

26 February 2019

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Credit Contracts and Consumer Finance Amendment Bill**

### **Purpose**

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1. We have considered whether the Credit Contracts and Consumer Finance Amendment Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO20935/6.0). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression) and s 21 (unreasonable search and seizure) of the Bill of Rights Act. Our analysis is set out below.

### **The Bill**

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4. The Bill principally amends the Credit Contracts and Consumer Finance Act 2003 ('the principal Act') with the purpose of strengthening the protections for vulnerable consumers of problem debt. The primary purpose of the principal Act is to protect the interests of consumers in connection with credit contracts, consumer leases, and buy-back transactions of land. The Bill makes amendments to the principal Act which are intended to reduce exploitation and mitigate the social and financial hardships associated with problem debt. Particularly, the Bill:
  - a. requires that people, who lend consumers credit and mobile traders who sell goods on credit, meet a fit and proper person test;
  - b. creates more stringent obligations on firms to establish that they are lending responsibly, fairly, and keeping records;
  - c. creates a maximum limit of debt that can accrue on high-interest loans;
  - d. creates new penalties and fines; and
  - e. requires firms to supply information necessary to establish the firms compliance (or otherwise) with its obligations.
5. The Bill also makes changes to the Fair Trading Act 1986 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

## Consistency of the Bill with the Bill of Rights Act

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### Section 14 – Freedom of expression

6. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.<sup>1</sup>
7. Several clauses in the Bill require lenders to disclose certain information or otherwise regulates how information must be imparted:
  - a. Clause 10 of the Bill requires that any advertising comply with standards, to be set out in regulations, as part of the lender satisfying its responsible lending obligations at section 9C of the principal Act;
  - b. Clauses 11 and 21 of the Bill require creditors keep and make available certain records to the Commerce Commission and approved dispute resolution schemes under certain circumstances. Clause 11 creates requirements in relation to records about how the lender made inquiries as part of satisfying itself of its responsible lending obligations. Clause 21 creates requirements in relation to records about how the creditor calculated credit and default fees;
  - c. Clause 14 of the Bill builds on existing requirements in s 17 of the principal Act which sets out initial disclosure requirements to be made by a creditor to a debtor at the beginning of a contract. Clause 14 requires creditors, who advertise to a debtor in a language other than English, to make initial disclosure of as much of the key information set out in Schedule 1 as applicable to the contract in the advertising language, where the creditor suspects or ought to reasonably suspect the debtor would have better understanding of the advertising language;
  - d. Clause 41 of the Bill requires that people seeking to be registered to provide services regulated by the principal Act disclose information to the Commerce Commission necessary for satisfying a fit and proper person test. This clause also prohibits a person from holding themselves out as being certified to provide the regulated service if they are not. The related cl 33 of the Bill also makes it an offence to make false or misleading statements as part of the registration process; and
  - e. Clause 42 of the Bill requires debt collectors under a credit contract to disclose regulated information to the debtor before debt collection starts.
8. A provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of the Bill of Rights Act, which asks if the objective of the provision is sufficiently important to justify limiting freedom of expression. If this is the case, the inquiry is then whether the limitation is rationally connected and proportionate to that objective, and whether the limitation is no more than reasonably necessary to achieve that objective.<sup>2</sup>
9. Whether any of these provisions amount to limits on the right to freedom of expression is arguable as, generally, they either compel the provision of factual information or

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<sup>1</sup> See, for example, *Slaight Communications v Davidson* 59 DLR (4<sup>th</sup>) 416; *Wooley v Maynard* 430 US 705 (1977).

<sup>2</sup> *Hansen v R* [2007] NZSC 7 at [123].

prohibit the disclosure of misleading, deceptive, or confusing information. Although some of this information may be commercially sensitive (e.g. how fees were calculated), the information is not of significant expressive value. Therefore, we consider that the imposition on the right to the freedom of expression is minimal.

10. To the extent that the Bill could be considered to engage the right to freedom of expression, considering the purpose of the provisions and the limited extent to which the requirements engage s 14, we consider the limitation is rationally connected with and proportionate to the important objective of protecting consumers. They are therefore justified under s 5 of the Bill of Rights Act.

## **Section 21 – Freedom from unreasonable search and seizure**

11. The provisions relating to the Commerce Commission’s powers to obtain information in relation to cls 11 and 21 have also been reviewed in light of s 21 of the Bill of Rights Act, which affirms the right to be secure against unreasonable search and seizure. The reasonable justification test, set out in s 5 of the Bill of Rights Act, does not apply to s 21 as the Supreme Court has held that an unreasonable search cannot logically be demonstrably justified in a free and democratic society.<sup>3</sup>
12. As set out above, the Commission may obtain records pertaining to the inquiries made by the lender under section 9C (cl 11) and how the creditor calculated each credit fee and default fee for the purposes of s 41 of the principal Act (cl 21).
13. The role of the Commission under the principal Act is to promote compliance with that Act through monitoring trade practices in credit markets, consumer lease markets, and buy-back transactions markets. In our view, the operation of the principal Act requires the Commission to be able to obtain information relevant to the conduct of lenders and creditors. The Commission’s powers are connected with the purpose for which they are provided and are proportionate. We accordingly conclude that they appear to be consistent with s 21 of the Bill of Rights Act.

## **Conclusion**

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14. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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<sup>3</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [162].