



New Zealand Market Subcommittee

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Ministry of Business, Innovation and Employment

By email

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CCCFA Exemption for Non-Bank Lenders – COVID-19 Relief

We are writing to you on behalf of wholesale funded non-bank lenders ("NBLs"). The New Zealand Sub-Committee of the Australian Securitisation Forum ("ASF") represents thirteen (13) NBLs, a number of whom are also members of the Financial Services Federation ("FSF").

Our concern relates to the work being undertaken by such lenders to assist their consumer customers due to the COVID-19 pandemic.

In particular, we are concerned that, absent a comparable exemption to that given to registered banks under the Credit Contracts and Consumer Finance (Exemptions for COVID-19) Amendment Regulations 2020 ("Bank Exemption"), NBLs' ability to:

- (a) address the financial hardship suffered by their customers due to COVID-19; and
- (b) effectively and efficiently fund their businesses through their securitisation programmes,

will be adversely affected.

The primary purpose of the Credit Contracts and Consumer Finance Act 2003 ("CCCFA") is to "*protect the interests of consumers in connection with credit contracts*". In addition, one of the express ancillary purposes of the CCCFA is "*to promote and facilitate fair, efficient and transparent markets for credit*". In our view, these purposes cannot be achieved in the context of the current pandemic if NBLs and their customers are treated differently from registered banks and their customers.

As noted in our letter dated 31 March 2020, a large number of New Zealanders borrow from NBLs. Many NBLs fund the loans they make to their customers (including consumer credit contracts) through securitisation programmes, including both "term" and "warehouse" securitisations. As at 31 March 2020, approximately \$6.8 billion of lending to these customers is funded through securitisation.

NBLs, like registered banks, are actively working to assist customers impacted by COVID-19 by providing payment holidays and other hardship accommodation. Based on ASF member feedback, we understand that a material number of variations are being requested and made. The FSF has advised us that it has provided (and will continue to provide) you with fortnightly data addressing (among other things):

- a) the number of requests for relief being sought by customers of their members;
- b) the number of loans varied due to such requests; and
- c) whether the variations relate to consumer or business loans.

In addition, we understand that the FSF has also collated data from its members noting the types of practical issues its members are facing when varying consumer credit contracts, given the current economic uncertainty and operational challenges arising from COVID-19. These issues have made it difficult at times for NBLs to strictly comply with the CCCFA (particularly with regard to disclosure and assessing a customer's ability to make payments without substantial hardship) and ensure they promptly consider urgent requests from COVID-19 affected customers. For example, we understand that NBLs are facing logistical challenges associated with mail houses being unable to print and post disclosure promptly and in the timeframes required by the CCCFA (where there is no compliant alternative to posted disclosure available). Similarly, we understand that some NBLs vary contracts by writing new loans - the lockdown conditions are making it challenging to gather all the relevant data electronically in order to assess whether the customer can make payments under the "varied" loans without suffering substantial hardship. NBLs have concerns about the practical ability to be satisfied as to affordability for CCCFA purposes, in light of the very real uncertainty about the impacts of COVID-19 on business and employment, interest rates, taxes and the property market, as well as public health.

Whilst the Commerce Commission's recent COVID-19 guidance ("**Guidance**") is certainly helpful to NBLs in providing comfort on the circumstances in which the Commission may take action against lenders, it leaves a number of gaps for NBLs. Given the Bank Exemption, registered banks do not face the same issues, despite both registered banks and NBLs providing the same product to New Zealander borrowers - credit.

We believe this could create pockets of COVID-19 financial exclusion by disadvantaging NBL customers and may be confusing for consumers, many of whom borrow from both registered banks and NBLs. We are concerned that applying different treatment of across consumers based on whether they borrow from an NBL or a registered bank will not assist in the development of "*fair, efficient and transparent markets for credit*".

We are also concerned that taking a different approach between registered banks and NBLs creates the risk that NBLs will take a more cautious approach to granting relief to their customers, potentially resulting in variations taking longer to process because they are looking to ensure they comply with the CCCFA. This would obviously be problematic for both customers, who need assistance on an urgent basis, and the NBLs who are looking to act responsibly and reasonably during this pandemic.

The different treatment also adversely affects NBLs in terms of their own funding. Absent an exemption comparable to the Bank Exemption, the key issues from a securitisation perspective are as follows:

- (a) The Guidance does not provide NBLs with certainty regarding enforcement action by the Commission or borrower/class action risk. Without an exemption, NBLs face the

risk of non-compliance with the CCCFA when making COVID-19 variations. Registered banks to do not face the same risk to the extent relief is provided under the Bank Exemption.

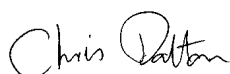
- (b) Where such non-compliance arises there is a risk that the NBL will likely breach certain provisions under its securitisation programme. For example, servicing agreements under securitisation programmes require the servicer (generally, the NBL) to comply with all laws (including the CCCFA) when servicing the securitised loans. Where such a breach occurs there is a risk the servicer will be required to indemnify its wholesale lenders (which, in the case of term securitisations, includes KiwiSaver schemes, insurance companies etc). In addition, a breach of undertaking could also result in a default under the programme. This risk is exacerbated in term securitisations, which have numerous wholesale "lenders", making it challenging for NBLs to seek any form of relief for such inadvertent/technical breaches of the CCCFA.
- (c) NBLs will also have some loans that have not yet been sold into their securitisation programmes. Where NBLs seek to sell such loans into the programme following lockdown or in subsequent months, there is a risk that the loans will not comply with the eligibility criteria or seller representations that must be met in order to complete the sale. If this is the case, NBLs will not be able to fund these loans in the manner they originally intended, which may also result in a higher cost of funds for such loans (and therefore potentially higher costs for borrowers). Securitisation generally provides a cheaper cost of funds for NBLs and enables such lenders being to offer competitive interest rates for their products.
- (d) Any uncertainty about whether NBLs are able to comply with the requirements of the CCCFA may negatively impact the appetite of wholesale funding institutions to participate in new term securitisations where consumer credit contracts are impacted by COVID-19. Such an outcome would be detrimental to New Zealand's capital markets and the provision of diversified funding options to New Zealander borrowers.

On this basis, we request that you consider providing NBLs with the same relief to that granted under the Bank Exemption.

We understand the importance of not extending any exemption too far as it risks providing relief to lenders that could take advantage of consumers during the pandemic. In this regard, we suggest the exemption should not apply to lenders of high-cost consumer credit contracts (as defined in section 25 of the Credit Contracts Legislation Amendment Act 2019, which is due to come into effect on 1 June 2020).

We look forward to discussing this request with you.

Yours sincerely,



Chris Dalton
Chief Executive Officer
Australian Securitisation Forum



Simon O'Connell
Director - Structured Finance, Westpac
ASF New Zealand Market sub-committee chair