

A credit law guide for consumer advisers helping people in debt

The Commerce Commission (the Commission) is the enforcement agency for fair trading and credit laws that protect the interests of consumers. We work with consumer advisory services to help monitor trade practices in consumer credit markets and identify areas of unlawful conduct and systemic harm.

The following pages provide guidance on the Credit Contracts and Consumer Finance Act 2003 (CCCFA) and Credit Contracts and Consumer Finance Regulations 2004 (Regulations) governing lenders. They also contain **Red Flags** which we have developed to alert you to areas we would like to hear about and to help you assist your clients by identifying potential unlawful conduct.

This guidance is not exhaustive and is not intended to be legal advice or legally binding.

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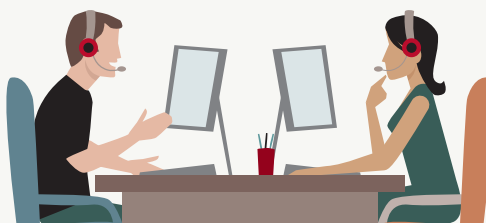
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How to use Red Flags

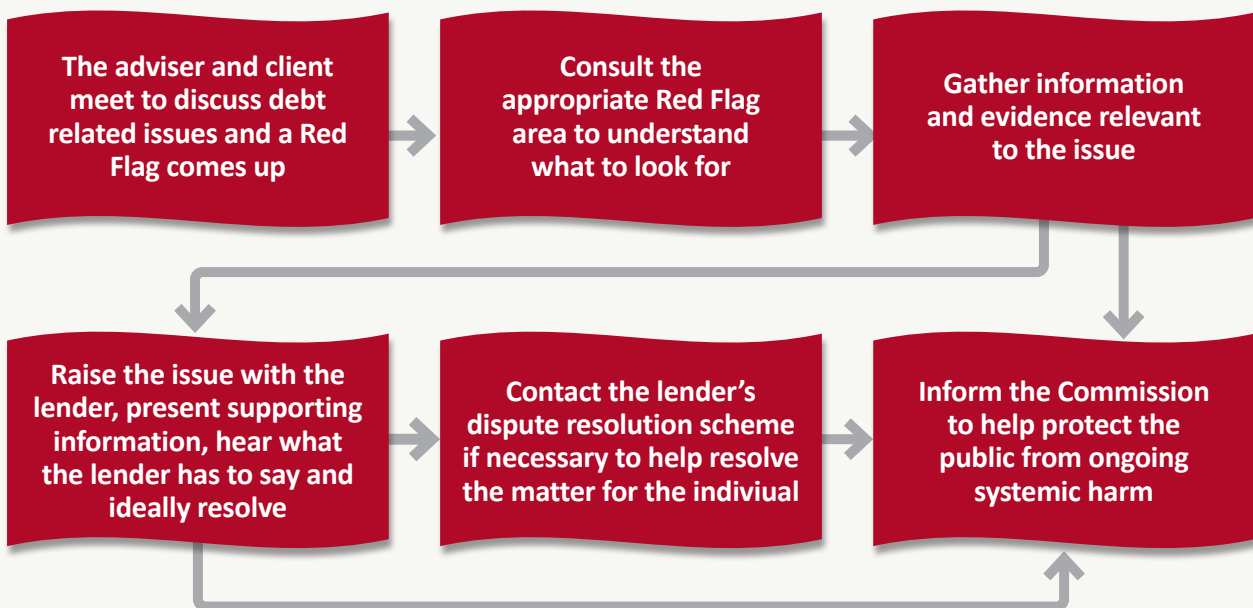
This resource is designed to be part of your workflow as a consumer adviser when meeting with clients and working with lenders. It sets out the lender's legal obligations (the law) when providing consumer credit and the 'Red Flags' typically encountered by consumer advisers. It can help you deal with situations where you suspect unlawful conduct has caused hardship and financial detriment to your client.

Information provided about the law highlights key provisions that are most likely relevant to

your work. If you need further guidance please get in touch with us, but you can also refer to the CCCFA or Responsible Lending Code for more provisions that may be relevant to your client.

Some words in this guide are defined terms and a glossary has been provided for your reference.

In this guide, a 'lender' is a person or a business that provides credit under a consumer credit contract (this includes mobile traders) and a 'loan' is a consumer credit contract (this includes credit sales entered into by mobile traders).



The role of the Commission is to protect the public from unlawful conduct and therefore we cannot seek outcomes on behalf of individuals, but dispute resolution schemes can. If trying to work out a reasonable outcome with the lender fails, you can contact their dispute resolution scheme to assist with a resolution. This is a free service. **You can complain to both the lender's dispute resolution scheme and the Commission.**

When informing the Commission about suspected unlawful lender behaviour, you can choose to either notify us or make a formal complaint.

Notify

This is an option if your client is reluctant to make a formal complaint. You will need to provide at least the lender's name if possible and a brief outline of what you believe is unlawful. The Commission will not necessarily act on this information alone, but it helps us understand lender behaviour and whether issues are emerging or systemic.

Send **notifications** to:
notify@comcom.govt.nz

Formal complaint

If your client is willing to speak with us about their experience and can provide evidence of suspected unlawful conduct, please send the Commission a formal complaint. The Commission may investigate and may take action that ranges from providing the lender with the appropriate guidance and education to more serious enforcement actions such as legal proceedings. Our goal is to promote compliance with the law. Your client's experience may help to stop similar experiences and harms from happening to others.

Send **formal complaints** to:
contact@comcom.govt.nz

Mobile traders and door-to-door sellers

The Law

From 1 June 2020 all contracts from mobile traders (for example truck shops and door-to-door sellers) are subject to the CCCFA.



Mobile traders must, among other things:

- comply with the lender responsibility principles
- complete an affordability and suitability assessment when making new agreements or increasing the credit limit
- be registered on the Financial Service Providers Register (FSFR) and belong to a dispute resolution scheme
- be certified by the Commission
- when advertising regular payments, display the total amount payable if known at the time.

Red Flags

You come across a new mobile trader you have not heard of before

You can search for the company on the FSFR. They must be a member of a dispute resolution scheme and recorded as certified to provide consumer credit (or have an exemption from certification). If not, the contract may not be enforceable.

Your client was a vulnerable borrower and felt pressured when entering into the contract and cannot cancel it or the cancellation fee is prohibitive

Mobile traders have a responsibility to treat the borrower reasonably and ethically and to assist borrowers so that they can understand the contract. They should also have systems in place to detect whether borrowers may be vulnerable because they have an increased duty of care when dealing with vulnerable borrowers. If the lender responsibility principles have been breached, the lender may have to refund the costs of borrowing.

Your client did not receive the goods in the time frame promised by the trader and the explanation is unsatisfactory

Mobile traders must not mislead consumers or make promises they are not able to deliver on. Your client may be able to cancel the contract before they receive the goods. Review the contract for your client's options. Other legislation also provides a way to cancel that may apply: see sections 36F and 36M of the Fair Trading Act (FTA) and section 5A of the Consumer Guarantees Act (CGA) 1993.

Your client fell into arrears soon after entering into the contract because the payments were unaffordable

See Red Flag area 7 about the rules for affordability and suitability assessments and Red Flag area 3 covering due diligence duties.

If you see these issues or have other problems in this area, notify us at notify@comcom.govt.nz or send a formal complaint to contact@comcom.govt.nz. For more about what you can do, see Next Steps on page 17.

High-cost loans (50% interest pa or more by itself or a combination)

The Law

High-cost lenders must:

Interest and fees

- not collect more than twice the loan advanced. For example, if the borrower borrowed \$300, the total payable must not exceed \$600 including any related loans such as top ups
- not charge compound interest, which is interest on interest
- not charge more than .8% per day (292% pa) including all interest and fees
- be able to explain how default fees exceeding \$30 in total are reasonable under the CCCFA.



Repeat borrowing ban

- Not provide another loan to someone who:
 - already owes money on a high-cost loan to another lender, or
 - owed money on a high-cost loan to another lender within the last 15 days, and/or
 - has had two or more high-cost loans within the last 90 days.

Disclosure

- Disclose:
 - that the loan is a high-cost loan
 - the effects of the interest and fees cap, including the maximum costs of borrowing and how those costs are calculated, and the total amount recoverable
 - a statement that their dispute resolution service is free, and
 - when advertising in print, that financial mentoring services and dispute resolution schemes are available.

Red Flags

Your client experienced issues concerning interest and fees, repeat borrowing or disclosure

You can let the lender know what you think has been breached and ask them to remedy it. For example, you can ask the lender to refund all the costs of borrowing paid (all interest and fees charged) if the repeat borrowing ban has been breached or mandatory disclosure was not provided.

In the event of:

The interest rate charge appears to be increasing on the loan statement

This could indicate the interest is compounding. You can ask the lender whether the interest is compounding or simple interest. If it's compounding, you can ask them to recalculate the interest and refund your client the difference.

The loan balance is more than double the amount borrowed

You can ask the lender to refund or credit the excess charged.

The default fees in total exceed \$30

The lender should be able to justify why the default fees exceed \$30 in total per loan. You can ask the lender to explain the 'transaction-specific costs' incorporated into the default fees; you can ask the lender to reduce the fee and refund the amount overcharged if you're not satisfied with the lender's explanation.

Your client falling into arrears soon after entering into the contract because the payments were unaffordable

See Red Flag area 7 about the rules for affordability and suitability assessments.

If you see these issues or have other problems in this area, notify us at notify@comcom.govt.nz or send a formal complaint to contact@comcom.govt.nz. For more about what you can do, see Next Steps on page 17.

Certification and due diligence duties

The Law

Certification *(from 1 October 2021)*

- All lenders must be registered on the FSPR and they must be certified by the Commission (some exemptions apply).
- For a lender to become certified, each director and senior manager within the company must be assessed as a fit and proper person to hold their positions. The assessment considers whether they are financially sound, honest, reputable, reliable and competent to do the job.

Due diligence duties *(from 1 December 2021)*

- Each director and senior manager of a lender is personally liable to ensure the lender:
 - has systems (policies, procedures and practices) that are compliant with the CCCFA and Regulations, and that its employees and agents are following those systems
 - has methods in place to systematically identify system deficiencies
 - promptly remedies those deficiencies when discovered.

Red Flags

Your client owes money to a lender you have not come across before

The lender is not certified but appears to be charging interest and fees on debt

The lender is using an unexpired FSP number (deregistered) on their disclosure statements

For the above Red Flags, lenders must be registered on the FSPR and listed as a creditor providing consumer credit and recorded as being certified or exempt from certification (you can check this at www.fsp-register.companiesoffice.govt.nz). If they are not, the contract may not be enforceable. Ask the lender whether they have applied to be certified as applications take at least two months to process.

You encounter issues with a lender that are causing your client financial detriment or hardship and appear to be related to a policy, process or practice

Complain to the lender as soon as possible and provide supporting evidence or explain why you think it's a system issue. Complaints are a method to detect system deficiencies. Your complaint could help the lender detect if there is an issue with its systems. If so, the lender should investigate the root cause and remedy the cause of the problem in a timely manner. You can talk to the lender about the detriment and what remedies might be appropriate. Directors and senior managers are personally liable if they breach their due diligence duties; they can be liable for fines of up to \$200,000, statutory damages and/or other compensation.



If you see these issues or have other problems in this area, notify us at notify@comcom.govt.nz or send a formal complaint to contact@comcom.govt.nz. For more about what you can do, see Next Steps on page 17.

Advertising

The Law

Lenders must ensure their advertising is stated in plain language in a clear, concise and intelligible manner.

From 1 December 2021, lenders must:

- provide key information about their loans in the same language used in their advertisements within the last 6 months if:
 - the language is different to the language used in the loan agreement, and
 - the steps are necessary to ensure the borrower and/or guarantor can make an informed decision about the loan agreement and/or guarantee

- not advertise using language that suggests no questions will be asked, or borrowers' circumstances will not be considered, for example 'no credit checks' or 'bankrupts OK'
- state any mandatory fees if advertising interest free contract terms
- state that responsible lending criteria will apply if advertising approval speed in minutes or hours, and
- display the total price, if known at the time, if the advertisement states a regular payment amount, for example \$20 a week.



Red Flags

Your client took out a loan because the advertising suggested a speedy approval, no questions would be asked, and/or their circumstances would not be considered

Ask your client about their loan application experience including when and where they saw the ad (online, text, radio etc). Advertisements must not represent that the lender will not fully inquire into the borrower's circumstances or that the loan has already been approved if affordability and suitability assessments have not been completed. Find out from your client whether questions were in fact asked. If no questions were asked, see Red Flag area 7 about the rules for affordability and suitability assessments.

The lender provided the loan agreement in a different language, (eg, English) to the language in which it was advertised. Things have happened that were unexpected because your client did not understand the loan agreement due to language barriers

You can ask the lender how they assisted your client to understand the loan agreement. If the lender didn't pick up that language was a barrier,

ask about their processes to identify issues with language and understanding. If the lender does not have processes or failed to follow them, you can complain to the lender.

You notice a flyer advertises a weekly price and it does not show the full price payable, but the small print provides a way to calculate it

This would suggest the full price could have been known at the time and therefore should have been disclosed in a prominent way. You can complain to the lender if the total price was not displayed and should have been known at the time of the advertisement; your complaint could help the lender detect if there is an issue with its systems.

You've worked out an arrangement with a lender to pay off your client's current debt, but the lender continues to send your client personalised ads to enter into new credit arrangements or top ups

Lenders must act with care, diligence and skill at all times including when advertising to provide credit. The lender should know your client is struggling to pay off current debt if they are working with you as the client's representative and you can ask the lender to stop sending offers for more credit to your client.

If you see these issues or have other problems in this area, notify us at notify@comcom.govt.nz or send a formal complaint to contact@comcom.govt.nz. For more about what you can do, see Next Steps on page 17.

Disclosure

The Law

When arranging a new loan, a lender must:

- provide mandatory initial disclosure information before the contract is entered into, including information about disabling devices if these are installed (this information is set out in Schedule 1 of the CCCFA) – Note: disclosure can be provided in a series of documents
- ensure disclosure is not misleading or confusing and is written in plain language
- not charge costs of borrowing until the required disclosure is provided.

During the contract term a lender must:

- provide certain information when the contract is varied, for example, when the credit limit increases
- provide continuing disclosure at least every six months
- when the lender sells the contract to another lender, provide the borrower and guarantor (if they can be found) with certain information, and

→ from 1 December 2021:

- in a prominent manner, provide information about financial mentoring services to the borrower if the borrower has defaulted in payment or caused their credit limit to be exceeded; makes a hardship application; and/or the lender declines a high-cost loan application
- in a prominent manner provide information about dispute resolution services to the borrower if they make a hardship application and/or complain about enforcement action (for example, debt collection), and
- before debt collection, provide certain disclosures required by the Regulations (see page 19 for details).

When disclosure is requested, such as a copy of the loan contract or statement, the lender must provide that disclosure within 15 working days in most circumstances. Note a fee may apply.

Lenders must ensure their standard form contract terms (and costs of borrowing) are clearly accessible on their website, if they have one.

Red Flags

Your client does not remember receiving documents when the lender was required to make certain disclosures

You can ask the lender when and how they made their initial disclosure (it may have been sent by email) and how they assisted your client to understand it. You can request copies of these documents.

The required disclosure, (such as the right to cancel, how to apply for unforeseen hardship and disabling devices if relevant, etc), is missing from the loan contract.

The lender may not be able to enforce the contract (make your client pay costs of borrowing or take debt enforcement action) until it makes correct initial disclosure. This also means your client can cancel the contract at any time, without penalty, until the corrective disclosure is made (your client will still need to pay back the balance of

the principal borrowed). You can ask the lender to refund or credit the costs of borrowing until corrective disclosure is made.

Finally, if a lender misrepresents its right to enforce the contract where it has not made correct disclosure, the lender is likely to breach the FTA.

You have asked the lender for copies of documents such as contracts and loan statements, but 15 working days have passed, and you have had no reply

You can complain to the lender and if necessary, their dispute resolution scheme. Breaches of request disclosure are an offence and the lender can be liable for fines up to \$600,000.

You cannot find a lender's standard form contract terms and the costs of borrowing on their website

Let the lender know its standard form contract terms and costs of borrowing are not clearly visible to you. Give them an opportunity to correct this as they can be liable for infringement fines of up to \$30,000.

If you see these issues or have other problems in this area, notify us at notify@comcom.govt.nz or send a formal complaint to contact@comcom.govt.nz. For more about what you can do, see Next Steps on page 17.

Lender responsibility principles

The Law (see section 9C of the CCCFA)

Lenders must:

- exercise the care, diligence and skill of a responsible lender at all times including when advertising, before entering into an agreement, and in all subsequent dealings
- make reasonable inquiries to be satisfied that the borrower can make the loan repayments without suffering substantial hardship. From 1 December 2021, the Regulations set out the enquiries lenders must make when conducting a full affordability assessment

- assist the borrower (and the guarantor if applicable) to make an informed decision; and to be reasonably aware of the full implications of the loan, including credit related insurance if relevant
- treat the borrower and their property in a reasonable and ethical manner including when breaches occur or when other problems arise
- from 20 December 2019, not enforce guarantees if the lender failed to comply with the affordability assessment requirements.

Red Flags

Your client does not understand why certain things have happened and was not aware of or fully understood important terms in the contract

You can ask the lender how they assisted your client and were satisfied your client understood the implications of the loan, and does the lender have any evidence of the client's understanding? If you aren't satisfied with the lender's answer, explain why you disagree and what issues it appears to have caused.

The lender is not working co-operatively with you, for example they continue to contact your client when the client has made it clear to the lender they are working with you

Lenders must treat the borrower in an ethical and reasonable manner throughout the life of the contract. You can make a complaint to the lender explaining your client's circumstances (they may be vulnerable). The Responsible Lending Code has guidance on how lenders should work with borrowers' representatives.

Your client was induced into taking out a new loan or a top up they did not want because the lender coerced them through emails, text, phone calls and/or door knocking

Ask your client roughly how many emails, texts or phone calls they received and over what period. Lenders must treat borrowers in an ethical and reasonable manner throughout the life of the

contract and should be conducting affordability and suitability assessments for a new loan or top up. If your client agreed under these circumstances, and is now struggling to pay, you can complain and request copies of the affordability and suitability assessments from the lender.

Your client (a guarantor) provided a guarantee but would not be able to afford the payments if called upon

The lender may not be able to enforce the guarantee if the guarantee was entered into on or after 20 December 2019 and a compliant affordability assessment was not done. The lender may have to refund any money paid by the guarantor and release the guarantor from the guarantee. The lender could also face penalties of up to \$600,000.

Your client regularly spends money on lifestyle costs such as entertainment, tithing or gambling, and they recently entered into a new loan agreement and is struggling to pay because the lender failed to account for those costs

From 1 December 2021, lenders must consider 'regular or frequently recurring outgoings that the borrower is unwilling or unable to cease' when estimating expenses for the relevant period. You can request the lender's records that must show how they were satisfied the borrower could afford the repayments without suffering substantial hardship in light of those outgoings. For more about affordability assessments see pages 10 and 11.

If you see these issues or have other problems in this area, notify us at notify@comcom.govt.nz or send a formal complaint to contact@comcom.govt.nz. For more about what you can do, see Next Steps on page 17.

Affordability and suitability assessments (set out in the Regulations)

The Law

Affordability

From 1 December 2021, lenders must:

- As a general rule, make detailed inquiries and gather documentation to conduct a full income and expense estimate (full affordability assessment) for the relevant period when the borrower is relying on income to repay the loan.
- This also applies when the loan is varied, and the credit limit will increase.
- Lenders do not have to conduct a full affordability assessment when the loan is varied and the credit limit will not increase, for example with an unforeseen hardship application.
- The lender must also ask the borrower about any likely changes to their income (foreseen circumstances).
- **Verify income** based on reliable evidence or consider whether the source and amount are realistic, for example when assessing boarder income.
- Not solely rely on what the borrower tells them.
- **Estimate likely expenses** in a two-part process:
 1. Make an initial expense estimate from asking questions or obtaining reliable information and assess for any missed expenses. For example, health issues are revealed because the borrower receives a disability allowance, but health expenses were missed from the initial inquiries, and
 2. Verify expenses with reliable evidence and if necessary, adjust expenses to reflect a reasonable minimum cost if underestimated. If verification is not practical, take the higher of the initial expense estimate or a benchmark expense. Lenders must account for expenses that borrowers are unwilling or unable to give up, for example savings, tithing or gambling.

- Then **make a final assessment** to be reasonably satisfied that it is likely the borrower will make the loan repayments without suffering substantial hardship. This is on the basis that income exceeds expenses for the relevant period because there was an adequate surplus or buffers were included for income and expenses.

Record keeping

- Keep records about the inquiries made including the results of their assessment for new loans or top ups entered into from 1 December 2021.
- Those records must show how the lender used the information to be satisfied the borrower or guarantor (if relevant) could make the loan payments (including any relevant insurance contract) without suffering substantial hardship.
- Provide the records for their affordability assessment to the borrower or guarantor (or their representative) upon request for free and within 20 working days.

Suitability

From 1 December 2021, lenders must:

- Ask the borrower detailed questions to gather information about the purpose of the loan, the amount or credit limit, the term, and other prescribed information set out in the Regulations.
- Keep records including the result of the assessment. The records must show how the lender used the information to be satisfied the finance provided was suited to the borrower's requirements and objectives.
- Provide the records of their suitability assessment to the borrower (or their representative) upon request for free and within 20 working days.



If you see these issues or have other problems in this area, notify us at notify@comcom.govt.nz or send a formal complaint to contact@comcom.govt.nz. For more about what you can do, see Next Steps on page 17.

Red Flags

If any of these issues relate to the lender's policies, processes or practices, the lender's directors and/or senior managers could risk breaching their due diligence responsibilities (to ensure compliance with the CCCFA) for which they are personally liable. Breaches can lead to penalties up to \$200,000. Complaints should be taken seriously, and the law requires them to rectify any system deficiencies in a timely manner.

Affordability issues

Your client was in a cashflow deficit when they entered into a new loan or received a top up on an existing loan and are struggling to pay for the loan or basic necessities

Your client is having repayment difficulties because of foreseen circumstances at the time they entered into the loan

The lender is requiring the client to pay the loan from their benefit or wages and the balance of funds left to cover living expenses, including a buffer, is insufficient and the client is experiencing substantial hardship

Your client has prioritised loan repayments and forfeited expenditure on current financial commitments because the lender did not conduct a full affordability assessment on the grounds it was 'obvious' the borrower would not suffer substantial hardship due to previous repayment history or on other grounds

The lender has not provided the records of their affordability and suitability assessment within the required timeframe or the records fail to show how the lender could be satisfied the borrower could afford the loan

For all the above flags, from 1 December 2021, you can ask the lender for their affordability assessment and they must provide it within 20 working days for free. Failure to provide those records within the required timeframe can lead to penalties up to \$600,000.

Lenders must in most circumstances conduct a full affordability assessment to ensure that the borrower can meet their current financial commitments and there is a surplus or buffers have been provided for. **The assessment must show how the lender used the information gathered to arrive at their decision** (record keeping guidance is provided in the *Responsible Lending Code* at point 5.20). Lenders are specifically required to ask about any likely changes to income (foreseen circumstances).

Lenders' records must show why they thought it was 'obvious' the borrower wouldn't experience substantial hardship, if that was the reason they did not conduct a full affordability assessment. In most circumstances, especially when initial inquiries show income to be low or moderate and/or expenses to be relatively high, lenders will need to conduct a full affordability assessment.

You can ask what inquiries the lender made about your client's circumstances, what your client told them and what steps they took to verify certain income or expenses as lenders can no longer rely solely on what the borrower tells them. For benefit income, lenders should be aware that certain benefits or supplements are provided for specific expenses and if incorporating that income, the corresponding expense should also be accounted for.

You can complain to the lender about issues with affordability and it helps to provide some evidence (including your client's circumstances) about why you think the loan was not affordable from the outset. The lender may need to compensate your client.

Suitability issues

Your client wanted to borrow a certain amount (or required a certain amount – for example to buy a particular good) but the lender extended more credit than what was required

The lender must make reasonable inquiries about the purpose of the loan; this specifically includes asking the borrower about how much they want to borrow. The lender's records should record the amount requested and if more was loaned, record a reasonable explanation as to why. If you consider the amount extended was not suitable for your client, you can complain to the lender. The lender may need to reduce the credit limit and/or compensate your client if financial detriment was suffered.

Your client asked for a loan with the additional requirement of making regular top ups, but every time they make a top up, the lender cancels the existing loan and charges an establishment fee on the new total

Lenders must ask enough questions about the borrower's requirements and objectives to ensure the type of finance provided is suitable to meet those needs. If you consider the type of finance was not be suitable for your client, you can complain to the lender. The lender may need to compensate your client.

Add-on products (for consumer credit contracts)

The Law

Lenders must:

- make sure the add-on products are affordable and suitable – the Regulations prescribe the inquiries the lender must make
- assist borrowers to make informed decisions about their purchases
- refund the unused portion of add-on products if the loan is repaid early in certain circumstances, and
- from 1 December 2021, maintain records about how they assessed their borrowers' add-on products for affordability and suitability. Those records must be made available upon request to the borrower or their representative for free within 20 working days.

'Add-on products' are generally taken out at the time the loan is entered into; examples include repayment waivers, mechanical breakdown insurance, guaranteed asset protection insurance and payment protection insurance.

In this guide, when we refer to add-on products, we are only referring to those financed under a consumer credit contract.



Red Flags

You suspect the add-on product is not suitable for your client, for example, your beneficiary client was sold a payment protection product that provided little or no benefit

Lenders must make inquiries about product suitability and keep records from 1 December 2021 that specifically include factors that could identify ineligibility such as employment status, age etc. You can ask for those records. They must also act with care, diligence and skill when selling these products. You can complain if you believe the products were not suitable. Lenders may have to refund the cost of the product and you could also ask for a refund of the interest charged on the premium paid.

Your client does not realise they purchased extra add-on products or does not understand the product's limitations

Lenders, themselves or via their agents, must assist the borrower to reach an informed decision and to understand the implications of the products that were sold. You can request the records to see how the lender was satisfied the products met your client's requirements. If you think the product sold was not suitable for your client's needs, you can complain to the lender.

The total cost of the add-on products is disproportionately high compared to the cost of the amount borrowed

If you think the total costs of the add-on products seem excessively high in relation to the amount borrowed, talk to the lender about your concerns. If your client is having difficulty with loan repayments, you can ask for the lender's affordability and suitability assessment for the add-on products sold from 1 December 2021.

If you see these issues or have other problems in this area, notify us at notify@comcom.govt.nz or send a formal complaint to contact@comcom.govt.nz. For more about what you can do, see Next Steps on page 17.

Credit and default fees

The Law (see section 9C of the CCCFA)

Lenders must:

- ensure their credit and default fees are not unreasonable. It is a criminal offence to provide for a fee that is unreasonable

'Reasonable' means the fees cannot exceed the lender's own costs and losses. Lenders cannot profit from their fees, and their fees can only recover business costs that are closely connected to the transaction between the borrower and lender

- charge third party fees such as insurance premiums, warranties and broker fees at cost
- disclose all fees to be charged under the consumer credit contract, and
- describe fees accurately so they reflect what activity they are for. For example, a fee described as miscellaneous would not be allowed.



Red Flags

Fees that appear unusually high compared to others

From 1 December 2021 lenders must keep records about how they calculate their fees and make those records available to the Commission upon request or a dispute resolution scheme when relevant to a complaint. They should, however, be able to explain to borrowers if asked, the types of relevant activities that gave rise to the fees charged to the borrower.

Fees charged that were not previously disclosed or fees charged for actions that were never carried out

Lenders must refund any fees that were charged and not previously disclosed or charged for actions never carried out. Some of those actions could be recorded in their affordability assessment records which you can request and review if you are concerned. For example, if the lender charged a fee for a credit check that formed part of their affordability assessment, they should have recorded this when it was done.

A broker fee *and* the lender's establishment fee seem unusually high

Lenders can only recover costs through fees that they actually incur. For example, if their affordability assessment records show the broker has done much of the work associated with the establishment of the loan, the lender's own unusually high establishment fee may be unreasonable.

Percentage based fees

The Commission considers percentage-based fees run a high risk of being unreasonable. It is unlikely that a percentage-based fee will accurately recover allowable costs.

The debt collection costs (on CCCFA contracts) seem unusually high

Debt collection costs are default fees when a lender uses a debt collector to enforce the debt; those fees must also be reasonable (see our Credit Fees Guidelines on third party collection costs).

For each of the above Red Flags, you may want to complain to the lender about the level of the fee.

If you see these issues or have other problems in this area, notify us at notify@comcom.govt.nz or send a formal complaint to contact@comcom.govt.nz. For more about what you can do, see Next Steps on page 17.

Unforeseen hardship

The Law

Lenders must:

- assist the borrower to understand the loan agreement, including their right to apply for unforeseen hardship
- consider an application for unforeseen hardship when an eligible borrower applies in writing within a certain time frame
- provide a reason if an application for unforeseen hardship is declined



- if the application for unforeseen hardship is accepted, make variations in one of the following ways:
 - reduce the payments and extend the term
 - suspend loan repayments for a specified period, or
 - suspend the loan repayments for a specified period and extend the term, and
- ensure variations to a contract due to unforeseen hardship:
 - make it likely the borrower can meet their new commitment to the lender while also meeting their necessities and other financial commitments, and
 - are fair and reasonable to both the lender and borrower.

Red Flags

Your client was unaware of their right to apply for unforeseen hardship

The lender has obligations to assist the borrower to understand the agreement and to disclose hardship application information in the initial disclosure statement. You can ask the lender how they assisted your client to understand the agreement. If there was a failure to provide assistance and it has caused problems, such as incurring substantial costs associated with default, you can complain to the lender. The lender may need to provide compensation. Refer to Red Flag area 5 about disclosure if there was a failure to disclose the hardship application information in the initial disclosure statement.

The lender is making the unforeseen hardship application process onerous, such as requiring a full affordability assessment before approving a variation

Lenders do not need to conduct full affordability assessments when contract variations do not increase the credit limit. You can ask them why they are taking this approach when the Regulations provide an exemption. From 1 February 2022, chapter 12 of the Responsible Lending Code sets

out the types of relevant inquiries including asking the borrower how much they can afford. If the lender carried out a full affordability assessment and the process exacerbated your client's hardship, you can complain to the lender.

Your client entered into an unforeseen hardship arrangement but did not understand the effect of the variation

Lenders have a duty to assist borrowers with understanding the effect of variations. For example, when a loan payment is lowered, and the term extended, the lender should explain that this may increase the amount the borrower owes. Lenders should also make borrowers aware if their contracts include add-on products that would assist with the borrower's unforeseen hardship.

The lender has varied the contract, but you do not believe the new repayments are affordable for your client

You can talk to the lender about the situation and explain why you think the payments are unaffordable and provide some evidence to support your view. You can suggest a more affordable repayment amount. The Responsible Lending Code suggests lenders should consider information provided by a borrower's representative as if it were provided by the borrower.

If you see these issues or have other problems in this area, notify us at notify@comcom.govt.nz or send a formal complaint to contact@comcom.govt.nz. For more about what you can do, see Next Steps on page 17.

Debt collection (for consumer credit contracts)

The Law (see section 9C of the CCCFA)

Lenders must:

- treat the borrower ethically and reasonably when defaults have occurred
- not mislead borrowers. For example: by threatening court action that is not possible; continuing to collect debts included in an insolvency procedure; or mimic official court documents
- notify the borrower if the debt is sold and if they assigned their rights to a new creditor
- not enforce debts when a complaint has been made or when an unforeseen hardship application is being considered, and

- from 1 December 2021, provide certain disclosure before debt collection begins (see page 19 for details).

Note: lenders are responsible for the actions of their agents.

Additional note: credit reporting agencies do not allow disputed, statute barred or debts below \$125 to be listed on a person's credit report. This is set out in the Credit Reporting Privacy Code and the agencies' T&Cs.



Red Flags

Your client received no disclosure or missing disclosure prior to debt collection

Lenders must provide certain disclosures about the debt to be collected (see page on Key Dates), including: the name of the creditor; information about the original loan (enough to identify it); and a breakdown of the amounts owing including the extra costs associated with enforcement. If the lender failed to provide this *before* debt collection started or failed to provide the required information, they could face an infringement fine of up to \$30,000 as well as statutory damages.

A complaint can be made to the lender. If a complaint is made in writing, lenders must halt the enforcement process until the complaint is resolved (ie, corrective disclosure is made). You could ask the lender to consider providing your client with compensation.

The debt collector's conduct amounts to harassment and coercion

Lenders must treat the borrower reasonably and ethically and have policies and processes in place that ensure their systems are compliant with the CCCFA and Regulations. This includes how they train, instruct and manage their agents. Lenders are responsible for the conduct of their agents and could be liable for penalties of up to \$600,000 and damages if their agents breach the law. You can collect information about the client's experience and complain to the lender.

The debt collector has misrepresented rights they do not have, such as threats to take the borrower to court or list the debt against their credit report when they have no right to do so

Debt collectors are subject to the FTA which prohibits misleading and deceptive behaviour. The FTA applies to all debts collected, not just those under a consumer credit contract.

If you see these issues or have other problems in this area, notify us at notify@comcom.govt.nz or send a formal complaint to contact@comcom.govt.nz. For more about what you can do, see Next Steps on page 17.

Repossession

The Law

Lenders must:

- specifically identify the secured goods (general descriptions are insufficient) and disclose the right to repossess these in the contract
- accept goods returned voluntarily if a repossession warning notice was issued and treat the returned goods as if they were repossessed
- freeze the loan balance (as per the Statement of Account after sale) if one or more secured goods are repossessed and sold, and

- not take security over, or repossess, essential items (except when the borrower used the borrowed money to buy that good) and important documents eg, passports. Essential items include beds, cooking equipment, washing machines, heaters and refrigerators.

Repossession agents must provide copies of certain documents before repossession.



Red Flags

Your client had goods repossessed that were not security items or were prohibited security items

Lenders' repossession agents must provide a list of the security items to be repossessed along with other prescribed information. The lender will have to return goods taken illegally and could be prosecuted.

Your client has had goods repossessed but the balance owing is increasing

Lenders must provide a Statement of Account after any security items are sold. No further interest or fees, including debt collection fees must be added; the lender must refund any money in excess of that balance.

Your client has received multiple repossession warning letters (incurring extra fees) but the lender does not carry out the repossession

Lenders must treat the borrower reasonably and ethically throughout the life of the contract. If the lender's actions cause the borrower to believe the goods will be repossessed but it never actually happens, the lender risks breaching the FTA by misleading the borrower or misrepresenting their intentions. The fees may also be unreasonable if they are charged but the lender does not carry out the task associated with that fee.

If you see these issues or have other problems in this area, notify us at notify@comcom.govt.nz or send a formal complaint to contact@comcom.govt.nz. For more about what you can do, see Next Steps on page 17.

Next steps and making complaints

Raising harmful issues due to unlawful conduct is important so it can be addressed and does not continue to cause harm. Lenders should take your complaints seriously as they can expose system deficiencies with the lender's policies, processes or practices.

When raising an issue with a lender or making a complaint to a dispute resolution scheme or the Commission, you should gather supporting facts that show why you believe the lender has not followed the law.



Gather important information from the client:

- A vital piece of information is knowing when the agreement started. This determines what legal provisions apply (see the key dates page).
- Record a brief outline of your client's circumstances and experiences that are relevant to the issue. For example, if irresponsible lending is the issue, then collect facts that might show how your client suffered substantial hardship or how the loan made it worse and they couldn't afford the loan from the outset.
- Ask your client about the application process and whether the lender asked enough questions about their income, expenses including other loan repayments, current circumstances and about known circumstances that might affect future income. Also, whether they asked about the purpose of the loan and your client's needs (eg, a need for future top ups) and how much they wanted to borrow.
- Ask your client whether they received information about any credit related add-on products sold, and if they did, how the lender helped them to understand what they were buying.

Gather supporting facts (evidence)

- This may include: your client's loan contract; loan statements; insurance contract or policy terms; pay slips; or WINZ statements (these can show whether the lender used temporary benefit income to pay for long term loans).
- The lender's records for their assessment of affordability and suitability (only for contracts and credit limit increases after 1 December 2021).
- Any advertising you think is non-compliant including text messages or emails your client received.
- Previous correspondence with the lender if relevant to the issue.

Talk and/or complain to the lender

If you suspect the lender did not follow the law and your client is in financial difficulty or their difficulties have worsened because of that lender's loan or actions, you should talk to them about your concerns. If this does not resolve the issue, make a complaint to the lender. Be prepared with your reasons why and present any supporting evidence. Be clear about how you would like the situation to be rectified and whether compensation is appropriate and why. It is a good idea to set this out in writing.

Contact the lender's dispute resolution scheme if necessary

If you feel you are not able to work successfully with the lender or you don't agree with the outcome, you can complain to the lender's dispute resolution scheme (at no cost to your client). It will investigate on behalf of your client to reach a resolution. Any order made by the dispute resolution scheme, if accepted by your client, is binding upon the lender meaning they must comply.

Notify or formally complain to the Commission

Notifications are important because the information helps us understand lender behaviour and whether issues are systemic or emerging. It provides context to the complaints we receive, but the Commission will not necessarily act on this information alone.

Send notifications to: **notify@comcom.govt.nz**

If a formal complaint is made, we will assess this according to criteria such as the extent of the harm, the seriousness of the conduct and the public interest in the matter. We will then decide whether to take further action and there are many ways we can address unlawful activity; it doesn't always have to be investigated. Our goal is to promote compliance.

Send complaints to: **contact@comcom.govt.nz**

Key dates when certain provisions are in force

In most cases, the provisions apply to contracts or variations from that date. One notable exception is the consequences for irresponsible lending, which apply to lenders' *actions* from that date (including on existing contracts).

Date	What came into force	What this means
6 June 2015	Lender Responsibility Principles	Contracts and variations on or from this date are subject to these principles
6 June 2015	Penalties for non-disclosure equivalent to the costs of borrowing	For contracts failing to disclose essential information, the lender may have to refund or credit all the costs of borrowing
20 December 2019	Consequences for irresponsible lending	Civil pecuniary penalties of up to \$600,000 and statutory damages equivalent to the costs of borrowing may be payable under existing contracts and variations, for conduct breaches from this date
	Prohibition of enforcement on guarantees in some circumstances	If a lender failed to properly assess the guarantor's ability to fulfil their obligations as guarantor, they cannot enforce the guarantee
	Disclosure can be made via electronic platform	Disclosure can be made by via an electronic platform provided the borrower (and/or guarantor) has agreed to this, and the information remains accessible throughout the contract term
	Enforceable undertakings	The Commission can accept enforceable undertakings in relation to breaches of the CCCFA. This applies to conduct before and after 20 December 2019
13 January 2020	Infringement offences for failure to publish standard form contract terms and costs of borrowing	It is an infringement offence if a lender does not publish their standard form contract terms and costs of borrowing on their website and at their premises. The Commission can issue a lender with a fine of \$1,000 for each of these offences without having to bring legal proceedings
1 May 2020	New rules for high-cost loans (50% annual interest or more) including additional disclosure requirements for these loans	Contracts from this date cannot: <ul style="list-style-type: none"> • exceed more than 100% of the borrowed amount • charge compound interest Default fees which are more than \$30 in total are considered likely to be unreasonable
1 June 2020	Mobile trader credit sale contracts subject to the CCCFA	All mobile trader contracts not paid for in full or from that date are subject to the CCCFA
	Prohibitions on rate of charge and repeat borrowing for high-cost loans	The annual interest rate including fees cannot exceed 0.8% per day (292% pa) and borrowers cannot take out another high cost loan in certain circumstances
1 December 2021	Revised Responsible Lending Code (revised 1 February 2021)	Updated comprehensive guidance on the Lender Responsibility Principles (except for Chapter 12)
1 December 2021	Prescriptive affordability and suitability regulations	Lenders must make certain enquiries about the borrower's income, expenses and circumstances and keep records that show the loan was affordable and suitable
	Affordability assessments must be made before material changes take effect	If the credit limit increases or further advances are made (top ups), lenders must conduct an affordability assessment

Date	What came into force	What this means
	Record keeping on affordability and suitability assessments and fees Lenders must provide their affordability and suitability assessments to borrowers (or their advocates) on request	Lenders must keep records demonstrating: <ul style="list-style-type: none"> • compliance with their obligations to conduct affordability and suitability assessments • how they calculated their credit and default fees Requests should be made in writing and the assessment provided for free within 20 working days.
	Lenders must provide information about the loan in the same language as advertised	If advertising in another language within the last six months, the lender must provide key information about the loan in the same language as advertised if the lender believes it will assist the borrower's understanding
	Certification	Directors and senior managers of lenders must be assessed as fit and proper to carry out their respective positions, so the company can be certified. Registration on the FSPR to provide consumer credit will not be possible without certification (unless the lender has an exemption). Existing financial service providers will need to be certified at their first annual confirmation after 1 October 2021.
	Due diligence duties (directors' duties)	Directors and senior managers of lenders are personally liable for non-compliant policies, processes and practices or for not rectifying deficiencies when brought to their attention. They can face fines of up to \$200,000 and be liable for statutory damages equivalent to the costs of borrowing.
	New disclosure requirements	Lenders must provide certain information about debt collection before debt collection starts. In certain circumstances, they must also provide information about financial mentoring services and dispute resolution.
1 February 2022	Chapter 12 of the Responsible Lending Code (hardship)	This provides comprehensive guidance about how lenders should treat borrowers suffering unforeseen hardship.

Disclosures that must be made from 1 December 2021 *before* debt collection starts

Regulation 23 of the Regulations sets out the information that must be disclosed.

It includes:

- information about the underlying credit contract including information that will help the debtor identify it, eg, the purpose of the loan
 - how the borrower can make a complaint about the debt collector
 - the borrower's right to apply for relief when experiencing unforeseen hardship and contact details for budgeting services
- details from the last regular statement if lenders are required to provide them including:
 - the unpaid balance
 - the dates and amounts of each advance
 - the interest charges, and
 - amounts paid by the borrower
 - the amounts and descriptions of the fees charged by the debt collector
 - the rates of any ongoing interest charges, credit fees, and default fees that will be charged under the contract, if known at the time.

Vehicle finance

Issues with vehicle finance is an area of lending we hear a lot about because for many advisers' clients, their car is their most important asset.

Common problems we hear about from consumer advisors

- Irresponsible lending practices. *See page 9*
- The total cost of the finance arrangement is high compared to the value of the car, or the cost of repayments are high compared to income. *See page 10*
- Poor car quality and mechanical problems soon after purchase. *See page 12*
- The client prioritises car repayments but is not able to meet basic living expenses. *See page 10*
- The financed value of add-on products is costly and/or has questionable. *See pages 10–12*



Helping your client under the CGA when the car breaks down

The CGA is self-enforcing but the FTA prohibits traders (car dealers or lenders in this case) from making false or misleading representations about consumer rights under the CGA, such as suggesting it doesn't apply because it is illegal to contract out of the CGA.

Any issues relating to pre-existing conditions may be a failure of acceptable quality (taking into consideration the price paid) and a claim under the CGA can be made to the supplier to provide a remedy. Ask your client whether there were any claims made about the soundness of the vehicle when it was being sold.

If the car's problems are significant and the car is substantially unfit for purpose or not of acceptable quality due to safety issues, the car can be rejected. These are typically for issues where your client would not have purchased it if they had known about the extent of the issues. The supplier (the dealer in the first instance) must provide either a replacement or a refund (your client's choice) and any refund must be in cash. Any rejection should be made within a reasonable time from the discovery of the defect.



A notice of rejection to the supplier needs to be in writing stating the grounds (ie, why it failed). The supplier is responsible for providing the remedies under the CGA.

Claims to satisfy the consumer's right to redress – repair, replace or refund can be made against the supplier of the goods. The supplier is normally the trader that sold the goods. **With financed goods the lender will also be the supplier if the loan was arranged by the person who supplied the goods** (normally the car dealer) and the loan was used to buy the goods.

If you cannot reach a satisfactory resolution with the dealer or the lender, a complaint can be made to the lender's dispute resolution scheme or the Motor Vehicle Disputes Tribunal.

Lenders are responsible for compliant affordability and suitability assessments and the conduct of their agents

Lenders may meet the lender responsibility principles through agents or other persons (such as car dealers or brokers who arrange the finance), but the lender remains responsible for ensuring that these obligations are met. Lenders are also responsible for the conduct of their agents. Complaints about agents can be made to the lender.

Useful resources

Commerce Commission

Visit: www.comcom.govt.nz
Search: Consumer Credit



Community Law

Visit: www.communitylaw.org
Search: Our Law Centres



Consumer Protection

Visit: www.consumerprotection.govt.nz
Search: Consumer laws



Dispute Resolution Schemes

Banking Ombudsman

www.bankomb.org.nz | 0800 805 950



Financial Disputes Resolution Service

www.fdrs.org.nz | 0508 337 337



Financial Service Complaints Limited

www.fscl.org.nz | 0800 347 257



Insurance and Financial Service Providers Ombudsman

www.ifso.nz | 0800 888 202



The Financial Services Provider Register

www.companiesoffice.govt.nz
Search: Financial Service Providers Register



The Responsible Lending Code

(as at February 2021)

Visit: www.mbie.govt.nz
Search: Responsible Lending Code



For further help and guidance and to order copies of **Red Flags**, please email:
credit.advocacy@comcom.govt.nz

Glossary for the purposes of the CCCFA

Benchmark expenses	Expenses that can be based on recent and reliable statistical information about household expenditure.
Costs of borrowing	Credit fees, default fees, and interest charges (including default interest charges).
Credit limit	The maximum unpaid balance permitted under the credit contract.
Consumer credit contract	Where a person borrows money or buys goods for personal and domestic purposes on a deferred payment arrangement and can be charged interest, credit or default fees and/or security can be taken.
Eligible borrower for an unforeseen hardship application	When someone has suffered a hardship they could not reasonably have seen coming, such as illness or injury, loss of employment, the end of a relationship, or death of a partner or spouse, and as a result cannot meet their current payments but could if the contract was varied.
Harassment and coercion	The use of threatening or intimidating behaviour such as unreasonably frequent contacts or doing so in a way that would cause embarrassment. This also includes a continued demand for payment from borrowers in circumstances where it is known they have no ability to pay.
High-cost loan	A consumer loan where the annual interest rate, the weighted-average annual interest rate or the combined interest and default rates are over 50%.
Income	Net income from any source after tax, KiwiSaver or other superannuation contributions, and other similar deductions.
Expenses (listed outgoings)	Any of the following: <ul style="list-style-type: none"> • fixed financial commitments, including accommodation costs, insurance, rates, body corporate fees, school fees, and child support • payments of any debts (this includes the new debt being considered) • living expenses, including utilities, food and groceries, personal expenses (including clothing and personal care), other costs associated with dependants if applicable (such as childcare), medical expenses, and transport expenses, and • any regular or frequently recurring outgoings eg, savings, investments, gym memberships, entertainment costs, or tithing etc that must be included to assess relevant expenses and that the borrower is unable or unwilling to cease after the agreement is entered into or materially changed.
Mobile trader	Someone not operating from a fixed premises and offers or agrees to supply consumer goods to an individual; either under a credit sale, or where the goods are partly or fully financed by an associated company under a consumer credit contract.
Relevant expenses	Any listed outgoings for the relevant period (whether or not they fall due in or beyond that period).
Relevant period	A maximum of one year from the agreement start date.
Senior manager	A person, other than a director, whose position (not necessarily their title) allows them to exercise significant influence over the management or administration of an entity.
Substantial hardship	Someone is experiencing circumstances where they cannot meet their current financial commitments such as basic necessities (including payment of existing debts).
Vulnerable borrower	Someone unlikely to understand the nature of a transaction or the information provided possibly due to language barriers or basic understanding of financial matters. Also, if they appear to be under significant pressure to obtain credit or give a guarantee.

