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Directors and senior managers of consumer credit providers now under a personal due diligence obligation

From the 1 December 2021, the Directors and senior managers of consumer credit providers are under a duty of due diligence to ensure compliance with the Credit Contracts and Consumer Finance Act (CCCFA). Directors and senior managers face potential personally liability if they fail to comply with that duty.

Who must exercise due diligence?

The duty of due diligence applies to every Director and senior manager of a consumer credit provider. The legislation defines a senior manager as a person who has significant influence over the lender.

The due diligence duty

The new duty requires Directors and senior managers to exercise the care, diligence and skill that a reasonable Director or senior manager would exercise to ensure the lender complies with its duties and obligations under the CCCFA. The Commerce Commission has guidance on the new due diligence obligation. The guidance lists steps for complying with the duty including:

- Directors and senior managers must take reasonable steps to ensure development and implementation of procedures designed to ensure compliance with the CCCFA. Reasonable steps must be taken to ensure employees and agents of the lender are required to follow those procedures, including regular training, and encouraging and incentivising staff to follow them.
- Director and senior managers must have methods in place for identifying any deficiencies in the effectiveness of compliance procedures. This may include mechanisms for reporting issues, carrying out regular audits and review of complaints.
- When deficiencies are discovered, the Directors and senior managers must take prompt action to remedy that failure. This includes having a system for identifying any borrowers affected by the deficiency within a reasonable timeframe, and procedures for minimising harm or remediating or compensating them in accordance with the Act.

The due diligence obligation cannot be delegated, however information from subject matter experts may be relied upon when reasonable to do so.

Personal liability

Directors and senior managers can face significant personal consequences for failing to comply with the new due diligence obligation. The Court may order a pecuniary penalty of up to $200,000, for which the Director or senior manager cannot be indemnified by the lender or by D&O insurance. Restrictions on indemnification also extend to the costs of defending a civil proceeding for a breach of due diligence. In the event of a breach, borrowers may also be entitled to statutory damages, compensation, or exemplary damages for which the director or senior manager may be jointly or severally liable to pay.

Additional certification requirement for consumer lenders

Under another recent change to the CCCFA, the Commerce Commission will now be assessing whether Directors and senior managers are fit and proper persons to hold their respective positions. This assessment will be carried out as part of the new consumer credit providers to be certification regime that came into force on 1 October 2021. The Commission

Directors and senior managers of consumer credit providers now under a duty to exercise due diligence
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has also issued guidance on the new certification requirement for consumer lenders.

Providing consumer credit services without certification can result in pecuniary penalties of up to $600,000 for a company or $200,000 for an individual.

Want to know more?

If you have any questions about the new duty and the steps you can take to ensure compliance with it, please contact Sarah Simmers or Sophan Pearson.