

9 October 2018



Rapid Loans NZ Limited  
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Auckland, 1010



### **Credit Contracts and Consumer Finance Act 2003: Warning**

1. The Commerce Commission (**the Commission**) has been investigating Rapid Loans Limited (**RLL**) under the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**). We have now completed our investigation and are writing to inform you of our concerns.
2. The Commission considers that RLL did not make reasonable inquiries before entering into consumer credit contracts with a vulnerable borrower, in April and September 2016, so as to be satisfied that it was likely that the borrower would make payments under the agreement without suffering substantial hardship.
3. In particular RLL failed to make reasonable inquiries into the borrower's income and expenses and likelihood of repayment. In addition, in assessing the information provided by the borrower, RLL failed:
  - 3.1 to take into account deductions to the borrower's income; and
  - 3.2 did not make any inquiries about the borrower's cash withdrawals when calculating the living costs.
4. The borrower was in a negative cash flow position at the time the loans were applied for.
5. As a consequence, RLL is likely to have breached section 9C of the CCCFA and failed to comply with the Lender Responsibility Principles.
6. After weighing up the factors set out in our Enforcement Response Guidelines<sup>1</sup>, we have decided to conclude the investigation by issuing this warning.

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<sup>1</sup> <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/>

## The investigation

7. The Commission received a complaint from a budget advisor who alleged that Ms [REDACTED] [REDACTED] (**the borrower**) suffered substantial hardship as a result of making payments under loan agreements with RLL. The allegation was made that RLL had not made reasonable inquiries into the borrower's ability to repay the loans at the time of entering into a loan in September 2016.
8. The Commission investigated the affordability assessments for two loans RLL entered into with the borrower during 2016. The investigation has found that:
  - 8.1 RLL assessed the borrower's income and expenses solely from 4 weeks of bank statements provided by the borrower and a copy of WINZ payment advice.
  - 8.2 The borrower was at her overdraft limit of approximately \$500 at the time both the April 2016 and September 2016 loans were entered into.
  - 8.3 The borrower used the loans she obtained from RLL to meet her repayment obligations on existing loans with RLL. In addition, RLL included further credit fees and a top up of further credit to the borrower over and above the amount to pay off the current loans increasing the borrower's vulnerability as her weekly repayment obligations increased.
  - 8.4 The borrower had defaulted on the April 2016 loan, which was her reason for applying for the September 2016 loan. She defaulted on this loan after 1 month and 8 days.
  - 8.5 RLL had incorrectly calculated both income (in particular relating to WINZ benefit payments) and expenses for the borrower (see **Annexure B**).

### *Treatment of WINZ deductions*

9. For both loan applications the borrower's income was comprised of a weekly WINZ benefit and a working for familie's payment (paid by the IRD).
10. WINZ made several payments on behalf of the borrower (known as deductions) before the benefit was paid into the borrower's bank account. The WINZ payment advice confirms that the borrower's deductions were \$391.15 which included two main deductions for rent of \$310 and power of \$25 per week.
11. RLL did not take into account these deductions when calculating the borrower's income and expenses. It used the pre-deduction amount instead of the amount received into the borrower's bank account. RLL made no allowance for rent or power expenses. The combined result of these errors had the effect of overstating the disposable income of the borrower.

### *Treatment of Cash Withdrawals*

12. RLL categorised cash withdrawals made by the borrower as discretionary spending and excluded them from the affordability assessment.

### *RLL's response to the Commission's investigation.*

13. In response to the investigation RLL reviewed its affordability calculations for the borrower and concluded that the amount allocated for her living expenses was incorrect as it did not include rent or power. However, RLL maintained that the borrower could still have made the loan repayments without suffering substantial hardship.
14. RLL undertook revised calculations based on four weeks of bank statements and concluded that:
- 14.1 For the April 2016 loan the borrower's weekly disposable income (after expenses and the loan repayment) should have been \$13.83 instead of the original amount of \$338.56; and
- 14.2 for the September 2016 loan the borrower's weekly disposable income (after expenses and the loan repayment) should have been \$97.81 instead of the original amount of \$182.54.
15. RLL advised that it had revised its processes for undertaking affordability assessments. RLL has also made a significant investment into its own software. It is now able to capture more specific application data of borrowers during its affordability assessment function.

### **The law**

16. Lenders entering into consumer credit contracts after 6 June 2015 are required to comply with the Lender Responsibility Principles set out in section 9C of the CCCFA (see **Annexure A**).
17. Relevant to this investigation is Principle 3(a)(ii) which states:

The lender responsibilities are that a lender must, in relation to an agreement with a borrower,-

- (a) Make reasonable inquiries, before entering into the agreement, so as to be satisfied that it is likely that-
- (i) the credit or finance provided under the agreement will meet the borrower's requirements and objectives; and
- (ii) the borrower will make the payments under the agreement without suffering substantial hardship

18. The Responsible Lending Code (the **Code**) provides guidance as to how lenders can comply with the Responsible Lending Principles. Paragraph 5.7 of the Code sets out

the type of inquiries a lender should make into a borrower's income and expenses. Paragraph 5.12 of the Code states that:

The scope and method of inquiries (as referred to at 5.7-5.11) that are reasonable for a lender to make to be satisfied of the matters set out in 5.1 may differ depending on the circumstances. A lender should make more extensive inquiries where:

(a) There is a greater risk that the borrower will not be able to make payments under the agreement. This includes where:

...

ii. the borrower is a vulnerable borrower.

19. The Code treats an individual as a vulnerable borrower where the lender knows, or the circumstances are such that the lender ought to know that the individual appears to be under significant pressure to obtain credit.
20. The Code advises that the scope and method of inquiries should be more extensive if there is a greater risk that the borrower will not be able to make payments under the agreement. This includes where the size of the loan is large relative to borrower's ability to repay and if the borrower is a vulnerable borrower.

### **The Commission's view**

21. In our view, RLL is likely to be in breach of section 9C of the CCCFA as it did not comply with the Lender Responsibility Principles detailed in sections 9C(2)(b) and 9C(3)(a)(ii).
22. RLL was provided eight weeks' worth of bank statements during the application phase; however enquiries were limited to only four weeks' worth and a copy of the borrower's WINZ payment advice. While this might provide some evidence of income and expenses it does not, in our view, provide a sufficient basis on which RLL could be satisfied the borrower would be able to make payments under the loan agreement without suffering substantial hardship
23. The fact the RLL failed to make inquiries about the borrower's circumstances meant that it was not able to properly assess the information it received from the borrower's bank statements. For example it treated the borrower's cash withdrawals as discretionary spending, when there was no reasonable basis on which to do so. It also failed to make any allowance for the borrower's rent or power.
24. The borrower was advanced \$1850 in April 2016 and even though she was in a default position, RLL advanced her a further \$2500 in September 2016.
25. In any event, we consider that the borrower in this case was, at the time she entered into the loan, likely to have met the definition of a vulnerable borrower within the meaning of the Code. It was apparent from the borrower's bank statements that she was at her overdraft limit of approximately \$500 at the time both the April 2016 and September 2016 loans were entered into. Accordingly we consider that in order to

comply with the Lender Responsibility Principles, RLL should have made more extensive inquiries into the borrower's income and expenses.

26. We do not consider that RLL could have been reasonably satisfied, from the information contained in those bank statements that the borrower could have made the payments under the loan agreement without suffering substantial hardship. Particularly RLL failed to take into account deductions made to the borrower's WINZ benefit when calculating income.
27. If RLL conducted an affordability assessment using the income received into the borrower's bank account and correctly determined the living expenses, the borrower would have been left in a negative weekly surplus on our calculations and RLL should not have provided the two loans. Any borrower with a negative weekly deficit after making the loan payments is at risk of substantial hardship if they are allowed to enter into a loan.

### **Next steps**

28. We recommend that RLL seeks legal advice and takes all steps necessary to ensure that the company complies with its obligations as a responsible lender.
29. While we will not be taking any further action against RLL at this time, we will take this warning into account if this conduct continues or if RLL engages in similar conduct in the future. We may also draw this warning to the attention of a court in subsequent proceedings brought by the Commission against RLL.
30. This warning letter is public information. We may make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

### **The Commission's role**

31. The Commission is responsible for enforcing and promoting compliance with a number of laws in New Zealand, including the CCCFA. The CCCFA protects the interests of consumers in connection with credit contracts and other consumer finance.

### **Penalties for breaching the CCCFA**

32. Only the courts can decide if there has actually been a breach of the CCCFA. A lender which breaches section 9C of the CCCFA may:
  - 32.1 have declaration concerning that breach made against it by a court;
  - 32.2 be subject to injunctive relief requiring the lender to comply with the lender responsibility provisions;
  - 32.3 be ordered to pay the losses or damages of a borrower;

- 32.4 be ordered to pay exemplary damages to a borrower;
  - 32.5 have a credit contract re-opened.
33. Where a lender fails more than once to comply with any of the provisions of the CCCFA the court may make an order prohibiting or restricting any person (including a director or principal officer of a lender) from:
- 33.1 providing credit under a consumer credit contract;
  - 33.2 acting as a director or taking part directly or indirectly in the management or control of any company or business that provides credit under a consumer credit contract; or
  - 33.3 being in the employ or acting as an agent of a credit in any capacity that allows the person to take any part in the negotiation of a consumer credit contract involving the provision of credit by the creditor.
34. RLL should be aware that the decision outlined in this letter does not prevent any other person or entity from taking private action through the courts.

#### Further information

35. We have published a series of fact sheets and other resources including a [responsible lenders guide](#) to help businesses comply with the CCCFA and the other legislation we enforce. These are available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz). We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the CCCFA.
36. You can also view the CCCFA and other legislation at [www.legislation.co.nz](http://www.legislation.co.nz).
37. Thank you for your assistance with this investigation. Please contact [REDACTED] on [REDACTED] or by email at [REDACTED] if you have any questions about this letter.

Yours sincerely



Catherine Butterworth  
Consumer Manager Auckland (Acting)

## Annexure A

### 9C Lender responsibility principles

- (1) Every lender must comply with the lender responsibility principles.
- (2) The lender responsibility principles are that every lender must, at all times,—
  - (a) exercise the care, diligence, and skill of a responsible lender—
    - (i) in any advertisement for providing credit or finance under an agreement; and
    - (ii) before entering into an agreement to provide credit or finance and before taking a relevant guarantee; and
    - (iii) in all subsequent dealings with a borrower in relation to an agreement or a guarantor in relation to a relevant guarantee; and
  - (b) comply with all the lender responsibilities specified in subsections (3), (4), and (5).
- (3) The lender responsibilities are that a lender must, in relation to an agreement with a borrower,—
  - (a) make reasonable inquiries, before entering into the agreement, so as to be satisfied that it is likely that—
    - (i) the credit or finance provided under the agreement will meet the borrower's requirements and objectives; and
    - (ii) the borrower will make the payments under the agreement without suffering substantial hardship; and
  - (b) assist the borrower to reach an informed decision as to whether or not to enter into the agreement and to be reasonably aware of the full implications of entering into the agreement, including by ensuring that—
    - (i) any advertising is not, or is not likely to be, misleading, deceptive, or confusing to borrowers; and
    - (ii) the terms of the agreement are expressed in plain language in a clear, concise, and intelligible manner; and
    - (iii) any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing; and
  - (c) assist the borrower to reach informed decisions in all subsequent dealings in relation to the agreement, including by ensuring that—

- (i) any variation to the agreement is expressed in plain language in a clear, concise, and intelligible manner; and
  - (ii) any information provided by the lender to the borrower after the agreement has been entered into is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing; and
- (d) treat the borrower and their property (or property in their possession) reasonably and in an ethical manner, including—
- (i) when breaches of the agreement have occurred or may occur or when other problems arise:
  - (ii) when a debtor under a consumer credit contract suffers unforeseen hardship (see section 55):
  - (iii) during a repossession process (including by taking all reasonable steps to ensure that goods and property are not damaged during the process, that repossessed goods are adequately stored and protected, and that the right to enter premises is not exercised in an unreasonable manner); and
- (e) ensure, in the case of an agreement to which Part 5 applies, that—
- (i) the agreement is not oppressive:
  - (ii) the lender does not exercise a right or power conferred by the agreement in an oppressive manner:
  - (iii) the lender does not induce the borrower to enter into the agreement by oppressive means; and
- (f) meet all the lender's legal obligations to the borrower, including under this Act, the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Financial Service Providers (Registration and Dispute Resolution) Act 2008, and the Financial Advisers Act 2008, which include—
- (i) obligations in relation to disclosure, credit fees, unforeseen hardship applications, and credit repossession under this Act; and
  - (ii) prohibitions on false or misleading representations and unfair contract terms under the Fair Trading Act 1986; and
  - (iii) the guarantee that the service of providing credit and any other services will be carried out with reasonable care and skill under the Consumer Guarantees Act 1993.



(4) The lender responsibilities are also that a lender must, in relation to a relevant guarantee that is taken by the lender,—

- (a) make reasonable inquiries, before the guarantee is given, so as to be satisfied that it is likely that the guarantor will be able to comply with the guarantee without suffering substantial hardship; and
- (b) assist the guarantor to reach an informed decision as to whether or not to give the guarantee and to be reasonably aware of the full implications of giving the guarantee, including by ensuring that—
  - (i) the terms of the guarantee are expressed in plain language in a clear, concise, and intelligible manner; and
  - (ii) any information provided by the lender to the guarantor is not presented in a manner that is or is likely to be misleading, deceptive, or confusing; and
- (c) treat the guarantor reasonably and in an ethical manner, including when breaches of a credit contract to which the guarantee applies have occurred or may occur or when other problems arise; and
- (d) ensure, in the case of a guarantee that is to be treated as forming part of a credit contract for the purposes of Part 5 under section 119, that—
  - (i) the guarantee is not oppressive:
  - (ii) the lender does not exercise a right or power conferred by the guarantee in an oppressive manner:
  - (iii) the lender does not induce the guarantor to give the guarantee by oppressive means; and
- (e) meet all the lender's legal obligations to the guarantor, including under the Acts specified in subsection (3)(f).

(5) The lender responsibilities are also that a lender must, in relation to a relevant insurance contract,—

- (a) make reasonable inquiries, before the contract is entered into, so as to be satisfied that it is likely that—
  - (i) the insurance provided under the contract will meet the borrower's requirements and objectives; and
  - (ii) the borrower will make the payments under the contract without suffering substantial hardship; and

(b) assist the borrower to reach an informed decision as to whether or not to enter into the contract and to be reasonably aware of the full implications of entering into the contract, including by ensuring that—

(i) any advertising distributed by the lender is not, or is not likely to be, misleading, deceptive, or confusing to borrowers; and

(ii) any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing.

(6) Subsections (3)(b)(iii) and (c)(ii), (4)(b)(ii), and (5)(b)(ii) do not apply to information that is subject to section 32(1).

(7) For the purposes of the inquiries required under subsections (3)(a), (4)(a), and (5)(a), the lender may rely on information provided by the borrower or guarantor unless the lender has reasonable grounds to believe the information is not reliable.

• Section 9C: inserted, on 6 June 2015, by section 9 of the Credit Contracts and Consumer Finance Amendment Act 2014 (2014 No 33)

**Annexure B****Affordability Assessments**

	RLL's affordability assessment	Commission's affordability assessment
	<b>April 2016 Loan</b>	
Weekly income	\$679.31	\$273.64
Weekly expenses	\$291.69 (this does not include amounts for rent and power)	\$291.85
Loan repayment amount per week	\$49.06	\$49.06
Weekly disposable income after expenses and loan repayment	\$338.59	-\$67.27
	<b>September 2016 Loan</b>	
Weekly income	\$584.49	\$381.92
Weekly expenses	\$344.13 (this does not include amounts for rent and power)	\$345.19
Loan repayment amount per week	\$57.82	\$57.82
Weekly disposable income after expenses and loan repayment	\$182.54	-\$21.09