

Commerce Commission lender webinar – Enforcement approach

July 2024

Kia ora koutou, my name is Jason and I am an Investigator in the Credit Branch. I will be sharing with you our enforcement approach today.

Before I get into that, I just wanted to make it clear that complaints are not the only way we obtain information that may lead to investigations. We also carry out proactive monitoring, for example our current fees monitoring project. We have undertaken this pro-active monitoring project to help us better understand the extent to which lenders are reviewing their fees and complying with their obligations under section 41A of the CCCF Act. Section 41A requires lenders to keep records about how their credit and default fees are calculated and that the calculations demonstrate the fees are not unreasonable. These records must be made available to the Commission within 20 working days, upon request. The monitoring project is ongoing. We encourage all lenders to regularly review their fees, especially when they consider any of the underlying costs may have changed.

Another avenue for the Commission to receive information is through our association with other regulators and organisations such as the FMA or dispute resolution schemes or financial mentors.

In terms of complaints, every complaint that is received goes through the following screening process. Complaints are logged in our system, along with any information / evidence provided. An initial assessment team consider any potential breaches of the legislation we enforce and contact the complainant for any additional information or documents necessary at this stage. The complaints are then considered by a screening panel which is made up of managers, investigators and lawyers.

During the screening and prioritisation stage we consider whether a matter warrants investigation. We also identify complaints where no further action will be taken for example the complaint may not identify a breach in the law, it may be out of date due to limitation provisions or be outside of our jurisdiction.

Our role is not to act on every complaint. In some cases, rather than open an investigation, the Commission may take low-level steps to resolve the issues underlying a complaint. Many of the complaints we assess will be unique to the complainant and we often recommend they engage directly with the creditor they have complained about. A complaint may also be better dealt with by another party, for example the relevant dispute resolution scheme, or for the complainant to seek individual assistance from financial mentoring services.

The screening process also identifies complaints which we believe are better resolved by the Commission engaging with a lender and letting them know we have received the complaint. We do this by either issuing an information passed to trader letter (IPTT), or having a meeting, instead of opening a full investigation.

As you can see, not all complaints lead to investigations. Equally not all investigations lead to prosecutions. In deciding whether to open an investigation, we consider:

- The lender's complaint and enforcement history, looking at whether this may be a one off or is a systemic issue, and any previous engagement with the lender on this issue;
- the extent of the harm caused by the alleged conduct, for example whether the harm is widespread or significant;
- the seriousness of the conduct, for example whether it's deliberate, ongoing or repeat behaviour versus accidental or one-off; and
- whether it is in the public interest to pursue the matter.

If a complaint does move to an investigation phase, we gather and analyse evidence so that we can form a view on whether a breach of the law may have occurred. From this we assess the complaint in light of the Enforcement Criteria, and determine whether to take the complaint further and, if so, to identify the enforcement responses applicable to the circumstances.

One of these enforcement response options is issuing a Compliance Advice Letter (CAL). Following an investigation, we may issue a CAL where we consider that the conduct gives rise to a possible breach of the law, but in our judgement the matter is not a priority to take further. CALs are educative (but they are not legal advice) and are issued in response to problematic conduct that we have identified.

We often follow up directly with the complainant, seeking additional information and documents relevant to their complaint, or conduct a witness interview to allow the complainant to provide their first-hand account of the matter. Alternatively, or often in parallel, we engage directly with the lender to gather information and documents related to the complaint, for example a copy of the complainant's credit contract, or more broadly detailed information about on its entire loan book.

While we do have comprehensive internal guidelines and processes that ensures the work we do has oversight, is done with consistency, and is completed to high standards, it is worth repeating that due to the nature of investigative work no two investigations will be the same. We appreciate at times it can be difficult for businesses not knowing what the next steps are, however our publicly available investigation and enforcement guidelines go a long way to providing insights and guidance into the process.

Wherever possible, the Commission encourages compliance with the law by providing education, engagement, outreach and advocacy – through things like this webinar.

We tend to prioritise our enforcement resources to focus on matters where the conduct is serious, (for example deliberate, ongoing or repeat) and/or where the greatest harm exists, or may occur, and there is a strong public interest to pursue the matter.

The enforcement response guidelines have more information about our approach and includes a useful diagram that shows the escalating enforcement options, or in other words, the enforcement consequences we would take aligned to the enforcement criteria assessment.

We also take this opportunity, to inform you that in August last year, the Commission published Consumer Remediation Guidance for Businesses. The guidance provides key principles lenders may wish to take into consideration when they identify conduct or omissions that may have led to a likely breach of one of the laws the Commission enforces. In short the guidance is designed to help businesses put things right when something may have gone wrong.

If you haven't already, it is a good idea to take a look at this guidance. Larissa will post these in the chat now.

Enforcement Response Guidelines: https://comcom.govt.nz/_data/assets/pdf_file/0030/62589/Enforcement-Response-Guidelines-October-2013.pdf

Investigation Guidelines: https://comcom.govt.nz/_data/assets/pdf_file/0028/89821/Competition-and-Consumer-Investigation-Guidelines-July-2018.pdf

Remediation guidelines: (https://comcom.govt.nz/_data/assets/pdf_file/0031/324976/Consumer-Remediation-Guidance-for-Businesses-August-2023.pdf)

Certification and duty to notify prescribed changes

You will all be aware of the requirement for lenders and mobile traders to be certified, unless they are exempt from certification. The Commission issues certification where it is satisfied that a lender's directors and senior managers are fit and proper persons to hold their positions.

Because the assessment is of the individual directors and senior managers, it is very important that the Commission is aware of any change in directors and senior managers, and other changes that go to an individual's fit and properness, and these changes may impact whether a lender should remain certified.

There is a duty on lenders to notify changes to the Commission within 10 working days of knowing of the change. This is set out in section 131R of the CCCFA. The changes that must be notified to the Commission are set out in regulation 25 of the CCCFA Regulation. They include where a director or senior manager is appointed or has resigned, has been charged with or convicted of a crime punishable by imprisonment in New Zealand or overseas, is adjudicated or likely to be adjudicated bankrupt in New Zealand or overseas, and more.

Non notification of prescribed changes by lenders is an area where we are not seeing a high level of compliance by lenders, which the Certification Team often picks up through proactive monitoring. It is a breach of the CCCFA not to notify the Commission, and there are serious penalties that can be awarded by a court – up to \$600,000 for a company and \$200,000 for an individual. To date we have dealt with this non-compliance through engagement and education, and more recently, we have begun issuing IPTT's to lenders. However, where we see repetitive breaches, especially where lenders have already received information about their obligations, then lenders can expect us to apply a graduated enforcement response in line with the ERG's. Larissa will post the link to the Fit and Proper Certification guidance and the new material changes form now:

https://comcom.govt.nz/_data/assets/pdf_file/0018/231183/Fit-and-Proper-Person-certification-guidance-2024_2_3.pdf

Notification to the Commission must be in writing. You can send notifications to certification@comcom.govt.nz

That is all I wanted to cover for today. Thank you everyone, I'll now hand back to Paul.