BUDDLE FINDLAY

Commerce Commission Guidance supporting the Credit Contracts Legislation Amendment Act 2019

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Current Status

The Credit Contracts Legislation Amendment Act 2019 amends the Credit Contracts and Consumer Finance Act 2003 and introduces, amongst other things, a new certification regime and a new due diligence duty.

The Commerce Commission has published supporting guidance. The latest guidance on the certification regime was published on 27 May 2021 and the latest guidance on the new due diligence duty was published on 2 June 2021.

We set out some of the key points and latest changes to this guidance in this article. If you would like advice on the certification regime, due diligence duties or amendments to the Credit Contracts and Consumer Finance Act 2003, please contact a member of our financial services regulation team.

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Background

The Credit Contracts Legislation Amendment Act 2019 (CCLAA) amends the Credit Contracts and Consumer Finance Act 2003 (CCCFA) and is a crucial part of the Government's changes to consumer credit laws to strengthen protection for borrowers.

Several of the changes to the CCCFA have already been introduced, with certain key changes coming into force on 1 October 2021. In particular, the CCLAA introduces two key concepts that affect directors and senior managers of entities that are captured by the CCCFA - a new 'fit and proper person' certification regime and a new due diligence duty. A 'senior manager' is a person who is not a director but occupies a position that allows that person to exercise significant influence over the management or administration of the entity.

The Commerce Commission has published guidance on both the certification regime and the new due diligence duty, both of which have been recently updated.

Fit and Proper Person Certification Regime and Guidance

The CCLAA introduces a new Part 5A to the CCCFA that contains a certification regime under which all lenders under a consumer credit contract and all 'mobile traders' will be required to be certified at an entity level by the Commerce Commission. The purpose of this certification is to set a high standard of personal and professional integrity for those involved in providing a lending or mobile trading service.

As part of this process, the Commerce Commission must be satisfied that all the lender’s current and prospective directors and senior managers are 'fit and proper' persons to hold their respective positions. This means the Commerce Commission must be satisfied these individuals are financially sound, honest, reputable, reliable and competent to perform their role.

Entities that are licensed providers are exempt from this requirement (eg entities who are licensed providers by virtue of being registered banks).

Failure to obtain certification (if required) may result in a court ordering you to pay up to $600,000 for a corporate entity (such as a company or partnership) and up to $200,000 for an individual.

Timing

Entities can apply for certification from 1 June 2021, with certification becoming compulsory from 1 October 2021. Entities that are registered on the Financial Services Providers Register (FSPR) before 1 October 2021 do not need to be certified until they complete their next annual FSPR confirmation, with the Commerce Commission suggesting that entities apply at least two months before they have to be certified.

Guidance and May 2021 Amendments

The Commerce Commission has published guidance to assist entities with understanding the new certification regime. This guidance has been recently updated (on 27 May 2021). The key changes are:

- The Commerce Commission will charge a non-refundable processing fee of $1055 (exc GST) for each director or senior manager listed in an application
- Updated instructions on how to navigate the online application portal
- Updated set of circumstances in which you must notify the Commerce Commission of any material change that may affect an entity's certification including, for example, if a director or senior manager has resigned, is removed or otherwise ceases to hold their position.

Due Diligence Duty and Guidance

The CCLAA introduces a new subpart 9 to the CCCFA that imposes new personal duty obligations on every director and senior manager of a lender under a consumer credit contract and/or mobile trader selling goods on credit.

Directors and senior managers must exercise due diligence to ensure that the entity complies with the CCCFA. This includes taking reasonable steps to:

- Implement (and require staff to comply with) procedures to ensure compliance with the CCCFA
- Ensure that appropriate systems are in place to systematically identify deficiencies in the effectiveness of these procedures
- Take prompt action to remedy any deficiencies discovered.

To meet these obligations, directors and senior managers are required to exercise the care, diligence and skill that a reasonable director or senior manager would exercise in the same circumstances taking into account (without limitation) the nature of the business (eg its size and the nature of the credit provided) and the position of the director or senior manager.

For a breach of the due diligence duty, a court may order the director or senior manager to pay a pecuniary penalty of up to $200,000, noting that a director or senior manager cannot be indemnified or insured for this pecuniary penalty.

Timing

Every director and senior manager of a lender (including some mobile traders) will have to comply with the new duty of due diligence obligations from 1 October 2021.

For clarity, if an entity enters into a contract with a borrower on 1 January 2019 and is required to give continuing disclosure on that contract after 1 October 2021 it will have due diligence duties in respect of the lender’s procedures for providing continuing disclosure (ie even though the contract was entered into prior to 1 October 2021, the entity must still be satisfied that it has systems in place for meeting its obligations from when the due diligence duty begins to apply on 1 October 2021).

Guidance and June 2021 Amendments

The Commerce Commission has published guidance to assist entities with understanding the new due diligence duty. This guidance has been recently updated (on 2 June 2021). The key changes are:

- Clarity on what constitutes 'significant influence' for the purposes of identifying a senior manager
- Clarity on what constitutes due diligence and how the appropriate exercise of due diligence will be assessed.

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