

**GRACE WINDHAGER**

**GETTING A FAIR DEAL? THE COMMERCE  
COMMISSION'S ENFORCEMENT OF LENDER  
RESPONSIBILITY PRINCIPLES**

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**Abstract**

*The lender responsibility principles were introduced into the Credit Contracts and Consumer Finance Act in 2015 and were intended to protect consumers from the conduct of unscrupulous lenders when entering into credit contracts. Under the CCCFA, the principles are enforced by the Commerce Commission. However, financial mentors have raised three main concerns regarding the Commission's enforcement process. They are a lack of clarity around the law, the timeliness of investigations and enforcement actions and a lack of transparency in the process. This paper analyses the validity of these concerns and argues that the main issue in this process is the length of the investigations. On average, these investigations take 654 days and, during this time, lenders can continue to breach the principles as there are no interim protections for consumers. Reducing the time required for investigations is an important way to reduce harm within this sector. However, there are practical limitations on the ability of the Commerce Commission to investigate quickly. Therefore, this paper argues that complementary interim protections should be considered so that unscrupulous lenders have less ability to take advantage of consumers whilst under investigation. A potential option suggested is the creation of a warning system that notifies the public of any lenders under investigation and requires lenders to disclose this. By making potential consumers aware of the risks, this could reduce harm in this sector and further the purposes of the lender responsibility principles.*

**Key Words**

*"Credit Contracts and Consumer Finance Act 2003", "lender responsibility principles", "Commerce Commission"*

**Word length**

*The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 7993 words.*

## *I Introduction*

In early 2023, a group of financial mentors known as Access to Justice expressed concerns regarding the Commission's enforcement action against irresponsible lenders.<sup>1</sup> They regularly saw cases that they think would breach the lender responsibility principles (the principles) set out in Credit Contracts and Consumer Finance Act (CCCFA), however, they felt that the Commission (the Commission) was not taking sufficient action, resulting in a continuation of such conduct. Furthermore, they were concerned that this was exacerbated by a lack of clarity around the law and transparency in the Commission's processes. This paper analyses the issues primarily through the examination of previous enforcement actions and argues that the key issue is the length of time required for an investigation to be completed. The author then suggests some potential solutions, focusing on how harm to consumers can be mitigated.

Part II of this paper discusses the legislation involved in this issue, looking at both its history and purpose to provide context for the current situation. It focuses on the principles which are the core focus of this paper.

The concerns raised by the financial mentors are elaborated on in Part III. This part also includes a case study that illustrates their concerns and shows the Principles and the Commission in action.

In Part IV, the author has analysed the three key concerns raised: a lack of clarity around the law, a lack of transparency in the enforcement process and the timeliness of enforcement action. To effectively analyse the Commission's enforcement actions, this paper considers each investigation that has been resulted in enforcement action under the principles. The author concludes that the key issue appears to be the time taken for investigations.

Finally, Part V considers potential solutions to the issues analysed in Part IV. It is proposed that, in addition to decreasing the time of investigations, interim protections should be introduced to protect consumers during this time.

## *II Background*

### *A Credit Contracts and Consumer Finance Act 2003*

The primary purpose of the Credit Contracts and Consumer Finance Act (CCCFA) 2003 is to "protect the interests of consumers in connection with credit contracts, consumer leases, and

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<sup>1</sup> Interview with Andrew Mitchell, Access Two Justice Representative (the author, phone call, 14 March 2023).

buy-back transactions of land”.<sup>2</sup> The Bill had been introduced by the Minister of Consumer Affairs, Judith Tizard, who specifically noted that the Act “empower[ed] the Commission to enforce the new legislation”.<sup>3</sup>

### *B Credit Contracts and Consumer Finance Amendment Act 2014*

Credit Contracts and Consumer Finance Amendment Act 2014 (the 2014 Amendment Act) was passed to strengthen the CCCFA, and address issues noted by MBIE in an operational review. These issues included unscrupulous lenders “giving loans that borrowers would clearly struggle to repay, misleading consumers about the real cost of a loan, not disclosing essential information, taking unnecessary security and using harsh repossession practices”.<sup>4</sup>

For the purposes of this paper, the most important implication of the 2014 Amendment Act was the introduction of the system of lender responsibilities which applied to all parties meeting the s 9B definition of a “lender”. These lender responsibility principles are laid out in s 9C of the amended CCCFA and include the requirement to exercise the care, diligence, and skill of a responsible lender as well as the requirement to comply with the specific listed lender responsibilities laid out in the CCCFA.<sup>5</sup> The compulsory principles are supplemented by the Responsible Lending Code (the Code), non-binding guidance issued by MBIE whose purpose (as set out in s 9E) is to “elaborate on the lender responsibility principles specified in section 9C(2) and offer guidance on how those principles may be implemented by lenders.”<sup>6</sup> Whilst the Code provides summaries of certain legal obligations, guidance for lenders, commentary and examples, it is not exhaustive and compliance with it does not guarantee compliance with the responsible lending principles.<sup>7</sup> The 2014 Amendment Act also increased the maximum penalties for breaches of the CCCFA to \$200,000 for an individual and \$600,000 for a company and gave the Commission the ability to issue infringement notices for minor breaches. The amendments took effect on 6<sup>th</sup> June 2015, with the first version of the Code being published in March 2015 and the most recent version taking effect in May 2023.

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<sup>2</sup> Credit Contracts and Consumer Finance Act 2003, s 3.

<sup>3</sup> (7 October 2003) 612 NZPD 8886.

<sup>4</sup> MBIE “Review of consumer credit law 2009–2015” Ministry of Business, Innovation and Employment <[www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-credit-law/review-of-consumer-credit-law-20092015/](http://www.mbie.govt.nz/business-and-employment/consumer-protection/review-of-consumer-credit-law/review-of-consumer-credit-law-20092015/)>.

<sup>5</sup> CCCFA, s 9C.

<sup>6</sup> Section 9E.

<sup>7</sup> MBIE “Responsible Lending Code” (April 2023) Ministry of Business, Innovation and Employment <[www.mbie.govt.nz/dmsdocument/26304-responsible-lending-code-april-2023](http://www.mbie.govt.nz/dmsdocument/26304-responsible-lending-code-april-2023)>.

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

Identification of continuing issues in the sector including “excessive cost of some consumer credit agreements, continued irresponsible lending and other non-compliance (including by mobile traders), unreasonable fees and irresponsible debt collection practices” led to the Credit Contracts Legislation Amendment Act 2019 (the 2019 Amendment Act).<sup>8</sup>

For this paper, the most significant changes were the introduction of new remedies and penalties for breaches of the CCCFA. A key example is the insertion of s 98A which allows the Commission to apply to the court for a compliance order in the case of a breach.<sup>9</sup> The Commission is also able to apply for pecuniary penalties of up to \$200,000 for an individual or \$600,000 in other cases under the new s 107A where the lender has breached the principles (as well as for other breaches laid out in the section).<sup>10</sup>

Changes were also made to the principles, including increased regulation around advertising, requiring records around lender inquiries to be kept and clarifying that reasonable inquiries included a requirement to comply with regulations made under section 138(1)(abd).<sup>11</sup>

### *D Credit Contracts and Consumer Finance Regulations 2004 and Amendments*

The responsible lending regime in the CCCFA regime was also impacted by changes made to the Credit Contracts and Consumer Finance Regulations 2004 (the Regulations). The Credit Contracts and Consumer Finance (Lender Inquiries into Suitability and Affordability) Amendment Regulations 2020 took a more prescriptive approach and required lenders to make detailed assessments of the suitability and affordability of loans.<sup>12</sup> Unexpected consequences and publicity led to the government making further changes to both the Regulations and the Code (see the Credit Contracts and Consumer Finance Amendment Regulations 2022). These latest changes to the regime (including version 5 of the Code) came into force on 4th May 2023.

### *E Enforcement Powers of the Commission Under the CCCFA*

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<sup>8</sup> Office of Hon Kris Faafoi “Impact Summary: Review of Consumer Credit Regulation – further policy recommendations” (28 August 2019) Ministry of Business, Innovation and Employment <[www.mbie.govt.nz/assets/credit-contracts-legislation-further-policy-proposals-regulatory-impact-summary.pdf](http://www.mbie.govt.nz/assets/credit-contracts-legislation-further-policy-proposals-regulatory-impact-summary.pdf)>

<sup>9</sup> Credit Contracts Legislation Amendment Act 2019, s 98A.

<sup>10</sup> Section 107A.

<sup>11</sup> Section 138(1)(abd).

<sup>12</sup> Credit Contracts and Consumer Finance (Lender Inquiries into Suitability and Affordability) Amendment Regulations 2020, s4.

The Commission is an “independent Crown entity that administers and enforces laws relating to competition, fair trading, consumer credit and economic regulation”.<sup>13</sup> Established by the Commerce Act 1986, The Commission describes their aim in relation to the CCCFA as ensuring “that all New Zealanders can have confidence that when borrowing money, they can do it safely”.<sup>14</sup><sup>15</sup>

The CCCFA lays out the enforcement role of the Commission in s 111(1), which states that “the role of the Commerce Commission under this Act is to promote compliance with this Act”. S 111(2) elaborates that the functions of the Commission in this area include taking enforcement action.

### *III The Issue*

Some financial mentors have expressed frustration at the Commission’s perceived lack of enforcement of the responsible lending provisions of the CCCFA.<sup>16</sup>

They have identified three main concerns around the current system of enforcement of the CCCFA. The first is the time that the investigation and enforcement actions by the Commission take to be completed. Underlying this concern is the continuation of the irresponsible lending that the CCCFA was meant to address whilst the Commission is considering whether to take action. The second concern is around the lack of transparency in the process. After making complaints on behalf of their clients, the financial mentors often have limited information about how the investigation is proceeding against the relevant potentially irresponsible lenders. The final concern is a lack of clarity around the law. Many financial mentors feel that the law is unclear in this area which hinders their ability to navigate the consumer protection system. Clarity, they say, could be achieved by getting a case on irresponsible lending before the courts and getting a decision that said whether certain conduct was or was not in breach of the law.

An illustration of the first two concerns can be seen in the case of GoCar Finance. Financial mentors collected 20 examples of loans that they felt constituted irresponsible lending and handed them over the Commission in October 2021.<sup>17</sup> Many of these cases involved a high-

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<sup>13</sup> Letter from Karla Reynolds (Engagement and Operations Manager for the Credit Branch of the Commerce Commission) to the author regarding the Commission’s role in responsible lending (21 June 2023) at 1.

<sup>14</sup> At 1.

<sup>15</sup> Commerce Act 1986, s 8.

<sup>16</sup> Interview with Access To Justice members, (the author, zoom meeting, 4 April 2023).

<sup>17</sup> Above n16.



interest loan being given to a desperate customer who was unable to repay it without significant hardship, calling into question Go Car Finance's affordability assessments. These situations often resulted in the customer having incurred debt far greater than the value of the car and still owing significant money to Go Car Finance even after the repossession of the car. The Chief Executive of FinCap, Ruth Smithers noted this, saying "too often we've heard of issues involving this lender concluding with a whānau having no car to show for a huge debt."<sup>18</sup> The Commission has opened an investigation into Go Car Finance after receiving the complaints referred to above from financial mentors. According to Consumer NZ, over the last two years the Commission has received 53 enquiries about Go Car Finance.<sup>19</sup> However, as at the time of writing (June 2023), the investigation has not been concluded. This has caused financial mentors to raise concerns over the time taken for the completion of an investigation, particularly given that Go Car Finance is continuing operations in New Zealand. Financial mentor group Access To Justice views Go Car Finance as the finance company currently causing the most harm through irresponsible lending.<sup>20</sup> They are concerned that if Go Car Finance cannot be held to account for its irresponsible lending it will suggest to the industry that the lender responsibility principles of the CCCFA are unenforceable.

Other specific finance companies that financial mentors have raised concerns about include Aotea Finance, DTR, Instant Finance, Gem Finance, Finance Now, Avanti, Q Card, Harmony, Unity Credit Union, Lifestyle Money, Better Lift, Mars Finance and Linsa Finance.<sup>21</sup>

## *IV Analysis*

### *A Transparency Around Investigations*

One concern raised by financial mentors was that there was a lack of transparency around the Commission's activities and so they were unsure how the Commission's investigations were proceeding.

As an enforcement agency, the Commission generally does not conduct their investigations in the public eye to avoid prejudicing or compromising them.<sup>22</sup> When considering whether to

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<sup>18</sup> Consumer NZ "Consumer NZ warning about dodgy car finance deals" (9 May 2023) Consumer NZ <[www.consumer.org.nz/articles/consumer-nz-warning-about-dodgy-car-finance-deals](http://www.consumer.org.nz/articles/consumer-nz-warning-about-dodgy-car-finance-deals)>.

<sup>19</sup> Above n 18. No information on the investigation is available from the Commission website.

<sup>20</sup> Email from Access To Justice members to the author regarding responsible lending concerns (9 August 2023).

<sup>21</sup> Above n 21.

<sup>22</sup> Reynolds, above n 13, at 12.

communicate information to parties, the Commission considers factors including: “the investigation principles, whether the communication will assist or hinder the investigation, including the integrity of the information that may be gathered, the need to give investigated parties information to enable them to participate in the investigation, the interests of complainants, witnesses, or affected persons, whether heightened confidentiality or commercial sensitivity attaches to the investigation, what information is already publicly known, for example through disclosure by interested or affected parties.”<sup>23</sup> Under the Commission’s investigative policy, the information able to be provided to financial mentors is likely to be limited to the Commission’s progress and likely investigation timing.

As a New Zealand governmental agency, the Commission is bound by the Official Information Act 1982. However, the Commission may withhold information about ongoing investigations if the release of the information would likely prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial.<sup>24</sup>

Recently, the Commission has begun publishing a quarterly panui (newsletter) for financial mentors which provides details of their investigative and enforcement activities, to the extent that they can without compromising their investigations. This includes sections on recent compliance and enforcement activity as well as a complaints/notifications data update. For example, the July 2023 issue included a description of the HSBC case (see below) and the warning letter sent (as detailed below).<sup>25</sup> It also stated that, between April and June 2023, the Credit Branch of the Commission received 97 complaints. Information was provided about their source, primary issue and the action that the Commission has taken in relation to them.

Overall, the Commission is legally entitled to limit the information provided to ensure that it can take enforcement action, but this remains a source of dissatisfaction with the Commission amongst financial mentors. Whilst the quarterly panui has been appreciated by these financial mentors, they continue to feel frustrated by the lack of transparency surrounding individual investigations and the ongoing actions of lenders who are a danger to vulnerable consumers. It is likely that frustration in this area would be reduced by having shorter investigation times as

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<sup>23</sup> Commerce Commission “Competition and Consumer Investigation Guidelines” (July 2018) Commerce Commission <[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0028/89821/Competition-and-Consumer-Investigation-Guidelines-July-2018.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0028/89821/Competition-and-Consumer-Investigation-Guidelines-July-2018.pdf)> at 13.

<sup>24</sup> Official Information Act 1982, s 6.

<sup>25</sup> Email from Commerce Commission to consumer advocates regarding a quarterly update on the Commerce Commission’s credit branch (21 July 2023).

well as having a system to alert and warn financial mentors and consumers generally of lenders under investigation.

### *B Clarity Around the Law*

Financial mentors have also expressed concerns around a lack of clarity in the law. In some situations, they lack certainty on whether the facts before them constitute a breach of the principles. This hinders their ability to advise clients and to call out irresponsible lenders. They note that this uncertainty is also present amongst the financial services industry and the dispute resolution schemes, leading to further confusion within the sector.<sup>26</sup> The financial mentors feel that further guidance is needed around specific situations where the principles of the CCCFA would be breached and others where they would not.

Currently, the Commission provides some education and guidance to financial mentors to assist them in navigating the consumer protection system on behalf of their clients. This is done primarily through the development of the Red Flags resource which aims to provide guidance and clarify about how to take direct action for clients and address suspected breaches of the CCCFA.<sup>27</sup> This resource was updated in 2021 to reflect the impact of the Credit Contracts Legislation Amendment Act 2019 as well as changes to the Code and Regulations.

However, recent large upheaval in the law around the principles in the CCCFA has led to uncertainty. As discussed in Part II, these principles as well as the Code, Regulations and relevant penalties have recently undergone significant changes which has resulted in this lack of clarity around the principles. Further law changes would exacerbate this issue and instead stability is needed to clarify situations and allow familiarity with the law. A potential course of action for the Commission is to provide more detailed guidance to financial mentors in the form of examples of cases where the principles were found to have been breached. The Commission's warning letters provide examples of situations where it is likely that certain conduct has been a breach of the principles. However, the changes mean that the Commission may also be uncertain on the specifics in certain situations. Therefore, test cases may have to be brought to provide certainty on the state of the law and the way that the courts will interpret it. To increase the number of examples within a reasonable time, the Commission could also anonymise and release the details of the investigations where no further action was

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<sup>26</sup> Access To Justice, above n 20.

<sup>27</sup> Reynolds, above n 13.

taken so that financial mentors and other interested parties have a greater understanding of the Commission's interpretation of the principles.

### *C Length of Investigations and Enforcement Actions*

When enforcing the principles, the Commission is empowered to undertake four main enforcement actions. It may issue a warning letter, agree on enforceable undertakings, agree on a settlement and/or get a judgment from the Courts against the lender.<sup>28</sup> The time required for the New Zealand court system to issue a judgment is a separate issue and will not be considered in this paper. Therefore, this analysis will focus on the length of the Commission's investigations.

Since the introduction of the principles, as laid out in section 9(C) of the CCCFA, the Commission has completed 19 enforcement actions relating to them. These cases (detailed below) resulted in one or more of the following types of enforcement action - the issue of a warning letter, an enforceable undertaking, a settlement or a judgment. The list below does not include cases where the Commission investigated but decided not to take further action as these investigations are not included in the Commission's case registry. It also does not include ongoing investigations such as the Go Car Finance investigation as they are not included on the case registry and sufficient information is not made available until after their completion.

#### *1 The HongKong and Shanghai Banking Corporation Limited (HSBC)<sup>29</sup>*

On 10<sup>th</sup> November 2021, the Commission received a self-report from HSBC. HSBC had identified timing issues in relation to two areas: "the disclosure of agreed variations for its home loans; and initial disclosure for temporary overdrafts provided to existing HSBC customers for the purchase of property at auction." HSBC's report included 1,053 occurrences of late initial and variation disclosure between 6 June 2015 and October 2021. After reporting, HSBC took remedial action including updating their processes and refunding the affected borrowers on the 28<sup>th</sup> of April 2022. On the 5<sup>th</sup> of April 2022, the Commission opened an investigation into HSBC's actions. They identified multiple likely breaches of the CCCFA including a breach of ss 9C(2)(a)(ii) and (iii) which require lenders to exercise the

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<sup>28</sup> Commerce Commission "Enforcement Response Guidelines" (October 2013) Commerce Commission <[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0030/62589/Enforcement-Response-Guidelines-October-2013.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0030/62589/Enforcement-Response-Guidelines-October-2013.pdf)> at 4.

<sup>29</sup> Letter from Commerce Commission to HSBC regarding a potential breach of the CCCFA (2 June 2023).

care, diligence, and skill of a responsible lender before entering into agreements to provide credit and in all subsequent dealings with the borrower and guarantor. As a result, the Commission issued a warning letter and closed the case on 2<sup>nd</sup> June 2023. This meant that the investigation was open for 423 days (1 year and 58 days) and that it was closed 570 days (1 year and 205 days) after the initial self-report.

### 2 *Xtreme Deals Limited and Director of Xtreme Deals Limited*<sup>30</sup>

On 23<sup>rd</sup> April 2020, the Commission opened an investigation into Xtreme after receiving multiple complaints regarding that entity's conduct. These complaints included situations where "customers had not understood when they would receive their goods under the Contracts, customers had difficulties when seeking to cancel their Contracts; and customers had to pay sizeable cancellation fees if they elected to cancel their Contracts before delivery of the goods."<sup>31</sup> The Commission determined that Xtreme had likely breached s 9C(1) of the CCCFA by failing to comply with the responsible lending principles set out in ss 9C(3)(b)(ii), 9C(3)(b)(iii) and 9C(3)(e)(i). These principles required that Xtreme set out the terms of the agreement in plain language in a clear, concise, and intelligible manner, not present any information misleading, deceptive, or confusing manner and ensure the agreement is not oppressive. As a result, Xtreme entered into enforceable undertakings with the Commission to remedy the harm of their conduct and the Commission issued a warning letter on the 17<sup>th</sup> August 2022. The investigation was open for 846 days (2 years and 116 days).

### 3 *ASB Bank Limited (ASB)*<sup>32</sup>

In December 2018, ASB contacted the Commission to report an error in calculation of Early Repayment Adjustment (ERA) fees. This error had affected the ERA fees for borrowers who had terminated their fixed rate term loan contracts between April 2005 and 6 December 2016 and included 58,842 instances. The Commission determined that ASB's actions had likely breached both the CCCFA and the Fair Trading Act 1986. This included a breach of s 9C(2)(a)(iii) of the CCCFA, by failing to act with the care, diligence and skill of a responsible lender in subsequent dealings with the borrower in relation to the agreement, by overcharging ERA fees. ASB agreed to provide the Commission with enforceable undertakings in relation

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<sup>30</sup> Letter from Commerce Commission to Xtreme regarding a potential breach of the CCCFA (17 August 2022).

<sup>31</sup> At 2.

<sup>32</sup> Letter from Commerce Commission to ASB regarding a potential breach of the CCCFA (1 June 2022).

to providing refunds to affected borrowers and the Commission issued a warning letter on 1<sup>st</sup> June 2022. The investigation was open for 834 days (2 years and 104 days).

4 *Austin Motor Company Limited (AMC)*<sup>33</sup>

The Commission opened an investigation into AMC on the 30<sup>th</sup> of October 2018 following a complaint from a community law centre. The complaint and subsequent investigation centred around a borrower whose income derived from New Zealand Superannuation and a Work and Income New Zealand benefit for her two grandchildren in her care. She was given a loan totalling over \$11,000 despite not having the ability to pay it off and, after defaulting, was given a subsequent loan totalling almost \$10,000. The Commission determined that AMC had likely breached of s 9C(1) of the CCCA by failing to comply with the responsible lending principles set out in s 9C(3)(a)(ii). AMC had failed to make reasonable inquiries, before entering into the loan, to satisfy that it was likely that the borrower would be able to make payments under the agreement without suffering substantial hardship. The Commission issued a warning letter on the 26<sup>th</sup> March 2021. The investigation was open for 878 days (2 years and 148 days).

5 *Auckland Council*<sup>34</sup>

In February 2020, the Auckland Council reported that it had identified multiple possible breaches of the CCCFA. These breaches were in relation to its Retrofit Your Home Programme which offered “financial assistance to ratepayers who wished to improve their property with insulation, heating, ventilation and/or energy efficiency.”<sup>35</sup> The Commission opened an investigation on the 6<sup>th</sup> of August 2020 and identified multiple likely breaches of the CCCFA. These included breaches of s 9C(3)(a) and (b) which require lenders to make reasonable inquiries and to assist the borrower in reaching an informed decision. In this case, the Auckland Council undertook credit checks of ratepayers in certain situations but did not make any further inquiry and acknowledged that the documents provided were unlikely to adequately bring information to the attention of the borrower. The Commission issued a warning letter on 23<sup>rd</sup> February 2021. The investigation was open for 201 days.

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<sup>33</sup> Letter from Commerce Commission to AMC regarding a potential breach of the CCCFA (26 March 2021).

<sup>34</sup> Letter from Commerce Commission to Auckland Council regarding a potential breach of the CCCFA (23 February 2021).

<sup>35</sup> At 2.

6 *Bank of New Zealand (BNZ)*<sup>36</sup>

On 7<sup>th</sup> September 2018, representatives from the BNZ met with the Commission to report potential breaches of the CCCFA. These related to a lack of disclosures for 14,932 loans entered into or varied between 6<sup>th</sup> June 2015 and 24<sup>th</sup> February 2017, affecting 11,956 customers. The Commission opened an investigation on the 3<sup>rd</sup> of October 2018 and identified multiple breaches of the CCCFA. These included the bank breaching its obligations under ss 9C(2)(b)(ii) and (iii) by failing to exercise the care, diligence and skill of a responsible lender by failing to provide disclosure in a number of situations. The Commission issued a warning letter on 2<sup>nd</sup> December 2020. The investigation was open for 789 days (2 years and 59 days).

7 *Superloans Napier Limited and Superloans Porirua Limited*<sup>37</sup>

Following several complaints by financial mentors, the Commission opened an investigation into the Superloans Group (made up of 5 different trading entities) on the 8<sup>th</sup> of August 2018. It considered potential breaches of the responsible lending provisions of the CCCFA between 1<sup>st</sup> November 2017 and 31<sup>st</sup> October 2018. The Commission determined that Superloans Napier and Superloans Porirua had likely breached s 9C(1) because they did not comply with the s 9C(2)(a)(ii) requirement to exercise the care, diligence and skill of a responsible lender before entering into loan agreements and the 9C(3)(a)(i) requirement to make reasonable inquiries so as to be satisfied that loan agreements would meet borrowers' requirements and objectives. Neither entity had any evidence that it had any process for using the borrower's stated purpose to assess whether the loan would be likely to meet the borrower's requirements and objectives. The Commission issued warning letters to both Superloans Napier and Superloans Porirua on 15<sup>th</sup> October 2020. The investigation was open for 799 days (2 years and 69 days).

8 *WeCare Finance Limited (WCFL)*<sup>38</sup>

On 8<sup>th</sup> August, the Commission opened an investigation into WCFL, following a complaint by a financial mentor. The complaint laid out how WCFL had repossessed a borrower's vehicle a week after she had entered into a No Asset Procedure, even though she was not in

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<sup>36</sup> Letter from Commerce Commission to BNZ regarding a potential breach of the CCCFA (2 December 2020).

<sup>37</sup> Letter from Commerce Commission to Superloans regarding a potential breach of the CCCFA (15 October 2020).

<sup>38</sup> Letter from Commerce Commission to WCFL regarding a potential breach of the CCCFA (10 October 2019).

default under the loan. The Commission determined that there had been likely breaches of multiple sections of the CCCFA. These included breaches of ss 9C(2)(a)(ii) and 9C(3)(a)(ii) by not making reasonable inquiries to be satisfied that the borrower would make the repayments without suffering substantial hardship and, therefore, did not exercise the care, diligence and skill of a responsible lender, as well as a breach of s 9C(3)(d)(iii) as WCFL failed to treat the borrower reasonably and in an ethical manner by repossessing her vehicle on an "at risk" basis when the vehicle was not within the definition of "at risk" as set out at section 83E(2). The Commission issued a warning letter on 10<sup>th</sup> October 2019. The investigation was open for 428 days (1 year and 63 days).

#### 9 *Rapid Loans Limited (RLL)*<sup>39</sup>

On 2<sup>nd</sup> February 2018, the Commission opened an investigation into RLL after a budget advisor made a complaint that RLL has not made reasonable inquiries into a borrower's ability to repay the loan and so the borrower had suffered substantial hardship as a result of making payments under loan agreements with RLL. The investigation focused on the affordability assessments used by RLL when the borrower had entered into the two loans. The Commission found that RLL had likely breached s 9C of the CCCFA as it did not comply with the principles laid out in ss 9C(2)(b) and 9C(3)(a)(ii) which required RLL to make reasonable inquiries. The Commission issued a warning letter on 9<sup>th</sup> October 2018. The investigation was open for 614 days (1 year and 249 days).

#### 10 *Dealer Finance Limited (DFL)*<sup>40</sup>

The Commission received three complaints from borrowers alleging that they had suffered substantial hardship as a result of making payments under loans after DFL had not made reasonable inquiries into their ability to repay the loans. The Commission concluded that DFL's conduct was likely to have breached section 9C(1) of the CCCFA by not complying with the obligation set out in ss 9C(2)(b) and 9C(3)(a)(ii) which require these reasonable inquiries to be made. As a result, the Commission issued a warning letter on 19<sup>th</sup> March 2018. As the date of the commencement of the investigation is not available on the Commission's website, the length of the investigation cannot be determined.

#### 11 *Westpac New Zealand Limited*<sup>41</sup>

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<sup>39</sup> Letter from Commerce Commission to RLL regarding a potential breach of the CCCFA (9 October 2018).

<sup>40</sup> Letter from Commerce Commission to DFL regarding a potential breach of the CCCFA (19 March 2018).

<sup>41</sup> Letter from Commerce Commission to Westpac regarding enforceable undertakings (20 December 2021).



In June 2020, Westpac reported to the Commission that it had encountered issues with the implementation of their Repayment Deferral scheme during the Alert Level 4 Covid lockdown. Specifically, it was applied to customer accounts without Westpac first explaining the implications including how the customer was likely to pay more over the term of their loans. On 9<sup>th</sup> September 2020, the Commission opened an investigation into Westpac's actions. The Commission determined that Westpac risked breaching ss 9C(2)(a)(iii) and 9C(3)(c) of the CCCFA which requires lenders to act with the care, diligence and skill of a responsible lender and to assist the borrower to reach an informed decision in all subsequent dealings with that borrower by not explaining the impact of the Repayment Deferral. Enforceable undertakings regarding payments to eligible customers and future reports to the Commission were accepted by the Commission on 20<sup>th</sup> December 2021. The case was open for 834 days (2 years and 104 days).

### 12 *MyFi NZ Limited and BHF Solutions (NZ) Pty Limited*<sup>42</sup>

On 20<sup>th</sup> February 2020, the Commission opened an investigation into connected entities MfFi and BHF. On 29<sup>th</sup> May, the Commission sent the entities a letter outlining their concerns around potential non-compliance with s 9C of the CCCFA and requesting that no further loan agreements be entered into unless website changes were made to ensure greater clarity for consumers. In their reply, MfFi and BHF denied non-compliance and informed the Commission of their intention to exit the New Zealand market. They entered into an enforceable undertaking which was accepted on 1<sup>st</sup> December 2020 and required them to give the Commission four weeks' notice of any intention to advertise for or enter into any new contracts with consumers in New Zealand and, if it did so, to implement changes to ensure compliance with s 9C. After the acceptance of the enforceable undertakings, the Commission continued their investigation to determine some factual issues, completing it on 16<sup>th</sup> November 2021. The investigation was open for 635 days (1 year and 270 days) although a letter was sent after just 99 days and the enforceable undertakings were accepted after 285 days.

### 13 *Moola.co.nz Limited*<sup>43</sup>

Moola was one of seven short term lenders whose lending practices were examined during a Commission review of high-cost short term lenders in New Zealand. An official investigation

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<sup>42</sup> Letter from Commerce Commission to MyFi regarding an enforceable undertaking (2 June 2023).

<sup>43</sup> Letter from Commerce Commission to Moola regarding a settlement agreement (14 September 2021).

into Moola's conduct was opened Commission on 23<sup>rd</sup> April 2017. This led to the Commission filing against Moola in the High Court on 8<sup>th</sup> July 2019. The two parties reached a settlement agreement on 14<sup>th</sup> September 2021. As part of the settlement agreement, Moola agreed to make payments to 50 borrowers affected by the breach of s 9C and enter into enforceable undertakings with the Commission. After reaching this agreement, the parties informed the High Court and sought a declaratory order. On the 19<sup>th</sup> of November 2021, the High Court made a declaration that Moola had breached ss 9C(2)(a)(i), 9C(2)(a)(ii), 9C(3)(a)(i), 9C(3)(a)(ii) and 9C(3)(d)(i). The case was closed on 19<sup>th</sup> November 2021 after the High Court judgment was released. The case was open for 1671 days (4 years and 211 days) with proceedings being filed after 806 days (2 years and 76 days).

14 *Quadsaa Pty Ltd (trading as Pretty Penny and PPL)*<sup>44</sup>

Quadsaa was one of seven short term lenders whose lending practices were examined during a Commission review of high-cost short term lenders in New Zealand. Following the review, the Commission opened an investigation into Quadsaa on 22<sup>nd</sup> December 2016. On 9<sup>th</sup> August 2019, the Commission filed civil proceedings against Quadsaa alleging that they had breached ss 9C(2)(a)(ii)/ 9C(3)(a)(i) and 9C(3)(a)(ii) of the CCCFA. A settlement agreement was signed on 29<sup>th</sup> June 2020 which required that Quadsaa may payments to the debtors and write off debts. As a result, the Commission discontinued the proceedings at the High Court. Proceedings were filed 960 days (2 years and 230 days) after the investigation had been opened with the settlement being signed 325 days after that.

15 *ASB Bank Limited*<sup>45</sup>

In September 2019, ASB reported a possible breach of the CCCFA to the Commission. On 6<sup>th</sup> June 2015, ASB had implemented a new operating procedure that resulted in staff in their branches and call centres making variations to borrowers' loan agreements. However, a review revealed that the process was potentially not consistently followed and that some customers were not given the required disclosure. As a result, the Commission opened an investigation on 4<sup>th</sup> November 2019. The parties reached a settlement agreement on 23<sup>rd</sup> February 2021 under which ASB admitted breaching 9C(2)(a)(iii) of the CCCFA (i.e., exercising the care, diligence, and skill of a responsible lender in any advertisement for providing credit or finance under an agreement or for providing credit-related insurance

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<sup>44</sup> Letter from Commerce Commission to Quadsaa regarding a settlement agreement (29 June 2020).

<sup>45</sup> Letter from Commerce Commission to ASB regarding a settlement agreement (23 February 2022).

under a relevant insurance contract) and agreed to pay a settlement amount to affected customers. The investigation was open for 477 days (1 year and 112 days).

#### 16 *Kiwibank Limited*<sup>46</sup>

In August 2019, Kiwibank reported that it had issues regarding their home loan variation disclosure policies, procedures and systems for certain types of home loan variations. The Commission opened an investigation on the 5<sup>th</sup> of March 2020 to investigate possible breaches of the CCCFA. On the 27<sup>th</sup> August 2020, the parties signed a settlement agreement under which Kiwibank admitted to breaching s 9C(2)(a)(iii) of the CCCFA and made payments to affected customers and the Commission closed their investigation. The investigation was open for 175 days.

#### 17 *ANZ Bank New Zealand Limited*<sup>47</sup>

On 24<sup>th</sup> July 2017, the Commission opened an investigation into incorrect Loan Variation Letters sent to customers by ANZ between 30 May 2015 and 28 May 2016. The two parties reached a settlement agreement on the 2<sup>nd</sup> March 2020. Under the agreement, ANZ admitted that these errors caused a breach of section 9C(2)(a)(iii) of the CCCFA (i.e., exercising the care, diligence, and skill of a responsible lender in any advertisement for providing credit or finance under an agreement or for providing credit-related insurance under a relevant insurance contract), made payments to affected customers, reimbursed the Commission and agreed to an independent review. The investigation was open for 977 days (2 years and 247 days).

#### 18 *Ferratum New Zealand Limited*<sup>48</sup>

Ferratum was one of seven short term lenders whose lending practices were examined during a Commission review of high-cost short term lenders in New Zealand. On 28<sup>th</sup> May 2018, the Commission filed civil proceedings against Ferratum, alleging that between 9 June 2015 and 23 October 2018, Ferratum breached ss 9C(2)(a), 9C(3)(a) and (b) of the CCCFA (which required it to exercise the care, diligence, and skill of a responsible lender, make reasonable inquiries as to the borrower's circumstances and assist the borrower to reach an informed decision). The parties reached a settlement agreement on the 6<sup>th</sup> May 2020. Under this

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<sup>46</sup> Letter from Commerce Commission to Kiwibank regarding a settlement agreement (27 August 2020).

<sup>47</sup> Letter from Commerce Commission to ANZ regarding a settlement agreement (2 March 2020).

<sup>48</sup> Letter from Commerce Commission to Ferratum regarding a settlement agreement (6 May 2020).

agreement, Ferratum admitted to breaching the CCCFA, signed Court-enforceable undertakings around its lending and advertising practices and repaid the cost of borrowing for 46 named borrowers. Upon informing the High Court of the agreement, the Commission also filed for a declaratory order which Fitzgerald J granted on the 7<sup>th</sup> of July 2020. The case was before the court for 768 days (2 years and 38 days) although the duration of the investigation is unknown.

### 19 *Ace Marketing Limited*<sup>49</sup>

The Commission opened an investigation into potential breaches of the principles of the CCCFA on 16<sup>th</sup> April 2018. On 12<sup>th</sup> June 2020, the Commission filed proceedings in the High Court against Ace Marketing alleging breaches of the principles. After a hearing on 3<sup>rd</sup> December 2021, a judgment was released on 6<sup>th</sup> December 2021 which declared that Ace had breached the CCCFA and Fair Trading Act 1986. Specifically, the judge declared that Ace had breached s 9C(1) via ss 9C(2)(b), 9C(3)(b)(ii) and 9C(3)(b)(iii) of the CCCFA and directed that Ace was not to provide credit unless it amended its contracts to comply with these sections. A reasons judgment was released on 25<sup>th</sup> July 2022. Following continued harmful behaviour, in 2022 the Commission sought and was granted banning orders for both Ace and its director. There were 788 days (2 years and 58 days) between the opening of the investigation and the filing of proceedings by the Commission.

Of these 19 cases, eight resulted from self-reports whilst a further eight can be confirmed as originally from complaints made by financial mentors, consumers, or a community law centre. The other three investigations were triggered during an industry review by the Commission into short-term lending, likely also originating from complaints.

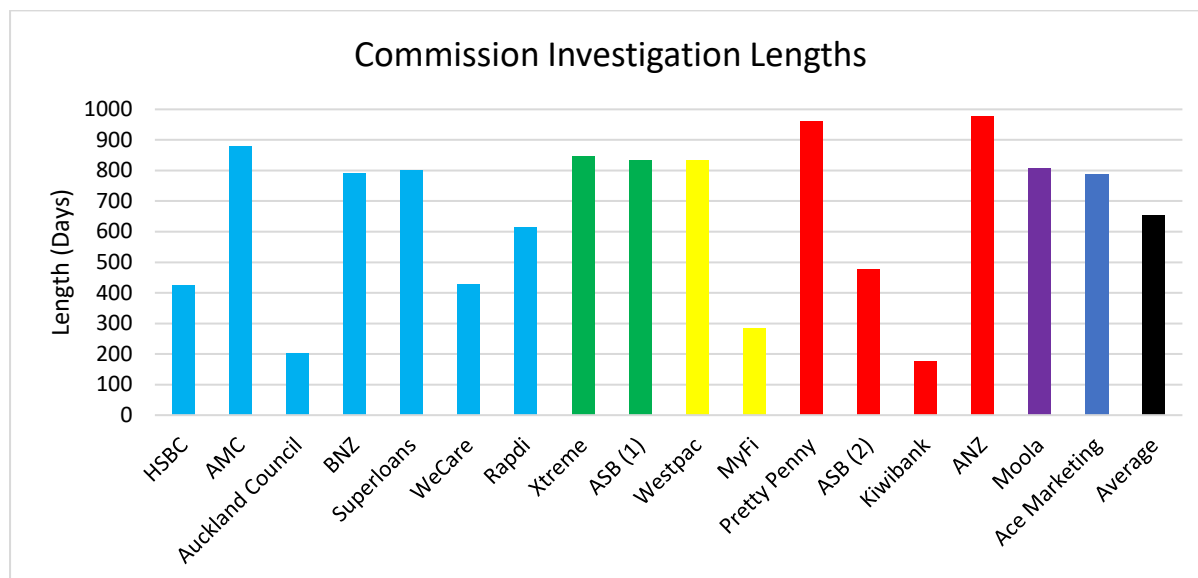
The most common outcome was a warning letter alone with eight cases receiving this. Two received warning letters and entered into enforceable undertakings. Two others resulted in enforceable undertakings alone. Four cases resulted in a settlement alone. Only three resulted in a judgment that considered whether the principles had been breached, with two of those also reaching settlements.

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<sup>49</sup> Commerce Commission v Ace Marketing Ltd [2021] NZHC 3312.

The following graph (Table A) shows the length of time each investigation took categorised by the enforcement action taken at the end of the investigation.<sup>50 51</sup>

Table A



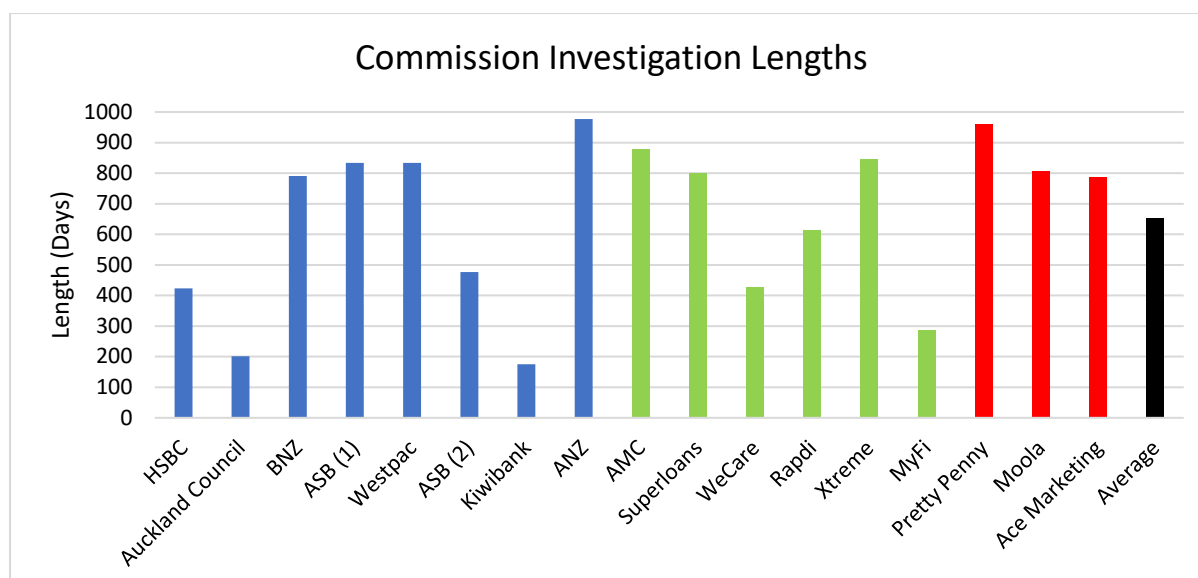
The following graph (Table B) also shows the length of the Commission's investigations but with the cases categorised by the trigger of the investigation.<sup>52</sup>

Table B

<sup>50</sup> The following methods were used when preparing this table. In cases where a warning letter was issued, the investigation length was deemed to have finished on the date the letter was issued. In both cases resulting in an enforceable undertaking, the investigation length is judged to have ended when the enforceable undertakings are accepted. However, this makes these investigation lengths less accurate as it necessarily includes time spend negotiating the enforceable undertakings. It should also be noted that the MfFi and BHF investigation continued after the enforceable undertakings were signed to determine some factual issues but for the purposes of this analysis it will be judged as having finished at the time of acceptance. When the Commission issued proceedings, this date is used as the end of the investigation. In cases where proceedings were not filed and a settlement agreement was reached, the investigation is deemed to have ended at the date the settlement agreement was signed. Like the cases involving enforceable undertakings only, these dates are less accurate as they include time in which the Commission was negotiating with the lender. Two investigations (Dealer Finance and Moola) had to be excluded from the table due to a lack of information around when they began.

<sup>51</sup> The following is a key for Table A. Light blue is the issue of a warning letter. Green is the issue of a warning letter and the use of enforceable undertakings. Yellow is enforceable undertakings alone. Red is a settlement agreement. Purple is a settlement agreement and judgement. Dark blue is a judgement alone.

<sup>52</sup> The following is a key for Table B. Blue is cases where the lender self-reported potential breaches of the lender responsibility principles of the CCCFA. Green is cases where complaints have been made to the Commission about a lender's behaviour (e.g., by financial mentors or consumers). Red shows the three investigations that were opened after the Commission had completed an industry review into seven short-term lenders.



Across all investigations, the average length is 654 days (1 year and 289 days). This shows that Commission has not meet its target of 95% of CCCFA investigations being decided within 18 months of the investigation being opened when considering all cases involving breaches of the principles.<sup>53</sup> Whilst there is variation for the investigation length across all outcome and trigger groupings, some observations can be drawn. Firstly, the investigations that resulted in the issue of warning letters were, on average, shorter than investigations with other outcomes (591 days vs 698 days). It is unknown if this is because the conduct was less extensive and/or complicated or if the dates for other types of investigations were less accurate (i.e., more challenging to differentiate between the end of the investigation and the negotiation stage). Secondly, investigations that were triggered by self-reports tend to be shorter than those triggered by other mechanisms (589 days vs 712 days). A potential reason for this could be that open communication and cooperation by the lender reduces the time the Commission needs to investigate. Overall, this variation in this data leads to conclusion that various factors impact the length of Commission investigations and it cannot be explained to any great extent by either the trigger or the eventual outcome.

#### *D Effectiveness of Enforcement Actions Taken*

<sup>53</sup> Commerce Commission “Statement of Performance Expectations 2022/23” Commerce Commission <[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0027/286623/Statement-of-Performance-Expectations-202223.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0027/286623/Statement-of-Performance-Expectations-202223.pdf)> at 12.

A case study of Commission actions taken against the high-cost lending industry show that the Commission's enforcement actions are capable of being effective in the long-term but that the time taken can stretch over multiple years.<sup>54</sup>

In 2015, the Commission received reports from financial mentors of the widespread harm in the high-cost lender industry as they attempted to achieve individual outcomes for their clients through the dispute resolution schemes.

This led to the Commission opening an industry-wide investigation into several high-cost lenders in 2016. Their focus was on disclosure and responsible lending obligations and included the lenders Ferratum and Pretty Penny. At this time, Christchurch Budgeting also made a complaint about Moola regarding irresponsible lending.

In 2017, the Commission filed proceedings at the High Court against Ferratum for irresponsible lending failures and oppression based on the result of their investigation. A key behaviour leading to the decision to pursue court action was the charging of up to 803% interest per annum.

Also in 2017, the Commission opened an investigation into Moola's irresponsible lending. As well as complaints from financial mentors, the Commission has also heard concerns from the District Court which had requested intervention regarding Moola's debt recovery proceedings after clerks witnessed what they believed to be irresponsible lending practices.

In 2018, the Commission commenced High Court proceedings against Ferratum alleging breaches of the responsible lending principles laid out in the CCCFA.

The same year, MBIE reviewed the CCCFA and proposes significant law changes including introducing new rules for high-cost loans. With the aim of specifically targeting high-cost lenders, FinCap and the budgeting sector lobbied for the inclusion of interest rate caps in the new legislation.

These law changes were passed in the 2019 Amendment Act and came into effect over the following two years. Included within the legislation were new rules and interest rate caps for high-cost lenders.

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<sup>54</sup> Renyolds, above n 13, at 9.

In 2019, the Commission Commerce filed High Court proceedings against Pretty Penny and Moola alleging irresponsible lending after receiving 76 complaints about Pretty Penny since March 2017.

In 2020, the Commission opened a monitoring project involving web-based research checking published interest rates and fees and examined sample borrower files for eight high-cost lenders. During this investigation, the Commission also noted that the number of lenders providing high-cost loans declined from 21 immediately before the law change to six at the end of 2020.

Also in 2020, the Commission settled with Pretty Penny and Ferratum. As a term of their settlement, Pretty Penny ceased operations in New Zealand, wrote off all outstanding loan balances and reimbursed 21 lenders for the cost of borrowing. Ferratum's settlement involved their admission that they had breaching the responsible lending provisions of the CCCFA and their repayment of the cost of borrowing for 46 named borrowers, totalling \$88,173. After the admission, the High Court also made declaratory orders stating that Ferratum's conduct had breached ss 9C(2)(a)(ii), 9C(3)(a), 9C(2)(a)(i), 9C(3)(b)(i), (ii) and (iii) of the CCCFA.

In 2021, the Commission obtained a declaration in the High Court that Moola's actions were irresponsible, breaching s 9 of the CCFA in a number of respects. They also entered into a settlement to credit or refund approximately \$2.8 million to current and former borrowers of Moola.

During 2021, many high-cost lenders exited the market, with only three high-cost lenders still operating as of June 2021. The final high-cost lender exited the market in 2022.

Overall, this indicates that the enforcement actions taken by the Commission can be effective in reducing harm done by irresponsible lenders. However, it also clearly demonstrates the concern from the financial mentors regarding the timeliness of investigations and enforcement actions. Whilst getting good results, the Commission's slow pace is causing damage as vulnerable consumers continue to be affected by lender's behaviour that breaches the CCCFA whilst they are under investigation.

*V Solutions*

*A Transparency*



The issue regarding the transparency of the Commission's investigations requires balancing the desirability of providing information for financial mentors to maintain accountability whilst also ensuring that the information released will not result in any major negative effects such as compromising the investigation in question. As discussed above, the introduction of the quarterly panui has increased the information available to financial mentors. Including greater information surrounding open investigations may help to assuage financial mentor's concerns in this area. Potentially listing names of lenders under investigation (as elaborated on below) would likely also help. However, due to the Commission's legal obligation to protect the integrity of ongoing investigations, it would appear that the most effective way to reduce financial mentor concerns in this area would be to reduce the length of investigations.

### *B Clarity*

Continuing from the above analysis, it would appear that frequent changes to the law around the principles have created uncertainty not only among financial mentors but also among other participants in the consumer protection system such as the dispute resolution schemes and potentially the lenders themselves. The lack of case law on specifics means that different parties (including different financial dispute resolution schemes) can have different interpretations of the law. The Red Flags resource for financial mentors provides assistance in this area but greater detail would help. A key example would be a summary of all investigations taken by the Commission into potential breaches of the principles. This would allow financial mentors to see clear examples of breaches that they can analogue to the situations they are dealing with. Releasing anonymised details of investigations that were found not to reach the threshold of breaching the principles would also be helpful as it would provide contrast and deepen the understanding of readers. In areas where the Commission is uncertain, test cases may need to be brought before the courts so specifics of the law can be determined. Issues with this include the time and expense of bringing a case to court but also finding a lender whose business practices involve possible breaches of the principles in question and who does not wish to settle/negotiate.

### *C Timeliness*

The key concern raised was around the timeliness of the Commission's investigations, with it being evident that reducing the time required for appropriate action to be taken would decrease the irresponsible practices that occur during the investigation. However, the Commission is limited by a number of factors in this area such as the need to provide

complete and detailed evidence, the difficulty is engaging witnesses and the slow movement of the court system. Greater funding and resourcing given to the Commission would have a positive effect on the duration of investigations by allowing the Credit Branch of the Commission to work through large volumes of documents and/or witnesses at a faster rate as well as having more people to research novel or complex legal, economic or evidential matters. As discussed above, recent changes the CCCFA regime will potentially reduce the time required for an investigation by mitigating the difficulty in accessing lenders' information on responsible lending and allowing the Commission to focus on responsible lending without also looking for breaches of other, more enforceable provisions.

#### *D Interim protections*

A key concern of financial mentors related to the issue of timeliness is that irresponsible lenders can continue operating and potentially taking advantage of borrowers whilst the Commission's case is being investigated and/or court action is being taken. To mitigate the risks to consumers during this time, interim methods could be given to the Commission for use during the investigation/enforcement action process.

A potential option could be the use of a warning system like that used by the Financial Markets Authority.<sup>55</sup> This would allow the Commission to identify lenders who the public should exercise greater caution around owing to many complaints, allegations of irresponsible lending etc. This could take the form of a "lender under investigation" media release once the Commission has identified potential breaches of the CCCFA. For this to be effective, the warning system would need to be easy to navigate by people with low technological literacy and so would likely need to have both a paper and digital component. Another feature of the system could be a digital newsletter to financial mentors (like the quarterly panui) that allows them distribute information within their communities and warn potential clients to be careful in their dealings with these lenders. This could also act as a deterrent to lenders as it would likely have negative effects on their reputations and decrease the amount of business they receive.

Another potential option would be to grant dispute resolution schemes the power to publish their decisions with lenders' names and/or force lenders to reveal details of dispute resolution scheme complaints resolved against them. As it utilises other components of the consumer

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<sup>55</sup> Financial Markets Conduct Act 2013, s 462.

protection system, this option requires little extra resourcing for the Commission, although the Commission would likely need to have a monitoring function. Having dispute resolution scheme decisions published would allow financial mentors and members of the public to be aware of patterns within lenders' behaviour and problematic lenders before the Commission has completed their investigation. Forcing lenders to reveal details of complaints against them would give potential borrowers the opportunity to select a different lender before engaging with a lender who may exhibit irresponsible behaviour. For this to be effective, the complaints would need to be displayed predominantly, potentially on the front page of their website. Thresholds relating to the number and significance of complaints could be used to in tiered system of requirements with highly complained about lenders required to have a pop-up notification that the user must read before continuing to their site.

#### *E Greater number of prosecutions*

Finally, the Commission could consider lowering the standards of harm, seriousness of conduct and public interest required for them to decide to take court action. It should also be noted that increasing the number of prosecutions is unlikely to increase deterrence if the prosecutions in question ultimately fail. As a result, the Commission would require extra resources in order to deal with a number of cases as well as increased advertisement around their complaints system to ensure that all irresponsible lenders are being brought to their attention. A question that would need to be considered is whether bringing court action would be more effective than issuing a warning letter in less serious cases, particularly given the high cost involved in a pursuing a prosecution.

It should also be noted that the deterrence factor may have been increased by the extension of the penalties available. The 2019 Amendment Act gave the Commission the ability to seek civil pecuniary penalties and statutory damages when the responsible lending provisions of the CCCFA have been breached. It is possible that these new changes will over time act as sufficient deterrence and the monitoring of this area would result in some interesting insights into effective deterrence factors.

## *VI Conclusion*

The lender responsibility principles were introduced into the CCCFA to protect consumers from predatory behaviour by lenders. Under the CCCFA, these principles are enforced by the Commission which can take a range of enforcement action. However, financial mentors

raised three main concerns around this process: that the time for enforcement action to be taken is too long, that there is a lack of clarity around the law and that there is lack of transparency during the process.

The high-cost lending case study shows how the Commission's enforcement action can be effective in ceasing irresponsible lending. However, the analysis of the concerns raised by financial mentors contained in Part IV also shows there to be flaws in the process, predominantly that harm continues to consumers during the lengthy investigation. The average length of the investigations was 654 days (1 year and 289 days) during which there are no specific remedies to prevent lenders from continuing irresponsible lending.

This paper proposes solutions that could address these concerns. Law changes to the principles themselves are not recommended as this would create further uncertainty which is already an issue. Instead, the key recommendations are reducing the time length of the investigation and implementing interim measures that can protect consumers when a lender is under investigation. These would reduce the concerns raised by financial mentors by decreasing the harm occurring in this area.

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