

Every advertisement for a high-cost consumer credit contract must include a prominent statement that a high-cost consumer credit contract should not be used for long-term or regular borrowing, and is only suitable to address temporary, short-term cash needs.

(1B) After regulation 5, insert:

Disclosure about dispute resolution and financial mentoring services

5A Disclosure about dispute resolution and financial mentoring services: hardship applications, arrears, credit declined, and complaints

(1) This regulation is for the purposes of **section 26B** of the Act.

When information needs to be provided

(2) The information required under **section 26B(1)(c)** must be disclosed by the creditor as soon as practicable after the creditor receives an expression of dissatisfaction related to its services to which a response or a resolution is explicitly or implicitly expected (a **complaint**).

(3) The information required under **section 26B(2)(a)** must be disclosed in every payment reminder sent by a creditor to a borrower under a consumer credit contract.

- (4) The information required under **section 26B(2)(c)** must be disclosed at the time when the creditor advises the person that their application for a high-cost consumer credit contract has been declined.
- What information must be provided*
- (5) The following information must be disclosed about dispute resolution schemes: 5
- (a) the name of and contact details for the dispute resolution scheme of which the creditor is a member (unless the Financial Service Providers (Registration and Dispute Resolution) Act 2008 does not require the creditor to be a member of such a scheme):
- (b) an explanation of what that scheme provides: 10
- (c) that the scheme will not charge a fee to any complainant to investigate or resolve a complaint.
- (6) The following information must be disclosed about financial mentoring services:
- (a) that the person can ask for free and confidential budgeting and financial capability advice from *MoneyTalks*: 15
- (b) the contact details for *MoneyTalks*:
- (c) a link to *MoneyTalk*'s Internet site.
- (7) In this regulation, *MoneyTalks* means the financial capability helpline that is funded and directed by the Ministry of Social Development. 20
- (2) After regulation 6, insert:

High-cost consumer credit contracts

6A High-cost consumer credit contracts for which costs of borrowing must not exceed loan advances

For the purposes of ~~**section 45A**~~ of the Act ~~the definition of high-cost consumer credit contract~~, the weighted average annual interest rate must be calculated as follows: 25

$$\text{weighted average annual interest rate} = \frac{R \sum_{n=1} [(r_n \times U_n) \div U]}{R}$$

where—

- R is the number of annual interest rates applying on a day 30
- r_n is each annual interest rate
- U_n is the unpaid balance to which r_n applies
- U is the total unpaid balance.

Example 1

Ms C has a credit card that says that the first \$1,000 was charged at an interest rate of 20%, and the rest of the unpaid balance (say, the next \$2,000) was charged at an annual interest rate of 30%. 35

$$R = 2$$

$$r_1 = 20\%; r_2 = 30\%$$

$$U_1 = \$1,000; U_2 = \$2,000$$

$$U = \$3,000$$

This gives a weighted average annual interest rate that day of 26.7%. The contract is not a high-cost consumer credit contract. 5

Example 2

An interest rate of 40% applies to the first \$1,000 of the unpaid balance, and another 45% applies to the entire unpaid balance of \$3,000. 10

$$R = 2$$

$$r_1 = 40\%; r_2 = 45\%$$

$$U_1 = \$1,000; U_2 = \$3,000$$

$$U = \$3,000$$

This gives a weighted average annual interest rate that day of 58.3%—so it will be a high-cost consumer credit contract, even though each individual annual interest rate is below 50%. 15

Rate of charge

6B Rate of charge

- (1) For the purposes of **section 45D** of the Act, the rate of charge must be calculated as follows: 20

$$r = \left(c \div \sum_{t=0}^T U_t \right) \times 100$$

where—

c is the total amount of charges (as defined in **section 45D(5)** of the Act) that is payable under the contract

r is the rate of charge (percent)

T is the number of days between the first advance under the contract and the final payment made, or anticipated to be made, under the contract 25

t is day_t

U_t is the unpaid daily balance on that day excluding the amount of the costs of borrowing within the meaning of **section 45A** of the Act that have accrued under the contract 30

Example

A contract provides for a \$500 loan with 200% interest pa and a \$20 establishment fee with 4 weekly repayments. The contract provides for total interest and fees of \$70.80 to be charged under the contract. The rate of charge calculation requires

that amount to be divided by the sum of the daily balances of credit provided. In this case, that sum is \$9,131.19. So the rate of charge is 0.775%.

- (2) For purposes of the definition of **credit provided** in **section 45D(5)** of the Act, the amount that must be excluded from the unpaid balance is the amount of the costs of borrowing within the meaning of **section 45A** of the Act that have accrued under the contract. 5

Schedule 1
Amendments to Schedule 1AA of Credit Contracts and Consumer Finance Act 2003

s 44

Credit Contracts Legislation Amendment Act 2019

- 5
- 5 Application of amendments to existing agreements**
- (1) In this clause, unless the context otherwise requires,—
- 2019 Act** means the Credit Contracts Legislation Amendment Act **2019**
- commencement**, in relation to any provision of the 2019 Act, means the commencement of that provision 10
- principal Act** means the Credit Contracts and Consumer Finance Act 2003 as if the 2019 Act had not been brought into force.
- (2) Except as provided for in **subclause (3)**, the amendments to the principal Act in the 2019 Act do not apply to existing agreements.
- (3) The amendments referred to in **subclause (2)** apply in relation to existing agreements as follows: 15
- (a) the amendments made by **sections 15 and 16** of the 2019 Act (variation disclosure) apply only to variations that take effect after commencement:
- (b) the amendments made by **section 21** of the 2019 Act (records about how fees calculated) apply to each credit fee and default fee that is calculated for the purpose of section 41 of the principal Act after commencement: 20
- (c) the amendments made by **section 22** of the 2019 Act (costs of borrowing must not exceed loan advance) apply to an existing agreement only as follows: 25
- (i) **section 45A** applies to restrict maximum costs of borrowing under an existing agreement only if an existing agreement is varied with effect after commencement; and
- (ii) the rules in that section for calculating the first advance and whether a contract is a related contract apply equally to all agreements (including those entered into before commencement): 30
- (d) the amendments made by **section 23** of the 2019 Act (duty of directors and senior managers of creditors) apply to obligations of the creditor in respect of existing agreements that arise for performance after commencement, or continue to require performance after commencement: 35

- (e) the amendments made by ~~sections 24 to 28~~ of the 2019 Act apply in respect of existing agreements only to breaches of obligations that occur after commencement:
- (f) the amendments made by ~~section 29~~ of the 2019 Act apply to existing agreements on or after the commencement in so far as ~~section 95A~~ (court may reduce effect of failure to make initial or variation disclosure) applies to the costs of borrowing in relation to any period after commencement: 5
- (g) the amendments made by ~~sections 30 to 36~~ of the 2019 Act apply in respect of existing agreements only to breaches of obligations that occur after commencement: 10
- (h) the amendments made by ~~section 39~~ of the 2019 Act (enforceable undertakings) apply to breaches of obligations in respect of existing agreements whether those breaches occurred or occur before, on, or after commencement: 15
- (i) ~~section 131B~~ (when person needs to be certified) of the principal Act (as inserted by ~~section 41~~ of the 2019 Act) applies only in respect of creditors or mobile traders who enter into a new credit contract, or agree a variation to an existing credit contract, after commencement:
- (j) the amendments made by ~~section 42~~ of the 2019 Act (disclosure before debt collection starts) apply to all existing agreements to the extent that debt collection starts after commencement. 20
- (4) In this clause, ~~existing agreement~~ means any credit contract, security agreement, lease, buy-back transaction, or other contract or arrangement —
- (a) to which the principal Act applies; and 25
- (b) that was entered into before this clause came into force.
- (5) In other respects, the principal Act continues to apply for the purposes of existing agreements, and for the completion of a matter or thing or the bringing or completion of proceedings that relate to existing agreements, as if the 2019 Act had not been passed. 30

Example 1

Before commencement, Ms D borrows \$100 from a creditor (C) under a consumer credit contract that has an annual interest rate of 500% pa and a term of 6 weeks. ~~Section 45A~~ does not limit the amount that can be recovered under that contract.

As at commencement, Ms D has repaid \$92, consisting of \$32 in interest and fees and \$60 of the principal. Her unpaid balance is \$40. 35

After commencement, Ms D refinances by entering into a further high-cost consumer credit contract with C to repay the remaining \$40, and will receive a further advance of \$50, ie, \$90 in total.

The first advance of \$100 in the pre-commencement contract caps the maximum costs of borrowing under the new contract. The maximum amount in interest, credit fees, and default fees that Ms D will have to pay under the new contract is \$100— 40

~~\$32 = \$68 (ie, the amount in interest and fees charged on the first contract (\$32) is subtracted from the first advance of \$100 to give a remaining cap of \$68).~~

Example 2

~~A creditor (C) and Ms S enter into a consumer credit agreement on **1 July 2019** (before the 2019 Act receives Royal assent).~~

~~C fails to make initial disclosure. C can rely after Royal assent on **section 95A** (court may reduce effect of failure to make initial disclosure) in respect of that failure before Royal assent, but only in respect of costs of borrowing in relation to the period after Royal assent.~~

~~C and Ms S vary the agreement on **1 October 2020** (after the 2019 Act receives Royal assent).~~

~~When so varying the agreement, C must comply with the lender responsibility principles as amended by the 2019 Act. If C fails to comply, Ms S may seek statutory damages as provided by the amendments made by **section 24** of the 2019 Act, and C may be liable for civil pecuniary penalties as provided in **Part 5A** (as inserted by **section 36** of the 2019 Act).~~

~~C starts debt collection on 1 November 2020. **Section 132A** will apply to the debt collector because debt collection starts after that section comes into force on **1 March 2020**.~~

6 Interpretation

In **clauses 7 to 11**, unless the context otherwise requires,—

2019 Act means the Credit Contracts Legislation Amendment Act **2019**

agreement means any credit contract, security agreement, lease, buy-back transaction, or other contract or arrangement to which the principal Act applies

commencement, in relation to any provision of the 2019 Act, means the commencement of that provision

existing agreement means an agreement entered into before the commencement of the relevant provision

new agreement means an agreement entered into after the commencement of the relevant provision

principal Act means the Credit Contracts and Consumer Finance Act 2003 as it read before the relevant provision of the 2019 Act commenced.

Application to existing agreements

7 General rule: existing agreements

Except as provided for in **clauses 8 to 10**,—

(a) an amendment to the principal Act in the **2019 Act** does not apply to existing agreements:

(b) the principal Act continues to apply for the purpose of existing agreements, and for the completion of a matter or thing or the bringing or

completion of proceedings that relate to existing agreements, as if the relevant provision of the **2019** Act had not commenced.

8 Application to existing agreements: Royal assent commencement

Disclosure

- (1) The amendment made by **section 15(1)** (decreases) of the **2019** Act applies to variation disclosure that is required to be made after commencement. 5
- (2) The amendments made by **sections 16(1), 17(1), and 17A** (disclosure if creditor cannot locate) of the **2019** Act apply to disclosure that is required to be made after commencement.
- (3) The amendments made by the following sections of the **2019** Act apply to existing agreements in respect of disclosure that is required to be made after commencement: 10
- (a) **section 19** (amendment to section 32(4));
- (b) **section 20** (amendments to section 35).

Statutory damages and other remedies and enforcement

- (4) The amendments made by **section 23A** (amendments to section 83J) of the **2019** Act apply in respect of enforcement action that occurs after commencement. 15
- (5) The amendments made by **sections 24, 25, 26, and 28(2)** of the **2019** Act apply in respect of existing agreements for breaches that occur after commencement. 20
- (6) The amendments made by **section 29** of the **2019** Act apply to existing agreements on or after commencement to the extent that **section 95A** (court may reduce effect of failure to make disclosure) applies to the costs of borrowing, costs of the lease, or costs of the buy-back transaction (as the case may be) in relation to any period after commencement. 25

Example

A creditor (**C**) and Ms S entered into a consumer credit agreement on 1 July 2019. C failed to make initial disclosure. C can rely after commencement on **section 95A** in respect of that failure, but only in respect of costs of borrowing in relation to the period after commencement.

- (7) The amendments made by **section 36** (pecuniary penalties) of the **2019** Act apply in respect of existing agreements for breaches or possible breaches that occur after commencement.
- (8) The amendments made by **section 39** (enforceable undertakings) of the **2019** Act apply to breaches in respect of existing agreements, whether those breaches occurred or occur before, on, or after commencement. 35

9 Application to existing high-cost consumer credit contracts: 1 June 2020 commencement

- (1) The amendments made by **section 22** (new **subpart 6A** of Part 2) of the **2019** Act apply to an existing agreement as set out in this clause.

Costs cap

- (2) **Section 45A** (costs of borrowing must not exceed loan advance) applies to an existing agreement as follows:

- (a) **section 45A** restricts maximum costs of borrowing under an existing agreement only if the parties to the agreement agree to change the agreement with effect after commencement; and
- (b) the rules in that section for calculating the first advance and whether a contract is a related consumer credit contract apply equally to all agreements (including those entered into before commencement).

Example

Before commencement, Ms D borrows \$100 from a creditor (C) under a consumer credit contract that has an annual interest rate of 500% pa and a term of 6 weeks. **Section 45A** does not limit the amount that can be recovered under that contract.

As at commencement, Ms D has repaid \$92, consisting of \$32 in interest and fees and \$60 of the principal. Her unpaid balance is \$40.

After commencement, Ms D refinances by entering into a further high-cost consumer credit contract with C to repay the remaining \$40, and will receive a further advance of \$50, ie, \$90 in total.

The first advance of \$100 in the pre-commencement contract caps the maximum costs of borrowing under the new contract. The maximum costs of borrowing that Ms D will have to pay under the new contract is \$100 - \$32 = \$68 (ie, the amount in interest and fees charged on the first contract (\$32) is subtracted from the first advance of \$100 to give a remaining cap of \$68).

Sections 45B and 45C

- (3) In **section 45B** (certain high-cost consumer credit contracts with other creditors prohibited), an existing agreement counts in the same way as a new agreement for the purpose of determining whether a person has had an unpaid balance on any high-cost consumer credit contract at any time within the preceding 15 days.

- (4) In **section 45C** (high-cost consumer credit contracts with certain repeat debtors prohibited), an existing agreement counts in the same way as a new agreement for the purpose of determining whether a person has entered into a high-cost consumer credit contract at any time within the preceding 90 days.

10 Other application to existing agreements

- (1) The amendments to the principal Act made by **section 10(1AAA) and (4)** of the **2019** Act apply to existing agreements in respect of material changes after commencement:

Example

A creditor (**C**) increases the credit limit under an existing consumer credit agreement after 1 April 2021.

C must make reasonable inquiries about suitability and affordability before making the change. If C fails to comply, the debtor may seek statutory damages and C may be liable for civil pecuniary penalties as provided in **Part 5A**.

- (2) The amendments made by **section 17B** of the **2019** Act (disclosure about dispute resolution schemes and financial mentoring services) apply to existing agreements in the same way as they apply to new agreements (for example, disclosure is required if a complaint is made after commencement regardless of whether the agreement is an existing or a new agreement).

- (3) The amendments made by **section 23** of the **2019** Act (duty of directors and senior managers of creditors) apply to duties and obligations of the creditor in respect of existing agreements that arise for performance after commencement or that continue to require performance after commencement.

- (4) The amendment made by **section 27** of the **2019** Act applies in respect of existing agreements for breaches that occur after commencement.

- (5) The amendments made by **sections 30 to 35** of the **2019** Act apply in respect of existing agreements for breaches that occur after commencement.

- (6) The amendments made by **section 40** (directors and senior managers may also be liable for statutory damages or compensation) apply, in respect of existing agreements, for breaches that occur after commencement of duties or obligations of the creditor that arise for performance after commencement or that continue to require performance after commencement.

- (7) **Section 131B** (when person needs to be certified) of the principal Act (as inserted by **section 41** of the **2019** Act) applies in respect of creditors or mobile traders who enter into a new credit contract, or agree a variation to an existing credit contract, after commencement.

- (8) The amendments made by **section 42** of the **2019** Act (disclosure about debt collection) apply to all existing agreements to the extent that debt collection starts after commencement or a new person becomes a debt collector after commencement.

Example

A creditor (**C**) and Ms S enter into a consumer credit agreement on 1 July 2019.

C starts debt collection on 1 May 2021. **Section 132A** will apply to the debt collector.

*Application to new agreements***11** **New agreements**

- (1) The amendments to the principal Act in the **2019** Act apply to new agreements.
- (2) **Section 41A(2A)** of the principal Act (as inserted by **section 21** of the **2019** Act) applies to new agreements regardless of whether the change occurred before, on, or after commencement.

5

*Other application***612** **Creditors registered as financial service providers before 1 April 2021 and mobile traders**

10

- (1) ~~This clause~~ **Subclause (2)** applies to every creditor that is registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 as at the close of **31 March 2021** and that is required to be certified under **Part 5A** of this Act.

- (2) **Section 131B** does not apply until the first due date on or after **1 April 2021** on which the person must supply to the Registrar its annual confirmation of details under section 28 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

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- (3) **Subclause (5)** applies to every creditor—

(a) that has made an application to the Commerce Commission in accordance with **section 131F** no less than 2 months before the first due date referred to in **subclause (2)**; and

20

(b) that is registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 as at the close of **31 March 2021**.

- (4) **Subclause (5)** also applies to every mobile trader that has made an application to the Commerce Commission in accordance with **section 131F** before **1 February 2021**.

25

- (5) **Section 131B** does not apply to that person before the earlier of the following:

(a) the close of the 20th working day after the person has failed to provide to the Commission any information that the Commission has required under **section 131F(3)** to assist it in determining the application;

30

(b) the date on which the Commission gives a written notice of decision to the person under **section 131I**.

Schedule 2
New Part 2 of Schedule 1AA of Financial Service Providers
(Registration and Dispute Resolution) Act 2008 inserted

s 57

Part 2
Provision relating to Credit Contracts Legislation Amendment Act
2019

5

34 Creditors registered as financial service providers before 1 April 2021

- (1) This clause applies to every creditor that is registered under this Act as at the close of **31 March 2021** and that is required to be certified under **Part 5A** of the Credit Contracts and Consumer Finance Act 2003. 10
- (2) The date on and from which the ~~person creditor~~ must be certified is ~~the first due date on or after 1 April 2021 on which the person must supply to the Registrar its annual confirmation of details under section 28 of this Act~~ the date in **clause 12(2)** or **(5)** (as the case may be) of Schedule 1AA of the Credit Contracts and Consumer Finance Act 2003, as amended by the **Credit Contracts Legislation Amendment Act 2019**. 15
- (3) After that date, section 18(1)(a) (which relates to deregistration) applies if the person is not certified.

Legislative history

9 April 2019
 30 April 2019

Introduction (Bill 131-1)
 First reading and referral to Finance and Expenditure Committee