Submission

to the

Finance and Expenditure Committee

on the

Credit Contracts and Consumer Finance Amendment Bill

23 June 2025

NEW ZEALAND BANKING ASSOCIATION – TE RANGAPŪ PĒKE
PO Box 3043, Wellington 6140, New Zealand
www.nzba.org.nz

About NZBA

1. The New Zealand Banking Association – Te Rangapū Pēke (**NZBA**) is the voice of the banking industry. We work with our member banks on non-competitive issues to tell the industry's story and develop and promote policy outcomes that deliver for New Zealanders.

2. The following seventeen registered banks in New Zealand are members of NZBA:

- ANZ Bank New Zealand Limited
- ASB Bank Limited
- Bank of China (NZ) Limited
- Bank of New Zealand
- China Construction Bank (New Zealand) Limited
- Citibank N.A.
- The Co-operative Bank Limited
- Heartland Bank Limited
- The Hongkong and Shanghai Banking Corporation Limited
- Industrial and Commercial Bank of China (New Zealand) Limited
- JPMorgan Chase Bank N.A.
- KB Kookmin Bank Auckland Branch
- Kiwibank Limited
- Rabobank New Zealand Limited
- SBS Bank
- TSB Bank Limited
- Westpac New Zealand Limited

Contact details

3. If you would like to discuss any aspect of this submission, please contact:

Antony Buick-Constable
Deputy Chief Executive & General Counsel
antony.buick-constable@nzba.org.nz

Sam Schuyt
Policy Director & Legal Counsel
sam.schuyt@nzba.org.nz

Executive summary and structure of this submission

4. The Credit Contracts and Consumer Finance Amendment Bill 137 – 1 (**Bill**) tackles the risk of a disproportionate and unwarranted liability on lenders who fail to make correct initial or agreed variation disclosure under the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**).

5. Presently, there is a risk that the CCCFA might be interpreted to require the lender to refund all interest and fees paid by the borrower while disclosure was incomplete, even where the failure was technical in nature (such as incorrect contact details of the dispute resolution scheme) and the borrower has suffered no harm or prejudice. While NZBA strongly disagrees with this interpretation, we agree that it is important to have the risk resolved as it is not only a risk for individual lenders but also for the financial system as a whole, including depositor-consumers, given the potential amounts at stake.

6. Going forward, the Bill will permit borrowers to seek an order that they are not liable for any or all of the costs of borrowing in appropriate cases (that is, where the other remedies available under the Act are insufficient to provide a just and equitable outcome). The onus will, however, be on the borrower to show that the other remedies available under the Act are insufficient to provide a just and equitable outcome. Like other pieces of consumer legislation, borrowers will be entitled to just and equitable compensation (but not to windfall gains).

7. In terms of past disclosure failures, the Bill retains the rights of borrowers and simply makes the legal position consistent for claims pre and post 2019. The courts will be expressly empowered to ensure a just and equitable outcome.

8. NZBA strongly supports these changes.

9. The remainder of this submission is structured in five parts:

    9.1. First, it provides an introduction to the issues and summarises the key points NZBA wishes to raise (Part A).

    9.2. It then sketches the relevant legislative history of the relevant provisions in the CCCFA (Part B).

    9.3. It then sets out NZBA's concerns with the current disclosure regime (Part C).

    9.4. Part D then explains why the proposed retrospective changes which extend the operation of the "just and equitable" adjustment regime are justified and in the public interest.

    9.5. The final section addresses technical drafting issues to the go forward position (Part E).

10. In relation to retrospectivity, NZBA has also sought advice from Professor Philip Joseph KC, New Zealand's leading expert on matters of constitutional law. Please refer to his submission, provided separately to the Committee.

A. Introduction and key points

11. The Bill amends the CCCFA and associated legislation. The four main impacts will be to:

    11.1. transfer regulatory responsibility for credit contracts and consumer finance from the Commerce Commission to the Financial Markets Authority (**FMA**);

    11.2. transition lenders from a certification to a licensing regime;

    11.3. remove the due diligence duty for directors and senior managers; and

    11.4. confirm that the court has the discretion to determine an appropriate outcome for a creditor's failure to make required initial or variation disclosure, which can include repayment of costs of borrowing.

12. As set out further below, NZBA supports all aspects of the Bill.

13. In terms of the first three aspects, NZBA supports the streamlining and efficiencies that will be achieved by transferring responsibility for the CCCFA to the FMA. It is a sensible evolution for the FMA to take on this role, given the widespread use of credit as a financial service and that the FMA has primary responsibility for supervision of conduct in the financial markets.

14. The Bill's use of the existing licensing mechanics within the Financial Markets Conduct Act 2013 to help achieve the transition of jurisdiction to the FMA provides a robust and familiar structure to NZBA members and other market participants. That licensing regime will enable the FMA to exercise supervisory powers over lenders, and their directors and senior managers, in a proportionate way. Thereby improving upon certain aspects of the current liability regime for directors and senior managers (such as restrictions on indemnities and insurance) which, as NZBA has observed in earlier submissions in this law reform process, are disproportionate and contribute to overly conservative lending practices.

15. In terms of the fourth aspect of the Bill (i.e. the consequences of a creditor's failure to make required initial or agreed variation disclosure), NZBA supports this important clarification to what is currently a flawed law.

16. It is important to put this aspect of the Bill in context:

    16.1. If a creditor fails to make required disclosure, the borrower is entitled to statutory damages and, if the court considers the specified amount of statutory damages is insufficient to compensate the borrower for loss or damage, it may award additional damages. Borrowers are also entitled to cancel the contract at any time if initial disclosure is not made.

16.2. As a result of an amendment to the CCCFA which took effect from June 2015, arguments have been made that in addition to these protections, the creditor must forfeit all costs of borrowing (interest and fees) in respect of a period of non-compliant disclosure. This interpretation could clearly have draconian consequences; a minor disclosure omission that goes unnoticed for several years could result in the creditor being forced to repay tens of thousands of dollars even where the error caused no harm and the borrower has enjoyed the loan on the agreed terms. Spread across the lending book of a bank or other lender, this could result in a potential solvency-threatening liability, and create financial stability risks for bank and lending customers more broadly.

16.3. Remedial legislation was enacted with effect from December 2019 to confirm that courts have the ability to tailor the consequences of a disclosure omission so that the result is "just and equitable". However, this "fix up" left creditors exposed in relation to disclosure failures that had occurred between June 2015 and December 2019.

17. NZBA considers that the present situation is highly problematic from a New Zealand Inc perspective and commends the Bill for properly addressing the issues.

18. For the period from June 2015 to December 2019, the Bill will extend the operation of the just and equitable adjustment provision.[1] That is, the amendment will provide clarity that any forfeiture of the costs of borrowing is not potentially automatic and that the court can do justice between the creditor and the borrower.

19. The focus of this submission is on this backward-looking aspect of the Bill. By way of summary, NZBA makes the following key points:

19.1. Disclosure remains a key obligation under the CCCFA. It is intended to help borrowers understand what their and the lender's obligations are under the credit contract.

19.2. In 2015, the CCCFA was amended to introduce lender responsibility principles as to suitability, affordability and providing assistance to a potential borrower. The lender responsibility principles provide increased protection for consumers under the CCCFA, including ensuring the borrower understands their obligations before entering into a loan or making a material change to the loan, and before disclosure is given. There are a range of potential consequences for a breach of the lender responsibility principles including a reversal of fees and interest charges in some circumstances.

1 In terms of the go forward position, the default position will be that a disclosure failure will not reduce the borrower's liability for the costs of borrowing. NZBA is supportive of this change but suggests, at least, some technical refinements to the drafting of the proposed new ss 94AA, 94AB and 94AC. These are explained in Part E below.

19.3. The appropriate remedial response to a disclosure failure should take into account the following matters:

(a) The requirements under the lender responsibility principles to assist consumers to understand their obligations and make informed decisions prior to and separately from the provision of disclosure.

(b) Not all of the information required to be disclosed under the Act is of equal importance. For example, the annual interest rate for a loan is clearly more material than the contact details of the dispute resolution scheme of which the creditor is a member (which is only required if a problem arises and which can be sourced elsewhere).

(c) While some of the disclosure requirements are straightforward, other requirements — such as providing "full particulars of a change" and what amounts to corrective disclosure — have proved uncertain in practice.

(d) A disclosure failure does not necessarily harm the borrower. For example, a borrower may be completely unaffected by the absence of variation disclosure where the creditor has correctly implemented a change requested by the borrower. In these circumstances, the borrower and the lender may be equally aware of the variation, and it would be more accurate to describe the issue as one of incomplete documentation or an administrative omission, rather than a non-disclosure issue.

19.4. As enacted in 2003, the CCCFA provided that in the event of a disclosure failure, the credit contract could not be *enforced* (i.e. by legal proceedings or by exercising security rights) until corrective disclosure had been made. This meant there was a "temporary freeze" on enforcement during a period of non-compliant disclosure. This temporary freeze on enforcement sat alongside various other potential remedies, namely statutory and/or compensatory damages and the right to cancel.

19.5. The 2015 amendments to the CCCFA included the introduction of s 99(1A) which provides that the borrower is not liable for the costs of borrowing in relation to any period during which the creditor has failed to comply with initial or agreed variation disclosure. One reading – which as set out below is disputed by NZBA – is that s 99(1A) requires a lender to refund all interest and fees received during a period where correct disclosure was not made (or cannot be proven). That is a flawed interpretation which, as the legislative history indicates, was clearly not the intended policy position.

19.6. While the 2019 reforms ameliorated the potentially draconian consequences of s 99(1A) by giving courts an express discretion in s 95A to extinguish or reduce the amounts of any costs of borrowing refund, they applied only from 2019 onwards. This meant that costs of borrowing received between 2015-2019 were left subject to the effects of s 99(1A) and the risks of the potential full forfeiture interpretation. The reasons for not extending the 2019 reforms to 2015, namely that debtors would be prejudiced, were weak and unconvincing.

19.7. The potential consequences of a full-forfeiture interpretation are draconian and punitive, and they carry risks for the wider financial system. NZBA does not consider the full-forfeiture interpretation is correct: rather, s 99(1A) is only targeted at the *enforcement* of costs of borrowing and does not oblige a lender to refund costs of borrowing already received. While NZBA considers the latter interpretation to be correct, the risk of the forfeiture argument nonetheless remains. Rather than waiting for a worst-case scenario to potentially come to pass, it is better to address the issue with the regime now.

19.8. In light of this history and the solvency and financial stability risks created by s 99(1A), NZBA considers that the removal of s 99(1A) with retrospective effect back to 2015 would be justified. That is, it would be defensible to see the introduction of s 99(1A) as unwarranted from the start, and to return to the clear "temporary freeze" position with effect from June 2015.

19.9. The Bill proposes a middle ground. Rather than removing s 99(1A) entirely, it applies s 95A back to 2015.

19.10. Although this change applies retrospectively, NZBA does not consider this to be objectionable given the impetus behind the change is remedial (to prevent risks to financial stability) and consumers would not suffer any legitimate prejudice. The amendment will leave untouched a borrower's right to seek redress from lenders that breach their disclosure obligations, while confirming that the court can decide what is a just and equitable result. Such an outcome is by definition just and equitable, and consistent with the way that the courts determine remedies for breaches of other laws.

B. History

20. Sections 17 and 22 of the CCCFA provide for initial and agreed variation disclosure.

20.1. Under s 17, a lender must disclose key information set out in Schedule 1 of the Act before the contract is entered into ("initial disclosure").

20.2. Under s 22, a lender must disclose to a borrower full particulars of any agreed change to an existing loan ("variation disclosure").[2]

21. As originally enacted, the CCCFA struck a balance between ensuring lenders were incentivised to make compliant disclosure and protecting consumers in the event of non-compliance. Striking this balance required a careful calibration of the Act's enforcement provisions. In summary, the Act provided a range of consequences for failing to make compliant disclosure:

21.1. <u>Right to cancel</u>: For breaches of s 17, the debtor had a right to cancel the contract under s 27. Section 30 set out the effect of cancellation. On cancellation, no party was obliged or entitled to perform it further, but the debtor was liable to pay interest charges on the unpaid balance for the period that credit was provided and reasonable expenses incurred in connection with the contract and cancellation of it.

[2] Section 22 also provides for disclosure of any other information prescribed by regulations.

21.2. Temporary freeze on enforcement: For breaches of ss 17 and 22, s 99 prohibited enforcement of the contract "before … disclosure is made". But the lack of compliant disclosure did not make the contract illegal or unenforceable in a broader or more permanent sense.[3] This was confirmed by the Court of Appeal in *King v Norfolk Nominees Ltd*.[4] That case concerned whether a finance company could enforce by legal proceedings a credit contract despite its original disclosure being non-compliant and having made corrective disclosure 2½ years into the contract. The Court held (consistently with the submission of the Commerce Commission, which appeared as intervener) that: "Corrective disclosure can be provided and a contract will then be enforceable".[5] Following that decision, corrective disclosure was subsequently provided and the High Court allowed enforcement of the contract.[6] Unenforceability, the High Court held, was not forever.[7]

21.3. Statutory damages: Section 88(1) provided an entitlement to statutory damages for a breach of s 17 or s 22. The amount of statutory damages was not linked to loss or damage suffered by the debtor. Rather it was specified in s 89. For breaches of ss 17 or 22 the amount of damages was (in most cases) the lesser of $3,000 or 5 per cent of the total of all advances made and agreed under the contract. However, s 91(1) gave the Court the power to extinguish or reduce the amount of statutory damages if it considered that it was just and equitable to do so.

21.4. Compensatory damages: In addition, if statutory damages were insufficient to compensate a debtor for loss or damage suffered as a result of a breach of s 17 or s 22, the Court had the power under ss 93 and 94(1)(b) to order damages to compensate for that amount of loss or damage not compensated by the amount of statutory damages.

21.5. Offence: The failure to comply with ss 17 or 22 was an offence under s 103.

2014/15 Amendments

22. With effect from June 2015, the CCCFA was amended by the insertion of s 99(1A). Section 99(1A) provides that "neither the debtor or 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".

23. There is no contemporaneous record explaining the impetus behind s 99(1A).[8]

---

3 CCCFA, s 136.
4 *King v Norfolk Nominees Ltd* [2012] NZCA 190.
5 At [46] and [47]. See also [64].
6 *Norfolk Nominees Ltd v King* [2013] NZHC 398, (2013) 13 TCLR 650.
7 At [87].
8 While officials noted in their October 2013 initial briefing to the Select Committee that submissions may raise the "effect of 'remedial disclosure' on the prohibition on enforcing consumer credit contracts if disclosure has not been made (sections 99 – 102)", this was the extent of the discussion/information provided.

24. When the 2014 Amendment Act was being considered by Select Committee:

24.1. In relation to the proposed insertion of s 99(1A), the Commerce Commission submitted (surprisingly given the position it adopted in *King*) that the Bill should be amended "to make it clear that fees that accrued during the period of non-disclosure cannot be charged after disclosure is made".[9]

24.2. Officials responded in their report to Select Committee that they disagreed with this submission, saying that it was a "difficult issue", that the regime for statutory damages and the prohibition on enforcement needed to sit together, and that if remedial disclosure was not possible, lenders could not recover "establishment fees, or other fees and interest, beyond the scope of the statutory damages".[10]

24.3. Additionally, a submission was made by Mr King (of *King v Norfolk Nominees*) that: "If there is no disclosure or non-compliant disclosure, no interest or fees should be payable".

24.4. MBIE's response was: "Disagree. Non-compliance with disclosure requirements is a breach enforceable by the Commerce Commission. Borrowers are also entitled to statutory damages (which are capped), and lenders are prevented from enforcing undisclosed consumer credit contracts. However, mandatorily preventing interest and fees from being payable would be significantly more punitive, and inconsistent with the existing policy settings in the CCCFA" (emphasis added).[11]

25. In other words, MBIE officials at the time were of the view that creditors should be able to charge fees and interest once corrective disclosure was made.

26. A subsequent MBIE discussion document (from 2016) suggests that s 99(1A) was introduced in response to *Norfolk Nominees Ltd v King*.[12] MBIE officials considered that having a freeze on enforcement which was temporary only "could in some circumstances be unjust."[13] Hence, MBIE suggests, s 99(1A) was introduced to turn the temporary freeze on enforcement into a permanent bar on enforcement.

27. As a matter of policy, this rationale for the introduction of s 99(1A) is far from convincing. The outcome of *Norfolk Nominees Ltd v King* reflected the orthodox and intended interpretation of the Act; disclosure failures create only a temporary — not permanent — freeze on enforcement. This approach strikes a balance between the different regulatory factors at play. A temporary freeze incentivises the creditor to ensure appropriate disclosure and to correct any problems, but was not punitive in

9 Commerce Commission "Submission to the Commerce Select Committee on the Credit Contracts and Financial Services Law Reform Bill" at [196].
10 Ministry of Business, Innovation & Employment "Credit Contracts and Financial Services Law Reform Bill: Officials' Report to Commerce Committee" (30 January 2014) at 171.
11 At 78.
12 Ministry of Business, Innovation & Employment "Discussion Paper: Section 99(1A) of the Credit Contracts and Consumer Finance Act 2003" (November 2016) [**2016 MBIE Discussion Paper**] at [15].
13 2016 MBIE Discussion Paper, at [18].

nature. As well, the borrower was protected as they could still pursue statutory damages, compensatory orders, or cancellation under the Act's existing provisions.

28. The policy rationale is even harder to understand on the forfeiture interpretation. On that interpretation, the introduction of s 99(1A) is particularly hard to reconcile with s 30 of the CCCFA. Section 30 applies where a borrower cancels a contract within 5 working days of initial disclosure being made (or at any time if that disclosure has not been made). Section 30 provides a formula which sets out that the borrower must still pay for the period prior to cancellation which includes the interest charges on the unpaid balance for the period in which the credit was provided (at the same rate that would have been payable over that period if the contract had not been cancelled) and expenses necessarily incurred by the creditor in that period. Parliament's clear intention that a cancelling borrower should pay these amounts tells against forfeiture of interest and fees for a disclosure failure where the contract remains on foot. Why would Parliament intend a borrower to be in a worse position if they exercise the right to cancel?

2019 Amendment

29. Further changes to the CCCFA's disclosure provisions were made in 2019. Section 95A was introduced to soften the potentially extreme consequences of disclosure failings. It provides that the court may, on an application of a creditor, order that the effect under ss 48 or 99(1A) of a failure to make disclosure under sections 17 or 22 be "extinguished or reduced to an amount specified by the court if the court considers that it is just and equitable that an order be made." Section 95B then states the matters the court making such an order must consider.[14] Section 95A operated prospectively — relief was only available in respect of fees and charges incurred after 20 December 2019.

30. NZBA considers that a bolder approach should have been taken.

31. First, rather than ameliorating the potential consequences for a poorly thought out s 99(1A), arguably the better approach would have been to revoke s 99(1A) which was unjustified and potentially draconian.

32. Secondly, on the amelioration approach, s 95A should have been drafted to apply retrospectively back to June 2015 in order to confirm relief is available in respect of fees and interest payable from 6 June 2015, when s 99(1A) became operative.

33. In other words, the Bill that is now being debated must complete what the 2019 amendment failed to do.

---

14 These include the role that s 99(1A) has in providing incentives for compliance with the Act, whether the person applying for the order had an appropriate compliance programme, and the extent of, and the reasons for, the breach or breaches.

34. When proposing the 2019 amendment, MBIE contemplated retrospectively amending the law from 2015 but shied away from that option.[15]

35. However, the Regulatory Impact Statement (**RIS**) did not engage in evidence-based findings. It speculated that lenders that had negotiated a settlement for breach might seek to "undo" their settlement were a retrospective law-change made.[16] The RIS offered no evidence in support. Nor does the analysis undertaken by MBIE withstand scrutiny. Settlements entered into on the strength of s 99(1A) would be *legally* binding, whether or not there was subsequently a retrospective law change.

36. MBIE accepted that "some form of retroactivity might be appropriate" and opted for a half-way house.[17] A lender might breach the disclosure rules during the relevant period (2015 – 2019), but still be able to rely on s 95A in relation to future interest and fees payable after the amendment takes effect.

37. MBIE gave the following example to support its half-way-house solution: a lender makes a non-compliant disclosure in 2015 but the breach is not discovered until 2025. If no retrospectivity applied, the lender would, on the forfeiture argument, forfeit 10 years of interest and fees payable. That outcome, MBIE accepted, would be grossly disproportionate for the lender and an undeserved windfall for borrowers.[18] This justified offsetting liability under ss 95A and 99B. But, on that example, is it logical to offset liability for six years but not the full 10 years? What if the breach were not discovered until 2030? The lender might offset liability for 11 years but not 15 years. By not being fully retrospective from 2015, the 2019 amendment promotes arbitrary distinctions and potentially seriously unjust outcomes.

38. The logical recourse is to backdate the operation of ss 95A and 95B so that they are equally applicable to costs of borrowing from 6 June 2015.

C. Disclosure, consequences of a failure to disclose and financial stability risks

39. Creditor disclosure obligations are contained in subpart 2 of part 2 of the CCCFA. Of relevance here, s 17 requires initial disclosure (of the information set out in Schedule 1) and s 22 requires disclosure of agreed changes.

40. The key information contained in Schedule 1 ensures borrowers are, before entering into a credit contract, aware of things such as the relevant interest rates, applicable

---

15 Ministry of Business, Innovation & Employment "Regulatory impact statement: consequences for lenders of non-compliant information disclosure: section 99(1A) of the Credit Contracts and Consumer Finance Act 2003" (May 2017) at [110]-[113].
16 At [113].
17 At [114].
18 At [115].

fees, and their repayment obligations while variation disclosure ensures borrowers are given "full particulars of the change" agreed to any given contract.

41. The lender responsibility principles introduced in 2019 require lenders to assist customers to make informed decisions before they enter into a loan or a material change to that loan, and before they receive disclosure. This reduces the reliance on disclosure to ensure customers are aware of their rights and obligations. While NZBA agrees that it is important that disclosure provided to consumers in relation to their credit contracts is accurate, and that there should be appropriate penalties for non-compliance, some disclosure failures can be very technical in nature. For example, some may involve the omission of the full name and full address of the lender, or a lender's registration name and number on the Financial Service Providers Register.

42. Equally, the precise requirements of disclosure are not always clear, or are at least open to interpretation. Under s 22(1)(a) for example, what amounts to "full particulars of the change" is not obvious from a reading of the provision.

43. While some aspects of disclosure are straightforward, it is unrealistic to suggest that disclosure obligations as a whole are clear and unambiguous.

44. Also, while initial disclosure is important for assisting informed decision-making by consumers who can cancel a consumer credit contract within 5 working days of initial disclosure being made (or at any time if that disclosure has not been made), variation disclosure under s 22 is more about record keeping and documenting changes that have often been requested by the borrower and then subsequently discussed and agreed with the lender e.g. changing an interest rate. In this regard, there are no cancellation or reversion rights associated with the giving of variation disclosure.

Forfeiture interpretation

45. On one interpretation — one NZBA strongly resists — ss 99(1A) and 48 impose an obligation on creditors to immediately forfeit and return all interest and fees paid by the borrower in respect of a period of non-compliant disclosure. In essence, this interpretation holds that the creditor is prevented from receiving payments for the relevant non-compliant period, even where the terms were clearly understood and the lender has incurred operational and funding costs in providing the loan.[19]

46. The forfeiture-interpretation would have draconian consequences for particular lenders, and creates an unwarranted financial stability risk, not the least for the depositor customers of lenders. Compliance with disclosure obligations have proved

---

[19] NZBA notes that this interpretation has not received judicial consideration, but is being relied on in the ongoing ANZ/ASB class action, *Simons & Ors v ANZ Bank New Zealand Limited and ASB Bank Limited* CIV 2021-404-1190. It has also been applied by the Commerce Commission in its settlement with Linsa Finance Limited at [21] https://comcom.govt.nz/__data/assets/pdf_file/0013/174010/Linsa-Finance-Limited-Settlement-agreement-22-August-2019.pdf

notoriously difficult. As MBIE noted in August 2024, the Commission had reached resolutions with some 18 lenders in relation to the June 2015 to December 2019 period.[20] If the forfeiture interpretation were to be upheld by the Courts, then there could be a substantial flow on financial risk to the banking sector. The RBNZ would be well placed to comment on these systemic risks.

47. MBIE's RIS for the 2019 amendment acknowledges that s 99(1A) was poorly designed and not "good" law: "the problem" it potentially created was "a large one".[21] Full forfeiture for breach of the disclosure requirements would be an overly blunt instrument for incentivising lenders' compliance. The RIS acknowledged "Section 99(1A), as drafted, has the potential to create highly damaging consequences."[22]

48. The RIS identified the problem with forfeiture in these terms: disproportionate and damaging financial impacts for lenders, over-compensation for borrowers, undue compliance costs for lenders, and higher interest rates and fees for borrowers. The RIS executive summary explained:[23]

> The viability of some lenders could be put at risk by the continued existence of section 99(1A) in its current form. In addition, undue effort is being expended on checking and rechecking disclosure documents, which has the potential to lead to slower loan processing times and added expense for lenders (that could translate into higher interest rates and fees for borrowers) … where breaches remain undetected for many years – the size of the forfeiture could be such as to pose prudential risks.

49. NZBA shares MBIE's concerns it had with s 99(1A) in 2017, and further highlights the following problems which arise under the forfeiture-interpretation.

50. First, it would potentially impose a disproportionate and draconian liability on creditors for disclosure failures regardless of the nature of the breach.[24]

    50.1. Consider a scenario where a lender makes a trivial error in its standard form disclosure statements for each contract in a $2 billion loan book, such as an error specifying the frequency with which continuing disclosure statements will be provided. If this error went undiscovered for three years, at current interest rates the costs of borrowing could be close to $500 million. Such disproportionate liability could not only put a lender in breach of its capital ratios and prudential requirements, it could threaten insolvency.

---

20 Ministry of Business, Innovation & Employment "Regulatory Impact Statement: fit for purpose consumer credit law" (August 2024), at 10-11.

21 Ministry of Business, Innovation & Employment "Regulatory impact statement: consequences for lenders of non-compliant information disclosure: section 99(1A) of the Credit Contracts and Consumer Finance Act 2003" (May 2017), at 3.

22 At 3.

23 At 3.

24 In its 2016 Discussion Paper, above n 12, MBIE shared NZBA's concern, noting that "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."

50.2. This is a particular risk for smaller lenders/deposit takers, who are less likely to be able to manage such losses as a proportion of their balance sheet compared to larger entities. However, and as MBIE has identified, small deposit takers play an important role by providing additional competition in the market and servicing a diversity of consumers' needs.[25]

51. The second issue NZBA has with this forfeiture interpretation is that it provides a windfall where the borrower may not have suffered any actual harm from a disclosure failure. MBIE has recognised this lack of harm in the context of the ongoing proceedings against ANZ and ASB, stating that it is "not obvious from the nature of the alleged disclosure failures that they caused real harm to borrowers' ability to make informed decisions about those loans."[26]

52. Types of more minor disclosure omissions that emerge from publicly available information include:

52.1. failing to include a lender's registration number as a financial service provider in initial disclosure;[27] and

52.2. failing to include the frequency at which continuing disclosure statements would be provided in initial disclosure.[28]

53. But even if there has been prejudice, it cannot be said that requiring the creditor to refund *all* the costs of borrowing over the relevant period is a proportionate response to the disclosure failure, especially given the potential consequences outlined above.

54. It is also fanciful to suggest, in the context of a complex piece of consumer protection legislation and a contested interpretation of s 99(1A), that a consumer may have arranged their affairs on the basis that they would receive such a cost-of-borrowing windfall if it was subsequently discovered that disclosure was not fully compliant with the Act.

55. Lastly, and to the extent consumers suffer prejudice or loss as a result of a disclosure failure, the CCCFA already affords sufficient compensation to them while incentivising lenders to provide compliant disclosure. This balance is struck without the threat of forfeiture for breach. As noted earlier, consumers are entitled to statutory damages for a breach of ss 17 or 22,[29] and in the event that the specified amount of statutory damages is insufficient to compensate the debtor for loss or damage relating to

---

25 Ministry of Business, Innovation & Employment "Regulatory Impact Statement: Whether to apply legislation retrospectively to give courts discretion when considering consequences for disclosure failures by lenders" (5 March 2025) at [30]. As MBIE observed, small lenders also place a competitive constraint on larger lenders, notably banks.

26 At [16].

27 Commerce Commission - Insufficient disclosure results in over $100,000 in refunds

28 Commerce-Commission-v-Smart-Shop-Limited-District-Court-Judgment-30-September-2016.PDF

29 Section 88(1). This is so even if a creditor is allowed to enforce a contract following corrective disclosure.

disclosure failures the court can, under ss 93 and 94(1)(b), order the payment of additional damages. Consumers are also entitled to cancel the contract under s 27 following initial disclosure.

56. Together, these existing protections (together with the proposed new declarations regime which makes it easier for consumers to seek remedies in certain circumstances) ensure consumers are adequately compensated in the event of disclosure failures and the lenders have strong incentives to comply. But, more significantly, they render the punitive and disproportionate effects of the forfeiture-interpretation of s 99(1A) simply unnecessary when viewed alongside the Act's carefully calibrated remedial provisions, which also provide for fines up to $600,000 and civil pecuniary penalties.[30] The potential to forfeit tens or hundreds of millions of dollars in interest and fees, where a borrower has had the benefit of the loan and suffered no prejudice, is completely out of step with the enforcement regime in the CCCFA.

57. Section 99(1A) was dysfunctional from the beginning. It has created a risk of disproportionate financial impacts on lenders (and of financial instability) and there is no consumer protection justification for the forfeiture interpretation. Disclosure breaches might persist undiscovered for months and even years, exposing lenders to liability in the billions of dollars in circumstances where a cost-free loan would be a pure windfall for borrowers. NZBA is not aware of any analogous provision in banking regulation in any other jurisdiction.

58. Accordingly, NZBA supports both the amendments to the regime going forward and confirmation that just and equitable relief is available in the June 2015 – December 2019 period. Both changes are in the public interest.

D. Retrospectivity

59. NZBA has sought advice from Professor Philip Joseph KC on the retrospective elements of the Bill. Please refer to his submission, provided separately to the Committee.

60. NZBA commends the retrospective application of ss 95A and 95B of the CCCFA.

61. Making ss 95A and 95B retrospective in application will not extinguish existing rights.[31] The amendment will leave untouched a borrower's right to seek redress from lenders that breach their disclosure obligations and will not impact any historic settlements, a

---

30 See s 103(1)(b) and 107A. While failures of initial or variation disclosure cannot result in civil pecuniary penalties, contraventions of the lender responsibility principles do. Significant disclosure failures may therefore breach these principles and result in civil penalties.

31 Specifically, the Bill will enable lenders to apply to the High Court for relief from potentially having to forfeit all fees and interest payable on loans during the relevant period. Clause 28 of the Bill proposes to backdate the operation of the two sections to apply to all loan agreements entered into on or after 6 June 2015.

point expressly provided for in the Bill. The amendment acknowledges consumers' rights but clarifies the method of computing the quantum of redress for breach. Borrowers will no longer potentially reap unexpected windfalls but will receive redress calculated rationally and fairly according to what is just and equitable (ss 95A – 95B).

62. Unless ss 95A and 95B are given retrospective effect, s 99(1A) can have deleterious consequences for lenders, borrowers and the financial system. Forfeiture of the interest and fees payable during a period of non-compliant disclosure will frequently be disproportionate to the seriousness of the non-compliance and the harm caused to borrowers. Borrowers will be over-compensated (cost-free loans) and non-compliant lenders disproportionately penalised.

63. Non-compliant disclosure may remain undetected for lengthy periods of time including by the lender itself. Non-compliance during the relevant period might force lenders to refund hundreds of millions of dollars to borrowers who suffer no demonstrable loss. A lender's liability might place it in breach of its capital ratios or other prudential requirements, placing undue strain on the financial system. This potentially would have adverse consequences for consumers who are depositors and for the economy as a whole.

64. Giving ss 95A and 95B retrospective effect does not trigger the principle against retrospectivity. Not all retrospective legislation is objectionable. Some statutes may need to apply retrospectively if they are to achieve their legitimate policy objectives. Retrospective legislation may promote the public interest where it is remedial and does not extinguish existing rights or impose liabilities or imposts.

65. In so far as the ANZ/ASB class action is concerned, and any other litigation commenced and ongoing against lenders before the date of the amendment backed by litigation funders or otherwise, that litigation can continue. Given the policy reasons for the amendment set out above, it is only right that the ability to make applications under s 95A applies to all lenders equally, including ANZ and ASB.

66. In this regard, NZBA agrees with MBIE's analysis in the RIS (5 March 2025) that providing the court with explicit discretion to deliver a just and equitable outcome is not objectionable "interference" with ongoing litigation. NZBA also notes that there is clear precedent for retrospective amendments to consumer credit contract legislation to apply even to pending proceedings, and that indeed – if retrospective law is to be enacted – it is usual for it to apply to pending actions, including appeals.[32]

---

[32] E.g. Credit Contracts Act 1981, as confirmed in *Sharplin v Broadlands Finance Ltd* [1982] 2 NZLR 1 (CA). The leading common law text on statutory interpretation (*Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, 2020)) states at [7.17] that: "where an amending enactment is clearly intended to be retrospective it will apply to pending actions, including appeals".

E. Prospective repeal of s 99(1A) and new ss 94AA, 94AB and 94AC

67. NZBA is supportive of the repeal of s 99(1A) but suggests, at least, some technical refinements to the drafting of the proposed new ss 94AA, 94AB and 94AC.

68. As above, the courts can already award statutory damages and make orders under ss 93 and 94 of the CCCFA under which a remedy may be provided if a person has suffered loss or damage from a breach of ss 17 and 22. To that end, on one view, the suggested ss 94AA, 94AB and 94AC are not necessary or are for clarification only and could be presented as examples, rather than separate sections as to how a court may wish to exercise its discretion when making orders under s 94.

69. If ss 94AA, 94AB and 94AC are retained, however, NZBA suggests amendments to ensure that the changes work with the statute and existing remedies. Specifically,

    69.1. that rather than referring to "a proceeding under s 93", the new provisions reference the consideration of an application under s 95 for orders under s 93;

    69.2. that thought is given as to whether s 94AA(1) is applied only where each of the requirements in s 93 is met. That is, that there has been: (i) a breach of a relevant provision; and (ii) the relevant party has suffered loss or damage in consequence;

    69.3. that s 94AA(2)(b) expressly refers to, not just other orders under s 94, but also any statutory damages paid or to be paid (as in s 94(1)(b));

    69.4. that s 94AC refers to:

        (a) any other orders made, agreements reached or criminal penalties imposed in relation to the same conduct; and

        (b) whether the debtor had a right of cancellation under s 27 and, if so, whether the debtor has exercised that right and obtained the amount due under s 30.

70. If it is of assistance to the Committee, the provisions operating without the need for recourse to s 99(1A) can be seen in the recent *Commerce Commission* v *El Cheapo* proceeding before the District Court. That case involved breaches of s 22 (with the lender failing to provide agreed variation when extending additional credit to borrowers). The Commission brought proceedings against the lender without reference to s 99(1A) and obtained:

    70.1. a criminal fine of $115,000; and

    70.2. $341,931.46 in statutory damages (to be either paid directly to borrowers or set off against their outstanding debts).