

Departmental Disclosure Statement

Credit Contracts Legislation Amendment Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

28 February 2019

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Part One: General Policy Statement

The Bill is the result of a review that identified ongoing issues in the credit market and significant harm to vulnerable consumers from problem debt. The issues identified included: the excessive cost of some consumer credit agreements; continued irresponsible lending and other non-compliance, including by mobile traders; unreasonable fees; and irresponsible debt collection practices.

The Bill addresses these issues by strengthening requirements to lend responsibly, especially in relation to how affordability and suitability tests should be conducted, limiting the accumulation of interest and fees on high-cost loans, and providing new remedies and penalties for non-compliance.

These changes support the primary purpose of the Credit Contracts and Consumer Finance Act 2003 (the **Credit Contracts Act**) which is “to protect the interests of consumers in connection with credit contracts, consumer leases and buy-back transactions of land”. The other purposes of the Act include promoting confident and informed consumer participation in credit markets and providing consumer protection.

Key changes that the Bill will introduce to the CCCFA include the following:

- a limit on the accumulation of interest and fees on high-cost loans to 100% of the original loan principal, over the life of the loan. This will only apply to loans with an annualised interest rate of 50% or more:
- all directors and top executives of lenders offering consumer credit contracts will be required to meet a ‘fit and proper person’ test, in order for the lender to register on the Financial Service Providers Register. This requirement will also apply to mobile traders. There will also be new duties on directors and top executives of lenders to ensure Credit Contracts Act compliance by lenders:
- enforcement provisions will be strengthened, including providing civil pecuniary penalties and statutory damages for breaches of lender responsibility principles:
- regulation-making powers will provide for greater prescription about how assessments of affordability and suitability must be conducted. The presumption that lenders can rely on information provided by borrowers and guarantors without objective verification will be removed:
- debt collectors will be required to disclose key information about the debt to the debtor, at the commencement of debt collection action.

As a package, the changes are intended to reduce problem debt and resulting consumer harms (such as financial hardship and mental and physical health issues).

The Bill also enables lenders who have breached disclosure requirements to apply to a court for relief from liability under section 99(1A) of the Act. This provides an avenue for lenders to obtain relief from potentially large and disproportionate liabilities as a result of minor disclosure breaches.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
Discussion paper: Review of Consumer Credit Regulation, MBIE, June 2018, accessible on MBIE's website https://www.mbie.govt.nz/info-services/consumer-protection/review-of-consumer-credit-law/consultation	
Background paper: Additional information to support the discussion paper, MBIE, June 2018, accessible on MBIE's website https://www.mbie.govt.nz/info-services/consumer-protection/review-of-consumer-credit-law/consultation	
2018 Desk-based study of Lenders, MBIE, June 2018, accessible on MBIE's website https://www.mbie.govt.nz/assets/67247cd663/desk-based-lender-study.pdf	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
N/A	

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
Impact statement: consumer credit regulation review, MBIE, 24 September 2018, accessible on MBIE's website https://www.mbie.govt.nz/assets/c09d5636b6/cover-sheet-consumer-credit-regulation-review.pdf	
Regulatory Impact Statement: consequences for lenders of non-compliant information disclosure under section 99(1A) of the Credit Contracts and Consumer Finance Act 2003, MBIE, May 2017, accessible on MBIE's website https://www.mbie.govt.nz/assets/60329c3fed/regulatory-impact-statement-section-99-1A.pdf	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
The impact statements were reviewed by MBIE's Regulatory Impact Analysis Review Panel. The Panel considered that the information and analysis summarised in the statements met the criteria necessary for Ministers to fairly compare the available policy options and take informed decisions on the proposals in this paper.	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO
N/A	

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
N/A	

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
<p>Analysis on the size of the potential costs and benefits of the policy to be given effect by this Bill is included in the impact statements available on MBIE's website at:</p> <ul style="list-style-type: none"> • https://www.mbie.govt.nz/assets/c09d5636b6/coversheet-consumer-credit-regulation-review.pdf • https://www.mbie.govt.nz/assets/60329c3fed/regulatory-impact-statement-section-99-1A.pdf 	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
<p>The effectiveness of this policy requires an increase in compliance (subsequent process and behavioural change) by creditors. This is particularly the case for changes related to responsible lending requirements. Enforcement action is considered to be an important motivator in encouraging and securing compliance. Analysis on the size of the potential costs and benefits of the policy to be given effect by this Bill is included in the impact statement available on MBIE's website at https://www.mbie.govt.nz/assets/c09d5636b6/coversheet-consumer-credit-regulation-review.pdf</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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No international obligations have been identified or raised through the policy process as being relevant to the Bill.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

Neither the principal Act nor the amending Bill set out obligations to Māori.

The Bill is intended to strengthen consumer protections, and thereby reduce problem debt and resulting harms to consumers (such as financial hardship and mental and physical health issues).

One consequence may be a tightening of access to credit, where this was previously being granted in breach of affordability or suitability requirements.
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Alternative avenues will not necessarily be available to all families, so there may continue to be service gaps for some consumers, in particular those experiencing hardship (among whom Māori, Pacific and single-parent families are overrepresented). In recognition of this concern, MBIE is working with the Ministry of Social Development, Te Puni Kōkiri, the financial services sector and community agencies to expand access to microfinance, inclusive banking products and other support, for people experiencing hardship.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

NO

No concerns have been raised by the Ministry of Justice in relation to provisions in the Bill limiting any of the rights and freedoms affirmed in the New Zealand Bill or Rights Act 1990.
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Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
<p>Clause 36 (new subpart 5A of Part 4, new s107A) provides for a new pecuniary penalty regime for breaches of the following provisions: parts of section 9C (lender responsibility principles); new s9C(9) (failure to provide information about reasonable inquiries); s41(2) or (4) (unreasonable credit or default fees); new s45A (costs of borrowing must not exceed loan advance); new s59B(1) (duty of directors and senior managers of creditors); new s131B (when a person needs to be certified); new s131D (prohibition on holding out that person is certified); and new s131R (duty to notify changes). Cases involving breaches of these breaches will be reviewed by the High Court. Penalties can be imposed where a person has attempted, aided induced or been a party to any of the breaches described.</p> <p>Clause 32 provides for new infringement offences for new s17A (disclosure in another language) and new s132A (disclosure before debt collection starts).</p> <p>Clause 33 makes it an offence to provide false and misleading information and statements in relation to certifications under Part 5A and for breaches of new s132A (disclosure before debt collections starts).</p>	
3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
<p>The Ministry of Justice was consulted on the above proposals through departmental consultation on the Cabinet proposals paper, and again during the drafting stage of the Bill. The Ministry of Justice raised concerns regarding the potential for “double jeopardy” which would arise if breaches were subject to both pecuniary penalties and criminal offences, as well as other civil liability orders. New section 107C provides that a pecuniary penalty cannot be imposed where criminal proceedings have been determined and vice versa.</p> <p>The Ministry of Justice also queried the justification for creating pecuniary penalties in the CCCFA. MBIE considers that the application of civil pecuniary penalties is appropriate in the proposed instances because:</p> <ul style="list-style-type: none"> • They would be used as part of a regulatory regime targeting regulatory compliance duties in the consumer credit markets. • We consider that civil pecuniary penalties are justified given the need to deter irresponsible lending that can result in significant financial gains. • Most lenders that are the subject of enforcement are companies and not individuals. • A criminal offence may be less appropriate for principles-based duties such as the lender responsibilities in the CCCFA. • The Commerce Commission is an adequately resourced enforcement body to implement the pecuniary penalties regime. • The CCCFA imposes many requirements on lenders. We would expect them to have a high degree of regulatory knowledge and have access to resources to protect themselves against the risk of liability. <p>Civil pecuniary penalties would also increase enforcement efficiencies for the Commerce Commission. They would reduce the need for the Commission to take separate criminal and civil proceedings in relation to the same conduct. Introducing civil pecuniary penalties would mean that the Commission would be able to obtain both compensation and a penalty in one set of proceedings.</p>	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	NO
N/A	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>Consultation has been undertaken with a range of dispute resolution services, consumer advocates and lenders. Public consultation on the discussion paper occurred between 27 June 2018 and 1 August 2018. There was a high degree of stakeholder agreement with problems identified, including both consumer advocates and most lenders.</p> <p>In addition, a discussion paper was publicly consulted on between November and December 2016 to test different policy options for amending section 99(1A) of the CCCFA in response to potential issues with the provision. Section 99(1A) provides that where there has been a breach of disclosure duties, the debtor is not liable for the cost of borrowing. The changes the government decided to make in response to that consultation (that the lender can apply to the courts for relief from the presumption of 100 percent forfeiture of interest and fees) are given effect to in this Bill. The discussion paper on section 99(1A) can be accessed on MBIE's website at https://www.mbie.govt.nz/assets/659c836053/discussion-paper-section-99-1a-cccfa.pfd.pdf</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
<p>Departmental consultation has been undertaken with the Ministry of Justice, The Treasury, Ministry for Pacific Peoples, Ministry of Social Development and Te Puni Kōkiri.</p> <p>The draft Bill has also been consulted on with the Financial Markets Authority, the Reserve Bank of New Zealand and the Commerce Commission (the enforcement agency for the current Act) to ensure the provisions are workable and complete.</p> <p>Much of the operational impact on lenders will come from the requirements to be prescribed in the regulations. Officials will consult with lenders and consumer advocates to inform the content of these regulations. Exposure drafts of proposed regulations will be published for consultation in mid to late 2019, to ensure these are workable.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
N/A	

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
N/A	

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	YES
<p>Relief is available to creditors who have breached disclosure requirements prior to the commencement of the Bill, in respect of interest and fees charged after commencement of the Bill. This allows them to recover interest and fees that would otherwise not be recoverable due to section 99(1A) of the Act, which prohibits recovery of interest and fees for any period in which a creditor was in breach of disclosure requirements.</p> <p>Relief can only be obtained by a court order, in accordance with statutory criteria for providing relief. Cases begun against lenders, and settlements completed, by the time the amended provision enters into force would remain unaffected.</p> <p>The change to section 99(1A) is not expected to unduly affect borrowers, as they will continue to have access to remedies for non-compliant disclosure by a lender. These include recovering interests and fees to the extent that relief is not granted by a court, as well as a right to cancel the loan agreement, and a right to statutory damages. However, without applying the change to existing agreements and breaches, lenders could face large and disproportionate forfeitures from historic breaches that have not yet been detected.</p>	

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	YES
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	YES
Clause 33 of the Bill amends the strict liability offence in section 103 of the Act, in order to avoid it inadvertently applying to new obligations added to the Act by the Bill e.g. keeping records about how fees are calculated.	

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
N/A	

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>Clause 41 of the Bill inserts new Part 5A of the Act, which provides that, before a person can act as a creditor or mobile trader, the Commerce Commission must certify that the person's controlling owners, directors and senior managers are fit and proper persons to hold their respective positions (new section 131B).</p> <p>The Bill provides that the Commission must give 10 working days' written notice of its intention to refuse certification (including giving reasons), and an opportunity for the applicant to submit on its refusal (new section 131H).</p> <p>The Commission is an independent Crown entity, and the usual requirements of administrative law will also apply: the Commission's exercise of its powers must promote the purposes of the Act, take into account relevant considerations (and not take into account irrelevant considerations) and be consistent with natural justice. The Bill also provides for an appeal to the District Court for a refusal to issue a certification or the imposition of conditions etc.</p>	

Powers to make delegated legislation

<p>4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?</p>	<p>YES</p>
<p><i>Declaring any credit arrangement or facility to be a consumer credit contract and any person or class of person to be a creditor or not</i></p> <p>The Bill introduces new regulation-making powers to declare that an arrangement or facility is a consumer credit contract, and to specify who is and is not a creditor under a consumer credit contract. These regulation-making power are intended to:</p> <ul style="list-style-type: none"> • future-proof consumer credit laws to address new credit products as they arise • address issues with products being structured to avoid regulation under the Act • provide legal certainty for emergent business models and new types of consumer credit contracts as to who is legally the creditor, reducing business uncertainty. <p>The Bill confines the power to declare products to be consumer credit contracts to an arrangements or facility that “has, or is intended to have, the effect of a person receiving a loan, or goods or services with deferred payment”. It includes criteria in new section 138(1BA) that the Minister may only make a recommendation for such regulations if he or she—</p> <ol style="list-style-type: none"> (a) is satisfied that the regulations are necessary or desirable in order to promote the purposes of the Act set out in section 3; and (b) has had regard to the economic substance of the relevant arrangement or facility; and (c) has consulted with the persons or representatives of the persons who the Minister considers will be substantially affected by the regulation. <p>There is also a safeguard in new section 138(1BC) in respect of regulations that declare a person or class of persons to be a creditor or not. It outlines that the Minister may only make a recommendation for such regulations if he or she has consulted with the persons or representatives of the persons who the Minister considers will be substantially affected by the regulation.</p> <p><i>Declaring a contract to be a high-cost consumer credit contract for purposes of new section 45A</i></p> <p>Clause 43 inserts a new section 138(1)(fa), which allows regulations to declare a consumer credit contract to be a high-cost consumer credit contract or a related consumer credit contracts. This affects which credit contracts have a cap on their total interest and fees.</p> <p>This is intended to address potential avoidance of the interest and fee cap. Currently the Bill defines a high-cost consumer credit contract as a consumer credit contracts with an annual interest rate exceeding 50%, or where the weighted average annual interest rate exceeds 50%. However, there may be ways for creditors to structure credit products such that they fall outside this definition, but impose similarly high costs on borrowers. The regulation-making power provides a disincentive for creditors to avoid these provisions of the Act, and ensures that any avoidance is expeditiously addressed to limit harm to borrowers.</p> <p>This power is limited to contracts that are regulated as consumer credit contracts.</p>	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>The Bill contains a number of regulation-making powers to prescribe further detail and technical matters that sit below the higher-level requirements of the Act. These are in delegated legislation as they may need to be revised frequently to respond to changing market practices and are not considered to be an appropriate use of Parliamentary time.</p> <p><i>Advertising standards for purpose of section 9C(3)(b)(i)</i></p> <p>Clause 43 inserts a new section 138(1)(abd), allowing regulations to prescribe advertising standards for the purpose of section 9C(3)(b)(i), to enable mandatory prescriptive standards for how creditors must advertise responsibly, including disclosure of interest rates.</p> <p>There is a safeguard in new section 138(1BC), which provides that the Minister may only make a recommendation for such regulations if he or she has consulted with the persons or representatives of the persons who the Minister considers will be substantially affected by the regulation.</p> <p><i>Inquiries for purpose of section 9C(7) that must be made before entering into agreement</i></p> <p>Clause 43 inserts a new section 138(1)(abe), allowing regulations to be made prescribing activities that must be performed as part of the requirement to make reasonable inquiries into the affordability and suitability of credit. The intention is to make the requirements more prescriptive, so that it is clearer to regulated parties how to comply.</p> <p>There is a safeguard in new section 138(1BC), which provides that the Minister may only make a recommendation for such regulations if he or she has consulted with the persons or representatives of the persons who the Minister considers will be substantially affected by the regulation.</p> <p><i>Key information to be disclosed before debt collection starts under section 132A</i></p> <p>Clause 43 inserts a new section 138(1)(jb), in which regulations will specify the particular information that must be disclosed before debt collection starts.</p> <p>There is a safeguard in new section 138(1BC), which provides that the Minister may only make a recommendation for such regulations if he or she has consulted with the persons or representatives of the persons who the Minister considers will be substantially affected by the regulation.</p> <p><i>Matters relating to certification of creditors under new part 5A</i></p> <p>The Bill provides that regulations will be able to prescribe certain matters relating to certification of creditors including:</p> <ul style="list-style-type: none"> • persons exempt from the requirement to be certified; • matters the Commission must have regard to in their certification of creditors; • conditions that certifications are subject to (in addition to those imposed by the Commission); • changes in circumstances in relation to the duty to notify the Commission of changes; • persons to which the Commission must give written notice of its decision to; • information that the Commission must send to the Companies Office Registrar; • requiring the payment of fees and charges, the amounts of those fees and charges or the manner in which they are to be calculated; and • other minor matters that new part 5A provides may be prescribed. <p>These regulations are necessary to provide for details relating to the certification regime that will not be known until closer to the regime comes into force.</p>	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
N/A	