

CREDIT MATTERS

CREDIT CONTRACTS AND CONSUMER FINANCE ACT UPDATE

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COMMISSION CHAIR'S WELCOME

THE COMMERCE COMMISSION IS RESPONSIBLE FOR ENFORCING THE CREDIT CONTRACTS AND CONSUMER FINANCE ACT 2003 (THE CCCF ACT), THE CURRENT LEGISLATION GOVERNING CONSUMER CREDIT.

Consumer groups have a vital role to play in ensuring debtors' rights under the CCCF Act are protected. We need your help to effectively enforce this important piece of legislation.

Many consumers do not understand their rights, or the obligations on those who lend them money. They do not know to complain to the Commission, which makes it difficult for us to get the information we need about breaches of the CCCF Act. By working together, consumer groups and the Commerce Commission can help ensure that debtors complain when the law is breached.

This newsletter will keep you up-to-date with our enforcement activities in relation to consumer credit. We aim to make your job easier by providing practical examples that will assist you to identify breaches of the CCCF Act.

We'll also tell you about the outcomes you've helped us to obtain for your clients by taking the time and effort to refer complaints through to the Commission.

The focus of the first issue is on how to bring a complaint to the Commission. It includes two recent case studies which illustrate the Commission's approach to disclosure under the CCCF Act.

Please keep referring complaints to the Commission, both alleged breaches of the Act and concerns about specific credit providers.

We also welcome your suggestions about the newsletter, and you can email creditmatters@comcom.govt.nz with your feedback.

Thank you again for your work in ensuring that consumers' rights are protected.

Paula Rebstock
Chair, Commerce Commission

BRINGING A CCCF ACT COMPLAINT TO THE COMMERCE COMMISSION

TO MAKE IT EASY FOR YOU TO REFER CCCF ACT CASES TO US, WE'VE INCLUDED DETAILS OF SOME OF THE BASIC INFORMATION THAT THE COMMISSION NEEDS TO GET AN INVESTIGATION STARTED. WE'VE ALSO PROVIDED DETAILS OF OTHER USEFUL CCCF ACT RESOURCES ON THE WEB.

Useful information to provide to the Commission includes:

- the name of the credit provider
- at least one way of contacting the credit provider, such as physical address, postal address, phone number or email address
- a brief summary of the issue you are concerned about and the basic area of the CCCF Act that you think has been breached

Once we have this initial information, we can get the investigation started. We might contact you for more evidence to support the complaint such as copies of:

- the loan contract and terms and conditions
- the disclosure documents
- any relevant advertising material
- any statements.

Our investigators might also want to talk with other people who may be able to provide us with evidence verifying the complaint, so if you can gather contact details of potential witnesses, then we can talk to them too. But if you don't have this further information, don't worry: it is our investigators' job to gather it.

Please note that we are interested in hearing from you even when you have only one example of a breach of the CCCF Act. As you'll see from the **Senate Finance case**, one complaint can make a difference.

INFORMATION ON THE WEB TO HELP YOU IDENTIFY BREACHES

ENFORCEMENT ACTION

If you want to keep up to date with the Commission's CCCF Act enforcement action as it's happening, or want to find out if we've taken action on an issue you're dealing with – check out the Media Release section of our website www.comcom.govt.nz/ConsumerCredit/MediaList.aspx.

If you would like to receive our credit related media releases then just subscribe to these by emailing us at creditmatter@comcom.govt.nz. Don't forget to give us your name, the name of your organisation and contact details in case we need to contact you.

CCCF ACT PUBLICATIONS

Have a look at our publications ***Credit Contracts and Consumer Finance Act – what you need to know*** and ***Credit Contracts and Consumer Finance Act - A general guide for the credit industry*** for more information about the CCCF Act. It can be downloaded from our website at www.comcom.govt.nz. Any advice to industry we issue also goes on our website. You will be able to find this advice under our Consumer Credit/publications tab at www.comcom.govt.nz.

THE CCCF ACT

You can also view a copy of the CCCF Act for free from the New Zealand legislation website at www.legislation.govt.nz.

WHAT IS DISCLOSURE?

IN PRACTICE, WHAT DOES ‘MAKING DISCLOSURE’ MEAN AND WHAT ARE THE BASIC RULES AROUND DISCLOSURE?

WHAT IS DISCLOSURE?

The CCCF Act and regulations require that:

- Certain written information must be provided to a debtor. This information is called **disclosure**
- Disclosure must be provided within a certain timeframe
- The disclosure must meet a particular standard. The Act sets out that standard

KEY DISCLOSURE POINTS

There are some key points to remember when dealing with a disclosure issue:

- The Act states which transactions are subject to the disclosure rules under the Act. Some transactions may be excluded from the disclosure requirements, even if they’re subject to other parts of the Act
- The Act sets out six different types of disclosure
- The Act tells you which parties to a loan transaction must receive disclosure
- The Act sets out timeframes for making disclosure
- The Act sets out standards for disclosure
- The Act sets out how disclosure can be made
- The Act sets out what information must be disclosed
- The Act also establishes penalties for creditors who do not comply with the disclosure rules

Let’s consider each of these points.

TRANSACTIONS COVERED BY THE ACT

The CCCF Act deals with four different types of transactions:

- credit contracts
- consumer credit contracts
- consumer leases (if they’re treated as a credit sale and consumer credit contracts)
- buy-back transactions of land.

Creditors do not have to provide disclosure in relation to “credit contracts” – these will mostly be business or investment loans. Disclosure must be provided for all of the other types of loan above.

Handy Tip

If you want to have a closer look at the definitions of these transactions or would like a refresher you could use the links from the New Zealand legislation website. The CCCF Act defines credit contracts in section 7, consumer credit contracts in section 11, consumer leases in section 16 and buy-back transactions of land in section 8.

For those who prefer hardcopies, our guides provide detailed explanations and flow charts to help you decide what type of transaction you’re dealing with.

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DIFFERENT TYPES OF DISCLOSURE

There are six different types of disclosure:

- **Initial disclosure** –made to the debtor (and guarantor) when the transaction commences
- **Variation disclosure** – made when the loan is varied
- **Request disclosure** – made when the debtor requests disclosure
- **Continuing disclosure** – disclosure that may be made during the term of the loan
- **Guarantee disclosure** – disclosure that is made to guarantors of loans
- **Disclosure of credit related insurance, repayment waivers, and extended warranties**

Handy Tip

The rules relating to these situations are set out in sections 17 to 26 of the CCCF Act.

WHO SHOULD RECEIVE DISCLOSURE?

Who should receive disclosure?

Disclosure should be made to every debtor under the contract. Disclosure should also be made to every guarantor under any guarantee given under the contract.

WHEN SHOULD DISCLOSURE BE MADE?

- **Initial disclosure** must be provided within five working days of the day on which the contract is made. It does not have to be made at the point of sale
- **Variation disclosure** can sometimes be required. Section 22 of the Act provides further details of when it will be required. If it is required, then it must be provided before the change takes effect
- **Request disclosure** can also be required in some circumstances. See section 24 of the Act for more details. If it is required it must be made by the later of 15 working days of the request or 15 working days after payment of any fee for the disclosure is provided
- **Continuing disclosure** has to be provided in some circumstances. The Act sets out specific exceptions when continuing disclosure doesn't have to be provided. If the exceptions do not apply, continuing disclosure must be provided every 45 working days for revolving credit contracts. For other types of credit, continuing disclosure must be provided every six months

Handy Tip

The rules setting out the exceptions for continuing disclosure are set out in section 21 of the CCCF Act.

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- **Guarantee disclosure** has to be provided to loan guarantors within 15 working days of the day on which the guarantee is given. Further disclosure may also be required if there are any variations to the loan. This further disclosure should be provided within five days of the loan variation. In some circumstances guarantor disclosure is not required
- **Credit related insurance disclosure** must be provided within 15 working days of the day on which the credit related insurance is arranged if the insurance was arranged by the creditor under the contract

WHAT STANDARD SHOULD THE DISCLOSURE MEET?

The CCCF Act sets a standard for disclosure. Disclosure must:

- be in writing
- contain the information required by the Act
- not be likely to mislead or deceive a reasonable person with regard to material terms of the contract
- express the key information clearly, concisely and in a manner likely to bring the information to the attention of a reasonable person

Handy Tip

Our publication ***Credit Contracts and Consumer Finance Act – A General Guide for the credit industry*** also contains a section on disclosure.

www.comcom.govt.nz/ConsumerCredit/ConsumerCreditPublications/PublicationsList.aspx

HOW CAN DISCLOSURE BE MADE?

Disclosure can be made:

- By giving the disclosure statement to the debtor (or guarantor)
- By sending the disclosure statement by post
- By electronic communication i.e. by email

Handy Tip

Disclosure must be made in writing, be made within the timeframes and must meet the disclosure standards.

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INITIAL DISCLOSURE - WHAT INFORMATION SHOULD BE DISCLOSED?

The CCCF Act sets out a list of information that must be provided to debtors when they enter a loan transaction. This information is called **key information**.

Key information for consumer credit contracts may include:

- creditor's full name and address
- initial unpaid balance
- details of subsequent advances
- the total of all advances
- annual interest rate or rates
- method of charging interest
- total interest charges
- details of each credit fee or charge
- explanation of what the debtor will be charged for full prepayment of the contract or how that charge will be calculated i.e. when the contract is repaid early
- details of any security interest
- details of default charges and default interest charges
- information about the debtor's right to cancel (statement of the right to cancel)
- details of interest free periods
- information about payments

Handy Tip

Schedule 1 of the CCCF Act contains a list of all of the key information that may need to be disclosed.

PENALTIES FOR FAILING TO PROVIDE INITIAL DISCLOSURE

There can be significant consequences for creditors who fail to disclose. These can include:

- The debtor being able to cancel the contract at any time before disclosure is made
- Creditors being unable to enforce (and recover) the debt before disclosure is made
- Creditors being unable to enforce any right to recover any property or security interest before disclosure is made
- Creditors may be liable for statutory damages
- Creditors will have committed an offence under the Act.

Some of these penalties may also apply to other types of disclosure.

The disclosure cases the Commission has taken all relate to the provision of initial disclosure of consumer credit contracts.

MODEL DISCLOSURE STATEMENTS

The regulations to the Act also provide for model disclosure statements. These forms are templates that creditors can use if they want to. Disclosure must contain all of the key information required by the Act.

Handy Tip

If a creditor tries to enforce a prohibited contract (a contract that cannot be enforced as a result of a failure to disclose) then they may also breach the Fair Trading Act by making false or misleading statements about their right to enforce the contract.

TWO RECENT CASES OF INADEQUATE DISCLOSURE

TWO CASES SHOW THAT NOT ONLY IS IT IMPORTANT TO DISCLOSE - DISCLOSURE NEEDS TO BE SUFFICIENT BOTH IN CONTENT AND FORM TO MEET THE STANDARDS SET DOWN BY THE CCCF ACT.

SENATE FINANCE – ILLEGIBLE DISCLOSURE

Senate Finance had a practice of providing debtors with disclosure at the point of sale – the car yard. Consumers received the documentation at the time they entered into the transaction. The document that the Senate Finance consumers were given contained all of the required information under the CCCF Act.

However some parts of the disclosure document were written in a very small font – and when faxed back and forth during the loan approval process between Senate Finance and the car yard, the documents became so distorted they were impossible to read. One debtor was told by a sales person at the car yard to “use a magnifying glass” when he raised concerns about the legibility of the disclosure document he received.

The Commission successfully argued that the illegibility of the print meant that the disclosure standards hadn't been met, and therefore no effective disclosure had been made at all and Senate Finance had breached the CCCF Act. Failing to disclose the terms and conditions of the contracts in question resulted in the contracts being unenforceable under the CCCF Act.

This led to Senate Finance pleading guilty to eight charges under the Fair Trading Act for misleading debtors into believing that their contracts were enforceable. As a result of the Commerce Commission action, Senate Finance paid statutory damages to 17 debtors \$13,700.

FALCON ADVANCES – INCOMPLETE DISCLOSURE

Like Senate, Falcon Advances provided finance to car buyers. Although Falcon Advances had taken steps to ensure its disclosure complied with the CCCF Act, not all of the key information required by the CCCF Act was disclosed. The key information not disclosed included the full name and address of the creditor, the method of charging interest, a description of the security interest and information regarding the extent to which the loan was secured.

Falcon Advances Limited and the Commerce Commission entered into a settlement late in 2006. Although there were several issues covered under the terms of the settlement, including the charging of unreasonable fees, the key issue was Falcon Advances' failure to make disclosure under the CCCF Act and subsequent breaches of the Fair Trading Act by misrepresenting that it could enforce the contracts.

As a result of the settlement with the Commerce Commission, Falcon Advances refunded overcharged fees of \$12,000 to over 100 customers.

To find out more about the Senate Finance and Falcon Advances cases, read the media releases online www.comcom.govt.nz/consumercredit/successfulfirstprosecutionunderccc.aspx and www.comcom.govt.nz/consumercredit/arfinanceprovidertorefund12000.aspx

LESSONS TO LEARN

THE SENATE FINANCE AND FALCON ADVANCES CASES PROVIDE SOME USEFUL TIPS FOR CONSUMER GROUPS. HOW DOES FAILURE TO DISCLOSE AFFECT YOUR CLIENT? WHAT OPTIONS DOES YOUR CLIENT HAVE?

FAILURE TO DISCLOSE AFFECTS YOUR CLIENTS RIGHTS

Creditors can't enforce their contracts unless they have met the disclosure requirements of the Act. If you're dealing with enforcement or repossession issues, you may want to check the disclosure documents first to make sure the credit provider has the right to enforce the contracts.

Until disclosure is made, debtors can cancel their consumer credit contracts. The three working day cancellation period only starts when disclosure is made.

ONE COMPLAINT CAN MAKE A DIFFERENCE

The Senate Finance prosecution arose from a single complaint. As the Commission investigation progressed, it became clear that there were many more consumers affected by the same breach of the CCCF Act. This one complaint led to sixteen other debtors also getting refunds.

EVEN IF DEBTORS HAVE AGREED TO THE CONTRACT TERMS, THERE ARE STILL OPTIONS

Even if debtors have signed the contract, and have been making payments, if the contract doesn't meet the standards required under the CCCF Act, debtors may still be able to obtain redress from non-compliant credit providers. In the Senate Finance case, the complainant had been making payments under the contract for six months when his complaint was investigated by the Commission.

IT'S NOT ENOUGH TO DISCLOSE – DISCLOSURE MUST MEET CCCF ACT STANDARDS

Disclosure needs to meet the standards of both content and form set down by the CCCF Act. In the Senate Finance case, the documents had contained all of the required disclosure information, but were unreadable. The Falcon Advances contracts were readable, but did not contain all of the required disclosure information.

BREACHING THE CCCF ACT CAN HAVE OTHER CONSEQUENCES

Both Senate Finance and Falcon Advances tried to enforce the contracts against the debtors and charged default fees and repossessed vehicles. As these creditors had not met the disclosure standards required under the CCCF Act, they could not legally do this. When the companies wrongly represented that they were entitled to take enforcement action they misled the debtors and by doing that, breached the Fair Trading Act.

EVEN IF THE CONTRACT HAS ENDED, THERE ARE STILL OPTIONS

Proceedings in relation to some breaches under the CCCF Act can be taken up to three years after the breach. Remember that to be covered under the CCCF Act, the contract must have been entered into after 1 April 2005.

If you have any clients that you think may have CCCF Act issues – please keep referring your complaints to the Commission.