

10 December 2019

[REDACTED]
The Hongkong and Shanghai Banking Corporation Limited
HSBC House, Level 7
1 Queen Street, Auckland

By email only: [REDACTED]

Dear [REDACTED],

Credit Contracts and Consumer Finance Act 2003: Warning and Compliance Advice

1. The Commerce Commission (**Commission**) has been investigating The Hongkong and Shanghai Banking Corporation Limited (**HSBC**) under the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**) following HSBC's self-report to the Commission regarding disclosure concerns.
2. We have now completed our investigation and are writing to you about matters that we consider raise concerns under the CCCFA.
3. In summary, the Commission considers that HSBC is likely to have breached:
 - 3.1 section 23 of the CCCFA, by failing to disclose to home loan borrowers that HSBC had exercised a power under the loan contract to increase the interest rate applying to their loans;
 - 3.2 section 23(3) of the CCCFA, by failing to provide disclosure to borrowers within the required five working days following HSBC exercising a power to increase the interest rate applying to home loans (with disclosure instead taking place between seven and eight working days); and
 - 3.3 section 26 of the CCCFA, by failing to provide disclosure to guarantors following HSBC exercising a power to increase the interest rate applying to home loans being guaranteed either within the required five working days, or at all.

4. After weighing up the factors set out in our Enforcement Response Guidelines¹ we have decided to conclude this investigation by:
 - 4.1 issuing a **warning** to HSBC for failing to disclose increased interest rates to borrowers; and
 - 4.2 providing **compliance advice** for:
 - 4.2.1 providing disclosure late to borrowers; and
 - 4.2.2 omitting to provide disclosure to guarantors.

Credit Contract and Consumer Finance Act 2003

Application of the CCCFA

5. The CCCFA 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.
6. HSBC's loan agreements are consumer credit contracts under section 11 of the CCCFA.²

Disclosure of changes following exercise of power

7. Section 23 of the CCCFA requires that a creditor under a consumer credit contract must provide the borrower with information if the creditor exercises a power under the contract to change:
 - 7.1 the amount of an interest rate;
 - 7.2 the amount, frequency, time for payment or method of calculation of any payment;
 - 7.3 the amount, frequency, time for payment, or method of calculation of any fee or charge; and
 - 7.4 the amount of a credit limit.
8. Full particulars of the change must be disclosed within five working days of the day on which the change takes effect.

¹ The Enforcement Response Guidelines are available at <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>

² Under section 11 of the CCCFA, a credit contract will be a consumer credit contract if: (i) the loan is to a natural person; (ii) the loan is wholly or predominantly for domestic or household purposes; (iii) interest or credit fees are or may be payable on the loan or if security is taken; and (iv) the creditor is in the business of providing credit or makes a practice of providing credit as part of its business.

Disclosure of changes to guarantors

9. Section 26 of the CCCFA requires creditors to ensure that disclosure is made to every guarantor of a consumer credit contract if the creditor exercises a power under the contract that has the effect of increasing the obligations that the debtor would otherwise have. Again, full particulars of the change are required to be disclosed within five working days of the changes taking effect.

The investigation

10. HSBC contacted the Commission on 13 July 2018 to advise that in May 2018, whilst conducting a routine internal audit of its retail banking business in New Zealand, HSBC identified instances of non-disclosure and late disclosure in relation to interest rate increases on home loans. The Commission opened an investigation as a result of this self-report.
11. As part of the investigation HSBC has provided the Commission with information and documents relating to the failures, including a report outlining its internal investigation into the disclosure issues. We also met with HSBC representatives in February 2019.

Potential breaches

12. In summary, HSBC identified that, in relation to home loan borrowers:
 - 12.1 *Non-disclosure:* On four occasions in 2014 and one occasion each in 2017 and 2018, it failed to disclose an interest rate increase to home loan borrowers in relation to a total of 225 loans (relating to 180 borrowers); and
 - 12.2 *Late disclosure:* On one occasion in 2017 and one occasion in 2018, it failed to disclose interest rate increases to home loan borrowers within the required five working days of the change taking effect in relation to a total of 2,090 loans (relating to 1,110 borrowers). Disclosure instead took place within seven or eight working days.
13. In relation to home loan guarantors, HSBC identified:
 - 13.1 on four occasions in 2014 and one occasion each in 2017 and 2018 it failed to disclose interest rate increases to guarantors in relation to a total of 71 loans they had guaranteed; and
 - 13.2 on four occasions in 2014 and one occasion each in 2017 and 2018 it failed to disclose within five working days interest rate increases to guarantors in relation to a total of 38 loans they had guaranteed (with disclosure taking place within six or seven working days).

How the disclosure errors occurred

14. HSBC advised that these disclosure errors occurred as a result of inadequate internal manual processes which meant that there were problems with identifying which borrowers needed to receive disclosure and some delays in providing disclosure to those who were correctly identified to receive disclosure. A problem was also identified in that when these errors occurred, they were not picked up on in a timely way.

Steps HSBC has taken to address the disclosure errors

15. HSBC advised that in July 2018, after identifying the error, it wrote to borrowers affected by the non-disclosure in relation to the 2018 interest rate increase providing them with full particulars of the change.
16. HSBC also advised that continuing disclosure statements borrowers received at regular intervals (between 1-3 months) would have contained most of the required disclosure information. HSBC is of the view that this would have provided borrowers sufficient information such that the harm caused by the disclosure failings was diminished.
17. After identifying how and why the disclosure errors occurred, HSBC advised that it took immediate steps to address the root causes of these failings, including by:
 - 17.1 making changes to its processes;
 - 17.2 moving to automated disclosure processes where possible rather than manual processes; and
 - 17.3 creating an automated alert when statement generation has failed.
18. HSBC has also advised the Commission that it has compensated all existing borrowers who did not receive disclosure and some former customers who did not receive disclosure.³
19. The compensation is based on the difference between the non-disclosed interest rate and the disclosed interest rate applied to the affected loan, for the period between the date the non-disclosed rate came into effect and the date that the borrower's next loan statement would have been generated.
20. The aggregate of the compensation paid to borrowers for non-disclosure is approximately \$7,000 with borrowers receiving a minimum payment of \$10.

³ Unless the loan had a zero balance at the date of interest rate increase. HSBC has not been able to contact 23 former customers and the compensation payable to them is being treated as unclaimed monies under the Unclaimed Money Act 1971.

The Commission's view

Failure to provide disclosure to borrowers

21. We are of the view that HSBC's failure to provide disclosure of the increase in interest rates to borrowers is a likely breach of section 23 of the CCCFA.
 - 21.1 Sections 23(1) and (2) require that a creditor give every debtor disclosure of the full particulars of the change where the creditor exercises a power under the contract to change the interest rate or payments to be made under the contract.
 - 21.2 Section 23(3) requires that disclosure be made within five working days of the change taking effect.
22. HSBC acknowledges that, for these borrowers, disclosure was never provided in a specific letter (other than the 2018 increase) but says that borrowers would have been made aware of the new interest rate when they received their next continuing disclosure statement, within one to three months following the interest rate increase.
23. Although we agree that continuing disclosure statements indicate an increase in interest rate, we do not consider that the increased interest rate would have been immediately obvious to the borrower, and whilst the new repayment amount would have been on the statement, the statement did not draw the borrower's attention to this increase. In addition, borrowers only received the statement showing the increased payment amount after it had already been applied to their loan.

Warning

24. The Commission has given careful consideration to the appropriate enforcement response in this case. It has decided to issue a warning in the particular circumstances of this case.
25. The Commission has taken the following factors into account:
 - 25.1 HSBC's decision to honour the interest rate representation disclosed to borrowers;
 - 25.2 the small number of affected borrowers;
 - 25.3 the timing and content of the letters and statements provided to borrowers subsequent to the disclosure failure;
 - 25.4 HSBC's pro-active conduct in self-reporting the issue and subsequent co-operation with the Commission's investigation; and
 - 25.5 HSBC's advised actions and process changes following discovery of the disclosure failures.

26. We will not be taking any further action against HSBC at this time in relation to this conduct, but we will take this warning into account if HSBC was to engage in similar conduct in the future. We may also draw this warning to the attention of a court in any subsequent proceedings brought by the Commission against HSBC.

Compliance advice

27. We consider the other disclosure failures HSBC has disclosed to us to be less serious given the limited harm to borrowers and guarantors in comparison to the non-disclosure to borrowers.

Late disclosure to borrowers

28. We consider the harm caused to these borrowers to be limited given that disclosure was only two to three days later than required. In addition, the interest rate increase was a result of HSBC exercising its power so it was advising borrowers of the change rather than disclosing the consequences of an agreed variation to the loan which could potentially be altered by the borrower.
29. We advise HSBC to regularly review its processes and systems to ensure it is complying with the statutory timeframes for disclosure identified in the CCCFA.

Disclosure to guarantors

30. We also consider that the harm caused in relation to guarantors by the lack of disclosure to be limited, given that HSBC has confirmed that over the entire relevant period, no guarantees were enforced.
31. Whilst we consider the harm caused to be minimal, this conduct nevertheless likely breaches the CCCFA. Accordingly, HSBC is advised to ensure that it meets its disclosure obligations for guarantors within the statutory timeframes identified under the CCCFA.

This letter is published

32. This letter is public information and will be published on our website. We may also make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

The Commission's role

33. The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the CCCFA. The Act is designed to protect consumers when they are borrowing money and enable them to make informed choices about using credit.

Penalties for breaching the CCCFA


34. Only a court can decide if there has actually been a breach of the CCCFA and a court can impose penalties where it finds the law has been broken.

35. If a court finds that a creditor has breached section 23 and/or section 26 of the CCCFA by failing to correctly disclosure required information, it may make orders including orders for:
- 35.1 statutory damages; and
 - 35.2 in the case of a body corporate, a fine of up to \$600,000 for conduct after 6 June 2015 and \$30,000 for conduct prior to 6 June 2015.
36. HSBC should be aware that our decision to issue this warning letter does not prevent any other person or entity from taking private action through the court.

Further information

37. We have published a series of fact sheets and other resources to help businesses comply with the CCCFA and the other legislation we enforce. These are available on our website at www.comcom.govt.nz.
38. Thank you for your assistance with this investigation. Please contact [REDACTED] on [REDACTED] or by email to [REDACTED] if you have any questions in relation to this letter.

Yours sincerely


John Lyall
Manager
Competition and Consumer Branch
Auckland