



Legally Talking

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Guarantors need to protect their rights

Over the past few months, there has been a significant increase in finance activity arising from low interest rates.

With increased lending to stimulate consumer spending across New Zealand during these uncertain financial times, lenders, borrowers and guarantors need now to be more vigilant in managing these relationships, particularly when there is a downturn in economic activity, job losses occur and parties are unable to meet their prior financial commitments. In the milieu, the rights of guarantors are often overlooked.

The Credit Contracts and Consumer Finance Act 2003 (the "Act") (amended by the Credit Contracts and Consumer Finance Amendment Act 2014) sought to address these issues including clarifying lender responsibility principles.

The lender is responsible to exercise the care, diligence and skill of a responsible

lender when advertising credit or finance and before and after providing consumer credit or finance and taking a relevant guarantee.

The introduction of the Responsible Lending Code (the "Code") clarified lender responsibility principles. The Code sets out processes, practices and procedures that a lender should follow to comply with the lender responsibility principles.

The Code is not binding and is not intended to be an exhaustive statement of what a lender ought to do in order to be a responsible lender. Of particular relevance, the Code highlights certain responsibilities of a lender where a guarantee is to be provided.

A lender must make reasonable enquiries before a guarantee is given so as to be satisfied that it is likely that the guarantor will be able to comply without suffering "substantial hardship". The lender should be satisfied that he/she will be able to make payments

under the agreement without undue difficulty in terms of meeting basic necessities (transport, accommodation, food, etc). The lender should make reasonable enquiries into the guarantor's income, expenses and likelihood of making payment.

Extensive enquiries would be required where the consequences of non-compliance are serious, ie the loss of the main residential property. A further obligation on the lender is to assist the guarantor to make an informed decision.

A lender should:

1. Inform the guarantor of the key features of the guarantee
2. Generally recommend legal advice and allow sufficient time for this pre-execution of the guarantee
3. Generally require legal advice where the guarantor's own home will be security

The level of explanation and assistance that are reasonable will depend on the circumstances. Greater assistance will be required where there is a greater risk the guarantor may not be aware of the implications, where the borrower might not comply with the agreement or the consequences of non-compliance are serious, ie loss of a significant asset. The duty of reasonable care that is required of a lender also extends to the enforcement of the guarantee post execution.

A lender must not take a new guarantee or vary an existing guarantee after a borrower has defaulted without informing the guarantor that the variation is necessary because of the default.

A lender should also consider agreeing an alternative payment arrangement where the lender calls on the guarantee and the guarantor was unable to comply.