

Commerce Commission  
Competition and Consumer Branch  
Level 13, 55 Shortland Street  
Auckland 1143

13 March 2020

By email: [fitandprobersubmissions@comcom.govt.nz](mailto:fitandprobersubmissions@comcom.govt.nz)

1. This submission to the Commerce Commission (**Commission**) is made by FlexiGroup (New Zealand) Limited (**FlexiGroup, we, us**) in respect of the 'fit and proper' assessment criteria contemplated by the Commission in the Criteria for Certification under the Credit Contracts and Consumer Finance Act 2003 consultation paper (**Proposed Criteria**).

### Background

2. FlexiGroup is an innovative financial services company offering a wide range of consumer credit products to New Zealanders. FlexiGroup supports the establishment of a minimum standard of probity and competence for directors and senior managers of lenders under consumer credit contracts.
3. We take this opportunity to submit on aspects of the Proposed Criteria which should be amended to ensure that the proposed standard for directors and senior managers is clear, reasonable, and easy to understand. We submit on both categories of 'fit and proper' assessment – probity, reputation and financial integrity (**Probity**), and competency and capability (**Competence**).
4. FlexiGroup does not seek confidentiality for these submissions. We would be happy to speak to our submissions or otherwise engage further on our points.

### Summary of our submissions

5. Our submissions have two main themes. First, we consider that there are concepts in the Proposed Criteria that should be clarified to avoid confusion. Second, we consider that some details should be expressly excluded from consideration.

### Clarity

#### *Financial soundness*

6. Being "financially sound" (12.1 of the Proposed Criteria) appears to be a criterion which applies to a lender rather than a director or senior manager. We do not consider an individual's "financial soundness" impacts their fitness to lead a consumer lender (except where the individual is bankrupt). Although FlexiGroup is aware that a person's financial

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position may impact their job performance in extreme circumstances, other criteria are likely to be engaged. Accordingly, we submit that either:

- a. a definition for “financially sound” should be provided (i.e. that this means not having been declared bankrupt in the past 10 years, or similar); or
- b. this limb of the definition of ‘fit and proper’ should be removed.

#### *Taking factors into account*

7. The Proposed Criteria should make clearer that the lists of criteria in Tables 1 and 2 will inform the Commission’s consideration as to Probity and Competence, but that the application of one of the criteria to a person will not necessarily disqualify that person from being ‘fit and proper’. For example, it is unlikely to be evidence of being unfit for a director or senior manager of a significant entity that the entity had received a warning or caution from a regulator. The Proposed Criteria should make it clear that each item in Tables 1 or 2 is a factor which the Commission will consider altogether.
8. We proposed the following language as a new paragraph 13.3:
  - a. *“The criteria in Tables 1 and 2 will be taken together in the Commission’s consideration as to whether a person is fit and proper. The application of one or more of the criteria to a person will not necessarily disqualify that person from being certified as ‘fit and proper’.”*

#### *Not all directors need to have each capability*

9. Boards are made up of individuals with different areas of strength who combine their skills to effectively govern. The Proposed Criteria Should make clearer that not every director needs to have all the relevant knowledge, experience and ability to understand the technical requirements of the business, but that this requirement applies to the board of directors as a whole.
10. We propose that paragraph 15.1 is amended as follows:
  - a. *“the relevant knowledge, experience and ability to understand the technical requirements of the business, when taken with the relevant knowledge, experience and ability to understand the technical requirements of the business of each other director or senior manager”.*

#### *Criterion 6 of Table 1 could be more clear*

11. Criterion 6 of Table 1 also refers to an individual having held a directorship or senior management role of an entity during which the entity received a “warning or caution” in New Zealand. The Proposed Criteria should clarify what is caught by the terms “warning” or

“caution”. As you are aware, there is a large spectrum of methods used by regulators to encourage best practice, many of which fall short of a formal warning or caution. It would be helpful to clarify this criterion by adding the word “formal”.

*Criterion 10 of Table 1 is unclear*

12. We consider that it is unclear whether criterion 10 of Table 1 applies to a lender’s previous application for certification, or to the individual. We propose criterion 10 of Table 1 is amended as follows:
  - a. “Has *been a director or senior manager of a person who has had a previous application for certification refused by the Commerce Commission.*”

*Senior managers*

13. The definition of ‘senior manager’ for the purposes of the Credit Contracts Legislation Amendment Act 2019 implies that a senior manager can be someone not directly employed by the lender being certified. This should be expressly stated in the Proposed Criteria, to avoid potential confusion. This can be done by way of a footnote to paragraph 11.

**Exclusions**

*Solvent liquidations*

14. Criterion 4 of Table 1 sets out that the Commission will consider whether a director or senior manager has previously been a director or senior manager of an entity that has been involved in insolvency procedures. The clear intent of this criterion is to capture where a person has been a director or senior manager of an entity which has been mis-managed, leading to its insolvency. We consider that, to avoid confusion, the Proposed Criteria should expressly exclude solvent liquidations or other forms of solvent restructuring from the list at criterion 4 of Table 1.

In the meantime, if you have any further questions please do not hesitate to contact me.

Yours sincerely,



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