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**High-Cost Lender Advertising:  
Considering the necessity of further reform to limit  
irresponsible advertising and protect vulnerable  
consumers**

**RESEARCH PAPER**

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## **Abstract**

*High-cost lending is a contributing factor to intergenerational poverty, hardship and social harm, particularly amongst vulnerable communities. The impact of high-cost lending on vulnerable communities is exacerbated by an inability to access mainstream credit and susceptibility to “flashy” advertising practices. Recent changes to the Credit Contracts and Consumer Finance Act 2003 have been enacted through the Credit Contracts Legislation Amendment Act 2019, with the advertising-specific changes expected to become law in October 2021. This paper analyses the sufficiency of the proposed changes and considers whether further restrictions on high-cost lender advertising are likely required.*

**Key Terms:** advertising, high-cost lending, Credit Contracts and Consumer Finance Act.

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## *I Introduction*

High-cost lending is acknowledged by the current government as contributing to the cycle of debt, which is linked to extreme hardship and intergenerational poverty.<sup>1</sup> Those who turn to high-cost lenders often do so as a last resort. They may be desperate for credit and have no other option due to not meeting the requirements of more mainstream lenders. The prevalence of high-cost lenders has increased in recent years, with many vulnerable borrowers engaging their services, such that the third-tier lender market became an 8.5-billion-dollar industry in 2019.<sup>2</sup>

The advertising of high-cost lending services is a problematic part of an industry rife with non-compliance. High-cost loans are frequently advertised as an easy solution that provides instant gratification and relief from financial stress. This misrepresents the reality for many consumers.

The Credit Contracts Legislation Amendment Act (Amendment Act) was recently enacted which, along with other reforms to the industry, introduces more prescriptive advertising regulation to come into effect October 2021.<sup>3</sup>

This paper will examine the current law on advertising as set out in the Credit Contracts and Consumer Finance Act 2003 (CCCFA) and present relevant evidence of lender non-compliance with the current law. It will outline the inadequacy of this current law, making specific reference to the advertising practices during the COVID-19 lockdown.

It will then examine the proposed changes under the Amendment Act, outlining the intent of the changes and consider how they are expected to impact high-cost lender advertising.

Finally, this paper will analyse whether the proposed changes to advertising are likely to be sufficient in protecting against predatory or irresponsible lending. It will consider submissions made on the proposed changes and canvas arguments made in support of and against further reform. It will then consider the necessity of further reform, specifically whether a complete ban on advertising is justified, or if further restrictions on certain

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<sup>1</sup> Hon Kris Faafoi “New measures added to protect against loan sharks” (press release, 3 September 2019).

<sup>2</sup> Sam Green, Nick Robertson and Ganesh Nana *The harm from high cost lending: the case for increased and improved regulation* (Berl, May 2019) (the Berl Paper) at i.

<sup>3</sup> These reforms were initially expected to take effect in April 2021 but were delayed due to the impact of COVID-19. See Hon Kris Faafoi “Government makes further inroads on predatory lenders” (press release, 4 June 2020).

advertisements are required to ensure the minimisation of social harm, in particular in the areas of celebrity endorsements and advertising to existing borrowers.

## *II High-Cost Lending*

### *A Importance*

A high-cost consumer credit contract is defined as a contract which provides for an annual interest rate of 50% or higher.<sup>4</sup>

The 2019 Te Puni Kōkiri report into microfinance institutions found high-cost lending to be one of the most “damaging and unethical lending structures currently operating”.<sup>5</sup> The research indicated that Māori, women and single parents were disproportionately affected by high-cost lending.<sup>6</sup>

High-cost lending is a contributing factor to debt and intergenerational poverty within New Zealand; it exacerbates problem debt, with high interest rates meaning a greater proportion of income is funnelled into repayments.<sup>7</sup> Debt associated with high-cost borrowing frequently becomes unmanageable and a source of emotional and financial stress that particularly affects those who are vulnerable or otherwise in hardship.<sup>8</sup>

The clients of high-cost lenders are usually those who do not qualify for credit from mainstream lenders, such as banks.<sup>9</sup> It is estimated that 30-35% of New Zealanders have credit scores that fall outside the lending criteria applied by mainstream lenders.<sup>10</sup> These clients often have high levels of existing debt with contributing factors including sudden unemployment, unexpected bills and a gap between income and the cost of basic necessities.<sup>11</sup>

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<sup>4</sup> Credit Contracts Legislation Amendment Act 2019, s 45C. Per this section, it also includes a contract where the weighted average annual interest rate is 50% or higher, a contract where the total interest charges, including default charges, that will be applied in the event of default is 50% or higher or any contract declared to be a high-cost consumer contract.

<sup>5</sup> *Te Puni Kōkiri Microfinance Research Summary* (2019) at 83.

<sup>6</sup> At 41.

<sup>7</sup> At 32.

<sup>8</sup> Ministry of Business, Innovation and Employment *Review of Consumer Credit Regulation: Additional information to support the Discussion Paper* (June 2018) (Additional Information Document) at [11].

<sup>9</sup> At [17].

<sup>10</sup> At [17].

<sup>11</sup> Liz Gordon and others *Research Report: Survey of Financial Mentoring and Budgeting Services in Aotearoa on high cost loans, debt collection and other consumer credit issues* (FinCap, February 2019) (Gordon Research) at 5.

High-cost lender behaviour has a particular impact on those in hardship as they must prioritise repaying the debt over accessing essentials, continuing their spiral into debt.<sup>12</sup> In addition, the stress and pressure of an unfavourable financial situation often impairs decision-making, meaning these consumers are even more likely to take out high-cost loans without fully considering the impacts.<sup>13</sup>

Advertising is one of two principal ways in which borrowers find out about high-cost lenders.<sup>14</sup> Borrowers tend to favour high-cost lenders who claim that creditworthiness is not as important of a factor as with traditional lenders and promise ease and speed in receiving the loan.<sup>15</sup>

Ensuring high standards of responsible lending by high-cost lenders is vital in reducing problem debt and ensuring those in hardship are not encouraged to obtain loans they cannot afford to repay.<sup>16</sup> This includes adopting responsible advertising practices.

#### *B Advertising Practices in the Consumer Lending Market.*

A 2018 review into the CCCFA found that irresponsible lending practices and inconsistent levels of compliance with responsible lending obligations were prevalent throughout the high-cost credit market.<sup>17</sup> The review noted that advertising practices was an area in which there was significant non-compliance.<sup>18</sup> It noted that the harm associated with irresponsible lending “falls disproportionately on vulnerable consumers”, with a particular impact on those in hardship.<sup>19</sup>

High-cost lending is frequently represented by lenders as an easy and attractive option that provides relief from financial distress. Research indicates that advertising is one of the key influences for consumers who use high-cost lenders, with 38.54% of clients seeing “advertising that promises easy money” as the main influence on their decision to borrow from a high-cost lender.<sup>20</sup>

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<sup>12</sup> Additional Information Document, n 8, at [77].

<sup>13</sup> The Berl Paper, n 2 at 5.7.

<sup>14</sup> Colmar Brunton Social Research Agency *Using a third tier lender: experiences of New Zealand borrowers* (August 2011) at 3.

<sup>15</sup> Colmar Brunton, n 14 at 3.

<sup>16</sup> Gordon Research, n 11 at 5.

<sup>17</sup> Ministry of Business, Innovation and Employment *Discussion Paper: Review of Consumer Credit Regulation* (June 2018) (Review of Consumer Credit Regulation) at [15].

<sup>18</sup> At [15].

<sup>19</sup> At [15].

<sup>20</sup> Gordon Research, n 11 at 32.

The review of the CCCFA that led to the 2015 changes emphasised that high-cost lenders tend to focus their advertising on the ease of accessing credit, rather than interest rates, to the detriment of consumers who seek to make comparison.<sup>21</sup> Common features of these advertisements included emphasising the simplicity and speed in applying for the loan, that money can be borrowed for any purpose regardless of circumstance or history, use of daily interest rates to imply interest is low, and emphasising the commonality of high-cost loans in that anyone can, and does, borrow.<sup>22</sup>

The 2015 changes, which introduced the responsible lending obligations, somewhat improved advertising practices. The Ministry of Business, Innovation and Employment (MBIE), in their 2018 review of consumer credit regulation, noted that a greater proportion of lenders were disclosing interest rates, fees and the relevance of borrower circumstances to their ability to finance loans.<sup>23</sup> While compliance with the current legislation has increased, a significant level of irresponsible or otherwise problematic advertising practices appears to remain.<sup>24</sup>

### *III Existing Advertising Regulation*

The existing regulation around advertising high-cost lending is predominantly set out in the CCCFA.<sup>25</sup> All lenders of consumer credit are required to comply with the lender responsibility principles set out in that Act.<sup>26</sup>

The CCCFA also provides for the creation of the Responsible Lending Code (the RLC).<sup>27</sup> The RLC is intended to provide more detail on the lender responsibility principles and guidance on how these principles can be complied with.<sup>28</sup>

The RLC and lender responsibility principles were enacted as part of the 2015 changes to the CCCFA. They were introduced in response to the social harms arising from high-cost lenders providing unaffordable or unsuitable loans to vulnerable consumers.<sup>29</sup>

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<sup>21</sup> Ministry of Consumer Affairs *Review of the Operation of the Credit Contracts and Consumer Finance Act 2003* (September 2009) at 13.

<sup>22</sup> At 55.

<sup>23</sup> Review of Consumer Credit Regulation, n 17 at [13].

<sup>24</sup> Review of Consumer Credit Regulation, n 17 at [15].

<sup>25</sup> Credit Contracts and Consumer Finance Act 2003.

<sup>26</sup> Section 9C.

<sup>27</sup> Responsible Lending Code 2017.

<sup>28</sup> Ministry of Business, Innovation and Employment *Discussion Document: Responsible Lending Code* (July 2014) at [14].

<sup>29</sup> Review of Consumer Credit Regulation, n 17 at [6].

In addition to the lender responsibility principles in the CCCFA and the RLC, the Advertising Standards Authority has developed a code for financial advertising. This code is intended to provide guidance to those who advertise for the lending, saving or investment of money, guarantees, financial instruments and the purchase or sale of securities.<sup>30</sup> It is relevant in determining what constitutes responsible financial advertising. This code recognises that financial advertisements carry a high standard of social responsibility and should not mislead, deceive or confuse consumers.<sup>31</sup> Compliance with this code is voluntary, with no consequences for non-compliance, though arguably provides useful guidance in ensuring financial advertising is responsible.

#### *A Credit Contracts and Consumer Finance Act Requirements*

The CCCFA requires every lender of consumer credit to comply with the lender responsibility principles.<sup>32</sup> The advertising-specific lender responsibility principles require every lender of consumer credit to, at all times, exercise the care, diligence and skill of a responsible lender in any advertisement for the provision of credit or finance.<sup>33</sup> They also require such lenders to assist the borrower in reaching an informed decision, making the borrower reasonably aware of the implications by ensuring that any advertising complies with any advertising standards and is not misleading, deceptive or confusing, nor is it likely to be.<sup>34</sup>

Currently, there are no prescribed advertising standards with the Act. The Act does not set out nor define what constitutes responsible advertising, provide examples of advertising practice that is irresponsible, or provide definitions for what constitutes misleading, deceptive or confusing advertising practices. The requirement that advertising not be misleading or deceptive reflects the obligations of all traders under the Fair Trading Act 1986 (FTA) and a body of law has grown around the issue of defining these words.

#### *B Responsible Lending Code Requirements*

The RLC is a non-binding code intended to elaborate on the lender responsibility principles and offer guidance on how these principles may be implemented and complied with by

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<sup>30</sup> Code for Responsible Advertising 2019 at 1.

<sup>31</sup> At 2.

<sup>32</sup> Credit Contracts and Consumer Finance Act 2003, s 9C(1).

<sup>33</sup> Section 9C(2)(a)(i).

<sup>34</sup> Section 9C(3)(b)(i).



lenders.<sup>35</sup> As the RLC only offers guidance, compliance with the RLC is not necessary for compliance with the lender responsibility principles.

Additionally, as the RLC is non-binding, compliance with the RLC is merely evidence of compliance with the lender responsibility principles.<sup>36</sup> A failure to comply with the RLC is insufficient to support a finding of irresponsible lending practices as the principles can be complied with by other means.<sup>37</sup> Therefore, while this guidance may be intended to reduce irresponsible advertising, the impact appears limited where compliance is not mandatory.

The guidance within the RLC can be applied to advertising across all media, including outdoor, online, emails and messaging.<sup>38</sup> The guidance in the RLC therefore applies to both direct advertising and advertising to the public, or a section thereof.

The advertising guidance in the RLC makes specific reference to the requirement that any advertising is not misleading, deceptive or confusing to borrowers. As stated above, the terms misleading and deceptive reflect the obligations under the FTA. The term ‘confusing’ is not defined within the RLC, though it makes reference to a decision of the High Court in a trademark case, which held that confusion goes no further than “perplexing or mixing up the minds” of the public.<sup>39</sup>

The RLC provides general practices that should be complied with to ensure advertising is not confusing, misleading or deceptive. These practices include ensuring advertisements can be readily understood by the intended audience, that key information is legible or audible and disclosed in such detail that demonstrates its importance, and that technical language and statistics are used in a way that can be readily understood by consumers.<sup>40</sup>

It also provides for more general practices. These include:<sup>41</sup>

- (1) avoiding giving an impression of overall levels of fees and costs that is not realistic;
- (2) displaying annual percentage rates, and any mandatory fees, prominently; and
- (3) including the total amount repayable when referring to an amount of regular repayments.

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<sup>35</sup> Section 9E(1).

<sup>36</sup> Section 9E(3).

<sup>37</sup> Additional Information Document, n 8 at [273].

<sup>38</sup> Responsible Lending Code, n 27 at 3.1.

<sup>39</sup> *New Zealand Breweries Ltd v Heineken's Bier Browerij Maatschappij N.V* [1964] NXLR 115 at [34].

<sup>40</sup> Responsible Lending Code, n 27 at 3.2.

<sup>41</sup> Responsible Lending Code, n 27 at 3.3.

The RLC sets out practices that should be avoided as they have the potential to make advertising misleading, confusing or deceptive. These practices include claims that insinuate the lender will not conduct proper inquiries into the borrower’s circumstances or consider these circumstances completely in making decisions.<sup>42</sup>

### *C Evidence of non-compliance with existing regulation*

The 2018 review by MBIE into consumer credit regulation found unacceptable rates of non-compliance that cause harm to vulnerable borrowers.<sup>43</sup> The report of this review noted evidence of activities that may be considered breaches of the requirement to advertise responsibly, namely upselling and repeatedly advertising high-cost loans to those who have repaid them, thereby encouraging consumers to borrow more than required.<sup>44</sup>

Advertising indicative of the concerning practices conducted by the high-cost lender industry occurred when members of the Finance and Expenditure Committee, in the course of considering the Bill that became the Amendment Act, partially completed online applications for high-cost lender contracts. Despite providing no financial information, some were contacted on up to 19 occasions, receiving direct advertising regarding their “pre-approved” loans and loan products offered by these and other lenders.<sup>45</sup> This suggests that some lenders are placing pressure on potential borrowers who have decided against completing loan applications.<sup>46</sup>

The targeting of specific groups, including those in low-income areas, is another practice which was evidenced by the review.<sup>47</sup> This practice suggests high-cost lenders aggressively target those who are vulnerable and likely to be tempted by advertising campaigns that highlight low barriers of approval, the ease of online applications and the speed in which the loan is received.<sup>48</sup> MBIE has found significantly lower levels of compliance in print media than online, indicating that non-compliant advertising may be targeted at vulnerable communities through newspapers or flyer drops.<sup>49</sup>

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<sup>42</sup> Responsible Lending Code, n 27 at 3.4 -3.5.

<sup>43</sup> Review of Consumer Credit Regulation, n 17 at [39].

<sup>44</sup> Review of Consumer Credit Regulation, n 17 at [39b].

<sup>45</sup> Finance and Expenditure Committee *Credit Contracts Legislation Amendment Bill: Final Report* (November 2019) (Final Report on the Bill) at 4.

<sup>46</sup> Additional Information Document, n 8 at [37d].

<sup>47</sup> Te Puni Kōkiri, n 5 at 83.

<sup>48</sup> Te Puni Kōkiri, n 5 at 83.

<sup>49</sup> Ministry of Business, Innovation and Employment *Desk-based study of Lenders: An overview of the New Zealand lender landscape and lender advertising and disclosure practices* (2018) (Desk-Based Lender Study) at [56].

The Commerce Commission has, since the 2015 changes, commenced proceedings against three high-cost lenders, alleging breaches of the lender responsibility principles that included a failure to ensure advertising is responsible. These proceedings were against Ferratum, Moola and Pretty Penny. The proceedings against Ferratum were settled out of Court, with the settlement including an undertaking by Ferratum to advertise responsibly by not sending direct messages to borrowers encouraging them to take out another loan where they have an existing loan, a recently repaid loan, or a failure to make repayments in the last six months.<sup>50</sup>

The proceedings against Moola remain open, with a Christchurch budget advisory service alleging their failure to exercise care, diligence and skill in email and text-based advertising.<sup>51</sup> The proceedings against Pretty Penny also remain open, with 76 complaints over two years evidencing the allegation of a failure to exercise the required care, diligence and skill in text, email, internet and radio advertising.<sup>52</sup>

MBIE found that a contributing factor to the level of non-compliance may be the uncertainty of lenders on how to comply with the lender responsibility principles.<sup>53</sup> MBIE suggested that this is likely due to the principles-based nature of the relevant obligations, combined with little case law and the Code providing only non-binding guidance.<sup>54</sup> The lack of certainty regarding what constitutes responsible lending and compliance with the Act suggests the need for more prescriptive standards.

#### *D Impact of Level Four COVID-19 Lockdown*

New Zealand entered COVID-19 Alert Level Four at 11:59pm on Wednesday 25 March 2020 and remained in this level until 11:59pm on Monday 27 April 2020.<sup>55</sup> Under this level, people were required to stay at home unless accessing essential services and non-essential businesses were closed.<sup>56</sup> COVID-19 has had a significant impact on many New Zealander's

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<sup>50</sup> Commerce Commission “High Cost lender Ferratum admits responsible lending breaches” (press release, 30 June 2020).

<sup>51</sup> Commerce Commission “Commission alleges irresponsible lending by Moola” (press release, 8 July 2019).

<sup>52</sup> Commerce Commission “Commission alleges irresponsible lending by Pretty Penny” (press release, 12 August 2019).

<sup>53</sup> Additional Information Document, n 17 at [40].

<sup>54</sup> Review of Consumer Credit Regulation, n 17 at [40].

<sup>55</sup> Rt Hon Jacinda Ardern “New Zealand moves to COVID-19 Alert Level 3, then Level 4 in 48 hours” (press release, 23 March 2020).

<sup>56</sup> Ministry of Health and New Zealand Police “Additional guidance on Alert Level 4 rules” (press release, 4 April 2020).

jobs and livelihoods, through loss of employment, employment uncertainty and income drops.<sup>57</sup>

The Commerce Commission provided guidance intended to assist lenders in applying the CCCFA during the time the New Zealand economy is impacted by COVID-19.<sup>58</sup> The Commission noted that lenders should continue to follow the RLC guidance, and not take advantage of the financial stress likely to arise due to COVID-19.<sup>59</sup> The Reserve Bank and Financial Markets Authority considered all lenders, including high-cost lenders, an essential service as they enable consumers and businesses to access capital.<sup>60</sup> Therefore, high-cost lenders continued to operate throughout.

A recent Commission for Financial Capability survey found that, due to COVID-19, 34% of households have experienced financial difficulties, with a further 40% at risk of financial difficulties.<sup>61</sup> Of those who were experiencing financial difficulties, 52% owed money due to missed household bill or credit payments.<sup>62</sup> 51% of these households had seen a loss in income.<sup>63</sup> This is indicative that those who were already experiencing financial difficulty are at an even greater risk due to the impacts of COVID-19, while others who have lost income are more likely to experience financial difficulty. The survey noted that population segments over-represented as experiencing financial difficulty included Māori and Pasifika, those renting and single parents.<sup>64</sup>

COVID-19 appears to have had a significant impact on the ability of consumers to pay for essentials and/or repay debt. This impact has been recognised by the current government, who noted the link between predatory lending and severe financial hardship, with COVID-19 only exacerbating the need of vulnerable communities for legislative protection.<sup>65</sup> The effects of the pandemic appear to be leaving consumers increasingly vulnerable, suggesting

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<sup>57</sup> Hon Grant Robertson and Hon Carmel Sepuloni “New payment to support Kiwis through COVID” (press release, 25 May 2020).

<sup>58</sup> Commerce Commission *The Credit Contracts and Consumer Finance Act 2003: Guidance for lenders operating during the COVID-19 pandemic* (April 2020) at [1].

<sup>59</sup> At [34].

<sup>60</sup> Email from Joseph Weller (Senior Adviser of the Reserve Bank of New Zealand) to Victoria Stace (Senior Lecturer at Victoria University of Wellington) regarding high cost lenders operating during lockdown (16 April 2020).

<sup>61</sup> Celestyna Galicki *Impact of COVID-19 on Financial Wellbeing* (Commission for Financial Capability, May 2020) at 1.

<sup>62</sup> At 2.

<sup>63</sup> At 2.

<sup>64</sup> At 2.

<sup>65</sup> Hon Kris Faafoi, n 3.

that to avoid irresponsible lending, high-cost lenders ought to take a particularly careful approach in their advertising practices.

A review of several prominent high-cost lenders' websites during lockdown revealed that some were modifying their terms and conditions of credit to recognise increased hardship.

Save My Bacon waived late fees for all consumers during the level four lockdown and encouraged consumers to get in contact to avoid any negative impacts on credit scores, with lending limited to essential services and those continuing to work.<sup>66</sup> Superloans stopped accepting new loan customers over lockdown.<sup>67</sup> They encouraged consumers who had not had their income negatively impacted, and who had current or previous loans, to reapply if they needed extra cash.<sup>68</sup> Cash Converters and Moola were two high-cost lenders whose terms and conditions did not materially change over the lockdown period.

While the actions of Save My Bacon and Superloans were a positive step to recognising the increased hardship, this represented a change to their terms and conditions of credit, rather than to their advertising practices. Their advertising practices did not indicate the same recognition of hardship, with these lenders continuing to promote the speedy approval of their loans and the minimal relevance of creditworthiness.

#### *IV New Advertising Regulation*

The 2015 changes have resulted in improved lender awareness of responsible lending requirements and improved transparency in advertising standard terms such as interest rates, fees and the relevance of borrower circumstances.<sup>69</sup> However, MBIE found that significant compliance issues continued within the industry, including in relation to advertising practices.<sup>70</sup>

MBIE noted that the reliance on the principles-based approach established by the responsible lending principles in the CCCFA, and elaborated on in the RLC, has contributed to non-compliance and confusion over obligations.<sup>71</sup> The regulations expected to be in effect from October 2021 made under the authority of the provisions inserted by the Amendment Act<sup>72</sup>

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<sup>66</sup> Save My Bacon "COVID-19 Update" (4 May 2020) <savemybacon.co.nz>

<sup>67</sup> Superloans "COVID-19; Express Loan Customers" (15 April 2020) <superloans.co.nz/covid19/>

<sup>68</sup> Superloans, n 67.

<sup>69</sup> Review of Consumer Credit Regulation, n 17 at [13].

<sup>70</sup> Review of Consumer Credit Regulation, n 17 at [15].

<sup>71</sup> Review of Consumer Credit Regulation, n 17 at [70].

<sup>72</sup> The changes are formalised in the Credit Contracts Legislation Amendment Act, with advertising-specific regulations inserted into the Credit Contracts and Consumer Finance Regulations 2004.

are intended to address issues regarding the lack of prescriptive requirements and continued irresponsible advertising.<sup>73</sup> Although the current requirements provide guidance on best advertising practice and general prohibited practice, they have been insufficient in ensuring all relevant information is provided in advertisements, such as annual interest rates, fees and risk warnings.<sup>74</sup>

The advertising-specific changes are expected to come into force in October 2021, with lenders having a responsibility to ensure their advertising complies with the proposed regulations 4AJ – 4AN in the Credit Contracts and Consumer Finance Regulations 2020 (which are, at September 2020, contained within an exposure draft).<sup>75</sup> The Amendment Act also inserts two new regulations into the Credit Contracts and Consumer Finance Regulations 2004 (the Regulations) that relate specifically to advertising financial mentoring services and risk statements, which apply only to high-cost lending.<sup>76</sup>

Notably, the introduction of prescriptive standards was supported by Save My Bacon, a prominent high-cost lender, as under the current system they recognised “a lack of clarity and detail regarding what constitutes ‘responsible lending’ at a practical level”.<sup>77</sup>

#### *A Credit Contracts Legislation Amendment Act 2019*

One key change enacted by the Amendment Act was to introduce more prescriptive advertising standards.<sup>78</sup> Under s 9C of the CCCFA, as amended by the Amendment Act, a lender must assist the borrower to reach an informed decision and be reasonably aware of the implications of entering the agreement by ensuring that advertising is not, or is not likely to be, misleading, deceptive or confusing to borrowers, *and* the lender must comply with the advertising standards in the regulations.<sup>79</sup>

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<sup>73</sup> Ministry of Business, Innovation and Employment *Credit Contracts Legislation Amendment Bill: Initial Briefing to the Finance and Expenditure Committee* (June 2019) (MBIE Initial Briefing) at [32].

<sup>74</sup> Ministry of Business, Innovation and Employment *Credit Contracts Legislation Amendment Bill: Officials’ Report to the Finance and Expenditure Committee* (August 2019) (Officials’ Report to the Committee) at [127].

<sup>75</sup> Finance and Expenditure Committee *Exposure Draft of the Credit Contracts Legislation Amendment Bill: Commentary* (November 2019) at 64.

<sup>76</sup> Credit Contracts and Consumer Finance Regulations 2004 (CCCFR), regs 4AAA; 4AAB.

<sup>77</sup> Save My Bacon “Submission to the Finance and Expenditure Committee on the Credit Contracts Legislation Amendment Bill 2019” at [5.2.a].

<sup>78</sup> Ministry of Business, Innovation and Employment *Exposure Draft of the Credit Contracts and Consumer Finance Amendment Regulations 2020: Commentary and Request for Submissions* (November 2019) (Exposure Draft Commentary) at [64].

<sup>79</sup> Amendment Act, n 4, s 10(2)(i).

The new advertising standards, currently (September 2020) contained in an exposure draft circulated by MBIE, and which are expected to apply from October 2021 are set out in regs 4AK – 4AN.<sup>80</sup> These regs are concerned with the advertisements of amounts payable under an agreement, interest rates or charges, no interest agreements and prohibited practices.<sup>81</sup>

Under reg 4AK, where an advertisement refers to payment amount under an agreement, the advertisement must state the total amounts of payments where ascertainable (and if the contract is to be paid out within seven years, covering most high-cost loans), displaying it as prominently as any payment amount.<sup>82</sup> This is essentially codifying the guidance in clause 3.3.c of the RLC; it does not add any additional requirements. The intent of this section is to enable consumers to compare loans with similar payment amounts and have a realistic impression of the cost of the loan.<sup>83</sup> It was suggested that the majority of borrowers were mainly interested in the amount of each repayment and the length of time for which the payment would need to be made, such that advertising a total payment amount would enable easy comparison.<sup>84</sup>

Under reg 4AL, where an advertisement refers to an interest rate or charge, it must state the annual interest rate, whether that rate is fixed (and for what period), variable or adjustable and any mandatory credit fees.<sup>85</sup> Lenders are not required to disclose default interest rates, but the rates in the advertisement must be the current interest rates that are ordinarily available.<sup>86</sup> This section is similar to the guidance in clause 3.3.b of the RLC. However, it notably excludes the guidance in clause 3.3.a that advertisements should avoid giving an unrealistic impression of the overall levels of fees and costs, despite this being the intent of the section.<sup>87</sup>

Reg 4AM applies where the advertisement states there is no interest, requiring the advertisement to also state any mandatory credit fees and the amounts of those fees.<sup>88</sup>

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<sup>80</sup> Ministry of Business, Innovation and Employment *Draft for Consultation: Credit Contracts and Consumer Finance Amendment Regulations 2020* (November 2019), (Draft Proposed Regulations) reg 4.

<sup>81</sup> Draft Proposed Regulations, n 80, regs 4AK – 4AN.

<sup>82</sup> Draft Proposed Regulations, n 80, at reg 4AK.

<sup>83</sup> Exposure Draft Commentary, n 78, at [74].

<sup>84</sup> Review of the CCCFA, n 21 at 13.

<sup>85</sup> Draft Proposed Regulations, n 80, at reg 4AL.

<sup>86</sup> Draft Proposed Regulations, n 80, at regs 4AL(3); 4AL(4).

<sup>87</sup> Exposure Draft Commentary, n 78, at [77].

<sup>88</sup> Draft Proposed Regulations, n 80, at reg 4AM. This provision, owing to applying only to zero interest credit, will not apply to most high-cost lending arrangements which, by definition, require high interest rates.

Under reg 4AN, advertisements must not represent, explicitly or by implication, that the lender will not fully inquire into the borrowers circumstances, and will not fully consider the circumstances in assessing whether to enter a credit agreement nor represent or imply that a loan has already been approved or granted if proper inquiries have not been completed.<sup>89</sup> This is similar to the guidance in clauses 3.4 and 3.5 of the RLC. It prohibits claims such as “15-minute approval”, “bad credit history – no worries” or “approval is guaranteed”. It is uncertain whether this extends to claims which emphasises the speed or the process. Notably, the UK report into the advertising of payday lending indicated that the resulting changes should require any representation about the speed of the lending process to be true, not misleading, and may require further disclosure where they amount to an incentive to borrow.<sup>90</sup>

It is noteworthy that these regulations have a somewhat limited application. The regulations in regs 4AK and 4AL only apply where the advertisement is being distributed to the public, or a section of the public.<sup>91</sup> Only regs 4AN and the prohibited advertising practices it sets out are applicable to direct advertising, such as communications between lender and borrower.

The changes also included a definition of advertising. “Advertising” is defined as including any form of communication that has been, or is to be, distributed to a person, is reasonably likely to induce a person to inquire about or apply for an agreement and is authorised by, or on behalf of, the lender or an associated person.<sup>92</sup> This definition was intentionally left broad.<sup>93</sup> It is intended to include verbal or direct individual communications that induce inquiries about credit arrangements, as well as advertising to the public.<sup>94</sup>

The final key change is the introduction into the Regulations of specific advertising requirements for high-cost consumer credit contracts.<sup>95</sup> Advertisements of high-cost credit on the lender website, any website an advertisement links to, and print advertisements must disclose information about financial mentoring or advice services.<sup>96</sup> Every advertisement for a high-cost consumer credit contract is required under reg 4AAAB to include a prominent

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<sup>89</sup> Draft Proposed Regulations, n 80, at reg 4AN.

<sup>90</sup> Business, Innovation and Skills Committee *Seventh Report; Payday Loans* (17 December 2013) at 55.

<sup>91</sup> Draft Proposed Regulations, n 80 at ss 4AK(1), 4AL(1).

<sup>92</sup> Amendment Act, n 4, s 9B(1).

<sup>93</sup> Exposure Draft Commentary, n 78 at [68].

<sup>94</sup> Exposure Draft Commentary, n 78 at [68].

<sup>95</sup> Amendment Act, n 4 s 69(2). These regulations have been inserted by the Amendment Act and become law in October 2021.

<sup>96</sup> Amendment Act, n 4, s 69(2).



statement that these contracts are not suitable for long-term or regular borrowing, and should only be used to address temporary, short-term needs for cash.<sup>97</sup> The intent behind these provisions is to ensure that potential borrowers are aware of the risks of high-cost lending and of the ability to easily access budgeting or financial advice.<sup>98</sup>

### *B Research into the Compliance of Current Advertising*

High-cost lenders tend to advertise their loans in a manner that promotes the speed and ease of online applications and the limited influence the credit history of the consumer has.<sup>99</sup> It is suggested that high-cost lenders practice profiled targeting, maximising profit by directing advertising at more vulnerable consumers.<sup>100</sup>

As assessment of the websites of a selection of high-cost lenders, undertaken by the author in March 2020, illustrates that current practices would likely be insufficient to meet the new and proposed regulations.

One high-cost lender, Superloans, promoted that consumers can get their first loan free.<sup>101</sup> They claim to give consumers “the ability to borrow short term funds in a quick and easy way”.<sup>102</sup> They also advertise a “Super Score” program, where the more a consumer borrows and repays loans, they are rewarded with higher limits and lower rates.<sup>103</sup> Whilst rewards programs are not prohibited under the Act, it is likely irresponsible to offer such a program when it carries with it the implication that these loans are suitable for repeat lending.

Save My Bacon advertised themselves as “a brighter way to borrow” and “a safe place” to borrow money.<sup>104</sup> They also claim to provide loan solutions that “never go beyond your means”.<sup>105</sup> Save My Bacon are affiliated with numerous radio show promotions, including the “ZM Secret Sound”, which gives away various amounts of cash.<sup>106</sup> The radio promotions state that they occur “thanks to Save My Bacon, a safe place to borrow money

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<sup>97</sup> Amendment Act, n 4, s 69(2).

<sup>98</sup> Exposure Draft Commentary, n 78, at [85].

<sup>99</sup> Desk-Based Lender Study, n 49 at [67].

<sup>100</sup> FinCap “Submission to the Finance and Expenditure Committee on the Credit Contracts Legislation Amendment Bill 2019” at 10.

<sup>101</sup> Superloans “Get a Free Loan” (11 March 2020) <superloans.co.nz>

<sup>102</sup> Superloans, n 101.

<sup>103</sup> Superloans “Super Score” (1 April 2020) <superloans.co.nz/super-score/>.

<sup>104</sup> Save My Bacon “Get a Loan” (11 March 2020) <savemybacon.co.nz>

<sup>105</sup> ZM “ZM’s Bonus Banger” (5 June 2020) <zmonline.com/whats-on/zms-bonus-banger/>

<sup>106</sup> Kevin Bacon “How to spend \$100k” (25 March 2020) <savemybacon.co.nz/blog/2020/03/25/How-To-Spend-100K-Dollars>

online”, only occasionally using a risk warning.<sup>107</sup> Guidance under the RLC suggests that where a celebrity advertises high-cost credit, they should convey a risk warning.<sup>108</sup>

Moola advertised their loans as being flexible and fast. They also make claims such as “Good credit? Bad credit? Don’t worry”.<sup>109</sup> In their submissions on the reform, Moola emphasise their belief that this advertising complies with the requirements set out in the RLC.<sup>110</sup> However, as this arguably implies there will not be a full inquiry into borrower circumstances, it would likely fail to comply with the requirement in reg 4AN(a).

Cash Converters claimed on their website their loans are simple, and while they may sound unmanageable and daunting, they are “just like any other loan”.<sup>111</sup> They also claim that their daily interest rate is “the real interest rate”.<sup>112</sup> This implies that the aforementioned APR, or annual percentage rate, is not the real interest rate, such that it may discourage consumers from using the APR for comparison.

High-cost lenders are also known to advertise their loans as being same day approval, with credit approved the same day it is applied for.<sup>113</sup> High-cost lenders also reportedly encourage borrowers to confirm new loans over text message, even if they have an existing loan, or are in default on that existing loan.<sup>114</sup>

Many of the advertising practices detailed within this section are unlikely to comply with the regulations set out in the MBIE exposure draft, despite much of these proposed regulations simply being a codification of the guidance set out in the RLC.

It is of note that some lenders may attempt to change their terms of credit to fall below the threshold of a high-cost lender as defined in the Amendment Act. The proposed regulations detailed above, except for those concerning the advertising risk statements and financial mentoring services, apply to all lenders of consumer credit, such that they would still apply to these lenders whether or not they meet the definition of “high-cost lender”.

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<sup>107</sup> ZM, n 105.

<sup>108</sup> Responsible Lending Code, n 27 at [3.6.b].

<sup>109</sup> Moola “Moola Loans” (4 March 2020) <moola.co.nz>.

<sup>110</sup> NZ Fintech “Submission to the Finance and Expenditure Committee on the Credit Contracts Legislation Amendment Bill 2019” at [14].

<sup>111</sup> Cash Converters “Loans” (4 March 2020) <cashconverters.co.nz/borrow>.

<sup>112</sup> Cash Converters “Annual Interest Rate” (4 March 2020) <cashconverters.co.nz/borrow>.

<sup>113</sup> Desk-Based Lender Study, n 49 at [75].

<sup>114</sup> Additional Information Document, n 8 at [26].

## *V Submissions*

Numerous submissions were made to the Finance and Expenditure Committee on the proposed introduction of increased prescription around advertising by lenders of consumer credit, in particular that of high-cost lenders. 33 budget services, in addition to other consumer advocates, proposed that the advertising of high-cost lending ought to be either completely banned or more strongly regulated.<sup>115</sup> A similar number of submissions supported the requirement that high-cost lenders include, in any advertisement, the information for a financial budgeting service.<sup>116</sup> There were other common themes in submissions, including the restriction of high-cost lending by prohibiting unsolicited offers of credit, celebrity endorsements or advertising over certain media or at certain times.<sup>117</sup>

It appears that existing provisions and guidance are inadequate to ensure consumers are protected against irresponsible lender advertising. Consumer NZ considered the prescription necessary to combat the advertising of credit as “easy to get and suitable for non-essential spending”.<sup>118</sup>

The Child Poverty Action Group, alongside 43 other submitters, supported the prescription around advertising regulations of all credit lenders, making specific reference to those lenders providing high-cost credit.<sup>119</sup>

Russell McVeagh was one of few submitters that believed the lender responsibility principles as they stood in the 2003 Act were a sufficient mechanism to ensure responsible advertising and preventing negative consumer outcomes.<sup>120</sup> Other submitters, such as NZ Fintech (trading as Moola, argued that a balance ought to be struck such that any advertising standards are prescriptive enough to be clear, but not so prescriptive that they become overly onerous.<sup>121</sup>

The New Zealand Bankers Association submitted that the changes may unintentionally lead to more conservative lending practices, reduce the amount of information available regarding borrowing choices and affect access to credit, such that vulnerable borrowers may

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<sup>115</sup> Officials’ Report to the Committee, n 74, at [131].

<sup>116</sup> At [14].

<sup>117</sup> At [132].

<sup>118</sup> Consumer NZ “Submission to the Finance and Expenditure Committee on the Credit Contracts Legislation Amendment Bill 2019” at [3.1].

<sup>119</sup> Officials’ Report to the Committee, n 74 at 57.

<sup>120</sup> Russell McVeagh “Submission to the Finance and Expenditure Committee on the Credit Contracts Legislation Amendment Bill 2019” at [3.5].

<sup>121</sup> NZ Fintech, n 110, at [15].

be left with no option other than the high-cost lenders who are the most active within their community.<sup>122</sup>

The Commerce Commission submitted that the lender responsibility principles, combined with the RLC, were not sufficient to ensure advertising practices were responsible.<sup>123</sup> In the view of the Commission, the current legislation provides no effective tool to enforce the advertising regulations aside from injunctive relief.<sup>124</sup> The Commission noted that there are currently no penalties for breaches of the lender responsibility principles as the Commission believes it would be difficult to prove loss or damage directly attributable to irresponsible advertising.<sup>125</sup>

MBIE noted that compliance with the lender responsibility principles regarding advertising was difficult to enforce due to the RLC providing guidance only.<sup>126</sup> The enactment of the proposed standards is intended to improve both consumer outcomes and the clarity of lender obligations by outlining what an advertisement should and should not include.<sup>127</sup> This will likely assist in compliance and enforcement, with the Commission, borrowers and lenders being better informed of requirements.

In addition, the proposed regulations include remedies and penalties for non-compliance with the lender responsibility principles.<sup>128</sup> These include pecuniary penalties for breaching the responsible lending principles and banning orders that prohibit or restrict lenders from any involvement in consumer lending.<sup>129</sup>

#### *A Financial Mentoring or Advice*

The Berl Report has suggested that the clients of high-cost lenders tend to borrow due to a general worsening in their financial situation, the need to repay prior debt or encouragement by the lender to take out new debt.<sup>130</sup> This report also suggested that cyclic nature of high-cost borrowing indicates that financial advice should be a prerequisite of entering such an

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<sup>122</sup> New Zealand Bankers Association “Submission to the Finance and Expenditure Committee on the Credit Contracts Legislation Amendment Bill 2019” at [11-12].

<sup>123</sup> Commerce Commission “Submission to the Finance and Expenditure Committee on the Credit Contracts Legislation Amendment Bill 2019” at [138].

<sup>124</sup> At [138].

<sup>125</sup> At [138].

<sup>126</sup> Officials’ Report to the Committee, n 74 at [129].

<sup>127</sup> MBIE Initial Briefing, n 73 at [40].

<sup>128</sup> MBIE Initial Briefing, n 73 at [43].

<sup>129</sup> MBIE Initial Briefing, n 73 at [44]-[45].

<sup>130</sup> The Berl Paper, n 2 at 5.7.

agreement, especially where a consumer already has a high-cost loan or recently repaid one.<sup>131</sup>

FinCap, alongside other submitters, proposed that all lenders should be required to advertise a national helpline for debt or financial hardship alongside their advertisement for services.<sup>132</sup> The exposure draft proposed disclosure of the MoneyTalks budgeting and advice service alongside high-cost lending advertisements.<sup>133</sup> MoneyTalks is a financial capability helpline funded by the Ministry of Social Development; essentially operating as a national debt helpline.<sup>134</sup>

The amendments to the Credit Contracts and Consumer Finance Regulations enacted by the Amendment Act (which insert new regulations 4AAA and 4AAB) require prominent disclosure of the MoneyTalks website and contact information, alongside a statement that MoneyTalks can be contacted for confidential and free financial capability and budgeting advice.<sup>135</sup> The foundation for the requirement is that consumers who access financial advice services are less likely to suffer financial distress or be encumbered by high-cost loans.<sup>136</sup>

The United Kingdom requires similar disclosure by gambling advertisers; whose companies fund the promotion of the “when the fun stops, stop” campaign in their advertising and written communications.<sup>137</sup>

The Family Finances Services Trust suggested that, furthermore, the disclosure of a local budgeting service should be included in advertising.<sup>138</sup> Moreover, they submit that the advertisement ought to recommend seeing a local budgeting service to ensure they are aware of, and able to consider, any alternatives.<sup>139</sup>

The Berl Report recommended that prior to a consumer being able to enter a second high-cost loan, or a new high-cost loan after recently repaying a previous one, it should be a requirement to obtain financial advice from a budgeting service.<sup>140</sup> Any such requirement

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<sup>131</sup> The Berl Paper, n 2 at 5.7.

<sup>132</sup> FinCap, n 100 at 70.

<sup>133</sup> Exposure Draft Commentary, n 78 at [84].

<sup>134</sup> CCCFR, n 76 at reg 5A(7).

<sup>135</sup> CCCFR, n 76 at reg 5A(6).

<sup>136</sup> The Berl Paper, n 2 at 12.

<sup>137</sup> FinCap, n 100 at 70.

<sup>138</sup> Family Finances Services Trust “Submission to the Finance and Expenditure Committee on the Credit Contracts Legislation Amendment Bill 2019” at 7.

<sup>139</sup> At 7.

<sup>140</sup> The Berl Paper, n 2 at 5.7.

ought to be outlined in high-cost lender advertising to ensure consumers are fully informed about their obligations.

Utilisation of the MoneyTalks helpline, or other budgeting advisory services, by those in financial distress has been concerningly low; 2% of those who had experienced financial difficulty in the COVID-19 study had used such services.<sup>141</sup> This may be attributable to a lack of awareness or belief that such a service could relieve financial distress. Galicki has suggested that accessing these services, and their guidance, would better inform consumers of their options for accessing credit and aid in successfully negotiating with lenders for relief given COVID-19.<sup>142</sup>

## *VI Options for Further Reform*

Although the advertising standards are yet to come into force, and the regulations contained in the MBIE exposure draft are yet to be finalised into their precise wording, further reform is arguably necessary to ensure high-cost lenders advertise responsibly.

The intent of the changes is to ensure effective enforcement of the existing responsible lending obligations.<sup>143</sup> The Gordon Research found support, among lenders and borrowers surveyed, for tighter controls on the advertising of high-cost loans, emphasising the need for simplicity and clarity from advertising.<sup>144</sup> Submissions on the Bill have suggested that there should either be a complete ban or restrictions that make consumers more aware of the associated risks, in particular around interest and penalty rates.<sup>145</sup>

FinCap submissions referenced a United Kingdom study which found that, for high-cost lenders, “profitability is dependent on repeat lending”.<sup>146</sup> These findings indicate repeat lending is profitable for high-cost lenders, meaning these lenders are incentivised to target advertising at consumers with existing or recently repaid loans.<sup>147</sup> In New Zealand, a vast majority of high-cost borrowers would appear to be returning consumers, forming up to 95%

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<sup>141</sup> Celestyna Galicki, n 61 at 2.

<sup>142</sup> Celestyna Galicki, n 61 at 2.

<sup>143</sup> MBIE Initial Briefing, n 73 at [68].

<sup>144</sup> Gordon Research, n 11 at 36-37.

<sup>145</sup> Ministry of Consumer Affairs *Pacific Consumers' Behaviour and Experience in Credit Markets, with Particular Reference to the 'Fringe Lending' Market; Research Findings Report and Government's Response Strategy* (August 2007) at 39.

<sup>146</sup> Sarah Beddows and Mick McAteer *Payday Lending: fixing a broken market* (Association of Chartered Certified Accountants, May 2014), n 17, at 21 as cited in FinCap “Submission to the Finance and Expenditure Committee on the Credit Contracts Legislation Amendment Bill 2019” at 23.

<sup>147</sup> FinCap, n 100 at 23.

of some firms' contracts.<sup>148</sup> This supports the view that further reform may be necessary to ensure repeat consumers, who are ordinarily in a more vulnerable financial position, are not targeted to ensure high-cost lender profitability. This is especially relevant in the context of other reforms, such as the interest rate cap, with lenders possibly looking elsewhere to maximise profitability.<sup>149</sup>

### *A Complete Ban on High-Cost Lender Advertising*

MBIE did not consider it necessary to completely ban advertising by high-cost lenders. They accepted that high-cost lender advertising may on occasion breach the RLC guidance but did not consider it to be “invariably harmful”.<sup>150</sup>

The Finance and Expenditure Committee noted a common theme among submissions that the advertising of high-cost short-term loans should be banned due to the extreme levels of associated harm and the propensity to be advertised as “desirable products” or “commonplace commodities”.<sup>151</sup> The Committee referenced several submissions which suggested that high-cost lender advertising should be regulated and treated akin to other products where the social harm is recognised, like tobacco or gambling.<sup>152</sup> The Salvation Army suggested that further research and discussion into whether banning high-cost lender advertising is necessary to protect consumers.<sup>153</sup>

A complete ban on advertising by high-cost lenders would arguably allow for recognition of the associated social harms. There is precedent for certain advertisements being prohibited to reduce harms associated with the product being advertised – as an example, no person in New Zealand may publish a tobacco product advertisement.<sup>154</sup> The intent of this prohibition is to regulate the marketing, advertising and promotion of tobacco as a means of reducing tobacco-related harms.<sup>155</sup> This aligns with tobacco being invariably harmful in that there are no known benefits of tobacco and it being inherently harmful to health.<sup>156</sup> The

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<sup>148</sup> Ministry of Business, Innovation and Employment *Credit Contracts Legislation Amendment Bill: Briefing Two to the Finance and Expenditure Committee* (July 2019) at [7a].

<sup>149</sup> Amendment Act, n 4 at s 45H.

<sup>150</sup> Officials' Report to the Committee, n 74115 at [131].

<sup>151</sup> Officials' Report to the Committee, n 74 at 57.

<sup>152</sup> Officials' Report to the Committee, n 74 at 57.

<sup>153</sup> Salvation Army “Submission to the Finance and Expenditure Committee on the Credit Contracts Legislation Amendment Bill 2019” at [19b].

<sup>154</sup> Smoke-free Environments Act 1990, s 22(1).

<sup>155</sup> Section 3A.

<sup>156</sup> Jefferson Fowles and Michael Bates *The Chemical Constituents in Cigarettes and Cigarette Smoke: Priorities for Harm Reduction* (Epidemiology and Toxicology Group, March 2000) at 6.

inherent harm through detriment to health, and distinct lack of benefit, is reflected through tobacco advertising being prohibited.

High-cost loans, by contrast, are considered a useful offering that assists borrowers with one-time or short-term needs that require immediate cash.<sup>157</sup> Advertising is a legitimate manner in which high-cost lenders reach consumers and compete within their target market. As with any business, if high-cost lenders are unable to advertise their product to reach consumers, their viability will be impacted. Therefore, a complete ban on high-cost lender advertising may detrimentally impact the high-cost lender market.

However, it ought to be noted that high-cost lenders rarely target their advertising at one-time consumers as they are not the most profitable. High-cost lenders encourage borrowers to reapply for high-cost loans over text message, including within messages indicating the borrowers are in default on their current loans.<sup>158</sup> An MBIE study of 182 high-cost loans found that 50% were second or subsequent loans taken out on the day, or day after, a previous loan was repaid.<sup>159</sup>

It is therefore arguable that there are, at minimum, some instances where high-cost lender advertising is invariably harmful, with these instances coinciding with the most profitable practice - repeat consumers.

Advertising to the wider public, or a section thereof, is unlikely to be invariably harmful, especially when considered alongside the proposed regulations expected to be introduced in 2021. Advertising which is directed at existing or past borrowers is significantly more likely to be considered invariably harmful.

A complete ban on high-cost lender advertising would, it is suggested, be inappropriate. Whilst there are numerous social harms associated with the advertising of high-cost lenders, they nevertheless offer a service that is not inherently harmful; if used appropriately it can be useful to assist with short-term or immediate needs.

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<sup>157</sup> Commerce Commission, n 123 at [10].

<sup>158</sup> Commerce Commission, n 123 at [141].

<sup>159</sup> Briefing Two, n 148 at [8b].



*B Additional Restrictions on High-Cost Lender Advertising – advertising to existing borrowers and celebrity endorsements*

A viable alternative to a complete ban on advertising may be specific further restrictions on to whom and how high-cost lenders may advertise, specifically any advertising practices that are invariably harmful.

The latest definition of advertising within the Amendment Act is sufficiently broad to capture direct advertising to current or previous consumers. Direct advertising, which includes all direct communications between lender and consumer, was submitted as one of the more irresponsible advertising practices, viewed as aggressive and targeted at the vulnerable.<sup>160</sup> The reforms on advertising are arguably insufficient to capture irresponsible advertising practices that directly target existing borrowers.

There is precedent for the advertisement of certain products/services to be heavily restricted to reduce associated harms – as an example, the advertising of gambling, or anything related to gambling, is restricted or prohibited. Gambling advertising is similarly required to be responsible.<sup>161</sup> The Gambling Advertising Code requires that any gambling advertising must be conducted in a manner that demonstrates social responsibility and does not undermine the need for preventing and minimising gambling related harm.<sup>162</sup> This Code contains two key principles, the preparation of gambling advertisements with a high level of social responsibility and the requirement of advertisements to be balanced, truthful and not misleading.<sup>163</sup>

This paper suggests that consideration ought to be given to which high-cost lender advertising practices are invariably harmful, so these practices can either be prohibited or restricted. Submissions considered that unsolicited offers of credit to existing or previous borrowers and endorsements of high-cost lenders by celebrities are practices that are invariably harmful.<sup>164</sup> Further restrictions imposed on endorsements by celebrities or advertising direct to current or previous borrowers could assist in reducing the impact of high-cost lending on more vulnerable consumers.

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<sup>160</sup> Commerce Commission, n 123 at [141].

<sup>161</sup> Gambling Act 2003, ss 16 and 313(g).

<sup>162</sup> Gambling Advertising Code, 2019.

<sup>163</sup> At 2 and 6.

<sup>164</sup> Officials' Report to the Committee, n 74 at [132].

Celebrity endorsements form an important part of some high-cost lender's marketing strategy. These endorsements by radio personalities and sportspeople facilitate the normalisation of high-cost borrowings. Such endorsements convey the implication that high-cost lenders are frequented by these celebrities, whose recommendations carry a higher degree of trust and confidence than that of other strangers. The promotion of high-cost lenders by celebrities, especially where alongside monetary prizes, acts to minimise the financial risk associated with financial borrowings.

The Ngā Tangata Microfinance Trust submission referenced high-cost lending as being “extremely harmful and advertised as desirable products”.<sup>165</sup> They reference endorsements by high profile individuals as being harmful due to misrepresenting the likelihood of those individuals personally accessing high-cost loans – specifically noting prominent sportsmen Kieran Read and Stacey Jones.<sup>166</sup>

The endorsement of high-cost lenders by celebrities will likely minimise the impact of any risk warning as the endorsement itself implies a level of trust and benefit in accessing high-cost lending services. Any endorsement ought to reflect the reality of who accesses high-cost lenders, which is unlikely to be the high-profile celebrities who advocate for their use. The public has a level of trust and confidence in endorsements given by celebrities. The result is that easily persuaded borrowers may turn to high-cost lenders as opposed to mainstream lenders, despite the financial impacts, owing solely to the endorsement.

This paper would therefore advocate for high-profile celebrity endorsements to be restricted to those which accurately reflect the celebrity's actual use of the high-cost lender. This would prevent high-cost lenders accessing the goodwill and public faith in the celebrity to normalise the use of high-cost lending services and encourage their use ahead of mainstream lenders.

Advertising directly to existing or previous borrowers contributes to the cycle of debt by encouraging consumers to take out additional high-cost loans prior to, or immediately following, repayment of existing loans.

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<sup>165</sup> Ngā Tangata Microfinance “Submission to the Finance and Expenditure Committee on the Credit Contracts Legislation Amendment Bill 2019” at 10.

<sup>166</sup> At 11.

The Commerce Commission submitted that directly advertising to borrowers who are in default, or have previously defaulted, ought to be prohibited, along with direct advertising to current borrowers who have requested not to receive further offers of credit.<sup>167</sup>

The Finance and Expenditure Committee noted that, if warranted, advertising regulations could prohibit high-cost lender advertisements being sent to persons known to be recent borrowers under high-cost lender contracts, such as is proposed in Australia.<sup>168</sup>

Advertising to existing borrowers is utilised by high-cost lenders as a marketing strategy: targeting those with the lowest acquisition cost. The minimal effort required to advertise to existing customers cannot justify its frequent utilisation as a means of targeting vulnerable customers susceptible to financial distress. This advertising is particularly problematic as evidenced by the failure of high-cost lenders to differentiate between those capable and those incapable of financing additional borrowings.<sup>169</sup>

This paper would propose, in line with the Commerce Commission submission, that the ability of high-cost lenders to advertise to existing or previous borrowers should be restricted, but not prohibited.<sup>170</sup> For example, high-cost lenders should not be able to advertise to borrowers who are in default, or have recently defaulted, or have required special considerations to meet repayments (for example, those consumers who have made a hardship application), or could not finance any additional repayments or who have recently repaid high-cost loans.

Borrowers who have recently defaulted or are in default on existing loans are highly unlikely to benefit from being offered additional lending. The advertising may only encourage these borrowers to further indebted themselves to high-cost lenders to repay debt caused by their initial default or failure to meet payments. Encouraging those who have recently repaid high-cost loans could also be viewed as invariably harmful as it encourages the cycle of debt and long-term use of high-cost loans to finance regular expenses.

While there may be a legitimate need for high-cost borrowing to provide short-term relief from financial difficulties, there is no benefit in advertising to borrowers who are already

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<sup>167</sup> Commerce Commission, n 123, at [143.2].

<sup>168</sup> Officials' Report to the Committee, n 74, at 58.

<sup>169</sup> See Victoria Stace and Jeremy Finn *Working Towards a Fairer Consumer Credit Market: a study of the issues in New Zealand's consumer credit market and proposals for reform* (Michael and Suzanne Borrin Foundation, Wellington, 2019) at 7 regarding borrowers in default being targeted.

<sup>170</sup> Prohibiting high-cost lenders from advertising direct to any existing or previous borrower would likely cause high-cost lenders to incur significant advertising costs.

experiencing significant financial distress and could nevertheless not afford to finance additional lending. The examples provided above are arguably examples of what the Committee would consider invariably harmful: there is no legitimate need for high-cost lenders to advertise to these borrowers and such advertising would only increase financial anxiety and distress.

These further restrictions (on the use of celebrity endorsements and advertising to the class of borrowers given as examples above) are particularly justifiable, especially considering the current situation regarding COVID-19. A significant proportion of New Zealanders are vulnerable due to redundancies, reduced hours or lost income, with an increasing number likely to become vulnerable. When vulnerable consumers face a dire financial situation, some might consider that they have no option other than high-cost lenders. Those who were already in a vulnerable financial position prior to COVID-19 would likely have had this situation exacerbated, such that they are increasingly desperate and susceptible to repeated offers of credit.

Therefore, it is contended that further limitations on what, and to whom, high-cost lenders can advertise are required. There is an identifiable need for such limitations in the areas of celebrity endorsements and advertising to existing borrowers.

### *C Balancing Costs against Harm Reduction*

The benefits of these further restrictions in limiting irresponsible advertising practices and social harms should be considered in light of additional compliance costs faced by high-cost lenders. The further restrictions will likely incur increased compliance costs, most notably for lenders who are already facing costs of bringing their practices in line with the new requirements introduced by the Amendment Act.<sup>171</sup>

These advertising regulations should not be excessively onerous, and should strike an appropriate balance between costs and benefits of compliance.<sup>172</sup> It ought to be noted that borrowers with low financial understanding, or comprehension of their ability to repay high-cost lending arrangements, are more likely to be influenced by advertising.<sup>173</sup>

The New Zealand Bankers Association questioned the need for further regulation with regard to the existing requirements, citing concern about overregulation and whether high-

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<sup>171</sup> Review of Consumer Credit Regulation, n 17 at 26.

<sup>172</sup> NZ Fintech, n 110 at [9].

<sup>173</sup> Sarah Beddows, n 146 at 55.

cost credit lenders should be targeted specifically rather than the industry as a whole.<sup>174</sup> It is noted that some restrictions, such as risk-warnings, celebrity endorsements and limitations on advertising to existing borrowers, can be appropriately limited to high-cost lenders. However, limiting all new advertising requirements to high-cost lenders would run the risk of high-cost lenders reducing interest rates enough to avoid being subject to these restrictions.

There is significant social harm associated with the provision of high-cost credit, particularly the targeting of vulnerable consumers and normalising of high-cost borrowings. Therefore, the costs of restricting celebrity endorsements and advertising to existing borrowers are reconcilable with the expected reduction in harm, especially to vulnerable borrowers experiencing financial distress.

### *VII Conclusion*

The advertising of high-cost lending is linked to problematic debt and the continuing debt cycle faced by vulnerable New Zealand consumers. The 2019 reforms to the CCCFA were intended to address these issues of irresponsible advertising practices and social harm to all consumers, with particular concern for the most vulnerable.

The current situation with COVID-19 brings to light the issues surrounding high-cost lending and the need for responsible advertising practices. It cannot be said that the ability of high-cost lenders to minimise costs by directly targeting the most vulnerable consumers should outweigh the problematic debt many consumers face when entering into high-cost loan agreements.

The changes to be enacted in 2021 are expected to have a positive impact on consumer outcomes by requiring improved disclosure regarding advertising rates and total payments, clarifying prohibited practices, and requiring risk warnings and information about financial mentoring services. However, it is arguable whether these changes will be sufficient to ensure that vulnerable consumers are not overtly targeted to promote lender profitability. This paper concludes that further reform is necessary to ensure that advertising practices are responsible, and that these practices remain responsible in all circumstances, including the COVID-19 pandemic.

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<sup>174</sup> New Zealand Bankers Association, n 122 at [24].

This paper asserts that vulnerable consumers will continue to suffer due to irresponsible advertising practices unless further reform is enacted. Whilst an outright ban on the advertising of high-cost credit cannot be justified, further restrictions on the ability of high-cost lenders to use celebrity endorsements or advertise direct to existing borrowers is likely justifiable.

These additional restrictions will assist in ensuring that high-cost lending is not portrayed as a normal, everyday way to access credit and that vulnerable consumers are not targeted to increase high-cost lender profitability. The policy is to ensure high-cost lender advertising is responsible and vulnerable New Zealand consumers are not enticed to borrow beyond their means and contribute to the continuing cycle of debt and intergenerational poverty.

## *VII Reference List*

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***Word count***

The text of this paper (excluding the abstract, table of contents, footnotes and reference list, but including substantive footnotes) comprises approximately 7,987 words.