

Credit Contracts and Consumer Finance Act

What you need to know



COMMERCE COMMISSION

NEW ZEALAND

Overview

The Credit Contracts and Consumer Finance Act 2003 (CCCF Act or the Act) sets out new rules governing lending. It was passed on 16 October 2003, and its regulations were made in August 2004 and October 2004.

Parts of the Act that deal with buy-back transactions of land came into force in October 2003. The remaining provisions of the Act apply from 1 April 2005. The Act has had a long lead-in period in order to allow the finance industry time to ensure that their systems and processes comply with the Act.

The Act repeals the Credit Contracts Act 1981 and the Hire Purchase Act 1981. Both these Acts will continue to apply to credit contracts and hire purchase arrangements agreed to *before* 1 April 2005, unless creditors opt to have their transaction covered by the new Act.

The new Act applies to three kinds of transaction:

- credit contracts and consumer credit contracts – including mortgages, hire purchase agreements, credit card debts, overdrafts, personal and cash loans and pawn-broking pledges;
- consumer leases – long-term leases of twelve months or more and leases containing an option to purchase goods;
- buy-back transactions of land (buy-backs) – where a homeowner (the occupier) transfers their home to a buy-back operator (the transferee) who, in return, pays their debts or gives them money, and the parties agree that the occupier can continue living on the property and, some time in the future, buy it back.

The Act applies to credit arrangements regardless of the amount of credit provided.



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What the Commerce Commission has to do with the Act

The Commerce Commission is an independent Crown entity responsible for enforcing the CCCF Act. The Commission also enforces the regulations of the Commerce Act 1986, Fair Trading Act 1986, Electricity Industry Reform Act 1998, Dairy Industry Restructuring Act 2001, Telecommunications Act 2001 and Credit Contracts and Consumer Finance Act 2003.

The Commission's role under the CCCF Act includes:

- monitoring trade practices in credit, consumer lease and buy-back transaction markets;
- prosecuting those who breach the Act;
- taking civil proceedings under the Act; and
- making available information for the guidance of consumers, creditors, lessors, transferees and others in relation to promoting compliance with the Act.

The Commission is not required to act for individuals; however consumers can take private proceedings for breaches of the Act.

What the Act does

The CCCF Act sets out rules for consumer credit contracts, consumer leases and buy-back transactions. The Act:

- states what information about the transactions consumers must be given, when it must be given, and what form it should take;
- sets minimum standards for some contractual terms; for example, the Act sets standards about the way in which interest is calculated and charged. There are also rules on credit fees and credit-related insurance;
- covers the circumstances in which a consumer credit contract can be cancelled;
- provides rules covering early repayment of debt including rules about how much a creditor can charge in these circumstances;



- deals with the circumstances under which a consumer can ask to change a consumer credit contract;
- allows the Court to reopen contracts if they are oppressive;
- prevents creditors from enforcing contracts if they have not complied with particular provisions of the Act;
- sets up a regime of statutory damages that will apply automatically if particular provisions of the Act have been breached;
- makes breaching certain provisions of the Act a criminal offence punishable by fines and, in some cases, by imprisonment;
- gives the Court the power to make wide reaching remedial orders.

How the Act applies

CCCF Act rules will affect:

- people who extend credit (creditors);
- people who operate or promote buy-back schemes (buy-back operators/promoters);
- people providing leases of goods (lessors);
- finance brokers;
- paid advisers;
- dealers, agents, retailers and insurance companies.

Some parts of the CCCF Act will apply to contracts where credit is acquired for business or investment reasons. However, the focus of the legislation is particularly on consumer credit transactions, which are:

- consumer credit contracts;
- consumer leases; and
- buy-back transactions.



A transaction will usually fall into one of these categories – and, therefore, under the Act – if:

- the creditor makes a practice of providing credit or the debtor and the creditor are introduced by a paid adviser;
- the debtor is an individual (not a company or organisation) and they are not acting as a trustee of a family trust; and
- the debtor has entered into the transaction primarily for personal, domestic or household purposes (or, in the case of buy-backs, for an investment).

The Act presumes that, if the debtor is an individual, they will have entered into the contract for personal, domestic or household purposes. In some cases a creditor can take a written declaration from the debtor stating that the contract is being entered into for business or investment purposes. If such a declaration is made correctly many of the Act's provisions will not apply.

Rules affecting Consumer Credit Contracts

Disclosure

Creditors and lessors who enter into consumer credit contracts must give consumers specific information about the terms of the contract in a written disclosure statement. This is important because it helps consumers understand from the outset what the transaction will cost, and lets them make an informed choice about using credit.

Under the Act, creditors are required to provide disclosure for consumer credit contracts, consumer leases and buy-back transactions. Important points about the disclosure requirements are that:

- generally a written disclosure statement is required:
 - at the start of a contract;
 - at regular intervals during the term of a contract;
 - if the contract is changed, either by agreement or under the terms of the contract; and
 - when a debtor or anyone guaranteeing the contract (the guarantor) asks for it;

- disclosure must be given to a guarantor at the start of a contract and sometimes if the contract is changed;
- disclosure must be clear, concise and not misleading;
- disclosure may sometimes be made electronically; and
- creditors are no longer required to disclose a “finance rate” for the contract or “a total cost of credit”. Creditors must disclose the annual interest rate separately, as well as any credit and default fees.

The Act’s regulations include model disclosure statements that a creditor may use to provide disclosure at the outset of a contract. If the forms are correct, they will meet the Act’s disclosure standards and comply with the law.

Interest

Interest rates (including any default interest rates) and the method for calculating the interest charges must be fully and clearly disclosed at the beginning of the contract.

Interest on a consumer credit contract must not be charged in advance. The maximum interest that can be charged on a consumer credit contract is the amount determined by applying the daily interest rate to the daily unpaid balance.

This means interest cannot be charged on a “flat-rate” basis – it cannot be simply calculated on the original principal then added to the initial loan amount. This is charging interest in advance.

The Act allows creditors to charge default interest if a debtor defaults in making a payment. Default interest can only be charged if the contract provides for it and any event only while the default continues.

There is no longer a 14 day stand-down period on charging penalty interest.

Some common law rules may limit the creditor’s ability to charge default interest. In addition the Act also prohibits oppressive conduct by the creditor.



Fees

All credit and default fees charged under consumer credit contracts must be disclosed in full at the outset of the contract and must be reasonable. The Act sets out factors that the courts must take into account when considering whether a fee is unreasonable. There are special rules for establishment fees (ie fees creditors charge for setting up consumer credit contracts), third-party fees that creditors pass on to debtors, and fees creditors charge on early repayment of a consumer credit contract.

- Establishment fees must be no more than what it cost a creditor to set up the consumer credit contract.
- Creditors cannot “mark up” or charge a premium on any fees charged by a third party. The creditor can only charge the debtor the actual amount they were charged.
- All other credit fees must reflect:
 - a creditor’s actual costs; and
 - reasonable standards of commercial practice.

Payments

There are rules about the way in which payments are credited. A creditor must credit a payment as soon as possible unless the contract states that they can credit payments according to a specified schedule of payments contained in their credit contract.

However, a creditor must accept any extra or early part prepayment unless the credit contract specifically states that the creditor has the right to decline it, in which case they must refund it to the debtor as soon as practicable.



Full Repayment

Debtors have a right to fully repay a consumer credit contract. However, creditors may charge a fee if a debtor repays a contract early and the creditor suffers a loss, providing the consumer credit contract expressly allows it. This would occur, for example, where a creditor lent money at one interest rate and, when the contact was repaid, interest rates had dropped so that the creditor could only re-lend the money at a lower rate.

But this fee must be reasonable. The regulations include a mathematical formula for calculating any loss. If a creditor uses the formula correctly, their estimate of loss will be treated as reasonable. Creditors may estimate their losses in other ways but will have to be able to show that any result is a reasonable estimate.

Credit-related Insurance, Repayment Waivers and Extended Warrantees

Creditors must not unreasonably require debtors get credit-related insurance, repayment waivers or extended warrantees. For example, a creditor cannot require a debtor to purchase:

- income-protection insurance, if the debtor is unemployed;
- insurance for goods sold on credit, if the debtor already has home and contents insurance that would cover the goods;
- a warranty that duplicates the manufacturer's warranty (eg a 2-month warranty on goods that have a manufacturer's warranty of 18 months).

Creditors must also disclose to debtors the terms of any credit-related insurance.

Cancellation

Debtors have the right to cancel a credit contract up to three days after disclosure has been made.

If the debtor has purchased goods on credit the debtor may cancel the credit part of the transaction but must pay the cash price of the goods in full.



Rules affecting Consumer Leases

The CCCF Act has rules on consumer leases. Consumer leases are leases that are for a period of 12 months or more or where the person taking the lease has an option to purchase the goods being leased.

Lessors must give lessees written disclosure of the required information and the terms of the lease.

A creditor can charge termination fees for an early termination of a consumer lease if the contract allows it but these fees must be reasonable.

Other rules affecting Buy-Back Transactions of Land

Buy-back operators must disclose information about the transaction to the occupier before they sign up to it. Buy-back operators must also ensure an occupier gets independent legal advice before entering into a contract, and cannot charge unreasonable fees for the transaction.

Enforcement

Oppressive Contracts

The courts can re-open any credit contract, consumer lease or buy-back transaction of land if it is oppressive, or if the creditor has acted or intends to act oppressively, or if the debtor was induced to enter into the contract by oppressive means.

The Act says a contract is oppressive if it is harsh, unjustly burdensome, unconscionable or in breach of reasonable standards of commercial practice.

The powers courts have, if a contract is found to be oppressive, include:

- altering the contract and changing the obligations under it;
- altering the ownership of property; and
- directing the payment of money.



Prohibited Enforcement

If a creditor, lessor or buy-back promoter fails to provide information they are required to disclose under the CCCF Act (particularly at the start of a contract and if the contract is changed), they may not be allowed to enforce the contract until they disclose the information.

Statutory Damages

The CCCF Act sets out new penalties, some of which will apply automatically if a creditor has broken particular rules. Statutory damages are designed to punish the creditor and deter others from breaching the Act. Statutory damages are payable regardless of whether the debtor has suffered any loss.

The Act also sets out some circumstances in which a creditor can apply to have any statutory damages reduced.

Other damages and remedial orders

The Court has wide powers to make remedial orders where the creditor has breached the act. These orders are designed to compensate the debtor for any loss suffered and can include orders for refunding payments, compensation and exemplary damages.

The Court can make orders not only against the creditor but also against other persons involved in the breach.

Offences

The CCCF Act makes it a criminal offence to breach its provisions. In most circumstances a convicted creditor will be liable to a fine of up to \$30,000.

The Act sets out further penalties for breaching court orders and for transferring property subject to a buy-back transaction that has not complied with the Act.



How to take proceedings under the Act

Consumers can take their own legal proceedings if they think that the CCCF Act has been breached. The Disputes Tribunal is able to hear claims where the amount of credit is under \$7,500. The Tribunal can decide claims where the amount of credit is between \$7,500 and \$12,000 but only if both parties agree.

The District Court can hear cases where the amount of credit is between \$12,000 and \$200,000. Where larger amounts are involved the matter must go to the High Court.

More information

The Commission has published a detailed guide – *Credit Contracts and Consumer Finance Act – A general guide for the credit industry* – primarily for financial lenders; it is available through the Commission’s website www.comcom.govt.nz. A printed version is available on request from the Commission’s contact centre on 0800 94 3600 or email contact@comcom.govt.nz

The Ministry of Consumer Affairs has published an introduction to the Act for businesses, and guides for consumers and retailers. These are available through the Ministry’s website www.consumeraffairs.govt.nz

Enquiries and complaints

You may contact the Commerce Commission in confidence if you have any information about breaches of the Act. Call the Contact Centre during office hours on 0800 94 3600, or write to Contact Centre, PO Box 2351, Wellington, or email us at contact@comcom.govt.nz

CONTACTING THE COMMERCE COMMISSION

To contact the Commission about potential breaches of the Act:

- call the Contact Centre on 0800 94 3600;
- write to Contact Centre, Commerce Commission, PO Box 2351, Wellington;
- email contact@comcom.govt.nz; or
- www.comcom.govt.nz

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