

## THE CREDIT CONTRACTS AND CONSUMER FINANCE ACT

# CONSEQUENCES OF BREACHING THE CREDIT CONTRACTS AND CONSUMER FINANCE ACT

The possible consequences for a creditor of breaching the provisions of the Credit Contracts and Consumer Finance Act (CCCF Act) are that:

- they may be unable to enforce the contract (prohibited enforcement);
- they will be liable for a set statutory penalty (statutory damages);
- they may be prevented from behaving in a particular way (injunction) or may be banned from operating within the finance industry in any way (banning orders);
- they may be convicted of a criminal offence and face a fine and/or imprisonment (offences);
- they may be ordered to pay compensation or to refund money to the debtor (general remedial orders); and
- the court may order that the contract be reopened (re-opening orders) and then make orders it thinks necessary to remedy any matters, including transferring property, altering the terms of the agreement, direct payments be made or direct a party to act or not act in a certain way.

### PROHIBITED ENFORCEMENT

The CCCF Act prohibits the enforcement of a consumer credit contract, consumer lease or buy-back transaction of land before its disclosure requirements are complied with.

#### CONSUMER CREDIT CONTRACTS

If initial disclosure or disclosure of agreed changes is not made in relation to a consumer credit contract, a creditor may not take steps to enforce the contract, and will have no right to recover property or enforce any security interest under the contract until that disclosure is made. In addition, a creditor who makes false representations to the effect that they can enforce a contract in this situation will be likely to breach the Fair Trading Act. Separate penalties apply for breaches of the Fair Trading Act.

If guarantee disclosure has not been made according to the CCCF Act, a creditor cannot take steps to enforce a guarantee until that disclosure is made.

Until disclosure has been made, a debtor can cancel at any time.

#### CONSUMER LEASES

If initial disclosure or variation disclosure is not made in relation to a consumer lease, a lessor may not enforce it or enforce any right to recover leased property or any security interest under the lease until the disclosure has been made.

#### BUY-BACK TRANSACTIONS OF LAND

If initial disclosure or variation disclosure is not made in relation to a buy-back transaction of land, a transferee may not enforce the buy-back transaction or any right to recover related property or any security interest under the buy-back.

The CCCF Act stipulates that a transferee in a buy-back transaction may not transfer the land if the occupier was not given initial disclosure as well as all the terms of the transaction and independent legal advice **before** entering into the transaction and the transferee knows or had reason to believe that the occupier did not receive initial disclosure, the transaction terms or independent legal advice. This cannot be remedied by late disclosure or subsequent legal advice; instead the transferee must apply for leave from the High Court to deal with the land.

The CCCF Act prohibits the enforcement of a consumer credit contract, consumer lease or buy-back transaction of land before its disclosure requirements are complied with.

## STATUTORY DAMAGES

### CONSUMER CREDIT CONTRACTS

A creditor is liable to pay the debtor statutory damages if any provisions are breached in relation to initial disclosure, continuing disclosure, variation disclosure, request disclosure, disclosure standards, charging of interest or disclosure of credit-related insurance, repayment waivers and extended warranties.

In addition, a creditor will be liable to pay statutory damages to a guarantor if any provisions are breached in relation to initial guarantee disclosure, request disclosure, guarantee variation disclosure or disclosure standards.

### CONSUMER LEASES

A lessor will be liable to pay statutory damages to a lessee if any provisions are breached in relation to initial disclosure, variation disclosure, request disclosure, disclosure standards or disclosure of credit-related insurance, repayment waivers and extended warranties.

### BUY-BACK TRANSACTIONS OF LAND

The transferee and buy-back promoter in a buy-back transaction of land will be liable to pay statutory damages if they breach the CCCF Act's provisions on initial disclosure or fail to meet the disclosure standards. The transferee will also be liable to pay statutory damages if they breach the CCCF Act's provisions on variation disclosure, request disclosure, or disclosure standards.

## INJUNCTIONS AND BANNING ORDERS

The Court may grant injunctions and interim injunctions restraining a creditor where the creditor's actions constitute:

- a breach or attempted breach of the CCCF Act;
- aiding, abetting, counselling or procuring anyone else to breach the CCCF Act;
- inducing or attempting to induce anyone to breach the CCCF Act;
- being a party to or knowingly concerned in (directly or indirectly) a breach of the CCCF Act; or
- conspiring with anyone to breach the CCCF Act.

The CCCF Act also gives the court the power to make orders banning people from:

- providing credit, leasing goods or being involved in buy-back transactions;
- taking any part (directly or indirectly) in the management of companies who provide credit, lease goods or are involved in buy-back transactions; and
- being employed by or acting as the agent of a credit provider, lessor or person involved in any buy-back transaction.

Banning orders may be made where the person:

- has been convicted of an offence under the CCCF Act or a crime of dishonesty; or
- has had a credit contract re-opened under the Credit Contracts Act 1981; or
- has had a credit contract, consumer lease or buy-back transaction of land re-opened under the CCCF Act; or
- has failed to comply on more than one occasion with the CCCF Act or the Credit Contracts Act 1981 ; and
- in the opinion of the Court is not a fit and proper person to be a creditor, lessor or transferee or promoter.

It is an offence to contravene a banning order, carrying a maximum penalty of \$30,000 and/or up to three months imprisonment.

## OFFENCES

It is an offence to contravene the CCCF Act's provisions relating to:

- disclosure requirements;
- disclosure standards;
- the debtors' right to cancel consumer credit contracts;
- interest charges on consumer credit contracts;
- fees;
- payments and prepayments;
- hardship provisions;
- declarations about the lessor's purpose in entering into the lease in consumer lease; and
- independent legal advice for occupiers in buy-back transactions.

Conviction carries a penalty of up to \$30,000.

The CCCF Act includes a reasonable mistake defence for these offences if a lender can prove that the breach was caused by a reasonable mistake or events beyond their control, was remedied as soon as possible and compensation has been offered to anyone who suffered loss or damage.

The CCCF Act specifically recognises the existence of a compliance programme in deciding whether a mistake is reasonable.

A mistake does not include a mistake of law. It will not be a defence for a lender to claim they were unaware their actions breached the CCCF Act.

It is also an offence for a transferee to transfer to a third party any land subject to a buy-back transaction without leave of the court if they know or have reason to believe that, before the occupier entered into any part of the transaction:

- they had not received initial disclosure; or
- they had not received a copy of all the terms of the transaction; or
- they had not had independent legal advice.

Anyone found guilty of this offence may be fined up to \$200,000 or imprisoned for up to one year. The defence of mistake is not available in respect of this offence.

Any person acting in breach of a banning order may be fined up to \$30,000 or imprisoned for up to three months.

## GENERAL REMEDIAL ORDERS

The CCCF Act also gives the court wide powers to make remedial orders. These orders include:

- refunds of any amounts improperly received (such as refunding an unreasonable fee);
- compensation for loss;
- exemplary damages; or
- consequential relief.

Orders can be made in favour of anyone who has suffered loss or damage, whether or not they were a party to the contract or transaction.

## RE-OPENING ORDERS

Under the CCCF Act, the court has powers to re-open a credit contract, consumer lease or buy-back transaction if it considers it to be oppressive, and to deal with the contract once it is re-opened, such as directing the transfer of property or payment of money.

For more information on re-opening orders, see the separate factsheet: *Oppressive Contracts – Reopening Provisions under the Credit Contracts and Consumer Finance Act*, available to download at [www.comcom.govt.nz/consumer-credit](http://www.comcom.govt.nz/consumer-credit)

## LENDERS AND BORROWERS

The CCCF Act uses a number of different terms to describe lenders and borrowers, depending on the nature of the transaction.

- Consumer credit contracts – creditors and debtors.
- Consumer leases – lessors and lessees.
- Buy back transactions – transferees and occupiers.

For the purposes of these fact sheets the terms creditor and debtor are used when referring generally to credit transactions, but the specific terms are used where relevant.

To check for updates to this fact sheet visit:

[www.comcom.govt.nz/consumer-credit](http://www.comcom.govt.nz/consumer-credit)

This fact sheet is part of a series looking at the Credit Contracts and Consumer Finance Act.

Other fact sheets can be downloaded from

[www.comcom.govt.nz/consumer-credit](http://www.comcom.govt.nz/consumer-credit)

### CONTACT

Contact the Commerce Commission with information about possible breaches of the Credit Contracts and Consumer Finance Act.

#### TELEPHONE

Our Contact Centre during office hours on 0800 943 600

#### WRITE

To us at Contact Centre,  
PO Box 2351, Wellington 6140

#### EMAIL

Us at [contact@comcom.govt.nz](mailto:contact@comcom.govt.nz)

This fact sheet is a guideline only, and reflects the Commission's view. The publication is not intended to be definitive, and should not be used instead of legal advice. It is traders' responsibility to remain up to date with legislation.

Only the courts can make an authoritative ruling on breaches of the Credit Contracts and Consumer Finance Act.