

23 February 2021

Auckland Council  
135 Albert Street  
Auckland

Attention:

[REDACTED]

By email:

[REDACTED]

Dear [REDACTED]

### **Credit Contracts and Consumer Finance Act 2003: Warning for non-compliance concerning the Retrofit Your Home Programme**

1. In February 2020, Auckland Council contacted the Commerce Commission (**Commission**) to report that it had identified multiple potential breaches of the Credit Contracts and Consumer Finance Act (**the Act**) in respect of Auckland Council's Retrofit Your Home Programme (**RYH Programme**).
2. The Commission has now completed its investigation into the matter disclosed. The purpose of this letter is to inform you about our views and to advise that the Commission does not intend to take any further action in relation to this matter.

#### **RYH Programme**

3. The Commission understands that the RYH Programme provided by Auckland Council involved the Council offering financial assistance to ratepayers who wished to improve their property with insulation, heating, ventilation and/or energy efficiency. The programme enabled ratepayers to borrow up to \$5,000 from the Council, and to make repayments over a term of nine rating years.

4. Auckland Council offered ratepayers loans under the RYH Programme between 2011 and 2020. It no longer offers the RYH Programme to new participants but continues to administer loans and accept repayments from existing participants. Under the loan terms, interest is payable on the loans but there are no fees payable.
5. Auckland Council accepts that loans made through the RYH Programme are consumer credit contracts pursuant to section 11 of the Act. The Commission agrees with this assessment based on its understanding of the RYH Programme. As such, in providing lending under the scheme, Auckland Council is obliged to meet certain obligations under the Act.
6. The Commission understands that the RYH Programme was initiated to provide a means for ratepayers to borrow funds at affordable interest rates to enable them to make their houses warmer, healthier and to reduce ongoing electricity costs. The Commission acknowledges the social benefit that could be gained from a scheme of its kind.
7. The primary purpose of the Act is to protect the interests of consumers in connection with credit contracts. To achieve this, lenders entering into consumer credit contracts have certain obligations, including those designed to ensure that consumers can make informed choices, to understand what they are agreeing to, and to keep track of their debts.
8. The Commission is responsible for promoting compliance with the Act. The Commission has considered the matters disclosed to it and considered the extent to which Auckland Council may or may not have breached its obligations under the Act.

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

9. The Commission has reviewed the information supplied by Auckland Council and agrees with the Council's assessment that it has likely breached its obligations under the Act as follows:

<b>Section(s) of the Act likely breached</b>	<b>Obligation</b>	<b>Why a breach has likely occurred</b>
Section 9C(3)(a)	Lender must make reasonable inquiries, before entering into an agreement with a borrower, so as to be satisfied that it is likely that the borrower will make the payments under the agreement without suffering financial hardship.	Auckland Council undertook credit checks of ratepayers in certain situations but did not make any further inquiry as to the potential borrower's circumstances or financial position.

Section 9C(3)(b)	Lender must assist the borrower to reach an informed decision as to whether or not to enter into the agreement and be reasonably aware of the full implications of doing so.	Auckland Council disclosed certain information intended to serve this purpose in a series of documents in a manner that it acknowledges was unlikely to adequately bring it to the attention of the borrower.
Section 9J(3)(a)	If the lender has an internet site, the lender must display prominently and clearly a copy of the standard form contract terms on that site.	The relevant standard form contract terms were available for download on a page on Auckland Council's website but were not easily identifiable or locatable.
Section 9K(3)(a)	If the lender has an internet site, the lender must display prominently and clearly on that site the creditor's fees, default fees, and annual rates of interest (and default interest charge rates).	Auckland Council did not ensure that the interest rates (including default interest rates) were clearly displayed on its website, nor did it display all information that was required to be included.
Section 17	Every lender under a consumer credit contract must ensure that disclosure of as much of the key information set out in Schedule 1 as is applicable to the contract is made to every borrower under the contract before the contract is entered into.	Auckland Council did not disclose all of the relevant Schedule 1 information prior to entering into contracts with borrowers, and certain information required to be disclosed to borrowers prior to entering into the contract was not disclosed until after the contract had started.
Section 18 <sup>1</sup>	Every lender under a consumer credit contract must ensure that disclosure of as much of the information set out in section 19 as is applicable to the contract is made periodically to every debtor under the contract in continuing disclosure statements.	Auckland Council did not ensure that all of the relevant information set out in section 19 was included in its continuing disclosure statements.  Auckland Council did not consistently provide continuing disclosure

<sup>1</sup> Taking into account Regulation 18 of the Credit Contracts and Consumer Finance Regulations 2004 (Regulations)

		statements within the timeframes prescribed under the Act and associated Regulations.
Section 46	A lender must credit each payment made under a consumer credit contract to the lender's account as soon as practicable after receipt of the payment.	Auckland Council (at times) did not consistently credit payments as soon as practicable after the receipt of payment and did not apply payments in the manner provided for under the agreement terms.

10. We have decided that we will not be bringing legal action in respect of these issues, but we are issuing the Auckland Council with this warning letter.<sup>2</sup>
11. A warning is not a finding of non-compliance; only the courts can decide whether a breach of the law has occurred.<sup>3</sup>
12. Auckland Council has told us that it has closed the RYH Programme to new participants and has suspended charging interest on existing loans until 1 July 2021. To that end, we understand that the conduct that has given rise to the potential breaches has ceased. If at any stage this is no longer the case and the conduct continues, we recommend that the Auckland Council seek legal advice about complying with the Act.

### **Credit Contract and Consumer Finance Act 2003**

#### *Application of the Act*

13. The Act applies to people or businesses which provide consumer credit contracts, consumer leases or buy-back transactions in the course of their business. The intent of the Act is to protect consumers when they borrow money or buy goods on credit.<sup>4</sup> It sets out the rules that must be followed when businesses provide loans or finance to consumers in New Zealand.<sup>5</sup>
14. As noted above, Auckland Council accepts that loans made through the RYH Programme are consumer credit contracts pursuant to section 11 of the Act.

<sup>2</sup> Full extracts of mentioned sections attached.

<sup>3</sup> Commission's published *Enforcement Response Guidelines – October 2013* at [41].

<sup>4</sup> See paragraph 7.

<sup>5</sup> These rules include but are not limited to: reasonable checks to be made that borrowers can afford to pay back the loan; and disclosure of information before any lending takes place and during the term of the loans.

### Auckland Council's response

15. Commission staff have met with staff from Auckland Council in person on three occasions<sup>6</sup>, and have had numerous phone and email exchanges to obtain information to assist with the Commission's investigation.
16. Auckland Council has been cooperative at all times and has provided the Commission with all information sought in order for it to understand the potential issues, including a comprehensive summary of the potential breaches identified by Auckland Council. The Commission has reviewed all information received from Auckland Council.
17. During our investigation, in order to address the potential breaches identified, Auckland Council (of its own volition) has advised the Commission that it has:
  - 17.1 stopped accepting applications for new loans under the RYH Programme; and
  - 17.2 suspended charging interest on existing loans and at this point no interest will be charged until 1 July 2021.
18. In addition, Auckland Council has advised the Commission that it plans to:
  - 18.1 for the period from 6 June 2015 until charging interest was suspended, refund interest charges of circa \$9.55M to approximately 20,500 out of the approximately 24,500<sup>7</sup> past and present ratepayers who have participated in the RYH Programme (i.e. full costs of borrowing);
  - 18.2 refund any rates penalties charged to the RYH Programme participants which were applied in relation to late payment of a RYH Programme targeted rate. This affects 11,353 accounts. The total amount of penalties to be refunded will be \$750,240; and
  - 18.3 refunds/credits will be applied from February 2021.
19. To date, any action taken by Auckland Council by way of remedy has been self-initiated and not at the request of the Commission.
20. Auckland Council has informed the Commission that it will comply with its obligations under the Act for all existing participants in the RYH Programme, and that the RYH Programme will not be re-opened for new applicants.
21. All existing participants under the RYH Programme were notified in February 2020 of an error with their loan accounts.<sup>8</sup> Auckland Council has also informed the Commission that it is working towards implementing a compliance programme for

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<sup>6</sup> Those meetings occurred on 14 February 2020, 29 October 2020 and 22 December 2020

<sup>7</sup> Of the approximately 24,500 ratepayers who have been involved with the RYH Programme, 13,334 remain in the RYH Programme, while approximately 11,116 have since exited the RYH Programme.

<sup>8</sup> <https://ourauckland.aucklandcouncil.govt.nz/articles/news/2020/02/retrofit-your-home-scheme/#:~:text=The%20Retrofit%20Your%20Home%20scheme>

managing the existing loans on a go-forward basis (covering its obligations under the Act and other relevant financial legislation). The Commission understands that this will be developed in line with a draft compliance framework provided by its external legal advisers.

22. Auckland Council has prepared and supplied the Commission with revised documentation which it intends to send to participants where corrective action is required.

### **Warning**

23. The Commission has considered the factors set out in our Enforcement Response Guidelines and the appropriate enforcement response. Having considered the particular circumstances of this matter, the Commission has decided to issue Auckland Council with a warning.
24. The Commission has taken the following factors into account:
  - 24.1 Auckland Council's pro-active conduct in self-reporting the issue and subsequent co-operation with the Commission's investigation;
  - 24.2 the nature of and intent behind the RYH Programme;
  - 24.3 Auckland Council's advised actions and process changes following discovery of the breaches;
  - 24.4 the length of time over which the potential breaches occurred;
  - 24.5 Auckland Councils' decision to refund full costs of borrowing to affected borrowers; and
  - 24.6 previous advice issued by the Commission in relation to compliance with the Act.
25. We will not be taking further action against Auckland Council at this time in relation to this conduct, but this does not prevent third parties from doing so. We will take this warning into account if Auckland Council was to engage in similar conduct in the future.

### **This letter is published**

26. This letter will be published on the case register on our website. We may also make public comment about our investigation and conclusions, including issuing a media release or making comment to media.
27. Thank you for your assistance with this investigation. Please contact George Fraser on 09 300 3720 or by email at [george.fraser@comcom.govt.nz](mailto:george.fraser@comcom.govt.nz) if you have any questions in relation to this letter.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'John Lyall', written in a cursive style.

John Lyall  
Consumer Auckland Manager