

CONSULTATION DOCUMENT

Criteria for Certification

under the Credit Contracts and Consumer Finance Act 2003

February 2020



Purpose

- 1 From April 2021 the Commerce Commission (the Commission) must be satisfied that all directors and senior managers of consumer credit providers (lenders) or mobile traders are 'fit and proper' under amendments to the **Credit Contracts and Consumer Finance Act 2003 (CCCF Act)**.¹
- 2 The Commission has been mandated (under 131E of the CCCF Act) to issue 'fit and proper' certification.
- 3 The Commission must certify a **lender or a mobile trader** if it is satisfied that the applicant's **directors and senior managers** are 'fit and proper' to hold their respective positions.
- 4 To achieve certification all directors and senior managers are individually assessed as a 'fit and proper' person. A lender or mobile trader cannot be registered on the Financial Service Provider Register (FSPR) providing those services without the Commission's certification.
- 5 If lenders or mobile traders provide consumer credit or mobile trading services without certification they could be liable for penalties (\$200,000 for an individual and in any other case \$600,000).
- 6 If there are changes to the directors and/or senior managers a reassessment of the 'fit and proper' certification may need to be made.
- 7 We are seeking feedback on:
 - 7.1 **'Fit and Proper' assessment criteria (Section 131F)** – the information the Commission should consider in assessing whether directors and senior managers are 'fit and proper' to hold their positions
 - 7.2 **Change in circumstances (Section 131R)** – when a certified person should be required to notify the Commission about a change in circumstance.
- 8 Please provide your submissions in response to the questions in this paper by **18 March 2020**.

'Fit and Proper' assessment criteria (Section 131F)

- 9 This document contains a draft set of criteria that the Commission proposes to apply to assess the fitness and propriety of directors and senior managers. It is intended as a consultation document to obtain feedback which will assist the Commission in the development of our final 'fit and proper' person criteria. The Commission intends to publish guidance in mid-2020 which will outline the application process and the way we intend to apply the criteria.
- 10 In developing the proposed assessment criteria, we have considered criteria used in other 'fit and proper' tests including those applied in New Zealand by the Financial Service Providers Registrar,² the Reserve Bank, the Financial Markets Authority,³ the Real Estate Agents Authority, the Overseas Investment Office and the Law Society. We have also looked at international regimes including those implemented by the Financial Conduct Authority and the Australian Investment and Securities Commission. We have also incorporated our knowledge about consumer credit and mobile trader industries.

1. Except providers of credit contracts and mobile traders that are licenced under Schedule 2 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

2. See s 14 Financial Service Providers (Registration and Dispute Resolution) Act 2008.

3. See s 396 of the Financial Markets Conduct Act 2013 and the Financial Markets Conduct Regulations 2008.

What is ‘fit and proper’

- 11 In determining whether a director or senior manager is ‘fit’, the Commission’s assessment will focus on whether the individual is competent and has the ability to do the job. ‘Proper’ relates to the character and integrity of the person.
- 12 Quite simply, a fit and proper person means someone who is:
- 12.1 financially sound
 - 12.2 honest, reputable and reliable
 - 12.3 competent to perform the role in question.
- 13 We have organised our proposed criteria for assessing fitness and propriety into two categories:
- 13.1 probity, reputation and financial integrity, as set out in **Table 1**
 - 13.2 competency and capability, as set out in **Table 2**.

Probity, reputation and financial integrity

- 14 Probity, reputation and financial integrity are qualities that can be demonstrated over time and demand a disciplined and ongoing commitment to high ethical standards. In assessing an individual’s level of probity, reputation and financial integrity, we propose to consider whether the individual:

Table 1:

Ref no:	Probity, reputation and financial integrity criteria
1.	Has been convicted of crime punishable by imprisonment in New Zealand or equivalent offences overseas.
2.	Has in the last 10 years, been bankrupt in New Zealand or overseas.
3.	Is currently a director, senior manager or controlling owner, or has previously been a director, senior manager or controlling owner of a corporate entity that has been placed into liquidation, receivership or voluntary administration in New Zealand or equivalent insolvency procedures overseas.
4.	Has been prohibited from acting as a director or promotor of a company or taking part directly or indirectly in the management of a company in New Zealand or overseas while being prohibited.
5.	Has as an individual, been subject to an investigation by the Commerce Commission or other equivalent New Zealand or overseas regulator that resulted in receiving a conviction, judgment award, arranging a settlement, penalty, enforcement action or receiving a warning.
6.	Has held a directorship or senior management role, that during the presence in the role, the corporate entity was convicted of a criminal or civil offence or subject to any regulatory action by NZ or overseas agencies resulting in judgment award, penalty, enforcement action, or warning or caution in New Zealand or a similar financial services provider regulator overseas.
7.	Individually or as a director or senior manager of a corporate entity, been prohibited from providing credit in New Zealand or overseas.
8.	Has had disciplinary action taken in respect of a profession or occupation by a professional body/organisation or regulatory body for persons engaging in that profession or occupation.
9.	Has either as an individual certified by the Commerce Commission or as a director or senior manager of a certified corporate entity, failed to comply with any conditions imposed on the certification issued.
10.	Has had a previous application for certification refused by the Commerce Commission.
11.	Has had an application for registration, certification or licence for the provision of financial services declined, or had registration, certification or licence removed or cancelled by a regulatory body in New Zealand or an equivalent regulatory body overseas.
12.	Any other matters the Commerce Commission may consider relevant to the decision about whether to certify the person as fit and proper.

Competency and Capability

- 15 Competency and capability are demonstrated when an individual possesses:
- 15.1 the relevant knowledge, experience and ability to understand the technical requirements of the business
 - 15.2 objectivity in decision making
 - 15.3 keen awareness of the inherent risks and the management processes required to effectively perform a controlled function.
- 16 In assessing an individual's level of competency and capability, we propose to consider the following:

Table 2:

Ref no:	Competency and capability criteria
13.	Nature and scale of the business and the range of services and activities undertaken during that business.
14.	Position(s) in the organisation and how long that position(s) has been held for.
15.	Current role(s) and responsibilities.
16.	Individually, the level of involvement in the organisation.
17.	Details of any directorships and senior management roles currently or previously held – with a description of the nature of each company's business and the dates of roles.
18.	Details of any other relevant employment history and experience.
19.	Details of qualifications – including a description of the qualification, the date it was attained and the institution that granted the qualification.
20.	Details of any professional body memberships currently or previously held – including the name of the organisation and the dates of membership.
21.	Details of other information, such as professional training courses, study, seminars or workshops that highlight expertise or competence appropriate to the role in the organisation.
22.	Any other information that is relevant to this capability assessment.

Q1	<p>What do you think of the proposed 'fit and proper' criteria in Table 1 and Table 2 of this consultation document and why?</p> <p><i>NOTE: If you have comments regarding a specific criterion please provide the reference number with your feedback.</i></p>
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Change in circumstances (Section 131R)

- 17 Under Section 131R of the CCCF Act the lender or mobile trader that has received certification must notify the Commission about any prescribed change in circumstances. Prescribed changes will be set out in Regulations to the CCCF Act and will be developed by the Ministry of Business, Innovation and Employment (MBIE).
- 18 We are seeking feedback which will assist MBIE to work out what changes should be prescribed in the Regulations. We suggest that such changes are likely to include changes that will affect whether the Commission can be satisfied that all the directors and senior managers of lenders or mobile traders are 'fit and proper' to hold their positions. It may include changes to the lender or mobile trader or changes that affect a director or senior manager. For example, the following changes could be relevant:
 - 18.1 new directors or senior managers
 - 18.2 changes in roles of directors or senior managers
 - 18.3 changes that would affect a director or senior managers' answers to the 'fit and proper' criteria set out in Table 1 and Table 2 such as, a relevant criminal conviction or bankruptcy.
- 19 There will be consequences for certified companies or individuals for failing to notify the Commission of prescribed changes. Companies may be liable for pecuniary penalties (\$200,000 for an individual and in any other case \$600,000).

Q2 What sorts of change in circumstances do you think could affect the Commission's assessment of whether directors and senior managers of a lender or mobile trader are 'fit and proper'?

How you can provide your views

- 20 Please send your submissions via email to fitandprobersubmissions@comcom.govt.nz by **18 March 2020**.
- 21 Please ensure that you provide your name, contact details and the name of the organisation or business name you are submitting on behalf of (if relevant).

What happens to your feedback

- 22 Please note that we publish all submissions on our website. This is an important step, as it allows us to test all information received from stakeholders in a fully transparent way. However, we recognise that there may be cases where submitters wish to provide us with confidential information in a submission.
- 23 If you are providing confidential information, please identify it at the time you provide the submissions. Ideally you would supply both confidential and public versions of your submissions.
- 24 Your feedback will contribute to the:
 - 24.1 final criteria used in the 'fit and proper' person assessment
 - 24.2 final list of material changes in circumstance included in the regulations.

Requests for Privacy

- 25 The Privacy Act 1993 establishes certain principles with respect to the collection, use and disclosure of information about individuals by various agencies, including MBIE and the Financial Markets Authority. Any personal information you supply in the course of making a submission will only be used for the purpose of assisting in the development of policy advice in relation to this review. Please clearly indicate in the cover letter or e-mail accompanying your submission if you do not wish your name, or any other personal information, to be published on our website.

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