

5 December 2016

Section 99(1A) CCCFA Review
Competition and Consumer Policy
Ministry of Business, Innovation and Employment
PO Box 1473
Wellington 6140

By email: consumer@mbie.govt.nz

**SUBMISSION on
Section 99(1A) of the Credit Contracts and Consumer Finance Act 2003
Discussion Paper**

1. Introduction

Thank you for the opportunity to make a submission on the discussion paper on section 99(1A) of the Credit Contracts and Consumer Finance Act 2003 (CCCFA). This submission is from Consumer NZ, New Zealand's leading consumer organisation. It has an acknowledged and respected reputation for independence and fairness as a provider of impartial and comprehensive consumer information and advice.

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2. Responses to specific questions

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

The consumer protection provisions of the CCCFA rely heavily on disclosure. It's therefore important the Act retains strong signals to lenders to comply with the disclosure requirements.

Disclosure also needs to be considered part of companies' responsible lending obligations. The Act recognises this, providing for sanctions when a lender fails to disclose required information to consumers.

We're not convinced a strong case has been made for amending section 99(1A). In the event a decision is made to proceed with changes, this must not be at the expense of consumer safeguards.

Question 2: Which of the five options described do you prefer and why?

There are potential issues with all five options described in the discussion paper. In particular:

- Limiting the costs of borrowing forfeited by the lender, as suggested in option A, could result in unjust consequences for borrowers, including situations where they aren't fully compensated for losses associated with inadequate disclosure.
- We agree section 99(1A) should maintain a presumption that the lender forfeits the costs of borrowing, as is suggested in option B. However, we consider the proposed amendment giving lenders the option to seek a court order to reverse this presumption lacks clarity. Should this option be pursued, the wording of the amendment will need improvement.
- We don't support option C as it requires the borrower to prove the conditions of the exception are met. We agree consumers are poorly placed to do this. Also, the lender has failed to comply with the legislation so the lender should be the one to prove the presumption shouldn't apply.
- Option D would appear to also require borrowers to prove the non-compliance was material. As stated above, we think consumers are poorly placed to do this.
- We don't support option E as it would reduce the incentives for lenders to comply with the disclosure requirements in sections 17 and 22 of the CCCFA.

Question 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 of the NZBA letter?

In our view, there are major issues with all four options proposed by the NZBA. In particular:

- Option one requires the debtor or Commerce Commission to apply to the court for an order refunding the costs of borrowing. As mentioned above, consumers aren't well placed to do this and we don't support this option.
- Option two requires a complete failure. We don't agree section 99(1A) should be limited to circumstances of complete failure. This would mean a lender could recover all costs even in cases where the consumer has suffered material disadvantage.
- Option three weakens the incentives on lenders to comply with the Act's disclosure obligations, to the extent that some may view non-compliance as simply a cost of doing business.
- Option four, like option one, requires the debtor or Commerce Commission to apply to the court for an order. We don't support this approach.

Question 4: Do you agree that relative to other lenders, banks may face disproportionate consequences under section 99(1A)?

No, we do not agree.

Question 5: Would it be appropriate to include or exclude only certain lenders/classes of credit contracts from the application of section 99(1A)? If so, which kind?

No, in our view, section 99(1A) should apply to all lenders and all classes of credit contracts.

Question 6: Do you think there is a case for removing section 22 from the ambit of section 99(1A)?

No, removing section 22 from the ambit of section 99(1A) would reduce the incentives on lenders to comply with their variation disclosure obligations.

Question 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)?

No, just because a creditor helps a borrower reach an informed decision under section 9C(3)(c) does not mean that creditor should be exempt from the application of section 99(1A).

Question 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)?

No, we do not think an amended section 99(1A) should have retroactive effect.

Question 9: Do you agree with MBIE's preferred approach?

While we agree with MBIE's preference on the supplementary issues, as stated above, we think more work needs to be done on the drafting of an amended section 99(1A) should changes to the Act proceed.

Thank you for the opportunity to make a submission on this discussion document. If you require any further information, please do not hesitate to contact me.

Yours sincerely



Sue Chetwin
Chief Executive