

## CONSULTATION RESPONSE REPORT

# Criteria for Certification

under the Credit Contracts and Consumer Finance Act 2003

JUNE 2020



## Acknowledgment

- 1 The Commerce Commission (the Commission) would like to thank all those respondents who took the time to share their viewpoints with us as part of this consultation.

## Introduction

- 2 From October 2021 the Commission will be required to certify all directors and senior managers of consumer credit providers (lenders) or mobile traders as ‘fit and proper’ as stated in the amendment to the **Credit Contracts and Consumer Finance Act 2003 (CCCF Act)**.
- 3 On **20 February 2020** we commenced consultation on two aspects of the amended legislation:
  - 3.1 **‘Fit and Proper’ assessment criteria (Section 131F)** – the information the Commission should consider in assessing whether directors and senior managers are ‘fit and proper’ to hold their positions.
  - 3.2 **Change in circumstances (Section 131R)** – when a certified person should be required to notify the Commission about a change in circumstance.

## The Consultation Process

- 4 The consultation was carried out as follows:
  - 4.1 the consultation document was published on the Commission website
  - 4.2 an email link to the consultation document was sent out to stakeholders that may have an interest in or be impacted or affected by the new ‘fit and proper’ provisions in the CCCF Act, and
  - 4.3 a media release was issued to highlight the consultation to respondents.
- 5 Respondents could provide feedback by offering written submissions via email.
- 6 The consultation period ended on 18 March 2020. We received 20 submissions which are outlined in the stakeholder response table (**Appendix A**) and submission summary (**Appendix B**).

## Our Response

- 7 The Commission reviewed and analysed the feedback collected from the consultation. We identified key themes from the submissions received and address these in our response below.

## Key themes

### Criteria too broad

- 8 Submitters expressed concern that the proposed questions were too broad and would elicit positive responses in circumstances which were not relevant to whether or not the individual was fit or proper. For example, one submitter submitted we should not take into account Warnings or Compliance Advice issued by the Commission or other regulators because they did not represent findings of non-compliance and were sometimes disputed by the lender. Similarly, some submitters expressed concern that being a director or senior manager of the liquidation of voluntary liquidation of a company did not necessarily speak to any fault on behalf of the individual because there were many reasons that companies took these types of steps.

***Our response – no change***

- 9 The proposed criteria are designed to elicit potentially relevant information. Where an individual gives a positive answer to a question, they will have the opportunity to provide an explanation before the Commission decides on whether they are ‘fit and proper’. The failure by a relevant person to meet any one of the criteria will not lead to an automatic refusal of an application as each case is assessed as a whole and on its own merits.

### **Objection to “any other information” criteria**

- 10 Some submitters also objected to the suggestion that the Commission will consider “other relevant information” as being too vague and open-ended.

#### ***Our response – no change***

- 11 The Commission is entitled to consider any relevant information in deciding whether or not to grant certification. While we have attempted to set out the type of information that we think is likely to be relevant to this assessment, we consider that we should reserve the possibility that there may be other information that we obtain, that is relevant but is not captured in our questions.
- 12 The Commission cannot take into account irrelevant considerations in making a decision, so any information not captured that we want to take into account that is not captured by the specific questions will have to be carefully assessed for relevance. Individuals will also have an opportunity to submit on any information.

### **Timeframes too long**

- 13 Where the proposed criteria are timebound (ie, bankruptcies in the last 10 years), some submitters suggested that shorter periods would be preferable.

#### ***Our response – change to criteria 17***

- 14 We have set timeframes that seek to capture as much information that could be relevant as possible. We have also been careful not to duplicate the criteria for disqualification on the Financial Service Providers Register (FSPR). These criteria mean, for example, that companies that have directors or senior managers that are undischarged bankrupts cannot be registered on the FSPR.
- 15 We will keep the periods for capturing relevant information under review. If it appears that we are capturing information that is of little value, we will consider reducing the relevant period.
- 16 We have decided, however, that the requirement to list details of all previously held director and senior management roles within an organisation may require unnecessary work particularly for experienced directors/senior managers. We have decided to only require details of the individuals last 10 positions. Individuals who have relevant experience that falls outside that period will also have the ability to provide the Commission with that information.

### **Concern that directors and senior managers “doubly punished”**

- 17 One submitter suggested that the Commission’s proposal to take into account convictions (of both companies and individuals) would doubly punish the individuals.

#### ***Our response – no change***

- 18 This submission misunderstands the purpose of certification which is about protecting the public from unscrupulous lenders rather than punishing them. Convictions for criminal offending are clearly relevant to whether an individual is fit and proper to perform their role.

## Commission should take into account “conflicts of interest”.

- 19 One submitter suggested that the Commission should take into account “conflicts of interest” in assessing fitness and propriety.

### ***Our response – no change***

- 20 We do not think that conflicts of interest are necessarily relevant to an assessment of whether an individual is fit or proper to perform their role. In any event they will be difficult to define.
- 21 Multiple submission required clarity around the way the Commission intends to apply these criteria. The Commission intends to publish guidance in late 2020 which will outline the application process and provide this clarity on the application process.

## Next Steps

- 22 The submissions we have received have helped us finalise the ‘fit and proper’ criteria to be used to certify directors and senior managers of lenders and mobile traders from October 2021 (**Appendix C**). The changes that we have made in response to submissions are included in our response above.
- 23 The submissions received for Question 2 will be handed on to Ministry of Business, Innovation and Employment (MBIE) and will help finalise the prescribed changes to be set out in the Regulations to the CCCF Act.
- 24 The consultation response report and all non-confidential submissions will be published on the Commission website.
- 25 The Commission intends to publish a ‘fit and proper’ certification guidance document in late 2020. This guidance will assist lenders and mobile traders to understand how to make an application and how the Commission will apply the criteria in assessing whether individuals are fit and proper.

## Appendix A: Stakeholder responses to consultation.

Organisation	Responses
Central Finance Limited	1
Chris Lee & Partners Ltd	1
Colonial Motor Company Ltd	1
E B Loans	1
Financial Services Federation (FSF)	1
Fincap	1
Flexigroup	1
Jade Financial Services	1
Mount Vehicle Finance Ltd	1
Ngà tàngata Microfinance	1
NZ Fintech	1
Primary Pacific Finance	1
Save my Bacon	1
UDC	1
Westforce Credit Union	1
Private Law Firm	1
Individuals	3
<b>TOTAL</b>	<b>19</b>

## Appendix B: Submission summary

**Question 1:** What do you think of the proposed ‘fit and proper’ criteria in Table 1 and Table 2 (*Appendix C*) of this consultation document and why?

### Probity, reputation and financial integrity criteria

**Criteria 1:**

Has been convicted of crime punishable by imprisonment in New Zealand or equivalent offences overseas.

*Submitters indicated a concern that convictions should be relevant to the finance industry only.*

**Criteria 2:**

Has in the last 10 years, been bankrupt in New Zealand or overseas.

*Submitters indicated a concern that 10 years was too long and queried why was it not in line with bankruptcy law (3 year).*

**Criteria 3:**

Is currently a director or senior manager or has previously been a director, senior manager of a corporate entity that has been placed into liquidation, receivership or voluntary administration in New Zealand or equivalent insolvency procedures overseas.

*Overall submitters supported this criterion remaining in its current form, however there were concerns raised over the circumstances surrounding liquidation, receivership or voluntary administration. It was highlighted that fault often didn't sit with the director or senior manager and that often solvent liquidation was carried out for entirely reasonable reasons (for example during a merger or acquisition).*

**Criteria 4:**

Has been prohibited from acting as a director or promotor of a company or taking part directly or indirectly in the management of a company in New Zealand or overseas while being prohibited.

*Submitters supported this criterion remaining in its current form.*

**Criteria 5:**

Has as an individual, been subject to an investigation by the Commerce Commission or other equivalent New Zealand or overseas regulator that resulted in receiving a conviction, judgment award, arranging a settlement, penalty, enforcement action or receiving a warning.

*Submitters raised concerns that this may be construed as a double punishment for directors and senior managers that had received and completed a conviction, judgement award, settlement, penalty, enforcement action or warning and had since behaved in a way commensurate with good character. They also highlighted that often facts in these cases were disputed and settlements reached were not necessarily indicative of guilt but occurred due to the cost associated with litigation.*

**Criteria 6:**

Has held a directorship or senior management role, that during the presence in the role, the corporate entity was convicted of a criminal or civil offence or subject to any regulatory action by New Zealand or overseas agencies resulting in judgment award, penalty, enforcement action, or warning or caution in New Zealand or a similar financial services provider regulator overseas.

*Submitters raised concerns that this may be construed as a double punishment for directors and senior managers that had received and completed a conviction, judgement award, settlement, penalty, enforcement action or warning and had since behaved in a way commensurate with good character. Distinction between the definition of 'warning' and 'caution' was also highlighted as an area that may cause confusion.*

**Criteria 7:**

Individually or as a director or senior manager of a corporate entity, been prohibited from providing credit in New Zealand or overseas.

*Submitters supported this criterion remaining in its current form.*

**Criteria 8:**

Has had disciplinary action taken in respect of a profession or occupation by a professional body/organisation or regulatory body for persons engaging in that profession or occupation.

*Submitters had concerns that not all professional bodies/organisations or regulatory bodies regulate to the same standard.*

**Criteria 9:**

Has either as an individual certified by the Commerce Commission or as a director or senior manager of a certified corporate entity, failed to comply with any conditions imposed on the certification issued.

*Submitters requested examples of the conditions that may be imposed. It was also suggested that we widen the scope and include New Zealand and overseas regulators as part of the criteria.*

**Criteria 10:**

Has had a previous application for certification refused by the Commerce Commission.

*Submitters supported this criterion remaining in its current form.*

**Criteria 11:**

Has had an application for registration, certification or licence for the provision of financial services declined, or had registration, certification or licence removed or cancelled by a regulatory body in New Zealand or an equivalent regulatory body overseas.

*Submitters supported this criterion remaining in its current form.*

**Criteria 12:**

Any other matters the Commerce Commission may consider relevant to the decision about whether to certify the person as fit and proper.

*Submitters raised concerns over the open-ended and vague nature of this criterion.*

**Competency and capability criteria****Criteria 13:**

Nature and scale of the business and the range of services and activities undertaken during that business.

*Submitters supported this criterion remaining in its current form.*

**Criteria 14:**

Position(s) in the organisation and how long that position(s) has been held for.

*Overall submitters supported this criterion remaining in its current form, however their needs to be distinction between the definition of 'position' and 'role' to avoid confusion with Criteria 15.*

**Criteria 15:**

Current role(s) and responsibilities.

*Overall submitters supported this criterion remaining in its current form, however their needs to be distinction between the definition of 'position' and 'role' to avoid confusion with Criteria 14.*

**Criteria 16:**

Individually, the level of involvement in the organisation.

*Submitters supported this criterion remaining in its current form.*

**Criteria 17:**

Details of any directorships and senior management roles currently or previously held – with a description of the nature of each company’s business and the dates of roles.

*Overall submitters supported this criterion remaining in its current form, however there were concerns raised over the need to detail all previously held roles, it may be very difficult and, in some cases, irrelevant for directors and senior managers who have held numerous positions over decades to have to detail them all. It was suggested that we provide a cap on the number of previously held roles.*

**Criteria 18:**

Details of any other relevant employment history and experience.

*Submitters supported this criterion remaining in its current form.*

**Criteria 19:**

Details of qualifications – including a description of the qualification, the date it was attained and the institution that granted the qualification.

*Overall submitters supported this criterion remaining in its current form, however it must be clear that a qualification is not essential but instead will act to further strengthen the application.*

**Criteria 20:**

Details of any professional body memberships currently or previously held – including the name of the organisation and the dates of membership.

*Submitters supported this criterion remaining in its current form.*

**Criteria 21:**

Details of other information, such as professional training courses, study, seminars or workshops that highlight expertise or competence appropriate to the role in the organisation.

*Submitters supported this criterion remaining in its current form.*

**Criteria 22:**

Any other information that is relevant to this capability assessment.

*Submitters raised concerns over the open-ended and vague nature of this criterion.*

**New Proposed Criteria**

*It was suggested that any conflict of interest needed to be captured in the assessment and may be relevant to the ‘fit and proper’ certification.*

**Question 2:** What sorts of change in circumstances do you think could affect the Commission’s assessment of whether directors and senior managers of a lender or mobile trader are ‘fit and proper’?

- Change in director or senior manager.
- Change in role of a director or senior manager.
- Any circumstance that would affect a certified individual’s original answers to the ‘fit and proper’ criteria.
  - The individual is convicted of a crime;
  - The individual enters bankruptcy or any other insolvency process, either in New Zealand or overseas;
  - An entity that the individual is a director, or senior manager, of has been placed in liquidation, receivership or voluntary administration;
  - The individual has become the subject of an investigation by a New Zealand or overseas regulatory body or agency
  - An entity that the individual is a director, or senior manager, of has become the subject of an investigation by a New Zealand or overseas regulatory body or agency
  - The individual has been prohibited from providing credit or financial advice, either as an individual or in their capacity as a director or senior manager
  - The individual has had disciplinary action taken against them, and
  - The individual has had certification or registration revoked or cancelled by a New Zealand or overseas regulatory body or agency
- Modelled on those provided in regulation 191 of the Financial Markets Conduct Regulations 2014.

## Appendix C: Finalised ‘fit and proper’ criteria.

Table 1:

Probity, reputation and financial integrity criteria
Has been convicted of crime punishable by imprisonment in New Zealand or equivalent offences overseas.
Has in the last 10 years, been bankrupt in New Zealand or overseas.
Is currently a director or senior manager, or has previously been a director, senior manager or controlling owner of a corporate entity that has been placed into liquidation, receivership or voluntary administration in New Zealand or equivalent insolvency procedures overseas.
Has been prohibited from acting as a director or promotor of a company or taking part directly or indirectly in the management of a company in New Zealand or overseas while being prohibited.
Has as an individual, been subject to an investigation by the Commerce Commission or other equivalent New Zealand or overseas regulator that resulted in receiving a conviction, judgment award, arranging a settlement, penalty, enforcement action or receiving a warning.
Has held a directorship or senior management role, that during the presence in the role, the corporate entity was convicted of a criminal or civil offence or subject to any regulatory action by New Zealand or overseas agencies resulting in judgment award, penalty, enforcement action, or warning or caution in New Zealand or a similar financial services provider regulator overseas.
Individually or as a director or senior manager of a corporate entity, been prohibited from providing credit in New Zealand or overseas.
Has had disciplinary action taken in respect of a profession or occupation by a professional body/organisation or regulatory body for persons engaging in that profession or occupation.
Has either as an individual certified by the Commerce Commission or as a director or senior manager of a certified corporate entity, failed to comply with any conditions imposed on the certification issued.
Has had a previous application for certification refused by the Commerce Commission.
Has had an application for registration, certification or licence for the provision of financial services declined, or had registration, certification or licence removed or cancelled by a regulatory body in New Zealand or an equivalent regulatory body overseas.
Any other matters the Commerce Commission may consider relevant to the decision about whether to certify the person as fit and proper.

**Table 2:**

<b>Competency and capability criteria</b>
Nature and scale of the business and the range of services and activities undertaken during that business.
Position(s) in the organisation and how long that position(s) has been held for.
Current role(s) and responsibilities.
Individually, the level of involvement in the organisation.
Details of any directorships and senior management roles currently or previously held – with a description of the nature of each company’s business and the dates of roles. (Up to 10).
Details of any other relevant employment history and experience.
Details of qualifications – including a description of the qualification, the date it was attained and the institution that granted the qualification.
Details of any professional body memberships currently or previously held – including the name of the organisation and the dates of membership.
Details of other information, such as professional training courses, study, seminars or workshops that highlight expertise or competence appropriate to the role in the organisation.
Any other information that is relevant to this capability assessment.

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