

2 June 2023

The Hongkong and Shanghai Banking Corporation Limited  
188 Quay Street  
Auckland Central  
Auckland 1010

Attn: [REDACTED]

By email only: [REDACTED]

Dear [REDACTED]

**Outcome of Commerce Commission's investigation into The Hongkong and Shanghai Banking Corporation Limited and its compliance with the Credit Contracts and Consumer Finance Act 2003: Warning**

1. The Commerce Commission (Commission) has been investigating The Hongkong and Shanghai Banking Corporation Limited (HSBC) in relation to HSBC's self-report of potential breaches of its disclosure obligations under the Credit Contracts and Consumer Finance Act 2003 (CCCF Act). These potential breaches pertain to the late disclosure of agreed variations to HSBC's home loan product and late initial disclosure of its temporary overdraft product.
2. HSBC identified and advised that the initial, variation, and guarantor disclosure issues with the CCCF Act likely date back to April 2005. However, the Commission has decided to focus on HSBC's conduct from June 2015 onwards, given the historical nature of the conduct, potential limitation issues and low number of affected borrowers prior to 6 June 2015.<sup>1</sup>
3. We have now completed our investigation into the matters reported to us and are writing to inform you of the outcome.

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<sup>1</sup> HSBC estimated that there were approximately 237 instances of late disclosure before 6 June 2015, relating to changes in payments dates and interest-only extensions.

4. In summary, the Commission considers that HSBC is likely to have breached the following sections of the CCCF Act from June 2015 to October 2021:
  - 4.1 Section 17, by failing to provide initial disclosure to the borrower before entering into a contract with the borrower.
  - 4.2 Section 22, by failing to disclose full particulars of the agreed change to the contract to the borrower before the change took effect.
  - 4.3 Section 25, by failing to disclose key information to the guarantor before the guarantor provided the guarantee.
  - 4.4 Section 26, by failing to provide variation disclosure to the guarantor within 5 working days of when the change was agreed to between HSBC and the borrower.
  - 4.5 Section 9C, by failing to exercise the care, diligence, and care of a responsible lender in the above scenarios.
5. The Commission has considered the factors set out in our Enforcement Response Guidelines,<sup>2</sup> and has decided to issue HSBC with a warning for the failures identified above. We note that a warning is not a final finding of non-compliance. Only the Courts can decide whether a breach of the law has occurred.

## **The law**

### *Application of the CCCF Act*

6. The CCCF Act protects consumers when they borrow money or buy goods on credit. It sets out the rules that must be followed by creditors when they provide loans to consumers in New Zealand.
7. The following provisions of the CCCF Act are relevant to the Commission's investigation into HSBC. Initial disclosure to borrowers
8. Section 17(1) states that:

Every creditor 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 debtor under the contract before the contract is entered into.

### *Initial disclosure to guarantors*

9. Sections 25(1) and (2) state that:

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<sup>2</sup> The Commerce Commission Enforcement Response Guidelines are available at: [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0030/62589/Enforcement-Response-GuidelinesOctober-2013.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0030/62589/Enforcement-Response-GuidelinesOctober-2013.pdf)

- (1) Every creditor who takes a guarantee of a consumer credit contract must ensure—
  - (a) that every guarantor under the guarantee is given or sent a copy of all of the terms of the guarantee (other than terms implied by law); and
  - (b) that disclosure of as much of the key information (set out in Schedule 1) as is applicable to each consumer credit contract that the creditor and the debtor enter into and to which the guarantee applies is made to every guarantor under the guarantee.
- (2) The copy of the terms of the guarantee must be given or sent, and disclosure of the key information concerning each consumer credit contract that the creditor and the debtor enter into and to which the guarantee applies at the time the guarantee is given must be made, before the guarantee is given.

*Agreed variation disclosure*

10. Sections 22(1)(a) and (2) state that:

- (1) Every creditor under a consumer credit contract must ensure that disclosure of the following information is made to every debtor under the contract if the parties to the contract agree to change the contract:
  - (a) full particulars of the change.
  - ...
- (2) Disclosure under this section must be made before the change takes effect.

*Disclosure of changes to guarantors*

11. Sections 26(1)(a) and (3) state:

- (1) Every creditor who takes a guarantee of a consumer credit contract must ensure that disclosure of the information set out in subsection (2) is made to every guarantor under the guarantee if—
  - (a) the debtor and the creditor agree to a change to the contract that increases the obligations that the debtor would otherwise have or reduces the time for payment of any payment to be made under the contract.
  - ...
- (3) Disclosure under subsection (1) must be made within 5 working days of the day on which—
  - (a) the change is agreed to by the debtor and the creditor, in the case of subsection (1)(a).

*Responsible lending*

12. Sections 9C(1) and (2)(a)(ii) and (iii) state:

- (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 -
  - ...
  - (ii) before entering into an agreement to provide credit or finance or a relevant insurance contract and before taking a relevant guarantee; and
  - (iii) in all subsequent dealings with a borrower in relation to an agreement or a relevant insurance contract or a guarantor in relation to a relevant guarantee.

### **The investigation**

13. On 10 November 2021, HSBC informed the Commission that it had identified timing issues in relation to:
  - 13.1 the disclosure of agreed variations for its home loans; and
  - 13.2 initial disclosure for temporary overdrafts provided to existing HSBC customers for the purchase of property at auction.

### *Potential breaches identified by HSBC*

14. In cases where the variation increased the borrower's obligations under the loan, borrowers were provided with late variation disclosure. That is because they were not provided with the variation disclosure *before* the change took effect. The variations to the home loans included:
  - 14.1 a break or change to a fixed or floating interest rate;
  - 14.2 reducing the borrowing term or credit limit; or
  - 14.3 changing the payment amount, frequency or scheduled payment date.
15. In addition, borrowers were not provided with initial disclosure before they entered into temporary overdraft contracts with HSBC.
16. HSBC reported 1,053 occurrences of late initial and variation disclosure affecting 611 customers from 6 June 2015 to October 2021. Based on a sample of 77 customer files requiring remediation, there was an average delay of 3.5 days in the provision of disclosure, except where changes had been made to the scheduled payment date. HSBC advised that the delay in such cases persisted until the borrowers received their next continuing disclosure statement.
17. The late initial and variation disclosure issues applied equally to guarantors of those affected loans. HSBC identified that there were 153 occurrences of late disclosure affecting 73 guarantors. HSBC also identified 28 occurrences of non-disclosure

affecting 14 guarantors in cases where there had been a change to the scheduled payment date.

*Identification of the disclosure errors*

18. We understand that HSBC discovered these potential breaches of the CCCF Act when its data reconciliation controls found an incident of non-disclosure, thus triggering a review of HSBC's disclosure obligations.
19. HSBC told the Commission that it had mistakenly carried over the interpretation and operational approach applicable to the Credit Contracts Act 1981. Consequently, agreed changes that were not documented as variations to the contract were not always identified for disclosure under section 22 of the CCCF Act. HSBC stated that it had "failed to adjust its operating approach in line with the evolving regulatory framework and available information".

*Steps taken by HSBC to address the disclosure errors*

20. HSBC advised the Commission that it had addressed the disclosure issues by:
  - 20.1 updating its policies and procedures;
  - 20.2 reviewing and implementing revised standardised templates that comply with the CCCF Act;
  - 20.3 moving from a process where disclosure letters were manually generated to an automated process to remove the potential for human error; and
  - 20.4 introducing an additional quality assurance check.
21. On 28 April 2022, HSBC refunded borrowers who were provided with late initial and variation disclosure after 6 June 2015. The refund amount was calculated on the costs of borrowing of a five-day delay in receiving disclosure, except in cases where the borrower had made a change to the scheduled date of payment. For such cases, HSBC returned the costs of borrowing between the date of the change and the date that the next continuing disclosure statement was provided. A minimum of \$10 was paid to each affected borrower, amounting to \$162,772 in total.
22. HSBC sent corrective disclosure to guarantors on 7 April 2022. HSBC noted that it had not enforced any guarantees on the loans where it had given late disclosure. As a result, HSBC has not provided any remediation to affected guarantors.

**The Commission's views**

23. The Commission opened an investigation as a result of the self-report. HSBC has cooperated with the Commission throughout the investigation and complied with all voluntary requests for information made by the Commission. In addition to HSBC's correspondence with the Commission, we have reviewed a number of documents,

including sample customer files, the methodology used to identify instances of delayed disclosure, remediation calculations, and corrective disclosure statements.

*Likely initial disclosure breaches – borrowers and guarantors*

24. Section 17 of the CCCF Act requires every lender to disclose to the borrower as much of the key information set out in Schedule 1 as is applicable to the contract, *before* the contract is entered into.
25. Section 25 of the CCCF Act requires every lender to disclose to the guarantor the terms of the guarantee and the key information set out in Schedule 1 as is applicable to the consumer credit contract, *before* the guarantee is given.
26. We consider that HSBC is likely to have breached its obligations under both sections 17 and 25 of the CCCF Act when it entered into the temporary overdraft agreements. This is because initial disclosure was not provided to borrowers and guarantors until *after* HSBC entered into the agreements or guarantees.

*Likely variation disclosure breaches – borrowers*

27. Section 22 of the CCCF Act requires every lender to provide variation disclosure to the borrower when a change has been agreed between the parties. Disclosure must be provided before the change takes effect, except in certain circumstances.
28. The Commission's view is that HSBC is likely to have breached section 22 of the CCCF Act by providing late or inadequate variation disclosure to borrowers when it agreed to variations that increased the borrowers' obligations under the home loans.
29. The Commission has reached this conclusion as variation disclosure was sent, on average, 3.5 working days after the change took effect, when HSBC agreed to changes that did not reduce the borrower's obligations or extend the time for payment. Specifically, these changes involved:
  - 29.1 a break or change to a fixed or floating interest rate;
  - 29.2 a reduction to the borrowing term or credit limit;<sup>3</sup> or
  - 29.3 a change to the payment amount, frequency or scheduled payment date.
30. In these situations where the borrower's obligations under the home loan increased, HSBC was required to provide disclosure prior to the change taking effect.

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<sup>3</sup> As of 20 December 2019, lenders must disclose to borrowers decreases to the credit limit within 5 working days of the change taking effect, in accordance with sections 22(3)(d) and 22(4) of the CCCF Act. However, prior to 20 December 2019, section 22(4) of the CCCF Act did not expressly capture decreases to the credit limit, unless the change resulted in a reduction of the borrower's obligations.

31. The Commission notes that HSBC has relied on the provision of the next continuing disclosure statement where there was a change in a payment date. The Commission is of the view that the content of the next continuing disclosure statement was insufficient to meet section 22 requirements as it did not disclose “the full particulars of the change”. The Commission considers that before 1 December 2021, disclosure of “full particulars of the change” required disclosure of both the agreed change and the effect of the agreed change on any of the remaining key information in Schedule 1 of the CCCF Act.<sup>4</sup>
32. However, solely for the purposes of remediating affected borrowers, the Commission acknowledges that HSBC calculated the costs of borrowing from the date variation disclosure should have been provided to the date of the next continuing disclosure statement.

*Likely variation disclosure breaches – guarantors*

33. Section 26 of the CCCF Act requires every lender to provide variation disclosure to guarantors when a variation to the contract is made. Where the variation occurs because of an agreement between the lender and the borrower, disclosure must be made within 5 days of the day of the lender and the borrower agreeing to change the contract.
34. We consider that HSBC is likely to have breached its obligations under section 26 of the CCCF Act by providing disclosure to the guarantor late when an agreed change to a home loan increased the borrower’s obligations. We also consider that HSBC likely breached section 26 by failing to provide variation disclosure to guarantors when it agreed to change the scheduled payment date.

*Likely responsible lending breaches*

35. Sections 9C(2)(a)(ii) and (iii) require lenders to exercise the care, diligence, and skill of a responsible lender before entering into agreements to provide credit and in all subsequent dealings with the borrower and guarantor.
36. In our view, the likely breaches of the initial disclosure and variation disclosure provisions set out above also constitute likely breaches of the responsible lending principles. In particular, sections 9C(2)(a)(ii) and (iii) because HSBC lacked the care, diligence, and skill required of a responsible lender when providing disclosure to borrowers and guarantors. The Commission notes that the late disclosure issues persisted for a number of years before they were identified and rectified by HSBC.

**Warning**

37. After weighing up the factors set out in our Enforcement Response Guidelines, the Commission has decided it is appropriate to conclude our investigation into HSBC for

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<sup>4</sup> See [Commerce Commission Disclosure for Lenders Guidelines](#), Part E for further guidance.

the likely breaches of sections 9C(2), 17, 22, 25 and 26 of the CCCF Act by issuing this warning letter.

38. The Commission has taken the following key factors into account:
- 38.1 the number of affected borrowers is limited and HSBC has remediated borrowers affected by the initial and variation disclosure issues after 6 June 2015;<sup>5</sup>
  - 38.2 corrective disclosure was provided to affected guarantors and no guarantees were enforced during the likely disclosure breach so there is limited harm to guarantors;
  - 38.3 HSBC proactively self-reported the issue to the Commission and subsequently co-operated with the investigation; and
  - 38.4 HSBC has made changes to its processes following the discovery of the disclosure issues. HSBC has taken active steps to ensure compliance with the disclosure obligations under the CCCF Act going forward.
39. This warning records our view that the conduct which HSBC engaged in is likely to have breached the CCCF Act and that legal action remains available to the Commission in future if the conduct continues or is repeated.

#### **Consequences of the warning**

- 40. This warning letter is public information and will be published on the Commission's case register on our website. We may make public comment about our investigation into HSBC and the conclusions we have reached, including issuing a media statement which will also be available on our website.
- 41. We may draw this warning letter to the attention of the Courts in any subsequent proceedings brought by the Commission against HSBC.
- 42. Please note that our decision to issue this warning letter does not preclude any other person or entity from taking private action through the Courts.

#### **Penalties for breaching the CCCF Act**

- 43. Only the Courts can decide if there has been a breach of the CCCF Act. The potential penalties of each of the likely breaches of the CCCF Act are set out below.
- 44. Where a lender fails to comply with section 17 by not providing timely initial disclosure, it may:

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<sup>5</sup> Note that the Commission does not agree that continuing disclosure statements constituted corrective variation disclosure in the case of borrowers who made a change to scheduled payment dates.



- 44.1 Be required to refund the costs of borrowing paid by borrowers during the period in which the lender failed to comply with section 17, in accordance with sections 48 and 99(1)(A).
  - 44.2 Be required to pay statutory damages to affected borrowers in accordance with sections 88 to 92.
  - 44.3 Be issued with an infringement notice and be required to pay an infringement fee of \$1,000 per notice.<sup>6</sup>
  - 44.4 Be in breach of an infringement offence and fined up to \$10,000 in the case of an individual and \$30,000 in the case of a company in accordance with section 102A.
45. Where a lender fails to comply with section 22 by not providing timely or adequate variation disclosure, it may:
- 45.1 Be required to refund the costs of borrowing paid by borrowers during the period in which the lender failed to comply with section 22, in accordance with sections 48 and 99(1)(A).
  - 45.2 Be required to pay statutory damages to affected borrowers in accordance with sections 88 to 92.
  - 45.3 Commit an offence and be liable on conviction of a fine of up to \$200,000 in the case of an individual and \$600,000 in the case of a company, in accordance with section 103.
46. Where a lender fails to comply with section 25 or 26 by failing to provide timely guarantor disclosure, it may:
- 46.1 Be required to pay statutory damages to affected guarantors, in accordance with sections 88 to 92.
  - 46.2 For a section 25 breach, be issued with an infringement notice and be required to pay an infringement fee of \$1,000 per notice<sup>7</sup> or be liable to an infringement fine of up to \$10,000 in the case of an individual and \$30,000 in the case of a company, in accordance with section 102A.
  - 46.3 For a section 26 breach, commit an offence and be liable on conviction of a fine of up to \$200,000 in the case of an individual and \$600,000 in the case of a company, in accordance with section 103.

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<sup>6</sup> Refer to regulation 4 of the Credit Contracts and Consumer Finance (Infringement Offences) Regulations 2015.

<sup>7</sup> Ibid.

47. Where a lender fails to comply with sections 25 or 26 by not providing disclosure at all, it may be liable to an infringement fine of up to \$200,000 in the case of an individual and \$600,000 in the case of a company, in accordance with section 103.
48. Where a lender fails to comply with section 9C by failing to exercise the care, diligence, and skill of a responsible lender, it may:
  - 48.1 Be subject to injunction orders.
  - 48.2 Be ordered to pay the losses or damages of a borrower, including exemplary damages or have a credit contract re-opened.
  - 48.3 Where the breach occurred after 19 December 2019, the lender may also be required to pay a pecuniary penalty of up to \$200,000 in the case of an individual and \$600,000 in any other case, in accordance with section 107A.

**Further information**

49. We have published a series of fact sheets and other resources to help businesses comply with the CCCF Act and other legislation we enforce. These are available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz).
50. The CCCF Act and other legislation can be viewed at [www.legislation.govt.nz](http://www.legislation.govt.nz).
51. Thank you for your assistance with this investigation. Please contact [REDACTED] on [REDACTED] or [REDACTED] if you have any questions in relation to this letter.

Yours sincerely

[REDACTED]

[REDACTED]

Credit Investigations and Compliance Manager

Cc: [REDACTED]