NEW ZEALAND BANKERS ASSOCIATION

Submission

to the

Commerce Committee

on the

Credit Contracts and Financial Services Law Reform Bill

8 November 2013

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Submission by the New Zealand Bankers' Association to the Commerce Committee on the Credit Contracts and Financial Services Law Reform Bill

About NZBA

1. The New Zealand Bankers' Association (NZBA) works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes which contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.

2. The following fourteen registered banks in New Zealand are members of NZBA:

   - ANZ Bank New Zealand Limited
   - ASB Bank Limited
   - Bank of New Zealand
   - Bank of Tokyo-Mitsubishi, UFJ
   - Citibank, N.A.
   - The Co-operative Bank Limited
   - Heartland Bank Limited
   - The Hongkong and Shanghai Banking Corporation Limited
   - JPMorgan Chase Bank, N.A.
   - Kiwibank Limited
   - Rabobank New Zealand Limited
   - SBS Bank
   - TSB Bank Limited, and
   - Westpac New Zealand Limited.

Oral submission and contact details

3. NZBA would appreciate the opportunity to make an oral submission to the Committee on this Bill.

4. If the Committee or officials have any questions about this submission, or would like to discuss any aspect of it further, please contact:

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Executive Summary

5. NZBA appreciates this opportunity to submit on the Credit Contracts and Financial Services Law Reform Bill (Bill).

6. Overall, we support the clear intent of the Bill to protect vulnerable New Zealanders, support responsible lending, and to target unscrupulous lenders, as endorsed by both Cabinet and Parliament.

7. However, we submit that a number of changes are needed to the Bill to ensure a better balance between protection of vulnerable consumers, and ensuring legitimate and well regulated lenders do not incur substantial additional compliance costs. The Bill has been drafted taking a 'one size fits all' approach which does not reflect the vastly different lending practices between market participants.

8. Although well intentioned, some of the changes proposed in the Bill will significantly increase uncertainty about what the law requires, unnecessarily increase compliance costs for all lenders and may unnecessarily restrict access to credit. As such, NZBA believes that the Bill could be improved to better target the behaviour of unscrupulous lenders, such as high interest rate and pay day lending businesses, without imposing unnecessary burden on responsible lenders.

9. We also strongly argue that enforcement of current consumer protection legislation should be a priority area of focus. The existing legislation is sufficient to address loan sharks who charge unreasonable fees.

10. Our key recommendations are:

- **Better enforcement of existing consumer protection legislation is required.**
- **New unreasonable fees provisions should be removed, as they are unnecessary, have not been subject to a robust policy process, would have a number of undesirable consequences, and the existing law in this area is currently subject to legal challenge.**
- **Greater clarity in responsible lending principles is needed.**
- **The Bill should allow the development of industry specific responsible lending codes.**
- **Responsible lending principles should not come into force until responsible lending codes are introduced.**
- **There should be more workable and practical disclosure requirements.**

General comment

11. The primary objective of the Bill is to target 'loan sharks' and other unscrupulous lenders who exploit the most vulnerable sectors of New Zealand society. NZBA supports this overarching aim, which was clearly endorsed in the first reading speeches on the Bill from Members of Parliament on all sides of the House.

12. The banking industry is a strong advocate for consumer protection. We also consider the ability to access credit is an important aspect of participation in New Zealand society. In NZBA's view, consumer protection legislation should be designed to appropriately facilitate, rather than limit, access to credit.

13. It would be regrettable if the Bill proceeded in its current state and resulted in vulnerable consumers being locked out of access to responsible lenders and being forced to deal with loan sharks and other fringe lenders.

14. Furthermore, in our opinion some of the proposed legislative changes would not only impact access to credit, but would also have other unintended consequences. Where this is the case, it is especially important that any amendments to established law are made in accordance with best practice in regulation. This requires at a minimum that proposed changes must be:
    - based on solid evidence of a problem for consumers
    - designed to implement a solution that targets the identified problem, and
    - both practical to implement, and designed in such a way as to limit any unnecessary burden on lenders.

Unreasonable fees

15. NZBA is strongly of the view that the changes to the unreasonable fees provisions in the Credit Contracts and Consumer Finance Act 2001 (CCCFA) should be removed.

16. Fundamentally, there is insufficient evidence of a problem with the current provisions. The existing provisions in the CCCFA require that a fee relates to a lender's reasonable costs. In our view the provisions are sufficient to deal with the large fees that may be charged by unscrupulous lenders, particularly when read in concert with responsible lending principles.

17. Furthermore, the process around the introduction of the current proposals has been rushed, without any robust testing of the proposed changes. As a result, the proposals as they currently stand have serious risks associated with them.

18. In addition we note that the law is still developing. As a result of litigation (Commerce Commission v Sportzone[1]) currently before the courts the perceived

[1] Commerce Commission v Sportzone Motorcycles Limited (in liq) and others [2013] NZHC 2531.

issue around enforceability will be addressed. As such, it is unnecessary to seek legislative change at this time.

19. Finally, while we do not agree that there is a problem with the current regime relating to unreasonable fees, if the Committee believes there are concerns, these can be better addressed through changes to disclosure requirements, coupled with proper enforcement of existing provisions. Disclosure requirements would also address the issue of exorbitant interest rates, by standardising disclosure of the rate against a time period (e.g. % per annum).

No evidence of a problem

20. The proposed changes to the regulation of feesare a fundamental rewrite of existing law. Given the cost and the inevitable uncertainty created by legislative change, good regulatory practice suggests that such changes should not be made unless there are sufficient grounds to justify them.

21. In this case there has been a fundamental lack of analysis of the perceived inadequacies with the existing regime, and an absence of robust testing of alternative solutions to address any such inadequacies. NZBA strongly suggests that any regulatory change be delayed until such time as this further analysis has occurred.

22. NZBA has extensively reviewed the public information around the review of credit fees, including information around the 2009 Discussion Document[2] and the 2012 Exposure Draft of Bill.[3] In addition, we have reviewed briefings and communication around these changes between officials and the Commerce Commission that we received under the Official Information Act.[4]

23. The overarching concern that appears to have driven the changes in the Bill is a perception by the Commerce Commission that the provisions are too uncertain, which:
    - allows lenders to incorrectly build costs into fees that are not at all related to the activity being undertaken, and
    - makes them difficult to enforce against such lenders.

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[2] Discussion Document: Review of the operation of the Credit Contracts and Consumer Finance Act 2003 available at http://www.consumeraffairs.govt.nz/legislation-policy/policy-development/credit-review

[3] Credit Contracts and Consumer Finance Amendment Bill Exposure Draft available at http://www.consumeraffairs.govt.nz/legislation-policy/policy-development/credit-review

[4] NZBA requested under the Official Information Act "all information relating to information relating to the inclusion of fees provisions within the credit law reform (that has now become the Credit Contracts and Financial Services Law Reform Bill), particularly anything related to the problem definition and potential options to address the perceived issues. This will include:

- Any internal notes, records, or communication, and
- Anything provided to the Minister, including communication with the Minister's office.

... [and] any communication between MCA and the Commerce Commission on the topic."

24. NZBA has been unable to find any evidence that these assertions, or the solution proposed by the Commerce Commission, were tested or challenged by officials. The material suggests that the changes in the Bill are essentially those proposed by the Commerce Commission with no consideration of other options. There is no evidence of any regulatory impact analysis around alternate options to address the perceived inadequacies in the regime. In addition, we have also not found any analysis of the consequences of the proposed changes.

25. We also do not agree with the assertion that the current provisions are unenforceable, particularly in light of the recent High Court landmark decision in Commerce Commission v Sportzone.

Concerns around the proposals

26. NZBA also submits that the proposed amendments as currently drafted have a number of undesirable and or unintended consequences. The proposed changes do not sufficiently target the behaviour of unscrupulous lenders, and impose an unjustified and disproportionate burden on the wider industry. Overall there is a real risk that the proposed changes would lead to worse outcomes for the market as a whole, which will negatively impact on consumers.

27. As noted above, the proposals were introduced at a late stage, which has meant that they have not been subjected to a robust public debate, including any discussion of the costs of the proposed changes. In addition, there is a lack of evidence that a proper regulatory analysis was undertaken. In particular, there is no evidence that any alternatives to the current provisions were considered.

Price control regime

28. The main concern we have about the proposals is that they could inadvertently create a price-control regime, akin to the regime created by Part 4 of the Commerce Act 1986. Such a regime may have negative impacts on the market, including imposing a disproportionate burden on larger lenders with complex business models.

29. The Part 4 provisions regulate pricing in industries where there is insufficient competition for the market to properly price goods and services. In such markets the Commerce Act puts in place a regime where suppliers are forced to link prices to the actual costs of providing that good or service.

30. While we agree with the broad position that costs should be appropriately allocated, we believe that there is sufficient competition in the lending market and the existing regime allows for effective enforcement of outlier behaviour. The flexibility of the current regime is preferable to the granular cost allocation regime that would be created under the proposed changes. The ongoing disputes under the price control provisions in Part 4 of the Commerce Act have demonstrated that the process of building cost allocation models involves complex issues and a wide variety of views even among perceived experts.

31. Under the proposed new regime lenders will have to create new complex costing models. While this may be reasonably simple for smaller businesses, for large entities with a wide product base such an exercise is both difficult and expensive. It assumes a narrow cost-based accounting exercise is always possible. This ignores the commercial reality for large lenders, such as banks, who have significantly more complex business models.

32. Given the complexity of the task, at times the Commerce Commission is likely to disagree with the approach taken by lenders. In such cases, the Courts will have to act as arbiters in technical cases of cost calculations. This may, for example, include litigation to determine the applicable economic/accounting principles and to apply those principles to particular fact situations. These types of outcomes would be both costly and uncertain for the industry.

33. Such a regime has no obvious benefits for consumers. It may also result in a number of negative outcomes. In the absence of any controls around interest rates, the difficulty in calculating fees and the associated risk of these calculations being challenged may simply drive some lenders to recover all costs through interest rate increases. Such a shift would materially reduce transparency for consumers as there is no requirement on lenders to provide information about how interest rates are set.

34. Furthermore, there is the possibility that such a shift would ultimately cost consumers more. The current regime allows lenders to implement a user-pays based model which charges borrowers for choices that they make. Thus, for example, default fees are only applied to borrowers who actually default. If all costs needed to be recovered through the interest rate, all borrowers would be penalised for the actions of some, increasing the costs for those that do not engage in such behaviour.

Law still developing

35. In addition to the concerns around the need for change, we note that the law on unreasonable fees is currently being considered by the courts in *Sportzone* which is likely to be appealed to the Court of Appeal. In *Sportzone* the Commerce Commission successfully challenged the way that general overhead costs were allocated to various credit fees, including establishment and account maintenance fees. Those fees were held to be unreasonable.

36. While the outcome of the appeal is still unknown it seems premature to make the proposed changes. The outcome is likely to address any perceived issues regarding the current provisions, particularly as they relate to a perceived inability to enforce.

Disclosure and enforcement

37. As stated above, NZBA does not believe that there is a fundamental issue with the current provisions in the CCCFA. If, however, evidence of a problem can be identified after further analysis, NZBA believes that issues can likely be addressed through disclosure and proper enforcement.

38. The introduction of enhanced disclosure requirements around fees, charges, and interest rates could help to ensure that disclosure is clear and comparable. This would give consumers the ability to clearly see and compare the costs of lending, including the interest charged in a standardised format, enabling them to make better decisions.

39. In addition, increased enforcement of existing laws coupled with, where necessary, enhanced enforcement powers under the law would further help to achieve the desired changes in market behaviour.

40. We believe that these would address many of the issues around unscrupulous lending practices without the need to introduce specific changes around unreasonable fees.

Responsible lending

41. NZBA strongly agrees that all lenders should lend responsibly. Registered banks are considered leaders in responsible lending. This has been consistently acknowledged by Ministers, Members of Parliament, and officials when discussing these reforms. NZBA's concerns with the Bill's responsible lending proposals are therefore practical, rather than philosophical.

Principles – General comments

42. NZBA supports the introduction of Responsible Lending Principles (Principles) which impose a common set of requirements around the duty of care to borrowers expected of all lenders in the market.

43. However, from a practical perspective, lenders should have certainty as to what is required to implement these Principles. It is important that the Principles, and any Responsible Lending Code (Code) provisions, provide sufficient clarity to allow lenders to confidently design systems to meet the requirements. This is especially important where the Principles introduce new subjective terms for which there is no body of case law to draw on for clarity. One example is Principle 3(b) which contains the concept of advertising that is "confusing" to borrowers. This new concept appears to go further than the established standard, but the use of a new term creates uncertainty due to the fact that there is no established precedent.

44. Uncertainty has the potential to increase compliance costs, which in turn is likely to result in higher overall costs to consumers. In addition, it may result in lenders adopting a conservative interpretation of the Principles, which could unnecessarily

limit access to credit for consumers. In both these scenarios, the outcome is avoidable and is in conflict with the objectives of the Bill.

Reasonable enquiries

45. More specifically, NZBA has a particular concern about the requirements in the proposed section 9B(3)(a), that a lender must make reasonable inquiries to be satisfied that:
    - credit provided can be expected to meet a borrower's requirements and objectives, and
    - the borrower can be expected to make the payments under the agreement without suffering substantial hardship.

46. NZBA believes that this clause is problematic due to the potential width of its scope and its overlap with the financial advice regime as regulated under the Financial Advisers Act 2008 (FAA). As such, we suggest that the scope of this provision is refined in order to make it workable for lenders to implement.

47. Regarding the scope, NZBA believes that this specific requirement creates uncertainty about whether the regime will impose an obligation on lenders to take on responsibility for personal financial decisions made by borrowers.

48. The current wording of this Principle appears to require the lender to step into the shoes of the borrower and advise on whether it is in the best interests of the borrower to agree to the contract. NZBA believes that this is inappropriate. It is unduly burdensome on lenders and unjustifiably limits borrowers' freedom of choice. In addition, it appears to be out of step with the other Principles which focus on ensuring that lenders lend appropriately, rather than regulating consumers' decisions to enter into credit contracts.

49. Our second concern is that this Principle as it is currently drafted creates additional uncertainty by overlapping with the regulation of financial advice under the FAA. The FAA regulates the provision of advice, including who can give advice and minimum standards as to the quality of advice. Credit contracts are captured under the FAA regime, and advice on these products is regulated by the Financial Markets Authority.[5]

50. The Principle as it currently stands would mean that advice as to the suitability of products would also be covered under the CCCFA. This would create uncertainty for lenders who would have to deal with two different regimes, and two different regulators. This is inefficient, and is likely to increase the cost of compliance without any additional benefit to consumers.

51. NZBA suggests that advice should continue to be regulated under the FAA, and that the Principle should be refined to clarify this position. If there are concerns

[5] Credit contracts are Category 2 products under the FAA.

about the current provisions under the FAA, a more appropriate solution would be to amend the FAA to address this concern.

Practical execution of Principles

52. NZBA believes that the regime needs to acknowledge, both in the legislation and in any Code which is eventually drafted, that the practical execution of the requirement to lend responsibly will vary depending on the context in which a contract is entered into. This will include considerations as to the type of credit product or service being provided and the circumstances of the customer.

53. The regime imposes an overarching requirement to lend responsibly in all cases. This is entirely appropriate and consistent with the objectives of the Bill. However, applying a one-size-fits-all approach fails to effectively distinguish between different circumstances that may apply in each case. By way of example, the types of questions lenders use when making “reasonable inquiries” as to the ability to repay may vary between a small overdraft and a mortgage. Similarly, the level of inquiry from an established client with a proven credit history may be different to that required for a new client.

54. Accordingly, NZBA suggests that the proposed section 9B be amended to expressly state that compliance with the Principles must be viewed in the context of the individual lending decision.

Responsible Lending Code

55. NZBA supports the use of a code mechanism to provide greater certainty as to how the details of the Principles will practically be implemented by lenders.

56. However, NZBA believes that it is not possible to design a single Code that provides sufficient certainty that all lenders are complying with the Principles, without imposing unnecessary and potentially disproportionate compliance costs on different segments of the lending market. Accordingly, NZBA suggests that the Bill is amended to allow for the approval of more than one Responsible Lending Code to make it easier for different sections of the market to comply with the Principles.

57. NZBA suggests that the provisions in the Bill be amended to facilitate approval, by the Minister of Consumer Affairs, of other Responsible Lending Codes in addition to the default Code. Under this proposal draft Codes could be approved by the Minister if they meet minimum standards. Once such a Code is approved, it would serve as an alternative to the default Code, which would apply in all other circumstances.

58. We note that possible drafting to enable this process has been provided to officials. The proposed drafting is included in Appendix 1.

59. NZBA submits that this common sense approach provides the necessary flexibility without compromising the implementation of minimum standards across the board.

It would not exempt any segment of the market from the provisions, but rather ensure that the provisions are implemented in a way that reflects the practical and commercial realities. Where there are particular concerns about particular types of market participants, such as payday lenders, specific provisions could be included in the Code which applies to that group.

60. In addition, since the Minister must approve any industry code, there are sufficient safeguards in place to ensure that the proper level of consumer protection is applied across the industry.

Implementation timeframes

61. NZBA submits that the Bill must be amended so that the Principles only come into force at such time as a default Responsible Lending Code has been approved.

62. Under the Bill as currently drafted the Principles will come into force immediately upon the passage of the Bill, but there will be a window of up to two years before any Responsible Lending Code (which has not yet been drafted) will apply.

63. This would create significant uncertainty for lenders and create considerable confusion for borrowers. If the Principles apply before the Code is introduced, lenders will be required to guess how these should apply during the transition. In the absence of guidance, diligent lenders will take a necessarily conservative approach, which would increase exclusionary pressure on borrowers. Lenders will then need to review and change their newly introduced systems once the Code comes into force. This would only be confusing for borrowers.

64. Furthermore, due to uncertainty as to how the Principles are meant to apply, there would be significant difficulties in enforcement if the Principles come into force before there is a Code. During the transition period, diligent lenders will attempt to comply in spite of the uncertainty. Unscrupulous lenders, however, are not likely to comply due to the low perceived risk of enforcement. This will impose an unjustified cost on diligent lenders, while making it difficult to enforce against the unscrupulous lenders targeted by the Bill. This would be inefficient for the industry as a whole, while providing no benefit to consumers.

Disclosure Requirements

65. NZBA is, in principle, supportive of moves to make disclosure information more useful for consumers. We do, however, have concerns about a number of the new disclosure requirements in the Bill which are impractical and will place requirements on banks that are unworkable. We outline these concerns and our proposed solutions below.

Securitisation vehicle carve-out

66. Clause 19 inserts a new section (section 26A) into the CCCFA which requires consumers to be notified if a credit contract that they are a party to is transferred.

The intention of this is to protect consumers against the risk of lenders transferring their contracts to third parties without their knowledge.

67. NZBA believes, however, that the current wording of this clause should be refined to exclude transfers into and out of securitisation pools.

68. Securitisation allows lenders to combine financial assets, such as mortgages, into one large pool which can then be packaged into smaller portions, such as covered bonds, to be sold to other investors. Securitisation is a common practice which both allows the wider investment market the ability to invest in these assets, and lenders to better structure their lending books. Securitisation programmes are important for banks because they mitigate the impact of stress in the global financial markets on New Zealand banks and the New Zealand economy generally.

69. From a customer's perspective transfers resulting from securitisations have no material impact on their loan. The customer continues to engage directly with their lender, and even if the securitised instrument is transferred (as in the case of a covered bond issue), the lender stays on as the manager of that loan. For this reason customers are not currently notified of such transfers as disclosure serves no practical benefit and, in fact, may serve only to confuse.

70. If enacted this provision would require banks to write to homeowners every time their mortgage is transferred into and out of a securitisation pool. The impact of this will be significant on banks. By way of example, one of our large member banks has estimated this will require around 30,000 communications per year.

71. NZBA has proposed a solution which would carve out these internal transfers, while leaving the remainder of the provision unchanged. We have supplied officials with proposed drafting to this effect. The proposed drafting and a more detailed explanation of the industry practice is included in Appendix 2.

Display of information

72. NZBA suggests further refinement of the disclosure requirements to:
- refine the definition of 'standard terms',
- future-proof the legislation through allowing for digital provision of information, and
- make the regime more workable for larger entities with a large number of products by allowing for the provision of information on request.

73. NZBA believes that the definition of 'standard terms' should be revised to ensure that it achieves the desired result. The intention behind the insertion of this term appears to be to limit the application to standard form contracts that are not negotiated by the customer. The current definition is, however, excessively wide. As such it would cover any agreement, whether standard or bespoke. In our view, 'standard terms' should be more explicitly defined to address the specific purpose

of the section and exclude terms that must be specifically tailored in any material way to meet any borrower's particular circumstances.

74. Furthermore, NZBA believes it is important that the Bill allow for the provision of information in digital form. Banks, like most organisations, are moving to a more digital business model. Increasingly the provision of information, even in a branch, is being done through digital media. For example, in many new bank branches customers can access key information through computers or iPads provided in the branch. This has a number of advantages, including reducing the risk that information received by consumers is out of date.

75. The current drafting of the provision does not make it clear that this would satisfy the requirements. As such, NZBA would like this to be clarified by explicitly including an option which would allow lenders to make current standard terms and conditions available in electronic form. This would help to ensure that the provisions are workable in the future.

76. If the Committee is nevertheless in favour of requiring that these terms be available in hard copy, NZBA suggests that the provision should be amended to allow for a model where information is provided on request.

77. Regarding the application of this provision to larger entities with a large number of products, NZBA also believes that it is in the best interest of consumers to allow for the provision of information on request.

Supply of information prior to contracting

78. The Bill makes a number of changes that amend current provisions in the CCCFA regarding the provision of information around credit arrangements:
    - New section 17 requires initial disclosure of key information before the relevant contract is entered into, rather than within five working days as currently allowed in the CCCFA.
    - New section 70 requires disclosure of credit repayment insurance, repayment waivers or extended warranties to be made before the day on which these contracts are arranged, rather than within 15 working days as currently allowed in the CCCFA.
    - New sections 22(4) and 23(1)(d) provide that the creditor may choose to make disclosure of specified changes either within five working days of the change being made or (if the creditor is required to make continuing disclosure under section 18) at the same time as the continuing disclosure is made. Currently, under the CCCFA, disclosure of these changes is not required.

79. NZBA questions the need for these changes and has concerns that the practical impacts have not been fully considered. Current provisions, combined with the extended cooling-off period and the responsible lending obligations create sufficient protections for consumers, without the need for the proposed changes.

80. A specific practical issue with the proposals is that they create limits to providing credit in a non-face-to-face environment. The existing provisions in CCCFA provide sufficient flexibility to allow customers to obtain products over the telephone or via the internet. Both consumer demand and the general shift towards a more digital business model have meant that in recent years this type of non-face-to-face interaction has become more frequent.

81. One common example is where an existing customer requests an emergency overdraft facility over the telephone because they are overseas, are at a point-of-sale, or are unable to visit a branch in a timely fashion. The proposed changes will make this type of transaction considerably more difficult. Not only does this have the potential to limit consumer choice, it also may unhelpfully reduce availability of credit. In our view, it would be better to address possible harm through responsible lending requirements, not by restrictions on how lending occurs.

82. NZBA submits that changes of this nature should not occur unless there are robust reasons for the changes. In the current situation there is no evidence of a problem, and NZBA believes that the changes are not justified. As such, we submit that these changes should be removed.

Appendix 1 – Proposed drafting for Responsible Lending Code approval

4 Overview

(ab) **Part 1A** contains provisions relating to lenders' responsibilities, including provisions for the development of a default ~~R~~responsible ~~L~~lending ~~C~~code and approved responsible lending codes, and requirements to publish information about standard terms and the costs of borrowing.

(...)

5 Interpretation

(...)

approved responsible lending code means a code approved under section 9J and brought into force under section 9K

default responsible lending code means the ~~C~~code prepared under section 9E and brought into force under section 9F

responsible lending code means either the default responsible lending code or an approved responsible lending code

(...)

93 Court's general power to make orders

(...)

(2) Replace section 93(a) with:

(aa) a failure to comply with the responsible lending principles (including a failure to comply with the applicable ~~R~~responsible ~~L~~lending ~~C~~code (*see* Part 1A)):

(a) a breach of any of the provisions of Part 2, 3, or 3A:

New Part 1A - Credit Contracts and Consumer Finance Act 2003 -

Responsible ~~L~~lending ~~C~~code

9C Purpose of ~~R~~responsible ~~L~~lending ~~C~~code

(1) The purpose of ~~the~~ a ~~R~~responsible ~~L~~lending ~~C~~code is to—

(a) elaborate on the lender responsibility principles specified in section 9B(2); and

(b) offer guidance on how those principles may be implemented by lenders.

~~(2) In any proceedings relating to this Act, evidence of a lender's compliance with the provisions of the Responsible Lending Code is to be treated as evidence of compliance with the lender responsibility principles.~~

9D Content of a ~~R~~responsible ~~L~~lending ~~C~~code

(1) In order to achieve its purpose, a ~~the R~~responsible ~~L~~lending ~~C~~code may set out any, or all, of the following:

(a) the nature and extent of inquiries a lender should make before entering into an agreement:

(b) the processes, practices, or procedures that a lender should follow—

(i) to verify information provided by a borrower:

(ii) to assess whether the relevant agreement is suitable for, and otherwise meets the requirements of, the borrower:

(iii) to ensure that advertisements for agreements, products, or services are not misleading, deceptive, or confusing:

(iv) to ensure that fees are not unreasonable:

(v) to ensure that borrowers and guarantors have sufficient information to enable them to make informed decisions:

(c) the processes, practices, or procedures that a lender should follow for the purposes of Part 3A:

(d) any other matter that promotes the lender responsibility principles (set out in section 9B(2)) and that is not inconsistent with any other enactment.

(2) ~~The Code~~A responsible lending code may also contain different provisions in relation to particular—

(a) lenders or classes of lenders:

(b) borrowers or classes of borrowers:

(c) agreements or classes of agreements.

9DA Lender must belong to a responsible lending code

(1) Every lender must belong to a responsible lending code from the date that the default responsible lending code is brought into force under section 9F.

(2) A lender may belong to an approved responsible lending from an earlier date,

(3) Each lender is presumed to belong to the default responsible lending code, unless it has notified the Minister in writing that it has chosen to belong to another responsible lending code.

(4) Each lender must make copies of the responsible lending code that it belongs to available for inspection by the public, free of charge,—

(a) at the organisation's head office (during ordinary office hours);

(b) at every branch of the organisation (if applicable and during ordinary office hours); and

(c) on an Internet site in an electronic form that is publicly available (at all reasonable times).

9DB Effect of responsible lending code

In any proceedings relating to this Act, evidence of a lender's compliance with the provisions of the applicable responsible lending code is to be treated as evidence of compliance with the lender responsibility principles.

~~How Responsible Lending Code made and administered~~ Default responsible lending code

9E Preparation of the default ~~R~~responsible ~~L~~lending ~~C~~code

(1) The Minister must—

(a) prepare the default ~~R~~responsible ~~L~~lending ~~C~~code; and

(b) ensure that the default responsible lending c~~C~~ode is published not later than 2 years after this section comes into force.

(2) The Minister may use any process that the Minister considers appropriate to develop the default responsible lending c~~C~~ode, but must—

(a) publish a draft default responsible lending c~~C~~ode and release it to the public:

(b) consult persons, or representatives of such persons, that the Minister considers will be substantially affected by the default responsible lending c~~C~~ode:

(c) consider comments received on the draft default responsible lending c~~C~~ode:

(d) prepare a revised default responsible lending c~~C~~ode in response to comments received:

(e) consult the Minister of Commerce and the Minister of Finance:

(f) consider comments received from those Ministers:

(g) prepare the final default responsible lending c~~C~~ode.

9F Default ~~R~~responsible ~~L~~lending ~~C~~code comes into force by notice in *Gazette*

(1) After the Minister has prepared the final version of the default responsible lending c~~C~~ode, as provided for in **section 9E(2)**, the Minister must give notice in the Gazette of the date or dates on which the provisions of the default responsible lending c~~C~~ode come into force.

(2) The notice may state different dates for different provisions, but no date may be before the 28th day after the date on which the notice is published in the *Gazette*.

(3) Each provision in the default responsible lending c~~C~~ode comes into force on the date stated in the notice that applies to the provision.

(4) The default responsible lending c~~C~~ode and the notice are each regulations for the purposes of the Regulations (Disallowance) Act 1989, but are not regulations for the purposes of the Acts and Regulations Publication Act 1989.

(5) The Ministry must ensure that the default responsible lending c~~C~~ode is available at all reasonable times on an Internet site maintained by or on behalf of the Ministry.

9G Amendment of the default ~~R~~responsible ~~L~~lending ~~C~~code

(1) The Minister may, at any time, amend or replace the default ~~R~~responsible ~~L~~lending ~~C~~code.

(2) **Sections 9E and 9F** apply, with any necessary modifications, to any amendment to, or replacement of, the default responsible lending c~~C~~ode.

(3) However, in the case of a minor amendment that does not materially affect the default responsible lending c~~C~~ode, the Minister need not comply with **section 9E(2)**.

Approved responsible lending code

9H Application for approval

Any person may submit a proposed responsible lending code to the Minister for approval.

9I Mandatory consideration for approval

When considering an application under section 9I, the Minister must consider if the proposed responsible lending code will achieve the purpose set out in section 9C.

9J Minister must decide application for approval

(1) The Minister must decide an application under section 9I by approving it or by rejecting it.

(2) The Minister may choose to approve an application subject to certain amendments. The Minister will inform the applicant of the required amendments and will give the applicant a specified period of time to resubmit its application.

(3) The Minister may only make a decision under subsections (1) and (2) after consultation with—

(a) the Minister of Finance; and

(b) the Minister of Commerce.

9K Notification and publication of decision

(1) The Minister must, as soon as practicable after deciding the application,—

(a) notify the applicant of the decision; and

(b) if the decision is to approve the application:

(i) ensure that the approval is published in the Gazette;

(ii) give notice in the Gazette of the date or dates on which the provisions of the approved responsible lending code come into force;

(iii) include a copy of the approved responsible lending code in the Gazette.

(2) The Ministry must ensure that any approved responsible lending code is available at all reasonable times on an Internet site maintained by or on behalf of the Ministry.

9L Reapplication by unsuccessful applicant

An applicant whose application has been rejected may at any time reapply under section 9I.

9M Amendment of an approved responsible lending code

(1) The applicant in relation to an approved responsible lending code may, at any time, submit a proposed amendment to that code to the Minister for approval.

(2) **Sections 9I to 9L** apply, with any necessary modifications, to any proposed amendment to an approved default responsible lending code.

Appendix 2 – Securitisation vehicle disclosure carve-out

Securitisation in the lending industry

1. Most types of consumer credit contract might be the subject of a securitisation. Payments that are commonly securitised in New Zealand include residential mortgage payments, motor vehicle finance payments and other non-mortgage loan receivables.

2. A typical securitisation may involve a lender ("originator") selling loan receivables into a special purpose vehicle ("SPV") which is often a trust created for this (and no other) purpose, in return for a purchase price paid by the SPV to the originator. That price is typically linked to the aggregate amount of the receivables purchased by the SPV, less a discount which provides for a security margin. The SPV's payment to the originator effectively allows the originator to fund the loans in question.

3. The SPV grants a security interest in the receivables it has purchased in favour of one or more third party investors who have provided the SPV with funding for the purchase price, by investing in debt securities issued by the SPV. The investor might comprise only one bank, or might comprise a number of investors in bonds issued by the SPV (typically being wholesale issues). At the end of the term of the funding term, the transferred receivables are typically transferred back to the originator.

4. The above typically all occurs without the knowledge of the borrowers by whom the securitised receivables are payable. Thus during the term of a securitisation arrangement, borrowers will generally continue to make their payments to an account of the originator, and to deal only with the originator, often in the same way as if their loan payments had not been sold to the SPV at all. Management of the customer relationship and of customer payments in that way is often performed on behalf of the SPV by the originator as a "servicer" or "manager", under contractual arrangements between it and the SPV.

5. While the above describes a "typical securitisation", it is not universally true of all securitisations and may vary from one securitisation to another. For example –
   - An SPV is not always a trust. It may be a company or a unit trust;
   - In other cases, the loans may not be transferred to an SPV but rather to an operating entity that provides funding and also operates its own separate business (effectively, an investor), but are still transferred on the basis that the originator continues to service the transferred loans;
   - In some cases the original lender may technically be the SPV, which transfers the loans "back" to the originator at a later stage, but with the originator again servicing them in the meantime.

6. It is intended that the carving out of securitisations from clause 19 of the Bill would also extend to securitisations of those kinds, and also to "covered bonds". Covered bonds involve the SPV creating a security interest in the pool of purchased

receivables in favour of investors in bonds issued by a related entity that issues the bonds that are thus secured.

Proposed text for carve out of transfers to/from securitisation vehicles under new section 26A

"(3) Nothing in this section applies to a transfer of a consumer credit contract which is -

a) a transfer to a securitisation SPV;

b) a transfer to a person which is made on serviced terms (the transferee); or

c) a transfer by a securitisation SPV or a transferee to the creditor from whom the consumer credit contract was acquired (the original creditor), the sponsor or a related entity of the original creditor or sponsor.

(4) For the purposes of this section -

"**related entity**" includes-

a) any entity that forms part of a group for the purposes of the Financial Reporting Act 1993 or would do so if that Act applied to any group of which that entity is a member, and

b) a company that is a related company as defined in the Companies Act 1993.

"**securities**" has the same meaning as in the Securities Act 1978;

"**securitisation SPV**" means an SPV -

to which a consumer credit contract is, or will be, transferred by a creditor;

a) which has granted, or will grant, a security interest in that consumer credit contract for the benefit of its secured creditors;

b) which carries on a business of acquiring, holding or originating consumer credit contracts (including any business incidental to that purpose, such as issuing securities in connection with acquiring, holding or originating consumer credit contracts); and

c) does not carry on any other business,

and includes a "covered bond SPV" as defined in the [Reserve Bank of New Zealand (Covered Bonds) Amendment Act 2013].

"**serviced terms**" means that as part of the arrangements in connection with the transfer of the consumer credit contract but subject to the terms of any servicing agreement with the acquiring creditor, either the original creditor, the transferring creditor or any other person provides management and administrative services in relation to the consumer credit contract.

"**sponsor**" means the person principally responsible for establishing the programme pursuant to which consumer credit contracts were or are transferred to the securitisation SPV or the transferee.

"**SPV**" means a special purpose vehicle. [*Drafting Note: This definition is as per the Reserve Bank of New Zealand (Covered Bonds) Amendment Bill noted above*]

"**transfer**" includes an assignment, sale, or other form of disposal. [*Drafting Note: Due to this definition, the bracketed words that appear in the first line of proposed section 26A can be deleted*]