MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HIKINA WHAKATUTUKI

Discussion paper

November 2016

Section 99(1A) of the Credit Contracts and Consumer Finance Act 2003

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Comments should be submitted in writing, no later than 5pm on 28 November 2016, as follows:

Email (preferred)
consumer@mbie.govt.nz

Post
Section 99(1A) CCCF Act review
Competition and Consumer Policy
Ministry of Business, Innovation and Employment
PO Box 1473
WELLINGTON

Any party wishing to discuss the proposals with Ministry officials should email, in the first instance, robert.clarke@mbie.govt.nz

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List of Acronyms

MBIE	Ministry of Business, Innovation and Employment
CCCF Act	Credit Contracts and Consumer Finance Act 2003
NZBA	New Zealand Bankers Association

1 Introduction

1.1 Context

1. This discussion paper concerns consumer credit contracts. It addresses the legal consequences, for the parties to such a contract, of the lender failing to meet its information disclosure obligations.

2. More particularly, the Minister of Commerce and Consumer Affairs is considering amendments to section 99(1A) of the Credit Contracts and Consumer Finance Act 2003 (the "CCCF Act"). Section 99(1A) provides that "neither the debtor nor any other person is liable for the costs of borrowing in relation to any period during which the creditor has failed to comply with section 17 or 22".

3. Article 5 of the CCCF Act defines "costs of borrowing" as any or all of the following: interest charges; credit fees; and default fees.

1.2 What is this document for?

4. This discussion paper is designed to test different options for the amendment of section 99(1A). Responses will be used to determine which of the different options is most appropriate, should a decision be made by the government to amend the provision.

2 Section 99(1A) in context

2.1 Lender disclosure obligations

5. Under section 17 of the CCCF Act, a 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 entered into". Under section 32(1), the disclosure must, among other things, express the information clearly and concisely, and must not be likely to deceive or mislead a reasonable person with regard to "any particular that is material to the consumer credit contract".

6. Furthermore, under section 22 of the CCCF Act, if the parties to a consumer credit contract agree to change the contract, the creditor "must ensure that disclosure of the following information is made to every debtor under the contract: (a) full particulars of the change; and (b) any other information prescribed by regulations to be information that must be disclosed under this section".

2.2 Consequences of non-compliant disclosure

2.2.1 Right to cancel

7. If proper disclosure has not been given, the debtor has the right under section 27 of the CCCF Act (with some exceptions[1]) to cancel the contract at any time during the period of non-disclosure.

2.2.2 Statutory damages

8. If compliant disclosure has not been given, the debtor is entitled under sections 88 and 89 of the CCCF Act to recover statutory damages from the creditor, except where the creditor can establish a 'reasonable mistake' defence under section 106.

9. The amount of damages is the lesser of $6,000, or 5% of "the total of all advances made and agreed to be made under the contract".[2]

2.2.3 Pecuniary penalty

10. If compliant disclosure has not been given, the creditor will have committed an infringement offence under section 102A of the CCCF Act, and will be liable to a fine of up to $10,000 (if an individual) or $30,000 if a company.

[1] Section 29(1) provides that section 27 "does not apply if the credit is provided for a specified period of less than 2 months and no part of the credit is used, with the knowledge of the creditor, to pay amounts owing to the creditor or a related company under another credit contract".

[2] Slightly different amounts apply in the case of revolving credit contracts, consumer leases, and buy-back transactions.

11. Alternatively,[3] the creditor may have breached section 103 of the CCCF Act, and so be liable, unless it can establish a 'reasonable mistake' defence under section 106, to a fine of up to $200,000 (if an individual) or $600,000 if a company.

2.2.4 Ban on enforcement

12. If compliant disclosure has not been given, the creditor (or anyone else other than the debtor) is prohibited under section 99(1) from enforcing the credit contract, before compliant disclosure is made.

13. In this regard, section 99(1A) clarifies that, even after a corrective disclosure has been issued, "neither the debtor nor any other person is liable for the costs of borrowing in relation to any period during which the creditor has failed to comply with section 17 or 22".

2.3 Background to section 99(1A)

14. The Credit Contracts and Consumer Finance Amendment Act 2014 inserted section 99(1A) into the CCCF Act. The bill on which this Act was based is referred to hereafter as the "Amendment Bill".[4]

15. Section 99(1A) was inserted into the Amendment Bill as a response to a High Court decision interpreting section 99 of the CCCF Act.

16. As noted above, section 99(1) of the CCCF Act prohibits a creditor from enforcing a consumer credit contract "before [compliant] disclosure is made". In the case of *Norfolk Nominees v King*, the original disclosure had been non-compliant, and a corrective disclosure was not made for 2½ years into the contract. The issue was whether the finance company, having made the corrective disclosure, could now "enforce" the contract by recovering all the interest and fees that should have been paid during the period of non-compliance.

17. In a judgment dated 5 March 2013, the High Court held that the creditor could indeed do so. It stated:

> "Parliament has legislated that the consequences of not complying with s 17 or s 22 is that the contract is unenforceable by the lender until such time as disclosure is made… [T]he referencing of the resumed right to enforce is to the time at which disclosure is made. If Parliament's intention had been to prohibit enforcement … the legislation could clearly have stated that. It did not do so. Instead, it stipulated a period, namely until initial disclosure is made. Unenforceability under s 99, in other words, is unenforceability for the time being. It is not unenforceability forever."[5]

18. Officials considered that this outcome was unintended and could in some circumstances be unjust. They therefore inserted section 99(1A) into the Amendment Bill.

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[3] Conduct that constitutes an offence under section 102A does not constitute an offence under section 103 (see section 103(5)).

[4] Originally, this was the Credit Contracts and Financial Services Law Reform Bill, introduced to the House in April 2013. This bill was later divided into two bills by the Committee of the Whole in May 2014, namely the Credit Contracts and Consumer Finance Bill and the Financial Service Providers (Registration and Dispute Resolution) Amendment Bill.

[5] *Norfolk Nominees Ltd v King* [2013] NZHC 398, at para [87].

2.4 Issue

19. On 17 May 2016, the New Zealand Bankers Association ("NZBA") wrote to MBIE concerning section 99(1A) of the CCCF Act. A copy of the letter is attached to this discussion paper as Annex A.

20. In its letter, the NZBA wrote that "members are concerned that creditors must refund costs of borrowing in *all* situations, even if they've corrected non-disclosure or there is no material harm to the borrower". This is an issue because "instances of non-disclosure or wrong disclosure are unavoidable, simply due to the volume of lending and extensive disclosure obligations now imposed".

21. The NZBA concludes that section 99(1A) "could have serious and harsh implications for a lender. In particular, the impacts are significant if a long period of time has elapsed before the disclosure breach is discovered or if the disclosure breach affects many loans".

22. Having considered the matter, and even bearing in mind the comfort that lenders might take from the prosecutorial discretion of the Commerce Commission, we consider that the NZBA raises a valid issue.

23. In particular, where the harm done is negligible (for example, if the creditor makes a small error when specifying the frequency with which continuing disclosure statements will be provided), the consequences may be disproportionate. Because all incidents of non-compliance are captured by section 99(1A), and all breaches of section 99(1A) attract the same consequences (loss of interest and fees for the period of non-compliant disclosure), the potential for disproportionate consequences is high. The prosecutorial discretion of the Commerce Commission (i.e. the ability not to pursue minor breaches) may provide insufficient certainty for lenders, especially given the potential for private action.

24. In addition, customers may suffer from overly-cautious lending practices. In discussions with officials, banks have said that greater liability under section 99(1A) means they may adopt slower and more complex lending processes, which negatively impacts on customer experience. This may affect other lenders also.

25. On the other hand, we are aware that the status quo has some advantages, in particular inasmuch as it provides a strong signal to, and incentive for, lenders to comply with their information disclosure obligations. The Commerce Commission has spoken positively to MBIE about section 99(1A) and its effect on improving compliance.

1	Do you have any comments on the description of section 99(1A) and/or the wider consequences of non-compliant disclosure by lenders?

3 Options

3.1 Introduction

26. Under the status quo, a borrower will not be liable for any costs of borrowing that accrue during the period of non-compliant disclosure, even if a corrective disclosure is made. In other words, the lender forfeits the relevant interest and fees.

27. Retaining the status quo remains an option. The main advantage of retaining the status quo is that it maximises the incentive for lenders to comply with their disclosure obligations. The main disadvantages have been outlined in section 2.4 above, namely the risk of disproportionate consequences for lenders in cases of minor breach, and the risk of overly-cautious (and slower, more complex) lending practices.

28. There are, in addition, five broad options for reform. Listed in order of the extent to which they differ from the status quo, they comprise:

    a. LIMITING THE AMOUNT FORFEITED: maintain the current system, but impose a cap on the amount or proportion of interest and fees that a lender forfeits;

    b. RELIEF FOR DISPROPORTIONATE CONSEQUENCES: Amend 99(1A) so that:

        i. *prima facie*, the lender forfeits the costs of borrowing (as at present); but

        ii. the lender has the right to attempt to rebut the presumption by showing that it is disproportionate;

    c. REQUIREMENT FOR MATERIALITY: Amend 99(1A) so that:

        i. *prima facie*, the borrower remains liable for the costs of borrowing; but

        ii. the borrower has the right to attempt to rebut the presumption by showing that the disclosure error was material;

    d. COMBINATION OF B / C: Amend 99(1A) so that:

        i. *prima facie*, the borrower remains liable for the costs of borrowing; but

        ii. the borrower has the right to attempt to rebut the presumption by showing that the disclosure error was material; but

        iii. if the borrower is successful, the lender then has the right to attempt to re-establish the presumption by showing that the consequences of forfeiting the costs of borrowing would be disproportionate;

    e. BORROWER REMAINS LIABLE: Repeal section 99(1A), so that the lender is entitled to the costs of borrowing once corrective disclosure is made.

3.2 Assessment of options for reform

3.2.1 Option A: limit on amount forfeited

29. Under Option A, section 99(1A) would remain as it is, except that the costs of borrowing forfeited by the lender would be expressly limited. The limit could be an absolute limit, or a proportion-based limit.

30. Potential drafting might include:

    a. ABSOLUTE CAP: "~~neither~~ the liability of the debtor ~~nor~~ and any other person ~~is liable~~ for the costs of borrowing in relation to any period during which the creditor has failed to comply with section 17 or 22, is limited to a maximum of $10,000"

    b. PROPORTION-BASED CAP: "neither the debtor nor any other person is liable for more than 50% of the costs of borrowing in relation to any period during which the creditor has failed to comply with section 17 or 22"

    c. HYBRID APPROACH: "~~neither~~ the liability of the debtor ~~nor~~ and any other person ~~is liable~~ for the costs of borrowing in relation to any period during which the creditor has failed to comply with section 17 or 22, is limited to a maximum of $10,000 or 50% of the costs of borrowing concerned, whichever is the lesser"

31. The figures of $10,000 and 50% have been used for illustrative purposes only. Respondents are welcome to propose different figures, accompanied by supporting arguments.

32. The main advantage of Option A is that it minimises the changes to the existing provision, and any associated uncertainty and disruption for stakeholders.

33. A disadvantage of Option A is that it continues to capture cases of minor and unimportant instances of non-compliant disclosure.

3.2.2 Option B: relief for disproportionate consequences

34. Under Option B, section 99(1A) would maintain a presumption that the lender forfeits the costs of borrowing, but would allow the lender the opportunity to reverse this presumption in the courts.

35. Potential drafting might include retaining section 99(1A) as it is, but inserting an additional provision such as

    a. "Neither the debtor nor any other person is liable for the costs of borrowing in relation to any period during which the creditor has failed to comply with section 17 or 22. However, upon application by the lender, the courts may issue an order to different effect, where the lender can demonstrate that such an outcome would be disproportionate to the gravity of the non-compliance";

    b. "Neither the debtor nor any other person is liable for the costs of borrowing in relation to any period during which the creditor has failed to comply with section 17 or 22. However, upon application by the lender, the courts may issue an order to different effect, where the lender can prove all of the statements in section 106, subsections (1)(a), (1)(b) and 1(c)".[6]

[6] Section 106 of the CCCF Act provides for a 'reasonable mistake' defence, but is limited at present to claims for statutory damages under section 88 and prosecutions under section 103(1). Under section 106, the person

36. The main advantage of Option B is it would exclude from its application minor errors in disclosure which are unlikely to harm the consumer party.

37. A disadvantage of Option B is that it would require adjudication by the courts, to determine whether the conditions of the exception were met. In other words, it lacks certainty for the parties.

3.2.3 Option C: requirement for materiality

38. Under Option C, section 99(1A) would set out a presumption that the borrower remains liable for the costs of borrowing, but would allow the borrower the opportunity to reverse this presumption in the courts.

39. Potential drafting might include:

    a. "neither the debtor nor any other person is liable for the costs of borrowing in relation to any period during which the creditor has failed to comply with section 17 or 22, where the non-compliance was materially adverse from the point of view of the debtor";

    b. "neither the debtor nor any other person is liable for the costs of borrowing in relation to any period during which the creditor has failed to comply with section 17 or 22, where the borrower would not have entered into the contract if the disclosure had been compliant".

40. The main advantage of Option C is that, like Option B, it would exclude from its application minor errors in disclosure which are unlikely to harm the consumer party.

41. A disadvantage of Option B is that it would require adjudication by the courts, to determine whether the non-compliance was materially adverse.

42. A further disadvantage of Option C is that, because it relies on the consumer to prove the conditions of the exception are met, and because consumers may (for financial, informational, or other reasons) be poorly placed to do so, it may in practice exclude from its application many cases of significant disclosure errors. In other words, Option C is unlikely in practice to achieve it sets out to do.

3.2.4 Option D: combination of B and C

43. Under Option D, there would be both a requirement for materiality, but also the potential for relief from disproportionate consequences.

44. Potential drafting might include the following:

> "Neither the debtor nor any other person is liable for the costs of borrowing in relation to any period during which the creditor has failed to comply with section 17 or 22 where the non-compliance was materially adverse from the point of view of the debtor. However, upon application by the lender, the courts may issue an order to different effect, where the lender can demonstrate that such an outcome would be disproportionate to the gravity of the non-compliance"

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concerned must prove that (a) the breach of the Act was due to a reasonable mistake or due to events outside of the person's control; (b) the breach was remedied (to the extent that it could be remedied) as soon as practicable after the breach was discovered by the person or brought to the person's notice; and (c) the person has compensated or offered to compensate any person who has suffered loss or damage by that breach.

3.2.5 Option E: borrower remains liable

45. Under Option E, section 99(1A) is repealed.

46. The main advantage of Option D is its simplicity. Because there is no new legislative wording required, there is no risk of unintended judicial interpretations.

47. A disadvantage of Option E is that lenders would face a lessened incentive to comply with disclosure requirements.

2	Which of the five options described do you prefer and why?
3	Are there other options for change that officials should consider? In particular, what do you think of the four options set out in the appendix to the NZBA letter?

3.3 Other issues

3.3.1 Types of lender covered

48. Section 99(1A) currently applies to all lenders party to a consumer credit contract.

49. However, members of the NZBA have claimed that section 99(1A) may impose disproportionate liability on banks. Relative to other lenders, some banks have claimed that they:

    a. deal in much higher value loans. This means that the loss of the interest and fees will be much greater than for other lenders; and

    b. deal in significantly larger volumes of loans. For this reason, they have heavily automated systems. Such automation can increase the risk that an error or bug goes undetected for a long period of time, and that it affects a significant number of customers.

50. Officials would like to test these claims.

4	Do you agree that, relative to other lenders, banks may face disproportionate consequences under section 99(1A)?
5	Would it be appropriate to include or exclude only certain lenders / classes of credit contract from the application of section 99(1A)? If so, which kind(s)?

3.3.2 Disclosure provisions covered

51. Section 99(1A) removes liability for costs of borrowing in relation to any period during which the creditor has "failed to comply with section 17 or 22".

52. NZBA members have suggested to officials that section 22 should be removed from the ambit of section 99(1A). In other words, section 99(1A) should only remove liability for costs of borrowing when the lender has breached section 17. The justification advanced for this suggestion is that section 22 requires the debtor to have agreed to a change, for that change to have been made.

53. Alternatively, if section 22 is kept within the ambit of section 99(1A), then NZBA members have suggested that non-compliance with section 22 should not remove liability for costs of

borrowing where the creditor can show it complied with section 9C(3)(c).Section 9C(3)(c) requires creditors to have helped the borrower to reach an informed decision in all later dealings under the agreement.

54. Officials would like to test these claims.

6	Do you think there is a case for removing section 22 from the ambit of section 99(1A)?
7	If section 22 remains within the ambit of section 99(1A), do you think that a debtor's liability for costs of borrowing should be maintained where the creditor shows it has complied with its obligations under section 9C(3)(c)?

3.3.3 Temporal application

55. NZBA members told officials at a meeting on 10 June 2016 that they would like any amendment to section 99(1A) to apply retroactively, from the time that the provision came into effect in 2015.

56. Clearly, such an approach is not ideal. Section 7 of the Interpretation Act 1999 stipulates that enactments do not have retrospective effect. The Law Commission has made clear that retroactivity should be applied only in exceptional cases.[7] We recognise that, if retroactivity is not applied, then this could lead to some complexity for both creditors and debtors, in terms of understanding which loans remain captured by section 99(1A) and which do not. Nevertheless, our preliminary view is that these are not exceptional circumstances.

57. If, however, retroactivity were applied, it would be necessary to formulate a positive provision to the effect that any revised provision shall be deemed to have been in effect since the original section 99(1A) came into force (6 June 2015).

8	Do you think the potential confusion for creditors and debtors, if retroactivity is not applied, meets the threshold for exceptional circumstances? Do you see any other reasons why an amended section 99(1A) should have retroactive effect (i.e. that any breaches of the provision that may have occurred since it came into effect in 2015 should be judged against the amended requirements)?

3.4 MBIE's preferred approach

58. Our preferred approach at this stage is Option B, relief for disproportionate consequences. This option would ensure that lenders did not forfeit interest and fees where they can demonstrate to the courts that such an outcome would be disproportionate to the nature and impact of the non-disclosure. Officials consider it appropriate that lenders be the party that should have to take court action, because it is lenders who have failed to make proper disclosure, and lenders will typically find taking court action less intimidating than borrowers.

59. On the supplementary issues, MBIE's preliminary preference is:

    a. Such relief is available to all lenders, not just banks;

    b. Section 22 remains within the ambit of section 99(1A); and

    c. Prospective application of the law change only .

[7] See, for example, Law Commission Report no.35, Legislation Manual Structure and Style, 1996 at para 64 et seq.

9	Do you agree with MBIE's preferred approach? Why / why not?

4 Recap of questions

1	Do you have any comments on the description of section 99(1A) and/or the wider consequences of non-compliant disclosure by lenders?
2	Which of the four options described do you prefer and why?
3	Are there other options for change that officials should consider? In particular, what do you think of the four options set out in the appendix to the NZBA letter?
4	Do you agree that, relative to other lenders, banks may face disproportionate consequences under section 99(1A)?
5	Would it be appropriate to include or exclude only certain lenders / classes of credit contract from the application of section 99(1A)? If so, which kind(s)?
6	Do you think there is a case for removing section 22 from the ambit of section 99(1A)?
7	If section 22 remains within the ambit of section 99(1A), do you think that a debtor's liability for costs of borrowing should be maintained where the creditor shows it has complied with its obligations under section 9C(3)(c)?
8	Do you think the potential confusion for creditors and debtors, if retroactivity is not applied, meets the threshold for exceptional circumstances? Do you see any other reasons why an amended section 99(1A) should have retroactive effect (i.e. that any breaches of the provision that may have occurred since it came into effect in 2015 should be judged against the amended requirements)?
9	Do you agree with MBIE's preferred approach? Why / why not?

Annex A: Letter from NZBA dated 17 May 2016

NEW ZEALAND
BANKERS ASSOCIATION

17 May 2016

Daniel O'Grady
Senior Advisor
Competition and Consumer Policy
Commerce, Consumers and Communications Branch
Ministry of Business, Innovations and Employment
PO Box 1473
WELLINGTON 6140

By email: daniel.o'grady@mbie.govt.nz

Dear Daniel

Section 99 of the Credit Contracts and Consumer Finance Act 2003

1. I am writing to you about the banking industry's concerns over section 99(1A) of the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**).

2. NZBA and its members support both the changed regime and its protection of debtor rights and extended creditor duties, including disclosure.

3. However, the industry is concerned section 99(1A):

    a. creates significant doubt and concern for lenders;

    b. leads to results and costs to lenders disproportionate to the harm caused by disclosure breaches (including non-disclosure);

    c. lacks enough flexibility, given the purpose of the CCCFA regime; and

    d. is inconsistent with international precedent which has relief provisions to deal with such concerns.

Background

4. Before June 2015, section 99 of the CCCFA provided that a lender could not enforce a loan or security if they failed to disclose under section 17 (initial disclosure) or section 22 (variation disclosure).
5. NZBA and its members suggest that lenders understood the scope of this clause. The clause reflected an equivalent provision in the old Credit Contracts Act 1981.

6. If a lender corrected disclosure, the lender could then enforce the loan or security. But other penalties would continue to apply to the creditor to address the original disclosure breach, including fines and statutory damages.

7. In June 2015, section 99 was amended to insert section 99(1A). Section 99(1A) provides that a borrower isn't liable for any costs of borrowing (**COB**), namely interest and fees, for any period during which a lender failed to comply with section 17 or section 22.

8. Even if the creditor corrects and makes the necessary disclosure later than needed under sections 17 or 22, the debtor is still not liable for the COB during the period of non-compliance.

9. This is notably different from the previous application of section 99(1). Under the previous position, non-compliance and the inability to enforce the contract and security interests outside the period of non-compliance, was corrected when disclosure was made. Again, the creditor would remain liable for the original disclosure breach, via penalties including fines and statutory damages. The Court also had the power to reopen the contract as oppressive.

10. A failure to comply with section 99(1A) creates a duty to refund the COB amounts (under section 48 of the CCCFA). Failing to refund under section 48 results in a further section 103 offence and further potential penalties which may be higher than those that applied for the initial disclosure breach.

Industry concerns

11. NZBA and its members support the new regime and the duties on lenders, including disclosure requirements.

12. But NZBA and its members have identified unexpected issues. Members are concerned that creditors must refund COB in *all* situations, even if they've corrected non-disclosure or there is no material harm to the borrower.

13. The Commerce Commission's media release of 17 March 2016 sets out that it compelled a payday lender, Cashinaflash.co.nz Limited, to refund COB under section 99(1A). Furthermore, the Commerce Commission's recent media release of 4 May 2016 warns other lenders about the implications of section 99(1A).

No proportionality or flexibility

14. Section 99(1A) does not allow any proportionality or flexibility by reference to the nature or facts of the non-disclosure or wrong disclosure, including harm to the debtor.

15. Members seek to comply with the CCCFA. But instances of non-disclosure or wrong disclosure are unavoidable, simply due to the volume of lending and extensive disclosure obligations now imposed.

16. The new provisions create a significant risk to lenders, regardless of the materiality of non-compliance or the steps the creditor has taken to comply.

17. There are different types of non-disclosure and wrong disclosure. But, as currently drafted, section 99(1A) would capture *any* errors in disclosure. For example, the section will catch inconsequential disclosure breaches, disclosure breaches a lender can easily correct, or disclosure breaches that don't harm the debtor or change the debtor's financial position.

18. Unlike the other enforcement rules in the CCCFA, there is no materiality threshold in section 99. A lender must refund COB for any period where the lender didn't meet disclosure rules, regardless of the materiality or impact upon the debtor. A lender must also refund COB even if the debtor has had use of funds over a long time or where both parties otherwise complied with the contract *as if the lender made disclosure correctly*.

19. Section 99 can be contrasted with the statutory damages provision. That provision enables a Court to consider whether the lender had an effective compliance programme, the extent of the breach, and whether the borrower was prejudiced by the breach.

20. Section 99 can also be contrasted with the infringement offences. Different penalties apply for a failure to include some of the information needed under the disclosure rules compared to a complete failure to make disclosure.

Potentially significant results

21. In its current form, section 99 could have serious and harsh implications for a lender. In particular, the impacts are significant if a long period of time has elapsed before the disclosure breach is discovered or if the disclosure breach affects many loans.

22. In the recent case of Cashinaflash.co.nz Limited, the Commerce Commission required a payday lender to refund COB. From media articles, it appears there was a reasonably minor non-disclosure of a transitional nature involving the lender's FSP registration number, dispute resolution service, and hardship information. The Commerce Commission has also stated it will compel lenders to refund COB in other similar situations.

23. The regime could also have unintended results as it may encourage lenders to remove helpful, but not compulsory, customer information from its contracts. Lenders may do this to mitigate risks that information is somehow inaccurate. NZBA and its members suggest that this would be a poor customer result and is inconsistent with the objectives of clear and meaningful disclosure.

Potential solutions

24. As with any new legislation, NZBA and its members are aware the CCCFA is in a period of review and refinement, to ensure results of the regime are what was intended.

25. NZBA and its members would like to work with MBIE and the Commerce Commission to better understand the potential challenges in section 99. We believe that an agreed approach can be reached that provides suitable consumer protection, while ensuring the the impact on creditors is proportionate.

26. NZBA and its members believe that there are potential refinements that could be made to section 99 to:

    a. keep the underlying purpose of the regime, including the rights of the debtors and powers of the Commerce Commission to enforce; and

    b. ensure the section does not result in a creditor being required to refund COB where that would be out of proportion with the facts or nature of any non or incorrect disclosure.

27. There is international precedent for having suitable relief provisions and powers to deal with such concerns. Australia, Canada and the United Kingdom give Courts discretion to compensate depending on the prejudice to the debtor, rather than a one size fits all approach. NZBA and its members can provide further details to help considerations.

28. We also set out in the **attached** appendix four possible amendment alternatives to section 99.

29. We appreciate it may take some time to review issues and options. NZBA and its members also wish to discuss timing and how changes may be applied to existing contracts.

Next steps

30. We wish to meet with you and your team to discuss the issues with, and possible solutions to address, section 99 as outlined above. NZBA and its members will look to work through with you some practical examples of how non-compliance may happen and the implications of refunding COB.

Yours sincerely

Karen Scott-Howman
Chief Executive
Telephone: +64 4 802 3355 / +64 21 703 030
Email: karen.scott-howman@nzba.org.nz

Appendix – Options for legislative amendments

Option One (Preferred)

(1A) A court may, on application of the Commission or any party to a consumer credit contract, order that the debtor or any other person is not liable for some or all of the costs of borrowing in relation to any period during which the creditor failed to comply with section 17 or 22.

(1AA) In deciding whether to make an order under section 99(1A), a court must have regard to the following matters:

(a) the role the prohibited enforcement provisions have in providing incentives for compliance with the Act;

(b) whether the creditor has an appropriate compliance programme;

(c) the extent of, and the reasons for, the breach or breaches;

(d) the extent to which any person has been prejudiced by the breach or breaches;

(e) the extent to which the creditor has compensated, offered to compensate, or agreed to compensate, the persons who are affected by the breach or breaches;

(f) the extent to which the breach was due to a reasonable mistake or due to events outside of the creditor's control; and

(g) the extent to which the breach was remedied (to the extent that it could be remedied) as soon as practicable after the breach was discovered by the creditor or brought to the creditor's notice; and

(h) the time that has elapsed since the date of failure to comply with section 17 or 22;

(i) any other matters the court thinks fit.

Note: Option 1 is NZBA and its members' preferred option. This option provides that a creditor can recover costs of borrowing despite non-disclosure under section 17 or 22, but allows the Commission or a debtor to apply to the Court to refund costs of borrowing. The provisions in in (a) – (i) above reflect sections 92 and 106.

Option Two

(1A) Neither the debtor nor any other person is liable for the costs of borrowing in relation to any period during which there has been a complete failure by the creditor to comply with section 17 or 22.

Note: 'complete failure' is a term used in section 102A(2) of the CCCFA. A creditor will be unable to recover costs of borrowing if there has been a complete failure to comply with section 17 or 22. This may still create some risk, particularly where the non-disclosure is accidental or outside of the creditor's control (for example, an email sent to the debtor which is undeliverable).

Option Three

(1A) Neither the debtor nor any other person is liable for the costs of borrowing in relation to any period during which the creditor has failed to comply with section 17 or 22, unless the creditor can show:

(a) the creditor had an appropriate compliance programme;

(b) the breach was due to a reasonable mistake or due to events outside of the creditor's control;

(c) the breach was remedied (to the extent that it could be remedied) as soon as practicable after the breach was discovered by the creditor or brought to the creditor's notice; and

(d) the debtor has not been prejudiced by the breach or the creditor has compensated or offered to compensate any person who has suffered loss or damage by that breach.

Note: This allows a creditor to avoid refunding interest and fees where there has been a failure to comply with section 17 or 22, but the onus is on the creditor to show the matters in (a) to (d) are met. The provisions in (a) – (d) reflect sections 92 and 106.

Option Four

(1A) A court may, on application of the Commission or any party to a consumer credit contract, order that the debtor or any other person is not liable or is only liable for only some of the costs of borrowing, due to the creditor failing to comply with section 17 or 22.

(1AA) Subsection (1A) does not apply to a complete failure to give or send a disclosure statement to a debtor or guarantor. Neither the debtor nor any other person is liable for the costs of borrowing in relation to any period during which there has been a complete failure by the creditor to comply with section 17 or 22.

(1AB) In deciding whether to make an order under section 99(1A), a court must have regard to the following matters:

(a) the role the prohibited enforcement provisions have in providing incentives for compliance with the Act;

(b) whether the creditor has an appropriate compliance programme;

(c) the extent of, and the reasons for, the breach or breaches;

(d) the extent to which any person has been prejudiced by the breach or breaches;

(e) the extent to which the creditor has compensated, offered to compensate, or agreed to compensate, the persons who are affected by the breach or breaches;

(f) the time that has elapsed since the date of failure to comply with section 17 or 22; or

(g) any other matters the court thinks fit.

Note: This provides a creditor cannot recover costs of borrowing for a complete failure, but allows the Commission or a debtor to apply to the Court to refund costs of borrowing for other failures to comply with section 17 or 22.