NEW ZEALAND BANKERS ASSOCIATION

Submission

to the

Ministry of Consumer Affairs

on the

Credit Contracts and Consumer Finance Amendment Bill Exposure Draft

25 May 2012

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Submission by the New Zealand Bankers' Association to the Ministry of Consumer Affairs on the Credit Contracts and Consumer Finance Amendment Bill Exposure Draft

Executive Summary

1. The New Zealand Bankers' Association (NZBA) appreciates this opportunity to submit on the Credit Contracts and Consumer Finance Amendment Bill Exposure Draft (Bill).

2. NZBA welcomes reforms to the Credit Contracts and Consumer Finance Act 2003 (CCCFA) that propose to improve the effectiveness of consumer protection regulation in New Zealand. NZBA recognises the efforts of the Ministry of Consumer Affairs (MCA) to consider seriously the views of submitters and, to this end, would welcome further opportunity to discuss our submission with you.

3. NZBA supports the Government's goal of better addressing and protecting consumers from harm caused by unscrupulous lenders. However, NZBA is concerned that some of the changes proposed in the Bill will increase uncertainty about what the law requires and increase compliance costs for all lenders. Accordingly, in this submission NZBA offers views on how the Bill could be improved to better target the behaviour of unscrupulous lenders (such as high interest rate and pay day lending businesses), without imposing unnecessary burden on responsible lenders.

4. NZBA considers that the most effective way to address and protect against the harm caused by unscrupulous lenders is to enhance the enforcement of existing laws and, where necessary, enhance enforcement powers under the law (such as the Bill's proposals for new section 99A).

5. At times it is not clear what problems in the current provisions of the CCCFA the Bill's proposals are seeking to address. Change to those provisions will cause cost and may not have the desired benefit of better protecting against unscrupulous lenders. Some of the changes in the Bill regarding reasonable fees, oppressive contracts, and introducing principles will create uncertainty and mean that existing case law on the CCCFA becomes unhelpful. Lenders may have to review and revise their compliance systems and credit products, when there appears to be no intention that all lenders need to do this.

6. As well as enhancing enforcement efforts in the third tier loan market, NZBA also welcomes further work on changes to the Credit (Repossession) Act 1997 to address lender behaviour around taking security over assets.

7. One of the distinctions between responsible and unscrupulous lenders is that responsible lenders tend to focus more on a debtor's ability to repay the loan (both so that the debtor does not suffer hardship and to minimise the lender's commercial risk of having a bad debt). In contrast, unscrupulous lenders tend to focus on the amount of security taken for, often low value, loans and the lender's rights when the debtor is in default (so that if a debtor cannot repay a loan, the lender can recover its costs through its stronger rights). Accordingly, the policy work in the area of repossession may have a greater impact on addressing the harm caused by unscrupulous lenders.

About NZBA

8. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes which contribute to a safe and successful banking system that benefits New Zealanders and the New Zealand economy.

9. The following thirteen registered banks in New Zealand are members of NZBA:

- ANZ National Bank Limited
- ASB Bank Limited
- Bank of New Zealand
- Bank of Tokyo-Mitsubishi, UFJ
- Citibank, N.A.
- The Co-operative Bank Limited
- The Hongkong and Shanghai Banking Corporation Limited
- JPMorgan Chase Bank, N.A.
- Kiwibank Limited
- Rabobank New Zealand Limited
- SBS Bank
- TSB Bank Limited
- Westpac New Zealand Limited.

General Comment

10. The particular problem identified in MCA's Regulatory Impact Statement is that, "*credit laws do not provide adequate consumer protections against unscrupulous lenders operating at the third their (loan sharks, fringe lenders)*".[1] While it is inevitable that that the scope of the proposed amendments will impact on responsible lenders, NZBA considers it important that the amendments are targeted at the problems caused by irresponsible lenders, such as loan sharks and fringe lenders. Uncertainty will result in unnecessary compliance costs for responsible lenders who already have processes and systems in place for ensuring their lending is appropriate to meet the needs of consumers.

11. The Regulatory Impact Statement also noted that imposing responsible lending obligations on all lenders is unlikely to result in significant added costs for those who are already behaving responsibly. However, this will only be true if responsible lenders have comfort that their current practices are sufficient to satisfy the new responsible lending principles contained in the Bill. To ensure that responsible lenders are not unnecessarily impacted by the amendments, certain aspects of the proposed amendments may require clarification.

12. In particular, we have fears that banks (who value their reputation) will need to invest considerable amounts of money to ensure that they have taken a comprehensive approach to compliance. In contrast, the target organisations – loan sharks – will do little if anything to comply, as they have little to lose and, based on our observations below, may well consider they are unlikely to face much by way of enforcement action.

13. It is on this basis that NZBA would like to see much greater accountability of the Commerce Commission (Commission) for outcomes relating to poor lending practices by loan sharks, including ensuring that the Commission has a permanent and active presence in the most vulnerable communities.

14. The CCCFA has been in force for seven years, and one of its primary objectives was to reduce the activity of loan sharks.[2] A review of the Commission's activity in

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1 Regulatory Impact Statement: *Responsible Lending Requirements for Consumer Credit Providers*, 14 October 2011, page 1.

2 Noted in the explanatory note to the Consumer Credit Bill:
"Lenders of last resort, or loan sharks, regularly breach the law, yet few people take credit cases to Court or to the Disputes tribunals because the law is seen as too complex, the process too costly or

this area demonstrates that resources have not been focused on investigating and taking enforcement action against the worst loan sharks. Research conducted by MCA prior to the Financial Summit in 2011 identified a total of 218 companies as third-tier lenders. This was found to be 18 per cent more than the number of companies found in a similar study in 2006. The 2011 research also found that in addition to growth in numbers, about 35-40 per cent of third-tier lenders appeared not to be registered as financial service providers more than six months after the legislative requirement to do so came into force.[3]

15. While we understand that the responsibility for monitoring registration falls under a different regulatory body, we are using this example to demonstrate that the CCCFA reforms provide an opportunity for the Commission to focus resources on this problem area, and reflect this priority with clear direction in the Commission's statement of intent.

Specific Comments

Question 1: How well do you think the responsible lending principles in the Bill (new section 9B) reflect the principles which should apply?

Question 2: Should any additional principles be included in (or removed from) the principles of responsible lending?

16. NZBA supports responsible lending practices, but is concerned that enacting principles as legal obligations creates uncertainty about legal requirements.

17. Based on the analysis outlined below, NZBA considers that principles (e)(i) and (f)(i) could be retained as a new obligation in the CCCFA that lenders must make reasonable inquiries as to the borrower's financial circumstances and whether he/she can be reasonably expected to make repayments without suffering substantial hardship. There is already a commercial incentive on lenders to do this as part of their assessment of whether and how much credit to provide.

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they feel intimidated. In future, lenders who breach the law and rip-off consumers will be held accountable. The Court will have wider powers to impose increased penalties, such as fines of up to $30,000. The reforms include a new, simplified formula for automatic penalties against lenders who breach information disclosure requirements."
Hon. Lianne Dalziel, Acting Minister of Consumer Affairs, Media Statement, 18 September 2002

[3] Third-tier Lender Desk-based Survey 2011, Ministry of Consumer Affairs July 2011.

18. The remaining proposed principles address activities that are already regulated by more detailed obligations in the CCCFA and in other legislation. NZBA submits that a more focused approach be adopted to support clarity and certainty, through removing certain principles and/or clarifying how they interact when overlapping with requirements under existing legislation.

19. In respect of the proposed principles where there appears to be some overlap with existing consumer protection legislation, NZBA submits that retaining these overlapping principles as currently drafted would make it unclear as to whether two different standards apply, or whether compliance with existing detailed obligations would be sufficient to comply with the principle. Those principles are:

(a) Principle (a) requires that lenders must exercise reasonable care and skill. This mirrors section 28 of the Consumer Guarantees Act 1993 which provides that, *"...where services are supplied to a consumer there is a guarantee that the service will be carried out with reasonable care and skill"*. A similar obligation also exists under section 33 of the FAA, which requires those providing financial advice to exercise reasonable care, diligence, and skill.

(b) Principle (b) requires the lender to provide the borrower with sufficient information to enable the borrower to make informed decisions, both at the time of entering into an agreement and during all subsequent dealings with the lender. Subpart 2 of Part 2 the CCCFA already outlines in detail the initial, continuing, variation and request, and guarantee disclosure required to ensure that the borrower is provided with the key information necessary to make an informed decision.

(c) Principle (c) requires that the lender ensure that the terms of the agreement are not unduly onerous and are expressed in a clear, concise, and intelligible manner. The CCCFA already provides for the reopening of contracts that are 'oppressive'.[4] Similarly, the CCCFA already specifies disclosure standards, which include the requirement that the disclosure is expressed *"clearly, concisely, and in a manner likely to bring the information to the attention of a reasonable person".*[5] Adding a new

[4] Credit Contracts and Consumer Finance Act 2005, Section 120.

[5] Credit Contracts and Consumer Finance Act 2005, Section 32(1)(c).

principle about terms that are 'unduly onerous', and ‘clear, concise, and intelligible disclosure’, will create uncertainty as to what the standard is, and whether it something more or less than the existing requirements contained in the CCCFA.

(d) Principle (d) requires that lenders must not do or say, or omit to do or say, anything that is, or is likely to be, misleading, deceptive, or confusing to the borrower. Similarly, principle (h) requires that lenders must not advertise, or permit to be advertised, agreements, products, or services in a manner that is, or is likely to be, misleading, deceptive, or confusing to borrowers generally, or if the advertisement is aimed at a particular class of borrowers, to that class. These principles are already substantially encompassed in section 9 of the Fair Trading Act 1989 which provides that, *“No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive”*. However, the extent to which this principle demands a different standard from the existing obligations is unclear.

(e) Principle (g) requires that lenders not charge unreasonable credit fees. Subpart 6 of Part 2 of the CCCFA already deals with unreasonable fees in some detail, and lenders who comply with those obligations should not have to do anything more to comply with any other standards.

20. Other principles introduce sufficient uncertainty that they should not be included as responsible lending principles. For example, principle (e)(ii) requires that lenders make reasonable inquiries as to the borrowers requirements and objectives in entering into the agreement, and principle (f)(ii) requires that lenders be satisfied, before entering into an agreement, that the agreement is otherwise appropriate for the borrower, having regard to the borrower’s circumstances, requirements, and objectives. These provisions may also duplicate the obligations imposed on some financial advisers under the FAA.

21. NZBA notes the recently released report on the Credit (Repossession) Act 1997[6], where the Law Commission suggested that the proposed responsible lending principles should extend to repossession activity in respect of consumer credit

[6] Law Commission Report, *Consumers and Repossession: A review of the Credit (Repossession) Act 1997*, Report 124 April 2012, Chapter 4.

contracts. NZBA welcomes further work in this area, but suggests consideration be given to modifying the principles into a more detailed series of obligations.

Question 3: Should a responsible lending code be developed by the Minister of Consumer Affairs in consultation with affected people, or by a code committee as with the Code of Professional Conduct for financial advisors?

22. If a code is required (which is discussed in the answer to question four), then NZBA agrees that codes that have broad industry support are the most effective. For example, the NZBA Code of Banking Practice effectively self regulates the banking industry by recording the minimum standards of good banking practice that NZBA member banks must satisfy.

23. Any code for third tier lenders (loan sharks, high interest and pay day lenders) should be developed by the Minister of Consumer Affairs in consultation with affected people, being the targeted lenders (loan sharks) and the consumers to be protected by the Bill. Consultation with affected people, as opposed to a code committee, will provide for the expedient development of a code for loan sharks with maximum engagement.

24. NZBA submits that its member banks who comply with the voluntary NZBA Code of Banking Practice should not be obliged to comply with any new code developed under the Bill, for the following reasons:

    (a) *Confusion for consumers of banking services*: The NZBA Code of Banking Practice provides a single accessible document where consumers can find (in plain English) rights and obligations that arise in their banking relationship. To apply the Bill's code to NZBA member banks would eliminate the benefit and protection consumers gain from being able to access their general rights and obligations in a single document.[7]

    (b) *Costs*: To apply the Bill's code to NZBA member banks in addition to the existing NZBA Code of Banking Practice would duplicate compliance costs that would be ultimately passed onto the consumer.

[7] Excluding the terms and conditions which may apply to a specific product or service.

25. If the Bill retains an obligation to comply with a code, then it could recognise that compliance by responsible lenders, such as registered banks, with an alternative industry code would satisfy that obligation.

Question 4: Is it appropriate for the code to elaborate and provide guidance on the responsible lending principles in the Bill, or should it be more prescriptive?

26. Based on the current drafting in the Bill, the legal status of codes would be uncertain. It is currently unclear whether a code would have legal status to bind the regulator to the code's view of compliance, or whether a code would be taken into account by the courts when interpreting the obligation to comply with the principles.

27. NZBA submits that a code should provide guidance as to compliance with the principles. That is, codes would not impose legal obligations but provide lenders with guidance as to how they could meet their legal obligation of compliance with the principles.

28. There needs to be more clarity as to the link between the principles and the proposed code. It is not clear whether the trigger for an investigation or enforcement would be a breach of the principles or a breach of a code. The Bill currently refers to a breach of the principles but it is likely that a code will be more important in practice. This is unsettling for NZBA given the consequences of a breach under the amended section 108.

Question 5: Do you agree with the new CCCFA purpose clause emphasising consumer protection and the market behaviours stated in new section 3(2)(a) and (b)?

Question 6: Should any additional purposes to those in new sections 3(1) and 3(2) be included (or be removed) in order to ensure that the CCCFA is interpreted in a way that meets its objectives?

29. NZBA agrees with the new CCCFA purpose clause emphasising consumer protection, and is pleased to note the consistency with the general purposes of other consumer laws. NZBA supports the move towards a uniform purpose statement for the protection of consumers.

30. NZBA does not see any need to add any additional purposes to the new sections 3(1) and 3(2).

Question 7: Looking at amended sections 17, 22 and 23, is there any justification for consumer credit contract disclosure being made after the contract is made?

31. NZBA submits that there is justification, based on current banking practices, for disclosure after a consumer credit contract is made. Any problems associated with post-contract disclosure can also be addressed by the cooling off period.

32. NZBA provides the following example of current banking practice to illustrate why disclosure can justifiably be provided after a consumer credit contract is made. Banks can extend an existing consumer's credit card limit or overdraft facility over the phone when they call from overseas or in an emergency. It is not practicable for disclosure to occur prior to the consumer credit contract being made in this instance (which differs from other forms of emergency credit because of the existing and ongoing relationship between banker and customer, which allows the bank to make a faster and more robust assessment of the debtor's ability to repay the credit).

33. In relation to section 17(1), NZBA submits that there should be consistency between the CCCFA and section 22 of the FAA. Accordingly, section 17(1) could instead read: "*every creditor under a consumer credit contract must ensure that disclosure of as much of the key information set out in Schedule 1 as is applicable to the contract is made to every debtor under the contract before the contract is made or, if not practicable before, as soon as practicable after the contract is made*." This would allow banks to provide disclosure to customers following a telephone conversation. Otherwise this delivery and service channel, which is highly valued by consumers, may no longer be viable.

Question 8: Looking at amended section 27, do you envisage any unintended consequences from extending the cooling off period from 3 working days to 5 working days?

34. NZBA has not seen sufficient evidence that a problem exists that can be resolved with an extension of the current CCCFA provision of a three working day 'cooling off' period, to five working days. In particular, NZBA is not convinced that borrower

decision making would change if the cooling off period is extended by two working days, especially if the problem being targeted is pay day lending where finance is likely to have been used by the borrower before the cooling off period has expired. NZBA could support an extension to the cooling off period to five working days if adequate problem recognition is first undertaken to identify whether irresponsible practices by problem lenders would be solved through this extension. However, without a clear beneficial outcome, extending the cooling off period would only negatively impact business certainty for responsible lenders.

Question 9: Looking at new sections 9H and 9I:

a) Will making standard terms and costs of borrowing available at creditors' premises and on their websites be sufficient to improve transparency and improve competition?

b) To what extent will these provisions promote shopping around by borrowers and effective competition among lenders?

35. NZBA submits that the display of standard terms will not enhance clarity or improve competition. Some consumers may even be overwhelmed by the sheer volume of information that may become available, and feel disempowered to make an informed choice. Publication of interest rates and fees, which banks currently provide, allows consumers to make comparisons on the key features of different credit products.

36. Mortgage lending is the largest part of consumer credit in which banks are involved. Bank mortgage loan rates are already very widely publicised, and the highly competitive nature of the mortgage lending market is illustrated by the high levels of mortgage lending advertising and shopping around by borrowers. Accordingly, in that part of the consumer finance market, the proposed new sections 9H and 9I will neither enhance clarity for borrowers nor improve competition among lenders.

37. More generally, there are likely to be difficulties arising from these provisions in relation all types of credit contract. In so far as they require a lender's rates to be disclosed at its premises, the provisions presuppose that there is only one, or at least a small number of, rates. That is unlikely to be the case for most sectors of the consumer finance market. Most lenders will typically have a range of rates that

vary depending on factors such as borrower credit standing, loan size and security type. Requiring all such rates to be disclosed at the lender's premises is, if anything, more likely to result in uncertainty amongst prospective borrowers about which rate applies to them, than it is to result in informed consumers who are more likely to "shop around".

38. The proposed new sections 9H and 9I may have a more productive result in respect of other types of consumer finance which are predominantly dealt with by lower tier lenders. Again, this emphasises the need for the Bill to target relevant lenders whose consumers will benefit from the reforms, rather than banks where reforms may create uncertainty for consumers.

Question 10: Looking at the amendments to sections 40, 41, 43, 44, 45, 51, 52 and new sections 44A and 52A:

a) To what extent do the amendments and additions adequately describe the process by which an unreasonable fee may be altered?

b) Do these provisions meet the objective of making the law clearer about what an unreasonable fee might be?

c) Do the provisions leave open any avenue to charge a fee which is unreasonable?

39. NZBA strongly submits that the CCCFA's current provisions regulating unreasonable fees should not be amended. The existing provisions already require that a fee has a strong connection with a lender's reasonable costs, and are in our view appropriate and sufficient to deal with the large fees that may be charged by unscrupulous lenders.

40. In particular, NZBA is concerned about:

(a) the change in section 44 to remove the reference to "reasonable estimate of any loss" to only refer to "creditor's reasonable costs" in new section 44 and "reasonable estimate of the creditor's financial loss" in new section 44A;

(b) the removal of reference to "reasonable standards of commercial practice"; and

(c) the removal of the one year time limitation on challenging fees.

41. The CCCFA currently provides that assessments of whether credit fees are unreasonable are to be determined by the courts taking into account a range of specified criteria, as set out in sections 42 to 44. If fees are not linked to underlying costs, that may indicate unreasonableness, but it will not be determinative. Consequently, the suggested amendments in the Exposure Draft in relation to unreasonable fees would amount to a fundamental change in the current law.

42. In our view, the proposed changes are not targeted to addressing concerns about the behaviour of unscrupulous lenders. It is accordingly not clear what the effect of the proposed changes will be or why they are needed. Banks charge reasonable fees based on their reasonable estimates of costs of services and generic costs. It is also reasonable commercial practice for a default fee to be charged to ensure there is an adequate disincentive to avoid default.

43. Furthermore, the proposed amendments will also reduce opportunities for product innovation. For example, banks commonly offer a suite of products and services for customers which often include price discounting on some aspects because costs are fixed across the portfolio. If such products are not able to be offered, this will adversely affect consumer choice.

44. We note that the proposed amendments relating to unreasonable fees were not considered in any of the Regulatory Impact Statements relating to consumer credit reform issued since December 2010 and were not considered at the August 2011 Financial Summit. We are not aware of any problem which needs to be addressed by an approach that is so broad in its application and consider that any fundamental law change out to be subject to rigorous cost/benefit analysis before adoption.

Question 11: Looking at the amendments to sections 57 and 58:

a) Will the new unforeseen hardship provisions improve access to hardship protections for those in genuine need?

b) Are additional changes necessary to protect consumers?

c) Are additional changes necessary to protect lenders from abuse of the provisions?

45. NZBA considers that the unforeseen hardship provisions are part of the CCCFA protecting consumers from the harm that can arise from irresponsible lending. It appears that there is a problem where debtors only become aware of the unforeseen hardship application process once they are in default, so allowing applications to be made within 2 months of default will provide greater protection.

46. However, the process creates a risk of vexatious applicants abusing the unforeseen hardship process when they have no basis for making an application. Given the obligations on lenders proposed in the new section 57A, the cost to lenders associated with that risk will be greater and may ultimately make consumer credit more expensive. Accordingly, in cases where the creditor requests further information from the debtor (within the 5 working day deadline), the creditor's obligation to provide a substantive response should be suspended until that information is provided. A substantive response could then be provided within 20 working days.

47. Also, proposed new section 57(1)(a) appears to be incorrectly drafted. It would read "... *the debtor may not make an application under section 55 if - a) the debtor has defaulted in a payment; and b) has been in default for 2 months or less* ..." The reference to a debtor being unable to make a hardship application if they have "been in default for 2 months or less" should presumably refer to "2 months or more", so that hardship applications cannot be made more than 2 months after a default.

Question 12: Looking at the new section 99A, are additional provisions needed to ensure unregistered lenders are not operating in the marketplace or to protect consumers from unregistered lenders?

48. NZBA supports new section 99A as a way to protect consumers from unregistered lenders. Hopefully these new consequences will encourage lenders to register, and become known to the FMA and Commission, who can then monitor compliance. NZBA also supports greater use of existing sanctions and enforcement powers to protect consumers from unscrupulous lenders.

Question 13: Do you think the amended Guidelines for reopening credit contracts, consumer leases and buy-back transactions will improve the protection of consumers from oppressive credit contracts (amended section 124)?

49. NZBA supports the Bill's intention to improve protection of consumers from oppressive contracts. However, NZBA is concerned that the proposed guidelines will unnecessarily lower the standard of oppression for *all* credit contracts (not just consumer credit contracts).

50. NZBA submits that the guidelines for reopening credit contracts should not include reference to a breach of the principles. The principles would impose an obligation on banks to, for example, make reasonable inquiries as to the borrower's financial circumstances and whether the borrower is able to repay without suffering financial hardship (principles (e)(i) and (f)(i)). A breach of these principles could occur by a lesser degree of 'oppression' than the current judicial position whereby the lender's knowledge of the borrower is relevant, but a lack of knowledge (and apparent legal advice) is critical to a finding of no oppression.[8] Accordingly, the question becomes what weight the will court place on a breach of the principles. On the one hand, a court may place limited weight on the principles due to the lesser degree of oppression required. However, on the other hand a court may emphasise a breach of the principles reflecting Parliament's intention of referring to the principles. NZBA submits that this uncertainty should be avoided by removing reference to the principles in the guidelines for reopening credit contracts.

51. NZBA further submits that MCA's intention to protect consumers from unscrupulous lenders is clear in the proposed guidelines. However, NZBA considers the change to section 124 inappropriate given its application to all credit contracts. NZBA is concerned that the lower standard of oppression will require an unsettling change to the judicial unwillingness to intervene in commercial credit contracts. NZBA supports the goal to protect consumers and accordingly suggests that changes to hardship provisions through the new section 57(1)(a) will better achieve the same end.

52. In more general terms, NZBA considers it unnecessary for the Bill to list guidelines of oppression in this way. The factors are already considered by the courts when relevant. Furthermore, NZBA submits (due to the content of the factors) the

8 *GE Custodians v Bartle* [2010] NZSC 146.

guidelines may be perceived as an attempt to codify the equitable doctrines of unconscionable bargain and undue influence. If that is the intention, then that is an important law reform task and should be the subject of a separate discussion.

Question 14: As an alternative, should we follow the approach to the re-opening jurisdiction in the Australian National Consumer Credit Protection Act 2009, and refer to "unjust" credit contracts rather than "oppressive" credit contracts?

53. The Australian National Consumer Credit Protection Act 2009 defines “unjust” (in section 76) in terms very similar to those already used in the definition of “oppressive” in section 118 of the CCCFA, and the factors listed are also similar to those proposed in the Bill. Accordingly, it is unclear how following the Australian approach would be different from the existing law or proposal.

Question 15: Do you think the amendments to the CCCFA Schedule 1 - Key information concerning consumer credit contract - will sufficiently improve disclosure or should additional information be provided in disclosure documents?

54. NZBA supports initiatives to ensure that appropriate key information is disclosed to borrowers to ensure that they have the information necessary to make fully informed decisions. NZBA considers that the proposals to change the content of disclosure statements could be improved in the following ways:

(a) Replacing paragraph (s) - statement of rights to cancel a contract: The CCCFA presently prescribes wording about rights to cancel that is universally used and appears to have worked and be understood by borrowers. There is no reason to change this approach. Given that the rights to cancel come from section 27, they will be the same for all contracts and so prescribed wording is appropriate. Further, allowing lenders to draft their own wording would lead to a range of descriptions, which may confuse consumers about whether each lender is subject to the same rules; creates a risk that a description is inadequate or inaccurate; and creates uncertainty for lenders about whether they have provided the required disclosure.

(b) New paragraph (sa) - statement of debtor's rights under section 55 where there is hardship: It would be helpful for disclosure documents to inform borrowers of these rights, but it would be preferable for the Schedule to provide prescribed text, for the same reasons given regarding paragraph (s) above. As outlined in response to question 11, NZBA is concerned about the risk of vexatious applicants abusing the unforeseen hardship process, so would welcome the opportunity to work with the MCA on the text of a statement of rights on those provisions, and in particular about when unforeseen hardship is suffered.

(c) New para (ua) about Dispute Resolution Membership: Disclosing this information in loan documents would be helpful for consumers. Banks already disclose this information in their disclosure statements required under the FAA, but unscrupulous lenders may not be providing FAA disclosure. There is a risk that duplication of disclosure may confuse consumers, but this may be worthwhile. Requiring this disclosure may also help the FMA and Commission identify which lenders are not members of dispute resolution schemes and may not be registered. Any loan documents that did not disclose dispute resolution details would raise a red flag, and regulators could also check whether a lender is in fact a member of the scheme they claim to be a member of.

Question 16: Are all the situations where the new law should have an effect on existing contracts covered in the Bill?

55. NZBA supports the transitional clause, except in relation to provisions regulating fees. As stated above, NZBA submits that the existing provisions regulating fees should not be amended. However, if they are amended then the new provisions should only apply to contracts entered into after the new provisions take effect. Applying a new test of reasonableness to existing contracts may be costly and difficult. More importantly, lending decisions were made on the basis of the existing law regarding fees. Changing the law during the life of a contract is retrospective and may cause loss to lenders.

Question 17: In your experience, will the amendment of section 44 of the Personal Property Securities Act 1999 prevent the practise of "drag-net" securities over all personal property?

56. NZBA supports the wording change but notes that, as the Law Commission stated in its report on the Credit (Repossession) Act 1997, the change is unlikely to prevent drag-net securities without additional enforcement efforts.[9] The Law Commission is concerned that there is no enforcement agency to protect consumers against repossessions that rely on drag-net clauses, and NZBA shares this concern.

57. Prohibiting the use by of powers of attorney by creditors to sign acknowledgments that particular chattels are subject to a drag-net clause is supported. However, that measure alone is unlikely to address the risks and harms surrounding drag-net clauses and repossession. NZBA welcomes further work on the Law Commission's recommendations to address this potentially harmful aspect of lender behaviour.

Additional Discussion: Cost of Finance Caps

58. NZBA understands that cost of finance caps are often adopted as the default rate by high risk lenders seeking to recover the cost of borrowing with a higher interest rate. NZBA considers it unnecessary to consider cost of finance caps at this time, given the range of consumer protection reforms considered in the Bill.

Contact

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9 Law Commission Report, *Consumers and Repossession: A review of the Credit (Repossession) Act 199*7, Report 124 April 2012, Chapter 7.