MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Addressing issues with consumer credit legislation: scope and timing of reforms

Date:	4 December 2023	**Priority:**	High
Security classification:		**Tracking number:**	2324-1021

Action sought		
	Action sought	**Deadline**
Hon Andrew Bayly **Minister of Commerce and Consumer Affairs**	**Discuss** with officials and **indicate** your preferred approach.	19 December 2023

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Glen Hildreth	Manager, Consumer Policy	OIA s.9(2)(a)		✓
Marcus Smith	Senior Policy Advisor			

The following departments/agencies have been consulted

Minister's office to complete:

- ☐ Approved
- ☐ Noted
- ☐ Seen
- ☐ See Minister's Notes
- ☐ Declined
- ☐ Needs change
- ☐ Overtaken by Events
- ☐ Withdrawn

Comments

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Date:	4 December 2023	Priority:	High
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Purpose

This paper seeks an initial indication from you of the scope of reforms you wish to pursue, in order to address issues with the *Credit Contracts and Consumer Finance Act 2003* (**CCCFA**) and associated regulations.

Executive summary

The Government is committed to reforming the CCCFA, both as part of the National party's 100-point plan for *Rebuilding the Economy* and its coalition agreement with the ACT Party. The CCCFA regulates credit that is available to consumers for their personal, domestic or household purposes, aiming to ensure that credit is provided according to the needs and interests of consumers. Regulations are made under the CCCFA to prescribe certain requirements, and the Responsible Lending Code provides additional guidance for lenders.

A number of changes to the CCCFA took effect between 2019-2021. Notably, regulations prescribing minimum steps for assessing affordability of the loan to the borrower (based on section 9C(3) of the CCCFA) took effect in December 2021, against the backdrop of increased liability for lenders.

Adjustments made to these regulations under the previous Government have failed to fully address some unintended impacts. The regulations remain largely inflexible and only differentiate the level of inquiry that is required based on the risk profile of the lending in a limited range of circumstances. Disproportionate inquiries create unnecessary compliance costs and difficulty for borrowers in accessing credit.

We are seeking an indication of your appetite for reform based on the issues you most wish to address and how quickly. Some options for the scope of a reform process (in descending order of timeliness) are as follows:

Option	Purpose	Description
Option 1	Address issues with the regulations to reduce the burden of requirements to assess affordability.	For example, revoke the affordability regulations, disapply them for certain lending, or develop alternative requirements that afford lenders greater discretion, and consider whether any consequential changes are needed to the Responsible Lending Code.
Option 2	In addition to Option 1, amend the CCCFA to provide more lasting solutions to disproportionate affordability assessments.	For example, better define the principles relevant to assessing affordability and reduce liability or the severity of penalties for breaches of this obligation. This option could also provide solutions to other issues you may wish to explore and take advice on.
Option 3	A more substantive review of consumer credit legislation and its relationship with conduct regulation of financial institutions, including	This could incorporate Option 1 or Option 2.

	potential to reconsider the institutional arrangements.	

You may wish to discuss these possible approaches with other Ministers (e.g. the Minister of Finance and the Minister for Regulation), coalition partners, and key stakeholders (e.g. a range of lenders, consumer advocacy groups, and the Commerce Commission).

We note a few dependencies relevant to deciding the scope of these reforms:

- your decision on what to do with the *Financial Markets (Conduct of Financial Institutions) Amendment Act 2022* (on which we intend to brief you shortly)
- the Government's intention to review regulation in the financial sector
- processes looking into competition for personal banking services (one of which is underway).

Following your direction, we can provide you with further advice on process and timeframes and draft a Cabinet paper seeking agreement to your preferred approach.

Finally, we are seeking your direction whether to continue with or discontinue four active policy processes on consumer credit:

Process	Reason	Proposal
Review of the high-cost credit provisions (e.g. interest rate caps, fees caps for loans with interest rate 50% or more).	Required by the CCCFA.	Continue and coordinate with whatever reform process you prefer.
Development of a permanent exemption from aspects of the CCCFA during emergency events.	Cabinet's August decision in principle to develop such an exemption.	Discontinue, given the need for this exemption arises from affordability requirements the Government is likely to relax.
Drafting of a full exemption from the CCCFA for voluntary targeted rates schemes administered by local authorities.	Policy approval given by Cabinet in August.	Continue, as applying the CCCFA to local authorities offering these schemes creates compliance costs that are disproportionate to the risks.
Drafting of an exemption from the annual returns requirement in cases involving assignment of a loan to an overarching lender.	Policy approval given by Cabinet in August.	Continue, given this is a technical change required to avoid duplication of reporting.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a **Discuss** with officials the policy objectives that should guide reforms to consumer credit legislation, the scope of reforms you are interested in pursuing and the priority you would like to give these reforms within the portfolio.

Agree / Disagree

b **Indicate** your initial preference between the following choices for reforming the CCCFA:

a. Confine options to the Regulations and Responsible Lending Code to directly reduce the burden of affordability requirements;

Agree / Disagree

AND/OR

b. Amend the CCCFA in order to:

i. explore potentially more effective and lasting options to improve access to credit while protecting consumers from unaffordable lending, e.g. based on better-defined principles, and/or

ii. ensure the Act's penalties/liability regime takes a proportionate approach to deterring harmful lender conduct, and/or

iii. address other issues you are aware of / wish to get advice on;

Agree / Disagree

OR

c. Undertake a wider reform process, examining the role of consumer credit legislation, how to approach it and where regulatory responsibility for it should sit;

Agree / Disagree

c **Note** that some choices for CCCFA reforms may be influenced by decisions taken on the Financial Markets (Conduct of Financial Institutions) Amendment Act 2022, the Government's intention to review financial sector regulation and processes looking into competition for personal banking services.

Noted

d **Note** that we have commenced a review the high-cost credit provisions, as required by the CCCFA.

Noted

e **Agree** we should discontinue the development of a permanent exemption for emergency events.

Agree / Disagree

f **Agree** we should continue with the drafting of exemptions, based on August Cabinet decisions [CAB-23-MIN-0348.01 refers], for voluntary targeted rates schemes and from annual returns requirements in certain cases.

Agree / Disagree

OIA s.9(2)(a)

Glen Hildreth
Manager, Consumer Policy
Ministry of Business Innovation and Employment

4 December 2023

Hon Andrew Bayly
Minister of Commerce and Consumer Affairs

..... / ...... / ......

Background

1. We understand that you would like options for improving the workability of the CCCFA to facilitate access to credit for those who need it, while protecting vulnerable consumers. We would like your feedback on the following policy objectives for work on the CCCFA:

   a. removing unnecessary compliance costs for consumers and lenders

   b. supporting consumers to access credit that meets their needs

   c. requiring lenders to treat consumers responsibly through regulation that is proportionate to the risk of harm and offers adequate redress

   d. ensuring regulatory obligations and the institutional arrangements supporting them are clear and simple.

2. There may be other factors you consider relevant and want reflected in policy advice on consumer credit, such as supporting competition in markets for credit.

Current settings and issues

The CCCFA operates within a wider system of regulations affecting financial service providers

3. The CCCFA regulates credit that is available to consumers for their personal, domestic or household purposes. It regulates all forms of consumer credit, such as personal loans, credit cards, mortgages, hire purchase sales and vehicle finance, and therefore affects most New Zealanders.

4. While the CCCFA is intended to only apply to consumer lending, we are aware that lenders sometimes provide credit to small business owners as if it were consumer credit regulated by the CCCFA.

5. Providing credit to consumers is one kind of financial service, meaning lenders regulated by the CCCFA are also regulated by financial markets legislation. In short:

   a. Lenders all need to be registered under the *Financial Service Providers (Registration and Dispute Resolution) Act 2008* (and therefore be a member of a dispute resolution scheme).

   b. Some lenders (namely registered banks and non-bank deposit takers) are also subject to both:

      i. prudential regulation and licensing by the NZ Reserve Bank (to ensure stability of the financial system), and

      ii. product/service-specific licensing by the Financial Markets Authority (to promote the integrity of conduct in financial markets).

   c. Banks and non-bank deposit takers would also, from 31 March 2025, be subject to the *Financial Markets Conduct (Conduct of Financial Institutions) Amendment Act* 2022. This requires banks and non-bank deposit takers to have effective systems and policies for designing, distributing and supporting the ongoing provision of products and services to customers, including consumer credit under the CCCFA.

6. For lenders who are not already licensed by the New Zealand Reserve Bank and/or Financial Markets Authority (e.g. finance companies, vehicle dealers, mobile traders and hire purchase providers), the CCCFA has a 'fit and proper person' certification requirement.

The CCCFA has undergone significant reform over the last decade

7. The CCCFA came into force in 2005. It was originally focused on ensuring consumers can make informed borrowing decisions through contractual disclosure requirements, a short cooling-off period and by providing consistent rules about how interest and fees are calculated and charged. It also aimed to help borrowers to seek relief from contract terms in the event of unforeseen financial hardship or where contract terms are oppressive.

2015 reforms placed a greater onus on lenders to act ‘responsibly’

8. The first major reforms to the CCCFA came into force in 2015, responding to reports from numerous sources that harmful lending practices were widespread, particularly by smaller, less scrupulous lenders. The most significant change was the introduction of lender responsibility principles, designed to ensure lenders are not indifferent to the circumstances of their customers or the effect of the credit they are providing (supported by a non-binding Responsible Lending Code). These include a requirement to make reasonable inquiries to be satisfied the loan will be affordable to the borrower, given the harms that can be caused by unaffordable debt.

Reforms between 2019 and 2021 increased liability for breaches, imposed greater restrictions on high-cost credit contracts, and prescribed requirements for certain responsible lending obligations

9. The *Credit Contracts Legislation Amendment Act 2019* and amendment regulations in 2020 made a series of reforms intended to address harm to vulnerable consumers. This was in response to observations of continued irresponsible lending, unacceptable rates of non-compliance, uncertainty about how to fulfil certain obligations, and poor visibility of lending practices. With the exception of rules for high-cost credit, these reforms were applied to all lending in the interests of consistent standards and competitive neutrality.

10. The following table shows when each of the notable reforms came into force.

Change	Commenced	Reference
Penalties created for contravening lender responsibility principles penalties and statutory damages increased.	December 2019	Section 88 and 89
Regulation-making power to bring certain classes of contract within the CCCFA or carve certain classes of contract out.		Section 137A-137C
Ability for court to reduce consequences of failure to make disclosures.		Section 95A and 95B
Additional restrictions (including cost of credit cap) on high-cost loans.	May 2020	Part 2, subpart 6A
Introduction of ‘fit and proper person’ test for directors and senior managers.	June 2021	Part 5A
Duty of directors and senior managers to exercise due diligence to ensure compliance with the Act.	December 2021	Section 59B
Requirement to maintain records showing how credit and default fees are calculated (to demonstrate they are not unreasonable).		Section 41A
Requirement to maintain, and share on request, records of inquiries made into affordability.		Section 9CA
Regulations prescribing minimum standards for assessing suitability and affordability, sitting beneath the relevant responsibility in the Act.		Regulation 4AE – 4A0

Issues with the scope and operation of consumer credit legislation

The affordability regulations, and other December 2021 changes, had some unintended impacts that we investigated last year

11. In early 2022 we investigated concerns that the regulations were negatively impacting borrowers. We found that lending processes had become more restrictive and onerous than was expected, resulting in some unintended impacts:

    a. More borrowers across all lending types who should pass the affordability test having applications declined.

    b. Borrowers being subject to unnecessary or disproportionate inquiries perceived by them as intrusive.

12. Overly restrictive and onerous lending processes were a consequence of:

    a. the way a number of specific provisions in the regulations were designed and drafted,

    b. combined with interpretational difficulties, and

    c. many lenders taking a naturally conservative approach to compliance given the CCCFA's strong liability regime (for example, underutilising the exception for 'obvious affordability').

13. The prescriptive nature of the CCCFA changes and their equal application to almost all consumer lending (with the exception of the high-cost credit provisions, which are subject to a presumption of unaffordability) also meant that lending was impacted outside of areas where there is a high risk of irresponsible lending and harm to consumers. Lenders could only in limited circumstances scale their inquiries to reflect the wide variation in risk presented by different products and borrower circumstances. The main exception for low-risk borrowers is the exception for 'obvious' affordability. This lack of flexibility in the regulations also reduces lender discretion to deal with anomalies or respond to urgent need for credit that has arisen from a personal emergency or to unforeseen expenses.

Changes made to the affordability regulations in 2022 and 2023

14. The investigation identified several options to address these impacts. We recommended exploring ways to target the affordability requirements based on risk. The previous Government did not originally agree to this approach, opting only to make some other relatively narrow adjustments to the regulations, namely:

    a. clarifying what inquiries are required to estimate expenses and more explicitly excluding discretionary expenditure

    b. creating new exceptions for refinancing existing credit

    c. expanding guidance on when the exception for 'obvious' affordability can be relied on.

Our assessment is that problems with the affordability regulations, combined with the liability regime, persist

15. We have continued working with lenders to understand to what extent the immediate impacts of the affordability regulations have been resolved and the nature of any ongoing impacts. We heard from lenders that their procedures for complying with the affordability regulations are now more settled and less problematic than at first. However, we share their view that the adjustments made to the regulations since the investigation (when combined with the liability regime) have failed to fully address the problems we identified. The regulations continue to impose a regulatory burden that is largely inflexible and, in many cases, disproportionate to the likely risks to consumers.

Your predecessor intended to address these issues through a review of the CCCFA

16. In August this year, former Minister of Commerce and Consumer Affairs, Hon Dr Duncan Webb, obtained agreement from Cabinet to review the scope and operation of consumer credit legislation [CAB-23-MIN-0348.01 refers]. This review was proposed in recognition of the issues above.

Potential scope of reforms

Possible approaches to improving consumer credit legislation

17. There are a range of possible reforms we can advise you on, depending on the issues you wish to prioritise. To help us scope this work, we are interested in your preference between three possible approaches.

Option 1: Address issues with the regulations to reduce the burden of affordability requirements (and update the Responsible Lending Code accordingly)

18. The affordability regulations could be revoked or modified to reduce the need for inquiries and compliance costs that are disproportionate to the risk profile of the lending. Modifications could include disapplying the regulations to certain lending or affording lenders greater discretion to assess risk and scale their level of inquiries accordingly.

19. Confining reforms to the regulations would mean they can be delivered more quickly than changes to the CCCFA. However, these reforms may not be as effective and provide the same degree of certainty/confidence as changes to the CCCFA. They would not address the conservative approach lenders take as a result of their liability.

20. It would be important to consult stakeholders to understand the likely consequences of the various changes that could be made to the regulations. Changes of this kind may also increase the need for guidance in the Responsible Lending Code (to support lenders' compliance with the high-level obligation in the CCCFA).

Option 2: Also amend the CCCFA in order to provide more lasting solutions to the persistent problems

21. Although amending primary legislation is a more involved process, it may ultimately prove more effective in avoiding disproportionate affordability assessments for two reasons:

    a. The obligation to assess affordability arises from the section 9C(3) of the CCCFA,. Amendments to this obligation may reduce the need to prescribe the steps required by better defining the principles relevant to ensuring lending is affordable (e.g. build in some discretion to scale inquiries based on risk).

    b. The severity of penalties and liability of directors and senior managers for compliance appears to reduce willingness to make use of discretion that is afforded by the regulations. These penalties and liability provisions are found in the CCCFA.

22. It may still be necessary to amend or develop new regulations and update the Responsible Lending Code under this approach.

23. This reform process would also provide the opportunity to address other issues or areas of underperformance that have been raised. For example, we could look at the wider enforcement regime to ensure it provides for proportionate consequences in the event of other breaches of the CCCFA. Again, good consultation with affected parties would be critical in understanding the consequences of options for reform.

Option 3: A wider process looking at the approach to consumer credit legislation

24. In addition to the above, there may be merit in evaluating the overall approach the CCCFA takes as a form of financial conduct regulation and its relationship with the *Financial Markets Conduct Act 2013.*

25. The CCCFA has evolved somewhat independently of other financial markets legislation and prudential regulation of banks and non-bank deposit takers. The Conduct of Financial Institutions amendments would increase the degree to which financial institutions are accountable to two regulators (the Commerce Commission and the Financial Markets Authority) for similar conduct.

26. This would likely amount to a 'first principles' review of consumer credit legislation, including the consideration of optimal institutional arrangements (e.g. whether to shift enforcement responsibility from the Commerce Commission to the Financial Markets Authority by incorporating consumer credit regulation, or aspects of it, into the *Financial Markets Conduct Act*).

Dependencies to consider and consultation

27. Your preference in terms of scope of a reform process may depend on some other reforms the Government intends to pursue regarding financial services. You may wish to discuss the likely timing of this review with your Ministerial colleagues (e.g. the Minister for Regulation and the Minister of Finance) and coalition partners, given the potential overlap with CCCFA reforms.

28. It could also be beneficial to test the scope of a reform process with key consumer credit stakeholders. This may help you to consider the resource implications for stakeholders and navigate some of the inter-dependencies. We note that a large portion of consumer lenders would also be affected by the Government's decisions on the Conduct of Financial Institutions amendments. Some are also likely to be affected by the Commerce Commission's study into competition for personal banking services and the select committee inquiry described in the coalition agreement between the National Party and New Zealand First, which may be a factor to consider in timing consultation and/or reforms to the CCCFA.

For your direction: related work

29. We are actively working on four other policy processes involving the CCCFA and seeking your direction on whether to continue with these.

High-cost credit review required by statute: must continue

30. The provisions applying to high-cost credit contracts (consumer credit contracts with an annual interest rate of 50 percent or more) require the responsible Minister to review their effectiveness as soon as practicable three years after they enter into force (see section 45L) and report to the House with findings. The three-year anniversary of these provisions was in June this year and we have accordingly commenced the review.

31. The purpose of the high-cost credit provisions is to protect consumers from the harm caused by accumulating excessive debts from default on high-interest loans and excessive interest and fees from repeat borrowing under high-interest loans. They attempt to achieve this through a range of measures, including interest rate caps and prohibitions on certain charges.

32. There no longer appears to be any high-cost credit products in the market. Lenders providing these products have either shut down or reduced their interest rates below the 50 percent threshold. Section 45L requires the review to consider whether the interest rate that defines a high-cost consumer credit contract should be reduced to a rate between 30 and 50 percent.

33. We have been preparing a discussion document to seek public feedback to inform our advice on the effectiveness of these provisions. We intend to brief you on a process and timetable for this review once we have an indication of the other reforms you wish to pursue.

Development of a permanent exemption for lending after an emergency event: proposing to stop

34. In August this year, Cabinet agreed in principle to a permanent CCCFA exemption to improve access to credit after emergency events such as the Auckland Anniversary floods and cyclone Gabrielle earlier this year [CAB-23-MIN-0348.01 refers]. Cabinet had responded to those events by making a temporary exemption from the requirement to assess affordability, which was intended to enable better access to temporary overdrafts and mortgage top ups.

35. We propose to discontinue work on this exemption. This is because we understand you are committed to pursuing reforms that would reduce the regulatory burden created by the affordability regulations, and that is likely to remove the need for this exemption in the event of an emergency event. If an event that has similar consequences to Cyclone Gabrielle were to occur in the meantime, we could support you and Cabinet to develop an appropriate short-term response (such as switching on the temporary exemption again).

A full exemption for voluntary targeted rates schemes: proposing to continue

36. Cabinet also agreed in August to fully exempt from the CCCFA voluntary targeted rates schemes administered by local authorities (e.g. loans to ratepayers to install insulation or heat pumps) [CAB-23-MIN-0348.01 refers].

37. These scheme loans are currently exempted from some provisions in the CCCFA. Cabinet agreed to fully exempt them on the basis the risks to rate payers are considered relatively low and the lenders in these cases are not commercially motivated.

38. Unless you take issue with this decision, or wish to take further advice on it, we propose to continue working with the Parliamentary Counsel Office to implement this Cabinet decision by drafting changes to the CCCF regulations. We are aiming to have amendment regulations ready to be made early next year.

A technical change exempting certain non-financial service providers from annual returns: proposing to continue

39. In the same meeting, Cabinet also agreed to exempt non-financial service providers (e.g. certain car dealers) who have assigned credit contracts to lenders (e.g. a finance company) from also having to complete annual returns in relation to those credit contracts.

40. We are working with the Parliamentary Counsel Office to give effect to this decision through the same amendment regulations as for the voluntary targeted rates exemption discussed above. We propose to continue with this given the relatively uncontroversial and straightforward nature of this change, as well as the benefit of implementing it without delay.

Next steps

41. We would like to discuss the options proposed in this paper with you. You may wish to test your preferred approach with other relevant Ministers, coalition partners and through targeted consultation with key stakeholders.

42. We will provide a more detailed briefing on options and timeframes based on your preferred approach and can a prepare a Cabinet paper on your behalf, seeking agreement to your preferred approach.

MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

EVENT BRIEFING

Meeting with Financial Markets Authority board on 26 January 2024

Date:	24 January 2024	**Priority:**	High
Security classification:		**Tracking number:**	2324-1691

Action sought		
	Action sought	**Deadline**
Hon Andrew Bayly **Minister of Commerce and Consumer Affairs**	**Note** the background information and talking points ahead of your meeting with the Financial Markets Authority board on 26 January 2024.	25 January 2024

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Tom Simcock	Manager, Financial Markets	s.9(2)(a)		✓
Daniel Meech	Policy Advisor	s.9(2)(a)		

The following departments/agencies have been consulted
N/A.

Minister's office to complete:

☐ Approved
☐ Noted
☐ Seen
☐ See Minister's Notes

☐ Declined
☐ Needs change
☐ Overtaken by Events
☐ Withdrawn

Comments:

EVENT BRIEFING

Meeting with Financial Markets Authority Board on 26 January 2024

Date:	24 January 2024	**Priority:**	High
Security classification:		**Tracking number:**	2324-1691

Purpose

To provide you with background information and talking points ahead of your meeting with the Financial Markets Authority board on 26 January 2024.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a **Note** the background information and talking points ahead of your meeting with the Financial Markets Authority board.

Noted

Tom Simcock
Manager, Financial Markets
Building, Resources and Markets, MBIE

24 January 2024

Hon Andrew Bayly
Minister of Commerce and Consumer Affairs

..... / ...... / ......

Background

1. You will be attending a meeting of the Financial Markets Authority (**FMA**) board (the **Board**) on 26 January 2024 in Auckland.

2. An agenda and talking points for the meeting have been provided at **Annex 1**. Key points for discussion are:

   a. the current fiscal situation

   b. the Board's current priorities

   c. the FMA's Briefing to the Incoming Minister (**BIM**)

   d. the Government's plans regarding the Conduct of Financial Institutions (**CoFI**) regime and the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**).

3. This meeting will be an opportunity for you to state your priorities for the year and hear from the Board about the issues that matter to them. It will also be a good opportunity for you to test your planned reforms to financial markets regulation with the Board, including the CoFI regime and CCCFA, given the FMA's interest in these areas.

About the FMA and the Board

4. The Financial Markets Authority is an independent Crown entity established under the Financial Markets Authority Act 2011. It is New Zealand's financial market conduct regulator, with the main objective of promoting and facilitating the development of fair, efficient and transparent financial markets.

5. There are eight current members of the FMA Board, including chairperson Mark Todd. As you know, Mark Todd will be stepping down from the Board at the end of his term [briefing 2324-0884 refers]. A search process for a new chair and member is underway. More information on the Board members has been provided in **Annex 2**.

FMA priorities

6. The meeting will include a discussion of the FMA's priorities. These are outlined in the FMA's Briefing to the Incoming Minister (BIM) which you received late last year (**Annex 5**). In the BIM, the FMA highlight the following areas as their strategic priorities.

Outcomes-focused regulation

7. The FMA would like to change the way it supervises and engages with its regulated population, so that its regulation is focused less on driving a 'compliance' mindset (checking boxes or meeting particular processes), and more on creating good outcomes for investors, consumers and markets. This change in approach is expected to enable more flexibility and innovation and minimise unnecessary regulatory burden.

8. The FMA has consulted on 7 'outcomes' it expects all firms to deliver. The consultation is clear that these outcomes do not establish new legal obligations. However, some industry participants have queried the legal status of the outcomes and whether firms will be expected to 'comply' with the outcomes in practice. The FMA's explanation is that this is not the intent, but that focusing on outcomes will assist firms to more easily meet their obligations in a way that achieves the purpose and intent behind them. You may wish to discuss this with the Board.

Implementing new regimes

9. The FMA notes that regulation of the financial sector has seen significant change over the past few years and the FMA's mandate has increased significantly. One of the FMA's key priorities is therefore to help guide industry through these changes. The BIM highlights changes to the regulation of financial advice, climate-related disclosures, changes to financial market infrastructures, and CoFI as particularly important changes.

Watchlist of key issues

10. The FMA highlighted the following as key areas that it will be watching:

    a. financial frauds and scams

    b. the impact of weather events on insurance

    c. greenwashing

    d. the credit union sector (where participants have been consolidating due to issues around capital adequacy, profitability and operating costs), and

    e. digital financial reporting (the FMA would like businesses to adopt digital financial reporting as soon as practicable).

Law reform

11. The FMA highlighted the following as key reforms to the law which it would like to support:

    a. the review of the CCCFA

    b. the Insurance Contracts Bill

    c. strengthening regulatory settings for custodians and critical third parties

    d. considering regulation of virtual assets (eg cryptocurrencies) in line with international standards.

Conduct regulation

12. You may wish to seek the Board's view on your proposals around reforms to financial markets conduct regulation, including the Conduct of Financial Institutions regime and the CCCFA.

CoFI reforms

13. The FMA are generally supportive of the direction of your proposed changes to CoFI and conduct regulation. Their view is that robust conduct regulation is a critical part of the 'twin peaks' model and they have been strongly supportive of CoFI to date. They have also expressed a view that changes to CoFI at this late stage may cause uncertainty for industry. The Board will have a particular interest in the proposal to bring the regulation of consumer credit within the FMA's remit, as the FMA has expressed support for this approach in the past.

14. The FMA has also expressed support for your proposals to review conduct licensing requirements with the objective of consolidation and simplification, and to explore opportunities for better coordination and cooperation between the FMA and Reserve Bank.

FMA view on conduct obligations

15. In your recent meeting with Samantha Barrass, you asked the FMA to provide any views on what conduct obligations should apply to financial institutions under CoFI. The FMA have provided a note (**Annex 4**) indicating they would like to explore introducing:

    a. an overarching fair conduct duty, that

    b. applies to <u>all</u> financial service providers.

16. The FMA argue creating a general duty like this across all financial services would provide firms with flexibility to demonstrate compliance in a wide variety of ways.

MBIE's view

17. MBIE previously explored introducing a general duty of fair conduct as part of early development of the CoFI regime. However, during legislative drafting it was determined that the concept of 'fair treatment of consumers' was insufficiently clear to introduce as a direct, standalone duty in legislation.

18. The CoFI regime instead sets a fair conduct principle that financial institutions must treat consumers fairly. The Act is designed so that this is not a direct duty but applies indirectly to institutions. Institutions are not required to 'comply' with the principle. Rather, there is a duty to have a 'fair conduct programme' that ensures their compliance with the fair conduct principle. The specific requirements of duty to have and maintain the programme are then clear enough for firms to have legal certainty as to their obligations, which then links to the guiding 'fair conduct' principle. We note also that this duty also only applies to banks, insurers, and non-bank deposit takers; it does not apply to other financial service providers (eg non-bank lenders).

19. Our view is that it would be possible to explore the extension of the CoFI fair conduct principle and programme requirements to other, or all, financial service providers (for example, non-bank lenders). However, we consider that applying these obligations as a direct duty would likely encounter the same issues about legal certainty.

CCCFA reforms

20. After advice in December 2023, you agreed to remove prescriptive affordability regulations for lower-risk lending or lenders. You also commissioned a broader review of the CCCFA to take place on a longer timeframe, in parallel with the CoFI review. The FMA has been informed about these developments and have been generally supportive.

FMA view on regulation of consumer credit

21. The FMA have expressed the view that it would be more appropriate for the regulation of consumer credit to sit with them, rather than the Commerce Commission. Their reasoning for this is set out in a note they provided you prior to the meeting (**Annex 3**). Generally speaking, the FMA believe there are opportunities to re-orient consumer credit regulation to align firms' duties, and the supervision of these firms, with the FMA's financial markets legislation. The FMA believe this would mean a principle-based and engagement-based approach could be taken, which would provide more flexibility.

MBIE's view

22. Officials agree it is sensible to explore bringing together responsibility for financial markets conduct and the CCCFA into a single regulator, and this is consistent with the update you are providing to Cabinet this week. However, officials also consider the CCCFA's current prescriptive approach does not easily align with the FMA's risk-based approach to regulation, which means it will be important to consider institutional design during Phase 2 of the CCCFA review.

Annexes

Annex 1: Agenda and talking points

Annex 2: Information on Board members

Annex 3: FMA note on CCCFA regulation

Annex 4: FMA note on conduct obligations

Annex 5: FMA BIM

Annex 1: Agenda and talking points

Agenda	
Item 1	Introductions
Item 2	Fiscal situation
Item 3	Board's priorities
Item 4	FMA BIM
Item 5	Conduct regulation including CoFI and CCCFA

Board's priorities

- I understand from the FMA's BIM that the financial sector and the FMA have seen significant change and reform in recent years.
- I also understand Mark will be stepping down as Chair at the end of his term in April, and I would like to take the opportunity to thank him for his work as Chair.
- With this background in mind, I am interested to hear about your priorities for the year as a Board, as well as your thoughts on how our work might complement each other.

FMA BIM

- I am interested to hear about the Board's priorities for the FMA.
- I would be interested to hear the Board's views on the proposed outcomes-focused approach and how this is landing with stakeholders?

Conduct regulation including CoFI and CCCFA

Planned reforms to CoFI and conduct licensing

- As you will be aware, I intend to review CoFI to ensure that financial institutions can implement the requirements more easily and in a way that is fit for purpose and proportionate.
- I also intend to review the 'twin peaks' regulatory model and how it has been implemented in New Zealand, and to review the FMA's conduct licensing requirements.
- What are the Board's views on these issues?

Regulation of consumer credit

- The FMA has provided me with a note on the regulation of consumer credit. Thank you to your team for this.
- I understand the FMA is of the view that moving the regulation of consumer credit from the Commerce Commission to the FMA would be beneficial. It would align well with the FMA's mission and legislation, and it would also mean consumer credit could be regulated on a risk-based basis.
- I'm interested in simplifying the regulatory landscape as it relates to financial services. I'm also interested in making it easier for borrowers to access credit that is appropriate for them.
- I expect to consider this as part of the second phase of the CCCFA review.
- Are there any points you'd like to raise from your perspective?

General duty of fair conduct

- Your team has provided me with a note on the FMA's view that a general duty of fair conduct could be introduced for all financial service providers.
    - I understand this has been explored in the past but was not progressed as it would not be clear enough to enforce as a standalone duty.
    - I also understand the FMA would want to see the obligation apply to ALL financial service providers.
    - It could be worth exploring this again but it would need careful consideration to make sure that any obligation was legally clear and did not impose unnecessary additional compliance costs on firms.
    - Any broadening of the scope of COFI could also be considered but would also take considerable time.
    - Does the Board have any views on this approach?

Annex 2: Information on Board members

Mark Todd, Chair

Mark has over 25 years' experience in financial markets regulation, including as a partner at a major law firm and through holding governance roles with both listed and unlisted companies. He co-founded Anti-Money Laundering Solutions and chaired Mint Asset Management. He was also the Customer Advocate at Westpac New Zealand.

Mark has indicated that he will be stepping down as Chair at the end of his term (30 April 2024). Sue Chetwin will be acting Chair until a full-term appointment is made.

Vanessa Stoddart

Vanessa is a Director of Channel Infrastructure, OneFortyOne Plantations Pty Ltd and a member of the board of Te Whatu Ora.

She also holds other charitable and advisory governance roles. She was previously a senior executive at Air New Zealand and CEO of Carter Holt Harvey Packaging Australia.

Sue Chetwin

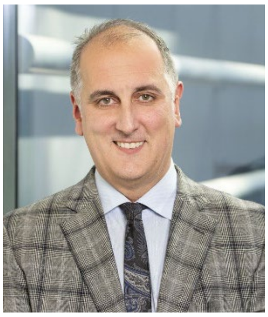
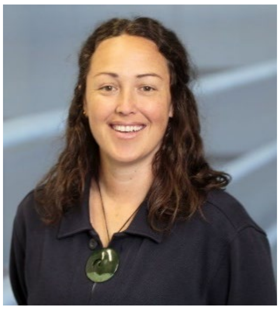
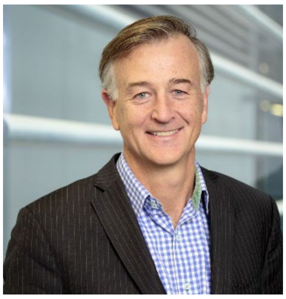
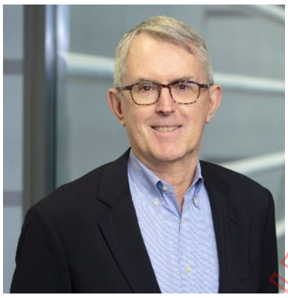
Sue has more than 12 years' experience working for and on behalf of consumers and is the former CEO of Consumer New Zealand.

She chaired the Government's review of drug buying agency PHARMAC and was a member of the Law Society Independent Steering Group Committee considering the terms of reference for the statutory framework for legal services.

Prasanna Gai

Prasanna is Professor of Macroeconomics and Head of the Departments of Economics and Accounting & Finance at the University of Auckland. Prasanna is a Senior Research Fellow at the Deutsche Bundesbank and an Academic Adviser to the Bank of Canada.

He has previously served as Special Adviser to the Governor of the Bank of Canada, Senior Adviser at the Bank of England, and Member of the Advisory Scientific Committee of the European Systemic Risk Board.

Christopher Swasbrook 	Christopher has more than 25 years' experience in stockbroking and funds management. He is currently the Managing Director of Elevation Capital Management Limited, Director of NZX-listed New Zealand Rural Land Company, NZX-listed Allied Farmers Limited, Bethunes Investments Limited and SwimTastic Limited. He is also a Member of NZ Markets Disciplinary Tribunal (since 2013) and a Member of the NZX Listing Sub-Committee (since 2008). He was previously a Partner at Goldman Sachs JBWere.
Kendall Flutey 	Kendall is the co-Founder and co-CEO of Banqer, a financial education company that delivers experiential software to develop financial literacy and capability in their learners. She is also a Commissioner to the Insurance & Financial Services Ombudsman Scheme, and a former member of the dissolved Digital Council for Aotearoa.
Mark Weenink 	Mark is an experienced corporate lawyer and was most recently General Counsel at Westpac New Zealand. Prior to joining Westpac, Mr Weenink held various positions, including Managing Partner at Minter Ellison Rudd Watts, and Head of Legal at Challenger Asset Management in Sydney.
Steven Bardy 	Steven is a senior executive with experience as a regulator and advisor in financial services and financial services regulation. He consults on financial services regulation to the World Bank and is a senior advisor to Principia Advisory, a European based global leader in ethics consulting. He was previously Managing Director of Promontory Australia, an IBM company, and a senior executive leader at the Australian Securities and Investments Commission. He was also the inaugural chair of the Assessment Committee of the International Organization of Securities Commissions (**IOSCO**) and an ASIC representative on the IOSCO Board.

Annex 3: FMA note on CCCFA regulation

Please see the attached document.

19 January 2024

Twin peaks and consumer credit

Purpose

1. This note sets out how the FMA would approach the regulation of consumer credit.

Background

2. The Commerce Commission (**ComCom**) has regulated credit contracts (consumer and business) since the 1970s and 80s.[1]

3. After the global financial crisis, securities regulators were typically refocused as 'conduct' regulators (commonly including credit). Central banks, or specialist agencies, were often provided separate 'prudential' regulatory responsibilities. When the FMA was established in 2011, Government decided not to separate CCCFA-related responsibilities from the ComCom, leaving a fragmented conduct model.

Moving the CCCFA to principles-based, risk-focused regulation

4. Consumer credit regulation previously reflected a principles-based model. Lenders had overarching responsibilities to make reasonable inquiries that the lending likely met the borrower's needs and avoided substantial hardship supported by a responsible lending code.[2]

5. That model did not prove adequate to prevent predatory and irresponsible lending, leading to reforms from 2018, which resulted in a more prescriptive, penalties-led, and one-size-fits-all approach. These changes have not proved to be well suited to the diverse range of lenders (size, sophistication, compliance culture) and products (from mortgages to vehicle financing). In some cases they have also not served borrowers' needs in terms of both protection and access to credit.

6. There is an opportunity to re-orient consumer credit regulation to align firms' duties, and the supervision of these firms, with the FMA's financial markets legislation. Re-orientating the CCCFA in this way to a would clarify obligations for firms and enable regulation to be applied in a proportionate manner according to the risks presented. This would provide a risk-based consumer protection focus.

7. The Financial Markets Conduct Act provides the FMA with a full range of tools to support appropriate differential regulation of registered banks and non-bank deposit takers, while retaining an appropriate focus on high-interest rate lending by all lenders, particularly those targeted at vulnerable communities and people.

8. The table below (simplified for brevity) indicates some key characteristics that Phase II of the CCCFA review could consider to that end.

Current	Suggested pivot

• Broadly one-size-fits-all legislative design with some specific high-interest rate product controls	• General conduct regime and high-level responsible lending principles for:
	  ○ Registered banks and non-bank deposit takers <u>and</u>
	  ○ Lower interest rate products
	• Additional specific duties and controls through a licensing regime for other lenders and relating to high-interest rate products

• Prescriptive affordability tests and disclosure requirements in regulations	• General principles, responsible lending code, and prudential requirements (eg LVRs) likely sufficient for low interest rate products • Disclosure settings likely broadly suitable. Could be refined for high-interest rate products and simplified for mortgage lending.

[1] Under the Hire Purchase Act 1971 and the Credit Contracts Act 1981.

[2] This code remains in effect today, accessible here, but reflects the more detailed and prescriptive settings of the present credit regime.

• Director and senior manager duties/liabilities for compliance	• More suitable for third tier or non-core lenders (which are smaller and not licensed for any other activities or prudentially overseen) • Could be tailored for banks and non-bank deposit taking lenders. Director and senior management conduct is already covered by existing conduct and prudential regulation.
• Enforcement and penalties-driven regime	• Principles-based conduct regime with full range of regulatory tools (engagement/education and direction orders/action plans for 'real time' interventions, as well as enforcement and penalties)

Flexibility for core market with principles-based regime

9. Registered banks and non-bank deposit takers are the core consumer credit market, which originate over 95% of the market (by value) in residential mortgages. It is therefore important that the fair conduct framework in the Conduct of Financial Institutions regime constructively aligns with CCCFA settings to balance fair conduct with consumer harm, credit access, lending discretion, and innovation.

10. Integrating consumer credit regulation into the FMC Act would allow the core group lenders flexibility to demonstrate compliance in a way that aligns with the aims of the regulatory system and their business, and allow expectations to evolve as new technologies, products, and business models emerge. It must also ensure higher interest rate products are appropriately overseen.

11. This would improve on the pre-2018 CCCFA design because lenders' duties in relation to consumer credit would be able to be viewed (and regulated) alongside the fair conduct principle currently in the FMC Act. In addition, the existing Responsible Lending Code could be reframed to reflect these principles in consultation with industry (registered banks and non-bank deposit takers, third tier lenders, the public and consumer interest groups).

12. This style of model is used and understood by a wide range of financial service providers through the financial advice regime and through entities' preparation for CoFI's fair conduct programme.

Closer oversight and scrutiny of riskier lenders and risky/complex products

13. Non-core lenders are smaller, not licensed for any other activities, not prudentially overseen, and have less mature compliance cultures. This area needs more focused obligations and rules. It requires a regulator to provide more intensive support, engagement, supervision, and intervention to improve conduct and compliance to an appropriate standard.

14. This would be a priority area for FMA regulatory activity and engagement because non-core lenders often offer particularly risky or debt-trap risk products, and target vulnerable groups. Effective regulation is critical to provide consumers with confidence to engage with those in this category who can provide responsible access to credit.

15. The FMA has experience, for instance through its regulation of financial advice, in using risk-based monitoring to support a graduated supervision model to deploy regulatory interventions (including guidance, engagement, site visits and other monitoring, or more direct tools). For credit, our approach would likely take into account the type of lender and product (e.g. pay day loans, or specific products with outlier interest rates), unusual volumes in lending (value and customer base), high or unusual default rates and/or property seizures, and trends in complaints (to disputes resolution schemes or to the regulator) and misconduct intelligence.

Conduct regulation

16. This type of market dynamic requires a flexible regulatory toolkit. The FMA uses a proactive approach for the participants and markets it oversees. Critically, a conduct based licensing regime allows proactive monitoring consistently across all conduct licences to detect potential

harms and risk signals before or while harm is unfolding. This contrasts with an after-the-fact enforcement-led deterrence and penalties regime that commonly relies on actual harm and complaints.

17. The FMA's approach balances engagement and guidance to encourage good business models and market practices with responsive risk-based tools to supervise and intervene in 'real time' (such as direction orders) across the design and lifecycle of the product, and to protect consumers.

18. This responsive approach is important for a well-functioning consumer credit market to improve standards, protect consumers, and support access to credit and financial inclusion whilst ensuring bad actors improve or leave the market across several key areas. This would be complemented by FMA's function of facilitating the provision of public information and education about all aspects of financial markets which will be able to support consumers of credit.

Alignment with financial markets conduct regime

Fair conduct

19. There will be clear and constructive benefits from aligning credit regulation with fair conduct rules, and regulatory certainty for firms dealing with one conduct regulator and compatible regulatory regimes for all financial products and services. Conduct and consumer credit risks align in the 'core' market where, for example, mainstream lending products result individual or systemic unfairness – in particular, the treatment of mortgage prisoners[3] – or individuals experiencing temporary hardship and need relief. This is an active focus for the FMA.

Emerging trends

20. Cross-cutting industry and regulatory trends in financial services will benefit from having a single conduct regulator. Particularly in credit decisions, lenders are increasingly adopting new technologies (particularly artificial intelligence and blockchain) and products (such as Buy-Now, Pay-Later or virtual asset-based products). The FMA is developing expertise in these fields, given their prevalence in financial markets.

21. There are also complementary workstreams with open banking and the consumer and product data right as well as the proposal to give FMA responsibility for unfair contract terms for insurance which, together with FMA-led consumer credit regulation, would support better visibility to balance risk and innovation in these markets with one regulator responsible for conduct regulation of all financial products and services.

Other Measures

22. In addition to reforming the regulation of consumer credit, there may be merit in considering measures to alleviate hardship for consumers who, regardless of the regime, struggle with debt. The United Kingdom, for example, offers temporary statutory protection from creditors contacting a debtor, enforcing debt, or adding interest or charges for up to 60 days. In addition, if a person is receiving mental health crisis treatment, this protection lasts the length of the treatment plus 30 days. This also would be timely because the banking sector are looking at similar options for scams and frauds which, while not the same, have some strong similarities. These options may be of interest for consultation, in particular with consumer groups.

[3] Often described as persons who are unable to switch mortgage providers because their debt or income characteristics do not meet responsible lending criteria (for example, if a mortgage is near or exceeds the current market value of the house). Some banks charge higher interest rates where the lending exceeds 90% LVR.

19 January 2024

Annex 4: FMA note on conduct obligations

Please see the attached document.

19 January 2024

Fair conduct as a general duty

Purpose

1. To provide FMA's initial thinking on key principles that the conduct of all financial service providers should reflect.

Fair conduct in financial services

2. We recommend exploring anchoring regulation of financial services in fair conduct to better facilitate public trust and confidence in the financial markets, and it sits well at the heart of a principles-based regulatory model for the reasons set out below.

3. An overarching duty allows firms flexibility to demonstrate compliance in a way that aligns with the aims of their business and the regulatory system, and allow expectations to evolve as new technologies, products, and business models emerge.

4. Using the core principle underpinning CoFI's fair conduct regime would result in a simple and streamlined approach. The CoFI legislation was designed so that it could easily be extended to other institutions by expanding the definition of 'financial institution', and the fair conduct principle is intended as an overlay that is easily applicable to other financial services.

5. The fair conduct principle that *a financial institution must treat consumers fairly* in s446C FMC Act provides the fundamental components of fair conduct as:
   - *paying due regard to consumers' interests;*
   - *acting ethically, transparently, and in good faith;*
   - *assisting consumers to make informed decisions;*
   - *ensuring that the relevant services and associated products that the [financial institution] provides are likely to meet the requirements and objectives of likely consumers*
   - *not subjecting consumers to unfair pressure or tactics or undue influence.*

6. The duty's design makes it suitable for all financial services because it:
   - Uses a principles-based regime to provide flexibility, support innovation, and avoid 'box-ticking'. It is supported by FMA's risk-based and outcomes-focused approach.
   - Fills a critical gap in 'twin peaks' regulatory system and aligns with international norms such as the FCA's duties in the UK, and is consistent with existing statutory duties and requirements in financial markets legislation, such as those in the Financial Advice Code.
   - Creates a supervisory relationship with licensed institutions that facilitates proactive and proportionate engagement – preferred by industry to reactive enforcement-led approach. These principles would require firms to engage well with customers, to consider how their fees deliver good value for customers, and to develop products that meet the needs of customers.
   - Supports all financial service providers to lift conduct maturity in pursuit of fairer outcomes while supporting innovation.

7. It may also be useful to consider adding to the fair conduct principle an element to ensure that firms deal with complaints and provide appropriate dispute resolution for customers.

Fair dealing as a backstop for bad conduct

8. All financial service providers are subject to 'fair dealing' obligations in Part 2 of the FMC Act. These are, however, negatively expressed as prohibitions on misleading or deceiving consumers or investors which is not equivalent to genuine fair conduct. The fair dealing foundation serves as a backstop for regulatory intervention for bad conduct but is orientated more towards reactive action. A fair conduct duty constructively builds elements of proactivity and positive conduct expectations.

OIA 18(d)

Please see the attached document.

16 March 2012

Consideration of the appropriate regulator for monitoring and enforcement of the Credit Contracts and Consumer Finance Act 2003

Purpose

You are required to report back to Cabinet by 31 March 2012 on outstanding decisions concerning amendments to the Credit Contracts and Consumer Finance Act 2003 (CCCFA) [CAB Min (11) 40/5].

This paper discusses which Crown agency should be responsible for the monitoring and enforcement of the CCCFA. Cabinet agreed in principle to the further investigation of the Financial Markets Authority (FMA) being the regulator responsible for monitoring and enforcement of credit under the CCCFA and credit repossession practices under the Credit (Repossession) Act 1997. The Commerce Commission is currently the regulator responsible for monitoring and enforcement of the CCCFA. There is no regulator responsible for the Credit (Repossession) Act.

The paper concludes that the Commerce Commission or FMA could be the regulator, but there is no strong case for change and therefore officials do not consider change to be necessary at this time.

Action Sought

	Action Sought	Deadline
Minister of Consumer Affairs	**Agree** to the recommendation and forward to the Minister of Commerce for his agreement.	20 March 2012
Minister of Commerce	**Agree** to the recommendation.	26 March 2012

Ministry Contacts

Name	Position and Unit	Telephone: Work	Telephone: After Hours	1ST Contact
Evelyn Cole	Manager, Consumer Policy	OIA s.9(2)(a)		✓
Leila Martley	Senior Policy Analyst, Consumer Policy			

16 March 2012

Minister of Consumer Affairs

Consideration of the appropriate regulator for monitoring and enforcement of the Credit Contracts and Consumer Finance Act

Executive Summary

There are two main financial market regulators in New Zealand, the Financial Markets Authority and the Reserve Bank. The Commerce Commission also has a role through the regulation of credit. Key roles are:

- The Reserve Bank: Responsible for prudential regulation and the licensing of banks, non-bank deposit takers and insurance providers.
- The Financial Markets Authority (FMA[1]) Responsible for regulating securities exchanges, financial advisers and brokers, trustees and issuers.
- The Commerce Commission: Responsible for the monitoring and enforcement of compliance with the Credit Contracts and Consumer Finance Act 2003 (CCCFA).

Cabinet has requested an investigation of whether it would be more appropriate for the Commerce Commission's regulatory responsibility for credit laws to be transferred to the FMA, to be undertaken alongside the FMA's investment and financial advice regulation.

The Ministry of Consumer Affairs (MCA) has considered the status quo (the Commerce Commission) with the alternative of the FMA as credit regulator based on: organisational mandate and skillsets, enforcement approach, alignment (with Australia, with other roles and functions), consumer contact and general costs and risks of change.

Organisational mandate and skillsets

The Commerce Commission and FMA both have a broad legislative mandate and the skillsets required for regulation of credit and in this context, either agency could be the regulator. There would be transition costs in case of transfer of responsibility to the FMA, as CCCFA expertise would need to be transferred, recruited or developed (at staff and Board levels). CCCFA expertise at the Commerce Commission is held in a specialist team and the legal team.

The CCCFA is enforced by the Commission alongside the Commerce Act and Fair Trading Act. All three Acts provide for enforcement by the Commerce Commission and self-enforcement by parties who consider they have been affected by an alleged breach of the law. Credit law prosecutions and settlements by the Commerce Commission have tended to be in respect of breaches of both the CCCFA and the Fair Trading Act. If the FMA were the regulator, there would be good alignments based on financial market relationships.

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[1] Abbreviations used in this paper: Financial Markets Authority (FMA), Fair Trading Act (FTA), Credit Contracts and Consumer Finance Act 2003 (CCCFA), Ministry of Consumer Affairs (MCA), Australian Securities and Investment Commission (ASIC).

Enforcement approach

The FMA and the Commerce Commission approach many aspects of regulation and enforcement in a similar way – they monitor the markets and gather intelligence, and they seek to improve market conduct by taking representative cases and through education.

The FMA also has responsibility for licensing, which applies to financial advisors, and is a best practice tool in consumer protection when the consumer cannot easily determine the quality of a product. This contrasts with the credit market, where the nature of a credit product can be seen and understood by consumers (when providers are complying with the law), and protection comes from the CCCFA (disclosure and not unreasonable fees requirements) and also from dispute resolution services (which provide a direct path to redress).

Both the FMA and the Commerce Commission work to protect consumers. The FMA protects consumers by regulating the issuers of financial products and advice (through licensing) and through ensuring required information is provided to investors to assist informed decisions. The Commerce Commission focuses on making sure consumers have information to make informed and competitive choices.

Closer alignment with Australia

The Australian Securities and Investments Commission (ASIC) has responsibility for regulatory oversight of investments and credit markets, for financial service providers, including credit providers, licensing and financial literacy. There are no particular problems associated with a lack of complete alignment with ASIC (for example, no double reporting by companies active in both countries as the CCCFA has no reporting requirements). In New Zealand, the Office of Financial Literacy and Retirement is the main agency responsible for financial literacy, and the Commerce Commission and FMA are expected to participate in financial education in credit (Commerce Commission) and investment (FMA).

Overlap or duplication of functions

The FMA and the Commerce Commission are both able to address misleading conduct at the moment - the Commission through the Fair Trading Act and the FMA through the Securities Act. Amendments to address overlap are being made as part of the Financial Markets Conduct Bill.

Clarity for consumers

Consumer contact is well established at the Commerce Commission and there are benefits in having the Fair Trading Act and CCCFA regulated together from a consumer contact perspective. Fair Trading Act and CCCFA complaints are all screened by the credit team to ensure complaints are addressed under the most appropriate legislation and to pick up misdirected complaints.

If the FMA were responsible for credit, it would require some public and business education regarding credit. There is already clear messaging that the FMA is responsible for the financial market. It is probably more important to clarify as soon as possible the outcome of this process so that any confusion does not grow. Some market participants are aware that a change of regulator is under consideration and the FMA also report receiving some credit related complaints.

Costs of change

The costs of change would be transitional, so should not be a major consideration in deciding the regulator. They include: one off costs of administrative change, possible loss of key staff who are subject matter experts, costs of educating the public and business, and organisational challenges.

Regardless of regulator, there is likely to be pressure for regulation resources, over and above the annual allocation of $1,295 million to the Commerce Commission's General Markets budget. At present, the Commerce Commission can manage priority by allocation of the wider General Markets budget, but there are trade-offs with the regulation of other areas. The FMA is funded by a mix of Crown and levy funding.

Conclusion and Next Steps

Based on organisational capability and alignment with other regulatory roles either the Commerce Commission or the FMA could be the regulator responsible for credit laws. The regulatory approach required for the CCCFA is similar to the Fair Trading Act, and there are on-going benefits of having the two Acts regulated alongside each other at the Commission.

At the same time, the FMA has the skills to regulate credit, and could develop, recruit or transfer CCCFA expertise. There could be benefits in having a single financial regulator, but currently there are no specific or pressing problems associated with credit and investment being regulated separately.

Given that either party could be the regulator for credit, there is no particularly strong case for change and officials do not consider change to be necessary at this time. If specific problems were to emerge over time, the matter could be re-examined.

In the past there have been Memorandums of Understanding between financial agencies to co-operate, and it would be desirable to redevelop a Memorandum of Understanding for co-operation and information sharing between the FMA and Commerce Commission.

Attachments

A table summary of the main discussion points is attached for your reference. *Summary Assessment of the Two Future Regulator Options for the CCCFA.*

Recommended Action

Minister of Consumer Affairs

We recommend you:

a **Agree** that the Ministry of Consumer Affairs prepare content and recommendations for Cabinet consideration that the regulation of the Credit Contracts and Consumer Finance Act remain with the Commerce Commission

Yes / No

b **Refer** this report to the Minister of Commerce for agreement

Yes / No

Minister of Commerce

c **Agree** that the Ministry of Consumer Affairs prepare content and recommendations for Cabinet consideration that the regulation of the Credit Contracts and Consumer Finance Act remain with the Commerce Commission

Yes / No

Evelyn Cole
Manager Consumer Policy

Hon Chris Tremain
Minister of Consumer Affairs

Hon Craig Foss
Minister of Commerce

Consideration of the appropriate regulator for monitoring and enforcement of the Credit Contracts and Consumer Finance Act 2003

Purpose of Report

1. You are required to report back to Cabinet by 31 March 2012 on outstanding decisions concerning amendments to the Credit Contracts and Consumer Finance Act 2003 (CCCFA) [CAB Min (11) 40/5].

2. This paper discusses which Crown agency should be responsible for the monitoring and enforcement of the CCCFA. Cabinet agreed in principle to the further investigation of the Financial Markets Authority (FMA) being the regulator responsible for monitoring and enforcement of credit under the CCCFA and credit repossession practices under the Credit (Repossession) Act 1997. The Commerce Commission is currently the regulator responsible for monitoring and enforcement of the CCCFA. There is no regulator responsible for the Credit (Repossession) Act.

Background

Reform of the financial sector

3. There has been considerable reform of the laws covering financial service providers and financial products (the financial market) over the last four years. The reforms have focussed primarily on deposits, investments and financial advice. They have resulted in changed responsibilities for the Reserve Bank (which is now responsible for prudential regulation and monitoring the activities of banks, non-bank deposit takers and insurance providers) and the establishment of the FMA in 2011 (responsible for regulating securities exchanges, financial advisers and brokers, trustees and issuers).

4. A new regulatory regime governing financial advice services has been put in place under the Financial Advisors Act 2008, and the Financial Markets Conduct Bill, which had its first reading in early March 2011, will result in further reform. The Bill deals with the conduct of providers of in financial products in both wholesale and retail markets.

5. Cabinet has also agreed to a number of reforms to the CCCFA. The review of credit law was added to the wider review of financial market laws in 2011.

What is covered by the financial market

6. The financial market is principally defined by the registration requirements of the Financial Service Providers (Registration and Dispute Resolution) Act 2008. Financial service is defined in the Act and includes banks, non-bank deposit takers (such as credit unions and finance companies), insurance providers, financial advisers, credit providers, issuers of credit and debit cards and other means of managing payments and stock brokers.

7. Under this Act, all financial service providers must be registered. The Ministry of Economic Development maintains the register. To be registered a person must not meet any of the disqualification criteria such as being an undischarged bankrupt or subject to a banning order. In addition:

   - If a financial service provider has retail clients (consumers, not wholesale client) they must belong to a consumer dispute resolution scheme (the Banking Ombudsman, Insurance and Savings Ombudsman, Financial Services Complaints Limited or Financial Dispute Resolution).

- Bank, non-bank deposit takers and insurance providers must meet the appropriate Reserve Bank of NZ licensing requirements.
- If a financial service provider provides financial advice, they must be licensed by the FMA or belong to a Qualifying Financial Entity approved by the FMA. The licence is subject to competency requirements (set by the FMA) and adherence to a code of conduct under the Financial Advisers Act.

8. Financial service providers that are solely credit providers and do not provide financial advice only have to be registered and belong to a dispute resolution scheme. Conduct regulation of credit providers is through the general requirements of the CCCFA. The requirement for credit providers to be registered will be strengthened when the CCCFA is amended in that un-registered credit providers will not be allowed to charge interest or fees.

The Credit Contracts and Consumer Finance Act (CCCFA)

9. The CCCFA was passed in October 2003 and came into full effect on 1 April 2005. The CCCFA was a substantial revision of the former credit legislation and for the first time provided for enforcement of credit law by a regulatory body, the Commerce Commission.

10. The CCCFA's scope includes home mortgages, personal credit cards, personal loans (from banks, credit unions, building societies, third tier lenders), consumer leases (hire purchase) for personal, domestic or household items, credit related insurance, gym contracts and all credit contracts with respect to oppressive contracts. Some of these products (i.e. hire purchase, buy-back schemes and no interest credit contracts) are not considered to be a financial service and therefore providers of only these services do not need to be registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

11. Consumer protection under the CCCFA is provided and competition promoted through requirements on providers, including provisions on: disclosure, cooling-off periods, not charging unreasonable fees, hardship and oppressive contracts. The full purposes of the CCCFA are provided in *Appendix A: The purposes of the CCCFA*.

Discussion Part 1: Current regulation regime

Regulation at the Commerce Commission

12. The Commission's legislated role is to take action when self-enforcement fails, as well as a wider role in monitoring and education. The Commerce Commission undertakes monitoring and enforcement of the CCCFA alongside enforcement of the Fair Trading Act 1986 (FTA). The functions of the Commission, in relation to the CCCFA are:

    a. to monitor trade practices in credit markets, consumer lease markets, and buy-back transaction markets

    b. take prosecutions in relation to breaches of the CCCFA

    c. take civil proceedings under the CCCFA, and

    d. make available appropriate information for the guidance of consumers, creditors, lessors, transferees, and other interested persons in relation to promoting compliance with this Act.

13. The Commission has five staff fully engaged in CCCFA work who are assisted by other investigators in the Competition Branch and legal advisors. About 80 percent of the CCCFA enforcement budget expenditure is on cases, and 20 percent on development or review of guidelines, industry codes or frameworks, government policy and law reform processes and public information and education.

14. The regulation and enforcement budget for the CCCFA is $1.295 million a year. This allocation was made in 2005 as part of the General Markets regulation budget, and has not been changed since 2005. The Commerce Commission can transfer funding within the General Markets regulation budget to meet priorities – generally as indicated by the Minister of Commerce through the annual Letter of Expectations to the Commerce Commission. As the CCCFA work has been considered a priority in recent years the annual spending has been more than the original allocation. The Commerce Commission spent $1.441 million on CCCFA enforcement over 2009/10 and $1,564 million in 2010/11.

15. Complaints about breaches of the CCCFA come in from varied sources. Most are direct complaints through the Commission's call centre (and/or raised by lawyers). Many come through budget advisors and community law centres. The Commerce Commission has pro-actively sought links with consumer advocacy groups and has established relationships for consumer representative groups to raise CCCFA issues. The Commission also collects intelligence and monitors the market in general, and scans Fair Trading Act complaints to pick up any issues that would fit better under the CCCFA. Companies that provide credit do not have any reporting requirements, but the Commerce Commission does conduct voluntary inspections.

16. Most CCCFA cases that reach the Commerce Commission are resolved as administrative resolutions: education and compliance advice, warnings and a smaller number to settlement. Litigation is less common with the Commission having 15 cases completed or current. Between 35 and 40 cases are investigated annually. Around 350 investigations have been completed since 2005. The most common alleged breaches relate to disclosure and unreasonable credit fees. Alongside CCCFA breaches, there are often Fair Trading Act breaches identified, usually s.13(i) which is a wide clause covering misleading representation (usually as to the creditor's rights or debtor's obligations). The Commission has completed enforcement action against banks as well as third tier lenders in the past. The current regulatory focus is on third tier lenders.

17. During the 2011 calendar year there were three CCCFA litigation cases resolved:

    a. Wenatex, an Australian bedding company, was found guilty of failing to observe the three-day cooling off period (to be extended to five days following amendment), and misleading consumers regarding deals for beds, costing around $5,000. Wenatex was fined and had to repay consumers.

    b. Efemcee Finance Ltd were found guilty of several breaches of the CCCFA including unreasonable fees and charging for insurance products without providing policy documents.

    c. Mortgage Rescue and Alan Ludlow were found guilty of several breaches of the CCCFA. Ludlow received a banning order, the first of its kind issued under the CCCFA, which indefinitely prevents him from setting up, operating or working in the consumer finance industry.

18. It is difficult to generalise the nature of CCCFA complainants because the scope of the legislation goes from bank mortgages to payday lender loans. While the CCCFA potentially affects all consumers, the current concern, and focus of amendment is on better protection for the most vulnerable.

19. Research[2] shows that those who use credit from third-tier lenders[3] often do so to buy necessities (for example, food and to pay utilities) and that consumers in the third-tier market are likely to have an urgent needs for finance as well as low levels of financial literacy, lack of knowledge of their rights and English as a second language. Common characteristics of families with loans in the third-tier credit market include: the household's main income from a benefit, dependent children, living in rented accommodation and being single parents[4]. The introduction of responsible lending principles into the CCCFA is intended to make credit providers take steps to check loans can be repaid without hardship.

20. The Commerce Commission has been actively seeking change to the CCCFA in areas where it sees the law is not clear or not delivering the desired policy outcomes. It considers it has not been able to enforce the CCCFA in a manner that would deliver the consumer protection anticipated by the policy underpinning the CCCFA. It has identified particular issues with the provisions on unreasonable fees. There are also misconceptions within consumer groups as to the powers provided to the Commission under the CCCFA. The Commerce Commission has been a significant contributor to the review of the CCCFA amendment and its on-going participation is expected in the development of amendments to the CCCFA.

The Financial Markets Authority (FMA)

21. The FMA was established in 2011 as a single market conduct regulator for New Zealand's financial markets. It consolidated a number of functions fragmented across the then Securities Commission, Ministry of Economic Development (including the Government Actuary) and the New Zealand Stock Exchange. The FMA's role is to contribute to the efficient functioning of, and to regulate, financial markets. It describes its role as follows[5]:

> *We oversee securities, financial reporting, and company law as they apply to financial services and securities markets.*
>
> *One of FMA's key statutory objectives is to promote and facilitate the development of fair, efficient, and transparent financial markets.*
>
> *FMA is committed to enforcement action which targets conduct that harms or presents the greatest likelihood of harm to the function of open, transparent, efficient capital markets. We will focus our enforcement resources on these matters.*

22. The FMA's work is organised around seven areas: Enforcement; Compliance Monitoring (including monitoring of financial sector providers); Primary Regulatory Operations (including licensing, retail surveillance and prospectus review); Strategic Intelligence; Stakeholder Relationships (including communications, investor advocacy and issuer guidance); Business Performance and Strategy; Legal.

23. As part of the Review of Securities Law in 2010 which led to the decision to establish the FMA, there was consideration of the FMA also being responsible for credit regulation and the CCCFA. At that time it was found that there were no compelling reasons to move the regulation from the Commerce Commission to the FMA. A summary of the relevant content of the Securities Law Review is outlined in the following table.

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[2] Colmar Brunton. *Using a Third Tier Lender: experiences of New Zealand borrowers*. Wellington: Ministry of Consumer Affairs, 2011.
[3] Third tier lenders are those lenders who are not a bank, non-bank deposit-taker or a financial adviser.
[4] Families Commission. *Escaping the Debt trap: Experiences of New Zealand Families Accessing Budgeting Services*. Wellington: Families Commission, 2009.
[5] http://www.fma.govt.nz/about-us/

Consultation question: *Should the Authority, rather than the Commerce Commission have responsibility for enforcing the CCCFA? What are the pros and cons?*[6]

Fourteen of 98 submissions to the Securities Law Review had responses to the question. Seven said they did not support transfer of the regulation of the CCCFA to the FMA (Trustees Executors Limited (TEL), Simpson Grierson, Bell Gully, Institute of Finance Professionals of NZ Ltd (INFINZ), Lazelle Forensic Accounting and Litigation Support, BNZ and the NZ Shareholders Association), four supported a move (Australian Compliance Institute, Kensington Swan, ASB and AMP). Three submissions commented without expressing a view. These included the Law Commission and NZX who both said that if there wasn't a particular problem a move shouldn't be considered.

Points made in favour of moving the regulation of the CCCFA to the FMA were:

- alignment with Australian systems and the 'twin peaks' model of financial regulation
- FMA oversight of financial providers, including credit providers, and
- same expertise required for Securities Law and CCCFA so consolidate skills base.

Points in favour of regulation of the CCCFA at the Commerce Commission were:

- existing expertise
- no problems at Commerce Commission
- lending to consumers distinct from the investment market
- a move would give the FMA dual focus and could overburden, and
- a view that the FMA should focus exclusively on securities markets.

24. Since the Review of Securities Law and the establishment of the FMA, the review of credit law was extended to be considered alongside and complementary to the other financial sector reviews. In October 2011 decisions were taken to add responsible lending provisions to the CCCFA and to have a responsible lending code. It is appropriate, in light of these changes, to re-examine whether they will lead to the CCCFA enforcement being a relatively better fit with the FMA or with the Commerce Commission.

Discussion Part 2: The future regulator of the CCCFA

25. The examination below addresses the following questions and topics:

a. Organisational mandate and skillsets: Legislative mandate? What are the skillsets required? What kind of organisational change could be required?

b. Enforcement approach: How do the Commerce Commission and FMA approach enforcement, monitoring and business education? What is their current finance sector regulatory focus? How are they placed to deliver on new responsible lending provisions in the CCCFA?

c. Alignment: How do the FMA and Commerce Commission align with Australian equivalents? Relevance of the 'twin peaks' model? Are there any benefits of closer alignment with Australia?

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[6] Competition, Trade and Investment, Ministry of Economic Development, *Review of Securities Law Discussion Document: June 2010* (p.178), accessed from http://www.med.govt.nz, accessed on 10 January 2012

d. Overlap or duplication of functions: The relationship between the Fair Trading Act and Securities Act. Collaboration between regulators.

e. Clarity for consumers: How do the FMA and Commerce Commission liaise with the public.

f. General costs and risks of change.

Organisational mandate and skillsets

26. Both the FMA and Commerce Commission have broad mandate under existing legislation. The Commerce Act gives the Commerce Commission general enforcement powers and it has specific regulatory power under the CCCFA.

27. The Financial Markets Authority Act gives the FMA broad mandate and enforcement powers in relation to financial markets and financial markets participants. This Act could be amended to add the CCCFA to its scope.

28. The skillset required for regulation and enforcement of the CCCFA requires investigative skills, the ability to prepare for court, and legal and accounting capability. Both the FMA and the Commerce Commission have these skillsets.

29. The FMA has indicated that credit law expertise would need to be transferred in, recruited or developed. The work could fit with its broader purpose of financial markets regulation and within the existing business unit Primary Regulatory Operations function, alongside monitoring and surveillance of financial advisers undertaken by this team. The FMA has been pro-active in establishing relationships with the finance sector – where many companies provide both investment and credit services.

30. As the current regulator, the Commerce Commission has credit law and industry expertise already. It is well networked with consumer agencies, budget advisors and lawyers who all refer cases. The work is undertaken within the Competition Branch, alongside enforcement of the Fair Trading Act. The Commerce Commission anticipates some training and up-skilling requirements for staff and the Board around the new CCCFA responsible lending provisions.

31. Either agency could be the regulator for credit based on skills and legislative mandate. In case of transfer, the FMA would need to develop, transfer in or recruit credit law expertise. The work either fits or could fit within existing team structures. There are advantages in the status quo placement with the regulation of the Fair Trading Act. As outlined already, all Fair Trading Act enquiries are scanned for potential CCCFA issues, and there are often breaches of both legislation together. The enforcement approach is also similar (see below).

Enforcement approach

32. The FMA and Commerce Commission use similar regulatory and enforcement tools – including education, collecting market intelligence and taking representative cases, and providing guidance notes to businesses.

33. A point of difference is that the CCCFA is self-enforcing which means it depends on parties and the Commerce Commission taking action and companies are not routinely monitored for compliance (in the manner that occurs for licensed entities or those with mandatory reporting). The enforcement regime for credit has much in common with the enforcement regime of the Fair Trading Act because it is about the provision of information for consumers to make informed consumer choices and redress through dispute resolution, the courts, or the enforcement agency taking action. The CCCFA also covers some types of transaction that are considered non-financial products[7].

34. Companies and individuals who are 'financial advisers' under the Financial Advisers Act 2008, have licensing requirements which are set and regulated by the FMA (as part of their core business). This approach to financial advisers fits well with consumer protection best practice, that licensing is relevant 'when it is inherently difficult for a consumer to know if a firm has the expertise, skills, or knowledge to deliver a satisfactory good or service'[8]. The FMA also monitors and enforces company behaviour under securities laws, for example, review of annual reports and their disclosure statements.

35. In the status quo the CCCFA enforcement approach has clear alignment with consumer law in terms of being self-regulating like the Fair Trading Act. A question to address is whether the new responsible lending principles being added to the CCCFA and the Responsible Lending Code will make the provision of credit similar to 'financial advice' (which does require oversight by the FMA). Responsible lending is about making sure credit can reasonably be expected to be repaid without causing undue hardship. The decision to take up credit is still a personal decision in the same way that people choose how much to spend on goods and services. The responsible lending provisions will add content to the CCCFA, but should not change the overall enforcement requirements.

36. In Cabinet discussion[9] of the amendments to the CCCFA it was considered that the establishment of a licensing regime for credit providers was too costly, but that some of the amendments to the CCCFA will have some of the benefits of licensing (for example, non-compliance with the principles of responsible lending can lead to companies being de-registered, and non-registered companies will not be able to charge fees or penalties).

37. Expectations for the FMA have been set in the securities markets, and that is where they see themselves working at present, and where many of the submissions on the Securities Law Review wished to see their focus remain. Credit law would be a new focus for the FMA, but could fit within their broader purpose of financial markets regulation. The Commerce Commission is currently directed to focus on third tier lending, and this would be likely to continue as the focus for credit for the near future.

Closer alignment with Australia

38. The option to have the Reserve Bank and the FMA as the only financial sector regulators has been suggested as providing closer alignment with institutional arrangements in Australia (and with the 'twin peaks' model) approach. 'Twin peaks' means a two agency model with the separation of regulation of:

- Prudential institutions (deposit takers, insurance companies, superannuation funds)

[7] Individuals and companies who provide hire purchase, buy-back schemes and no interest credit contracts (also covered by the CCCFA) are not considered to be providing a 'financial service' and do not need to be registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008.
[8] OECD, Consumer Policy Toolkit, 2010, p. 96
[9] For background see Appendices, (see background in *Appendix E: Regulatory Impact Statement, Responsible Lending Requirements for Consumer Credit Providers, October 2011.)*

- Financial market conduct and the quality of their disclosure about financial products (companies listed on the stock exchange, companies offering financial advice).

39. An alternative to a 'twin peaks' system would be to have only one financial markets regulator for prudential and financial regulation. The following table summarises the 'twin peaks' approach taken in Australia, with the New Zealand equivalent alongside.

Activity/Organisations	Australia	New Zealand
Prudential Institutions	Australian Prudential Regulation Authority (APRA)	Reserve Bank of New Zealand
Financial services market behaviour	Australian Securities and Investments Commission (ASIC)	Financial Markets Authority

40. ASIC has responsibility for regulatory oversight of investments and credit markets. It also is responsible for financial service providers licensing (including credit providers) and has a key role in financial literacy. ASIC only became responsible for credit in 2010/11, following a transfer of responsibilities from the Australian States and Territories. APRA is the prudential regulator and the Reserve Bank of Australia is responsible for currency and stabilisation.

41. If the option to place credit regulation with the FMA is progressed, it would make the FMA more closely match ASIC although the FMA does not have lead responsibility for financial literacy - it works alongside the Office of Financial Literacy and Retirement in educating financial market participants and providing information to consumers. The Commerce Commission also engages in educating credit market participants and providing information to consumers. The FMA is also not responsible for credit provider licensing given there is no licensing requirement.

42. As it stands, there are no particular problems associated with a lack of complete alignment with Australia on the regulation of credit - for example, no double reporting by companies active in both countries as the CCCFA has no reporting requirements. Similarly, there is no reason for financial companies to report regularly to the Commerce Commission. While alignment with Australia is generally desirable, it is not a stand-alone reason for change; it should also address a problem.

Overlap or duplication of functions

43. In the status quo both the Fair Trading Act and Securities Act have provisions on 'misleading or deceptive conduct', with the Fair Trading Act providing that an action cannot be taken against a person who would be liable for that conduct under the Securities Act or the Securities Markets Act.

44. Regardless of which agency has responsibility for the CCCFA it will be desirable to prevent duplication and this could be achieved by appropriate amendments in the Financial Markets Conduct Bill to delineate responsibilities. It is also important that the FMA and Commerce Commission have a good working relationship. There has already been joint enforcement activity in South Auckland to ensure financial service providers (particularly credit providers) were aware of, and complying with, the new laws that came into effect in 2010 and 2011.

45. Prior to the establishment of the FMA there was a Financial Regulators Coordination group with a Memorandum of Understanding on co-operation and information-sharing. The Commerce Commission was a member of this group. A new Council of Financial Regulators has been established, and the Commerce Commission is no longer a member. It would be desirable for the Commerce Commission and FMA to re-enter a Memorandum of Understanding covering their joint areas of interest, sharing of information and working together.

Clarity for consumers

46. As described, the Commerce Commission operates a call centre for consumers and business to register suggested breaches of the CCCFA and has established connections with consumer groups.

47. Change to the FMA as one agency responsible for all non-prudential financial sector enforcement could provide for clarity of messaging to consumers in the long run, but there would need to be public and business education regarding credit, and it could take time for the change to take effect in terms of public contact.

48. The FMA is a new entity but clearly responsible for oversight of the investment side of financial markets. Many organisations who accept deposits and investments also provide credit. Many only participate in financial markets with respect to investments, for example, companies undertaking share offers.

Credit (Repossession) Act

49. The Credit (Repossession) Act 1997 is not monitored or enforced by any government agency. The Law Commission is reviewing this Act as part of the wider credit review.

50. One proposal under consideration is that the agency responsible for regulating the CCCFA will also monitor the Credit (Repossession) Act where repossession is associated with a consumer credit contract.

Costs of change

51. The costs of changing regulators would be transitional and have been identified as:

   a. Change creates time periods of uncertainty for staff (from the concept through to legislation being enacted and implemented). During times of uncertainty and during transfer, expertise and momentum of enforcement can be lost. The Commerce Commission has specialist staff and networks, which could be put at risk.

   b. If specialist and experienced staff were lost during the change process, there could be an additional loss of momentum to amendment of the CCCFA given the input of the agency and key staff into amendments.

   c. Change creates opportunities for gaming by parties under investigation[10].

   d. One-off administrative costs have not been estimated yet, but similar scale one-off moves have been estimated at between $300,000 and $400,000[11].

   e. One-off costs of public and business education.

   f. On-going costs in the first few years for the FMA of recruitment and up-skilling (in the case of transfer).

   g. Possible organisational challenge for the FMA given relative newness of agency, and new focus that would be required (currently concentrated on investment side of financial market, although could potentially cover all of financial market).

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[10] The FMA has noted that gaming by parties under investigation has not been in evidence since its establishment from predecessor agencies, and there has been no stakeholder feedback to that effect. It comments that some acceleration has been seen under a more efficient operating structure with clearer accountabilities and that FMA has an established history of picking up new legislative mandates and no service interruption has been seen with either FMA's new or inherited regulatory responsibilities.

[11] [CAB Min (11) 28/5] Cabinet papers about moving Charities Commission into DIA and several other small restructures. SSC website, Cabinet paper released in 2011.

52. Regardless of regulator, there is likely to be pressure for regulation resources, over and above the allocation of $1,295 million provided in the annual allocation to the General Markets budget. At present, the Commerce Commission can manage priority by allocation of the wider General Markets budget, but there are trade-offs with the regulation of other areas. If changed to the FMA a different funding model would need to be considered as much of the FMA's work is funded through levies and fees.

Conclusion

53. Based on organisational capability and alignment with other regulatory roles either the Commerce Commission or the FMA could be the regulator responsible for credit laws.

54. Given that either party could be the regulator, and the existence of several beneficial alignments in the status quo, there is no particularly strong case for change and officials do not consider change to be necessary at this time. If specific problems arise in future, related to the regulation of credit, change could be reconsidered.

55. It would be desirable for the FMA and Commerce Commission to develop a Memorandum of Understanding to facilitate co-operation on credit matters.

Consultation

56. The Commerce Commission and FMA have, been consulted in the development of this advice and both have noted neutrality on outcomes. The Ministry of Economic Development and Treasury have also been consulted.

Appendix A: The Purposes of the CCCFA

The purposes of the CCCFA are:

- *to protect the interests of consumers in connection with credit contracts, consumer leases, and buy-back transactions of land; and*
- *to provide for the disclosure of adequate information to consumers under consumer credit contracts and consumer leases—*
    i. *(i) to enable consumers to distinguish between competing credit arrangements or competing lease arrangements; and*
    ii. *(ii) to enable consumers to become informed of the terms of consumer credit contracts or consumer leases before they become irrevocably committed to them; and*
    iii. *(iii) to enable consumers to monitor the performance of consumer credit contracts or consumer leases; and*
- *to provide rules about interest charges, fees, and payments in relation to consumer credit contracts; and*
- *to enable consumers to seek reasonable changes to consumer credit contracts on the grounds of unforeseen hardship; and*
- *to provide for the disclosure of adequate information to consumers under buy-back transactions of land and for the provision of independent legal advice to those consumers—*
    i. *(i) to inform consumers of the terms, the effects, and the implications of those transactions before they become irrevocably committed to them; and*
    ii. *(ii) to enable consumers to monitor the performance of those transactions; and*
- *to provide rules about fees in relation to buy-back transactions of land; and*
- *to prevent—*
    i. *(i) oppressive credit contracts, consumer leases, and buy-back transactions of land; and*
    ii. *(ii) oppressive conduct by creditors under credit contracts, lessors under consumer leases, and transferees under buy-back transactions of land.*

Regulator for monitoring and enforcement of the Credit Contract and Consumer Finance Act

To	Hon Simon Bridges	**Priority**	Medium
Date	8 June 2012	**Deadline**	12 June 2012

Purpose

1 In March 2012 the Minister of Consumer Affairs, then Hon Chris Tremain, and the Minister of Commerce, Hon Craig Foss agreed that the Ministry of Consumer Affairs (MCA) prepare content and recommendations for Cabinet consideration that the regulation of the Credit Contracts and Consumer Finance Act 2003 (CCCFA) remain with the Commerce Commission.

2 This note is to provide you with background on the decision.

Background

3 The Commerce Commission is currently the regulator responsible for monitoring and enforcement of the CCCFA. There is no regulator responsible for the Credit (Repossession) Act.

4 As part of decisions taken in October 2011 to amend the CCCFA to provide for responsible lending, Cabinet:

a. agreed in principle to the further investigation of the Financial Markets Authority (FMA) being the regulator responsible for monitoring and enforcement of credit under the CCCFA and credit repossession practices under the Credit (Repossession) Act 1997, and

b. directed MCA to consult the Treasury, the Ministry of Economic Development, the Commerce Commission, and the FMA on the proposal that the FMA have regulatory responsibility for the CCCFA and the Credit (Repossession) Act 1997 [CAB Min (11) 40/5].

5 Following analysis prepared in line with the Cabinet direction, the attached paper *Consideration of the appropriate regulator for monitoring and enforcement of the Credit Contracts and Consumer Finance Act 2003*, 16 March 2012, was forwarded to the Minister of Commerce and Minister of Consumer Affairs.

Key points: Analysis of the CCCFA regulator

6 The analysis of the CCCFA regulator was based on six main areas comparing the Commerce Commission (*currently* responsible for the monitoring and enforcement of compliance with the CCCFA alongside the Fair Trading Act) and the FMA, who are responsible for regulating securities exchanges, financial advisers and brokers, and trustees. The main points in the discussion and conclusion were:

i. *Organisational mandate and skillsets*: Either agency could regulate the CCCFA based on organisational mandate and general skillsets. Specific credit law expertise would need to be transferred, recruited, or developed at the FMA. As the current regulator, the Commerce Commission has credit law and industry expertise already. It is well networked with consumer agencies, budget advisors and lawyers who all refer cases.

ii. *Enforcement approach*: The FMA and Commerce Commission use similar regulatory and enforcement tools – including education, collecting market intelligence and taking representative cases, and providing guidance notes to businesses. The enforcement regime for credit has much in common with the enforcement regime of the Fair Trading Act. It provides information for consumers to make informed consumer choices and redress through dispute resolution, the courts, or the enforcement agency taking action. The CCCFA also covers some types of transaction that are considered non-financial products[1].

iii. *Alignment with Australia:* No particular problems were identified with a lack of complete alignment with Australia on the regulation of credit[2], for example, there is no double reporting by companies active in both countries as the CCCFA has no reporting requirements.

iv. *Overlap or duplication of functions:* In the status quo both the Fair Trading Act and Securities Act have provisions on 'misleading or deceptive conduct', with the Fair Trading Act providing that an action cannot be taken against a person who would be liable for that conduct under the Securities Act or the Securities Markets Act. Potential for uncertainty about the regulator is now being addressed as part of the Financial Markets Conduct Bill.

v. *Clarity for consumers:* The Commerce Commission operates a call centre for consumers and businesses to register potential breaches of the CCCFA and has established connections with consumer groups. Expectations for the FMA have been set in the securities markets, and that is where they see themselves working at present, and where many of the submissions on the Securities Law Review 2010 (which led to the establishment of the FMA) wished to see their focus remain.

vi. *Costs of change:* The costs of changing regulators were noted as being transitional; and based on uncertainty, loss of staff and specialist skills, opportunities for gaming (by parties under investigation), costs of public and business education and some new and on-going costs for the FMA, and a new focus that could be challenging during its establishment stage.

7 Given that either party could be the regulator, and the existence of several beneficial alignments in the status quo, there was no particularly strong case for change. Officials advised that they did not consider change to be necessary, and recommended accordingly to retain regulation of the CCCFA at the Commerce Commission. This recommendation was agreed by the then Minister of Consumer Affairs and the Minister of Commerce.

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[1] Individuals and companies who provide hire purchase, buy-back schemes and no interest credit contracts (also covered by the CCCFA) are not considered to be providing a 'financial service' and do not need to be registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

[2] In Australia credit is regulated alongside financial markets regulation at the Australian Securities and Investments Commission (ASIC).

Next Steps

8 A final report back to Cabinet on all outstanding issues to be included in the Credit Contracts and Consumer Finance Amendment Bill, including the regulator question, is due by 31 July 2012. Content is being prepared to reflect the decision made by Ministers in March; that the Commerce Commission remains the regulator responsible for the CCCFA.

9 A separate recommendation will also be made to incorporate into the CCCFA those matters currently regulated by the Credit (Repossession) Act 1997. This will be addressed in the response to the Law Commission's review of the Credit (Repossession) Act 1997. The Commerce Commission would then also be the regulator responsible for enforcement matters related to consumer credit repossession.

Recommendation

10 **Note** that MCA is preparing a proposal, for Cabinet consideration, that the monitoring and regulation of the Credit Contracts and Consumer Finance Act 2003 remain with the Commerce Commission.

Yes/No

Evelyn Cole
Manager, Consumer Policy

Hon Simon Bridges
Minister of Consumer Affairs

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Feedback on CCCFA Review Discussion Paper

Date:	27 April 2018	**Priority:**	Medium
Security classification:	**In Confidence**	**Tracking number:**	2668 17-18

Action sought		
	Action sought	**Deadline**
Hon Kris Faafoi Minister of Commerce and Consumer Affairs	**Provide** feedback on the attached draft discussion paper. **Note** we have a meeting booked on 7 May to receive and discuss your feedback.	7 May 2018

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Jason Le Vaillant	Acting Manager, Competition and Consumer Policy	OIA s.9(2)(a)		✓
William Townsend	Graduate Policy Advisor	OIA s.9(2)(a)		

The following departments/agencies have been consulted:
Departments/agencies as listed in the stakeholders list in **Annex 1**.

Minister's office to complete:

☐ Approved
☐ Noted
☐ Seen
☐ See Minister's Notes

☐ Declined
☐ Needs change
☐ Overtaken by Events
☐ Withdrawn

Comments:

BRIEFING

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Feedback on CCCFA Review Discussion Paper

Date:	27 April 2018	**Priority:**	Medium
Security classification:		**Tracking number:**	2668 17-18

Purpose

To seek your feedback on the draft discussion paper for the Credit Contracts and Consumer Finance Act 2003 (CCCFA) review.

Executive summary

1. On 4 December 2017, you commissioned the Ministry of Business, Innovation and Employment to undertake a targeted review of consumer credit regulation in New Zealand [Briefing 1151 17-18]. The review will summarise the impact of the 2015 responsible lending reforms to the CCCFA, and assess further policy options which may be required to promote responsible lending.

2. Desk-based research and initial consultation with numerous stakeholders have been undertaken. Insights from both have been incorporated into a draft discussion paper.

3. We seek your feedback on the draft discussion paper (**Annex 4**). An updated version will then be provided to you, along with a Cabinet Paper seeking approval to release the paper for public consultation.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a **Provide** feedback on the attached draft discussion paper.

Provided

b **Note** that we have booked a meeting with you on 7 May to receive and discuss your feedback.

Noted

s.9(2)(a)

Jason Le Vaillant
Acting Manager, Competition and Consumer Policy

27 April 2018

Hon Kris Faafoi
Minister of Commerce and Consumer Affairs

..... / ...... / ......

Background and context regarding the CCCFA review

4. On 4 December 2017, you commissioned the Ministry of Business, Innovation and Employment (MBIE) to undertake a targeted review of consumer credit regulation in New Zealand [Briefing 1151 17-18]. This work includes the development of a joint issues and options discussion paper for public consultation.

5. As discussed at our meeting on 4 April, we engaged with over 30 stakeholders and undertook desk-based research to identify the key issues and options for inclusion in the discussion paper.

6. **Annex 1** sets out the stakeholders we engaged with during preparation of the discussion paper.

7. **Annex 2** illustrates the broader regulatory context of the consumer credit industry, including the numerous requirements which apply to different types of lenders.

Overview of the draft discussion paper

8. The discussion paper notes relevant research and data, the findings of MBIE's desk-based lender survey, as well as feedback from stakeholders on the impacts of the 2015 reforms.

9. The primary focus of the paper is on the problems which remain after the 2015 reforms, and potential options to address them. The paper also briefly summarises the positive themes about the reforms which have emerged to date, and asks for feedback on these.

10. We previously met with you on 16 February 2018 to discuss emerging issues from our consultation and work on the CCCFA review and outline the range of interest rate cap options that you requested.

11. We also met with you on 5 April 2018 to provide an update on the CCCFA review and progress on the discussion paper. At that meeting, we outlined the full range of issues and options contained in the discussion paper. **Annex 3** summarises the issues and options in the paper.

12. Internationally, regulatory responses to irresponsible lending and problems related to high-cost loans have been varied. Stakeholders tend to be positional, and the academic research on high-cost lending is polarised and often contradictory.

13. For these reasons, the paper is framed openly, canvassing a range of options and seeking feedback on their costs and benefits. It does not present preferred options.

Interdepartmental Consultation

14. Informal comments on a previous draft of the paper were received from the Treasury, the Commerce Commission and the Financial Markets Authority (FMA). Their early feedback has been incorporated into the current version attached for your feedback.

15. Additionally, formal interdepartmental feedback is currently being sought on the discussion paper from officials at the Ministry of Social Development, the Ministry for Pacific Peoples, Te Puni Kōkiri the Commerce Commission, the Treasury and the Department of the Prime Minister and Cabinet. Internally within MBIE, feedback is being sought from the Government Centre for Dispute Resolution.

Likely stakeholder responses to discussion paper

16. Consumer credit-related harm is a well-publicised issue and we expect a large number of stakeholders (including advocacy groups and lenders) to submit on the discussion paper.

17. The following options are likely to be controversial and generate debate and submissions, as well as media attention, particularly in industry publications:

- Interest rate cap options: Most short-term high cost lenders will likely be opposed to the options, while advocacy and social service groups are likely to support them. The Financial Services Federation and New Zealand Banking Association have said they do not have concerns about interest rate caps. Some customers of high cost lenders may have concerns about Cap Option C (abolishing high-cost lending).

- Increasing registration requirements for creditors: Stronger registration requirements are likely to be supported by the National Building Financial Capability Charitable Trust and potentially other consumer groups. Some lenders have indicated a preference for licensing over interest rate caps. There are likely to be industry concerns that stronger registration requirements will impose compliance costs on all lenders, despite poor practice by just a few. These risks are clearly identified in the costs and benefits segments of the discussion paper.

  - Potential change of regulator: This may cause concerns regarding continuity and cost of implementation from some stakeholders. We expect that while lenders will be opposed to the option of a licensing regime, some lenders will be supportive of the Financial Markets Authority being responsible for any licensing (and also CCCFA enforcement). Note that we have been engaging with the Commerce Commission and the Financial Markets Authority on the draft discussion paper to ensure that they are aware of the options canvassed in the paper and have had an opportunity to comment on the framing of the relevant discussion.

- Increased industry levy on lenders to fund monitoring and enforcement: You have indicated that you will give further consideration about whether to include this option before public release. Industry submitters are likely to express concern about increasing the levy while regulators and consumer advocates would likely welcome the option as a method for boosting monitoring and enforcement resources.

Debt collection agencies

18. We do not yet know how the debt collection options will be received by debt collection agencies as we have not had the opportunity, in the time available, to engage directly with major collection agencies. For this reason, the debt collection options in the paper are framed more tentatively.

19. A number of the larger agencies are represented by the Financial Services Federation (FSF). The FSF Executive Director, Lyn McMorran, is aware of our general concerns in this area, and that the paper will contain proposals relating to debt collection practices.

20. Once we have received your initial feedback on the draft discussion paper we will meet with major debt collection agencies. The purpose of the meetings will be to advise of the general content of the paper, understand their key areas of interest, and encourage participation in the review.

Ensuring participation from individuals, especially consumers

Summary for consumers and small business

21. As the paper is relatively long, we will publish a two page summary alongside the full discussion paper.

22. The summary is designed specifically to help individuals (consumers, but also smaller lending and debt collection businesses) engage with and submit on the issues. The two page summary will include links and a QR code to take readers to a feedback template.

23. An indicative draft of the two page summary is attached as **Annex 3**. We will work with the designers to ensure the text in the final version is easier to read.

Consultation event for consumers

24. From past experience, it is unlikely that large numbers of consumers will submit on the paper, despite the summary and communications activities around the review.

25. For this reason, while the discussion paper is open for submissions MBIE will hold a consultation event with representatives of vulnerable communities to maximise the opportunity for feedback from these groups. This event will be supported by the Pacific Policy team at MBIE.

Potential communications and risks

26. As discussed above, a number of the options may be criticised as too heavy-handed or costly for businesses.

27. We suggest that if these criticisms are raised, you could respond along the lines of:

- The discussion paper includes a range of potential solutions suggested by stakeholders, and asks for feedback on their pros and cons.
- All feedback will be carefully considered before I decide which (if any) changes to recommend to my Cabinet colleagues.
- I encourage everyone to submit on the costs and benefits different options would have for their business.

28. Given most consumers (and some lenders) are unaware of their existing rights and responsibilities, another risk is that people will not understand the hypothetical nature of the proposals. MBIE will mitigate this with clear messaging at publication, along the lines of:

- "If consumers or agencies/stakeholders have any concerns they can:

  a) seek advice and information from resources such as:

    - a local Citizens Advice Bureau or Community Law Centre
    - Consumer Protection: the Consumer Protection website has information on what you can do, or you can call the free Consumer Protection helpline for assistance: 0508 426 678 (0508 4 CONSUMER).
    - the Commerce Commission: the Commerce Commission website also has information about the responsibilities of those providing goods and services on credit (http://comcom.govt.nz/consumer-credit/what-borrowers-need-to-know/) as well as obligations under the Fair Trading Act 1986 (http://comcom.govt.nz/fair-trading/know-your-rights/).

  b) make a complaint to the lender or trader. If it is not resolved, a dispute can be lodged with the dispute resolution scheme which the lender or trader belongs to. The scheme should be disclosed with the credit contract, or can be obtained from the Financial Service Providers Register at https://fsp-register.companiesoffice.govt.nz/.

  c) complain to the Commerce Commission. The Commerce Commission is responsible for investigating breaches of the Fair Trading Act 1986 and the Credit Contracts and Consumer Finance Act 2003. You can make a complaint by calling 0800 943 600, online at http://www.comcom.govt.nz/the-commission/making-a-complaint/online-complaint-form/ or via post at PO Box 2351, Wellington 6140."

Next steps

29. We would appreciate your feedback on the attached discussion paper in **Annex 4** at our meeting scheduled for Monday 7 May 2018.

30. While you are reviewing the draft discussion paper, we will work on ways to reduce its length to make it more accessible.

31. An indicative timeline is:

Projected Phase	**Estimated Date**
Your feedback on discussion paper	7 May 2018
Draft Cabinet paper to you seeking approval for public release of discussion paper	11 May 2018
DEV approval for release of discussion paper for public consultation	13 June 2018
Cabinet confirmation of release of discussion paper for public consultation	18 June 2018
Public consultation period (including at least one consultation event with representatives of vulnerable groups)	Late June 2018–August 2018
Cabinet approval of final policy recommendations	October 2018

Annexes

Annex 1: List of stakeholders consulted

Annex 2: Broader regulatory environment diagram

Annex 3: Two page summary of the discussion paper

Annex 4: Draft discussion paper

Annex 1: List of stakeholders consulted [

Government agencies	Crown agencies
1. Ministry for Social Development 2. Ministry for Pacific Peoples 3. Te Puni Kōkiri, Whānau Ora Team 4. Reserve Bank of New Zealand 5. The Treasury	6. Commerce Commission 7. Financial Markets Authority 8. Commission for Financial Capability
Dispute Resolution Services	**Consumer Advocates**
9. Financial Services Complaints Ltd 10. Financial Disputes Resolution Service 11. Insurance and Financial Services Ombudsman 12. Banking Ombudsman	13. National Building Financial Capability Charitable Trust 14. Whānau Manaaki Kindergartens (Whānau Ora Navigators) 15. Citizens Advice Bureau 16. Community Law Centres (Auckland and Waikato) 17. Consumer NZ
Lenders	**Other key stakeholders**
18. Moolah 19. Cash Converters 20. Home Direct 21. Save My Bacon 22. Ngā Tangata Microfinance 23. Good Shepard 24. ANZ 25. BNZ	26. Specialist Collection and Consultants Ltd (Debt Collectors) 27. Financial Services Federation 28. New Zealand Bankers Association 29. KiwiDebt 30. Russell McVeagh

Annex 2: Broader regulatory environment of consumer credit industry

Lenders

Registered Banks

Reserve Bank Act 1989

This holds the Reserve Bank responsible for monetary policy, and promoting a sound and efficient financial system. It protects consumers with the Reserve Bank's prudential supervision regime of registered banks.

Credit Unions and Building Societies

Non-bank Deposit Takers (NBDT) Act 2013

This Act protects consumers by regulating NDBTs in similar ways to registered banks by way of licensing, risk management processes and monitoring to avoid financial harm to the economy and consumers in the case of a NBDT collapsing.

Other lenders:

- Vehicle finance
- Non-bank credit cards
- Finance company diversified lenders
- High cost (short term) lenders
- Hire purchase

Credit Contracts and Consumer Finance Act 2003

The CCCFA helps to protect consumers when they're borrowing money. It also helps to ensure they can make informed choices, know what they're agreeing to and can keep track of their debts. It is enforced by the Commerce Commission.

Fair Trading Act 1986

The FTA aims to protect consumers from misleading and deceptive conduct and unfair trade practices. It is also enforced by the Commerce Commission.

Financial Services Provider Act 2008

The FSP Act mandates an electronic register of Financial Service Providers and requires them to register with a dispute resolution scheme. The register is maintained by the Companies Office and the FMA provides oversight of some service providers.

Anti-Money Laundering and Countering Financing of Terrorism Act 2009

The Act imposes due-diligence, record keeping, reporting and other compliance obligations on financial institutions.

Privacy Act 1993

The Act provides compliance obligations in relation to the collection, use and disposal of personal information.

Personal Properties Securities Act 1999

The PPSA protects consumers by regulating the enforceability and application of security agreements within consumer credit contracts.

Crimes Act and Summary Offences Act

The Acts provide recourse to the New Zealand Police for harassment and other offences against people and property.

Annex 3: Two page summary of discussion paper

How could lending laws be better?

Review of the Credit Contracts and Consumer Finance Act 2003

Give us your views on some of the big issues facing borrowers and lenders.

We want to protect consumers from irresponsible lending and debt collecting practices, and make sure the lending market works well.

Tell us what you think, and help make the law better for all New Zealanders.

Submissions are due by [date].

We've heard that Kiwis are facing problems when borrowing and lending...

Some credit is very expensive. Some lenders are charging annual interest rates of up to 800% for a cash loan, where it's more common to charge 30% interest.

For more info, go to page...

Too many people are getting loans they can't afford to pay back, or don't understand. This creates more debt and other serious problems for borrowers and their families.

For more info, go to page...

Some creditors are charging fees which don't seem reasonable. However, its not always clear what a reasonable amount would be.

For more info, go to page...

We've heard complaints about bad behaviour during debt collection. There seem to be many false claims about the amount of money owed, some very high fees, and unrealistic demands for payment.

For more info, go to page...

Some new products aren't covered. This means that consumers don't have the same protections when using these new types of credit, and lenders don't have a level playing field.

For more info, go to page...

Lenders are also telling us **that the rules about online disclosure are out of date.**

For more info, go to page...

Mobile truck shops continue to create unaffordable debt.

For more info on issues related to mobile truck shops, go to pages 37 and 83

- **Have you experienced these problems?**
- **Are these issues serious enough to need a change in the law? Tell us what you think.**

Go to xxx
or contact us directly at xxx.

provisional

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Here are some ideas for how to fix these problems (including some related to mobile truck shops). Tell us what you think.

Should the law be more specific around how lenders should act? The law currently lets lenders figure out what steps to take to do the right thing. We're investigating whether it should tell lenders exactly what they can and can't do.

For more info, go to page...

Should lenders need a licence to operate? We're looking at different ways to decide who is allowed to lend money and charge interest.

For more info, go to page...

Do we need to increase penalties for lenders who break the law?

For more info, go to page...

Should we cap the cost of some loans? And if so, what is the best way to limit interest and fee costs?

For more info, go to page...

How can we make sure that lenders' fees are reasonable? We're proposing tighter rules around how fees are calculated and advertised.

For more info, go to page...

Should there be more rules about debt collection? We're looking at making debt collectors give more information to debtors. Other ideas include new rules about repayments and contact with debtors.

For more info, go to page...

How can we include new types of loans in the law? There are different ways to change what products are covered.

For more info, go to page...

For online loans, can we make it easier for lenders to communicate? We want to make sure lenders can use the latest technology, while still making sure consumers get the information they need about the loan.

For more info, go to page...

What are the pros and cons of these ideas?

Are there other solutions that would work better? Tell us what you think.

positional

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HĪKINA WHAKATUTUKI

Annex 4: Draft discussion paper

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Consumer credit review, final policy recommendations briefing B

Date:	5 March 2024	**Priority:**	Medium
Security classification:		**Tracking number:**	0470 18-19

Action sought		
	Action sought	**Deadline**
Hon Kris Faafoi Minister of Commerce and Consumer Affairs	**Note** the contents of this briefing. **Decide** which of the policy recommendations you agree with and would like to propose in your Cabinet paper. **Meet** with officials to discuss this briefing.	16 August 2018

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Jennie Kerr	Manager, Competition and Consumer Policy	OIAs.9(2)(a)		
Monika Ciolek	Principal Policy Advisor	OIAs.9(2)(a)		✓

The following departments/agencies have been consulted:
N/A

Minister's office to complete:

- ☐ Approved
- ☐ Noted
- ☐ Seen
- ☐ See Minister's Notes
- ☐ Declined
- ☐ Needs change
- ☐ Overtaken by Events
- ☐ Withdrawn

Comments:

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Consumer credit review, final policy recommendations briefing B

Date:	5 March 2024	**Priority:**	Medium
Security classification:		**Tracking number:**	0470 18-19

Purpose

1. To seek your in-principle decisions on a second set of policy recommendations relating to the Credit Contracts and Consumer Finance Act (**CCCFA**), and resulting from the Review of Consumer Credit Regulation and the Financial Inclusion Industry Forum (**FIIF**).

2. When we know which proposals you would like to proceed with, MBIE will work with the Commerce Commission and others to estimate the cost of these (along with the proposals from brief A) for inclusion in a Cabinet paper.

Executive summary

3. This briefing contains a second set of policy recommendations stemming from the review. These have been developed to align with your policy decisions on the first brief.

4. Submitters confirmed that there has been ongoing non-compliance with the requirements of the CCCFA, resulting in consumer harm. While the rate of non-compliance is hard to quantify, there were serious and widespread concerns expressed by a broad range of submitters. To address non-compliance, we recommend implementing a form of occupational regulation for senior personnel in consumer credit providers, and adding more prescriptive requirements in key areas. Prescriptive requirements are easier for consumers to understand, and easier to investigate and enforce. Specifically, we recommend:

   - a fit and proper person test for directors and senior managers of consumer credit providers, as a prerequisite to registration as a financial services provider. This will complement banning orders in preventing 'phoenix lenders'.

   - civil pecuniary penalties, statutory damages and expanded injunction powers for breaches of the CCCFA, as these are not currently available for breaches of responsible lending requirements

   - duties for directors and senior managers of creditors to take reasonable steps to ensure that the creditor complies with its CCCFA obligations. This will provide stronger incentives for key personnel to ensure there are systems in place to enable compliance

   - a regulation-making power to prescribe requirements for affordability and suitability assessments, and for advertising (including a requirement that a lender provides disclosure documents in the same languages as their advertisements).

5. We also recommend removing the provision of the CCCFA that states that a lender may rely on information provided by the borrower or guarantor unless the lender has reasonable grounds to believe the information is not reliable. Lenders should obtain objective verification of key borrower information as part of making 'reasonable enquiries'.

6. Submitters also confirmed that there are widespread concerns about debt collection practices. We recommend amending the CCCFA to increase disclosure requirements at the commencement of debt collection activity. We also recommend you direct officials to work with the Code Advisory Group and collection agencies to develop additional guidance regarding responsible debt collection, and working with consumer advocates. These changes will only apply to debts subject to the CCCFA, and changes to the Responsible Lending Code do not create prescriptive legislative requirements. However in our view a policy approach which emphasises engagement and collaboration is the most appropriate first step to addressing conduct in the sector.

7. Along with the changes agreed in Brief A, this package of reforms will require additional funding for the Commerce Commission, initially for implementation and then a smaller amount on an ongoing basis. We envisage this could be met via a mix of additional Crown funding, cost-recovery through fees, and an increase in the existing levy paid by consumer credit providers. We recommend a change to the levy power in the Financial Markets Authority Act to create the potential for levies to be directed to the Commerce Commission's work in this area.

8. In relation to emerging products and questions around the scope of the CCCFA, we recommend including a new regulation making power which enables products to be declared within or outside the scope of the Act, similar to the designation power of the Financial Markets Authority. This will more flexibly address innovation in credit markets and could be used to address harms from new unregulated products in future, where there is a case to do so.

9. In relation to ideas raised after the FIIF, we advise that no statutory amendments are required as the CCCFA already has broad exemption making powers which could be used to remove regulatory barriers (once identified).

10. A map of the package of recommended reforms stemming from the Review is in Annex 1.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a **Note** that you have requested MBIE to develop a Cabinet paper making policy proposals stemming from the Review of Consumer Credit

Noted

b **Agree** to propose the following statutory amendments in that Cabinet paper:

1. Introduce a fit and proper person test as a prerequisite to lender registration, to be administered by the Commerce Commission.

Agree / Disagree

2. Introduce civil pecuniary penalties, statutory damages and expanded injunction powers for breaches of the CCCFA.

Agree / Disagree

3. Introduce duties for directors and senior managers of creditors to take reasonable steps to ensure that the creditor complies with its CCCFA obligations.

Agree / Disagree

4. Create a regulation-making power to prescribe how lenders or classes of lenders must satisfy the requirement to undertake affordability and suitability assessments under section 9C(3)(a) of the CCCFA.

Agree / Disagree

5. Remove the provision in section 9C(7) of the CCCFA that states a lender may rely on information provided by the borrower or guarantor unless the lender has reasonable grounds to believe the information is not reliable.

Agree / Disagree

6. Create a regulation-making power to prescribe how lenders or classes of lenders must satisfy the requirement to advertise responsibly in section 9C3(b)(i) of the CCCFA.

Agree / Disagree

7. Require that, where a lender advertises in a language other than English, the lender must provide disclosure in that language.

Agree / Disagree

8. Increase disclosure requirements at the commencement of debt collection activity.

Agree / Disagree

c **Direct** officials to work with the debt collection sector and the Code Advisory Group to add the following to the Responsible Lending Code, once the legislation is passed:

1. a requirement for creditors to work with consumers' advocates in good faith

Agree / Disagree

2. additional guidance on responsible debt collecting, including about affordable payment plans, frequency of contact with debtors, and avoiding oppressive fees.

Agree / Disagree

d **Note** that we do not recommend that the scope of the CCCFA be expanded to include credit contracts that charge default fees, retail investors, small businesses, or family trusts, or to be expanded to apply directly to third-party debt collection agencies.

Noted

e **Agree** to the creation of a new regulation-making power to enable products to be declared to be consumer credit contracts, declared *not* to be a consumer credit contract, and to declare who the creditor is (and is not) under a credit contract.

Agree / Disagree

f **Note**, in relation to FIIF initiatives, that where specific CCCFA requirements are an obstacle to developing or offering an inclusive product or service, exemptions can be sought via the existing regulation-making power.

Noted

g **Agree** to an amendment so that a portion of the levy paid by financial service providers can potentially fund the Commerce Commission, rather than solely funding the Financial Markets Authority. The levy would not be able to be collected until 2020 (when the amendment comes into force).

Agree/Disagree

h **Direct** MBIE to prepare estimated costings to enable part-funding of agreed reforms via an increase in Crown funding.

Agree / Disagree

i **Meet** with officials on Thursday 16 August to discuss this briefing.

Agree / Disagree

Jennie Kerr **Manager, Competition and Consumer Policy**	Hon Kris Faafoi **Minister of Commerce and Consumer Affairs**
.... / ...... /	..... / ...... / ......

Background

11. In November 2017, you instructed MBIE to undertake a targeted review (**the Review**) of the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**) [Briefing 1151 17-18 refers].

12. On Friday 10 August we briefed you with an overview of the results of consultation on the Review. You agreed to policy recommendations around interest and fee caps, fees, substantiation of affordability/suitability assessments, and stronger banning powers [Briefing 0315 18-19 refers].

13. This briefing contains a second set of policy recommendations stemming from the Review. These have been developed to complement your policy decisions on the first brief.

14. A further brief is being prepared, relating to

    a. mobile traders, and

    b. minor changes to the CCCFA regarding online disclosure and other technical matters.

Policy recommendations

15. A summary of our reasoning for each recommendation is set out below. A summary map of the package of recommended reforms stemming from the Review is in Annex 1.

Irresponsible lenders – a fit and proper person test and creditor licensing

Problem and proposed options

16. There are currently low barriers to entry into the consumer credit lending market. A lender must simply be registered on the Financial Service Providers Register (**FSPR**) to lend. This is likely to contribute to continued irresponsible behaviour in the market as unsuitable individuals who can still pass the minimal FSPR registration requirements are not prevented from operating as lenders *before* they can cause harm to consumers. Currently people are mostly excluded from registration and operation by recent dishonesty offences (e.g. Police or Serious Fraud Office prosecutions). These people are not excluded from registration or operation if there has been a history of regulatory misconduct by themselves or their past businesses, or by other general indications that they have a risk of acting irresponsibly.

17. The discussion paper sought feedback on two options to address this.

18. Registration Option B is a fit and proper person test for directors and senior managers of creditors. This test would require directors and senior managers of lenders to be assessed as fit and proper persons (good character and capability), as a pre-condition of registration on the FSPR as a credit provider. There would be exemptions for creditors who already have their directors and employees assessed under a fit and proper person test (e.g. registered banks). This option complements the streamlining of CCCFA banning orders you agreed to in briefing A.

19. Registration Option C is a comprehensive licensing regime, which requires a fit and proper person test but also requires that the prospective lender satisfy the licensing authority that they have sufficient systems in place to comply with the law, before they are issued a license to lend to consumers.

Stakeholder views

20. Almost all stakeholders and submitters (across lenders and borrower groups) believed that there should be greater restrictions and a higher bar on who can be a provider of consumer credit. The main justifications for this support included: a reduction in the risk that registered credit providers go on to lend irresponsibly or otherwise breach the law; better alignment with

other occupational regulation regimes; and the information gains to the Commerce Commission of better understanding who is operating and not complying in the market.

21. There was close to universal support in submissions (Full Balance disagreed) for a fit and proper person test for consumer credit providers, as a way of ensuring that those engaging in consumer lending are suitable and capable individuals.

22. Views on a comprehensive licensing regime for consumer credit providers were more divided. Many submitted in support of mandatory creditor licensing from both borrower and lender groups as a way of better controlling who can operate, and improving monitoring and enforcement. However, there were still a reasonable number of submitters who outlined their concerns about the large costs and other implications of creditor licensing, such as the potential for reduced competition and innovation in consumer credit markets (Financial Services Complaints Limited, First Mortgage Managers Limited, Financial Services Federation, Acorn Finance, Susan Bingham, Business NZ, DCO Finance, ANZ and Cash Converters).

High-level costs and benefits

23. The fit and proper person test and the comprehensive licensing options are not mutually exclusive. A fit and proper person test would likely be part of a comprehensive licensing regime if it were to be adopted. The Financial Markets Authority already requires senior people in other financial service providers to be fit and proper persons, as do other regulators overseas.

24. A fit and proper person test for consumer credit providers could reduce the number of irresponsible lenders, by setting the bar to operation in the market higher and preventing those who are unsuitable from operating. Such a test would also contribute to preventing 'phoenix' lenders, who move their lending operations between companies and thus FSPR registrations to avoid enforcement.

25. Some lenders would incur a small cost in having their directors and senior managers assessed. These costs would not be incurred by lenders whose personnel are already assessed under a fit and proper person test.

26. There would inevitably be some initial and ongoing costs to Government involved in operating a fit and proper person test. These could be partially recovered via application fees, but the shortfall would need to be funded. We note that the Commerce Commission was supportive of a fit and proper person test for reducing irresponsible lending while highlighting that the agency responsible for its administration would need to be appropriately funded.

27. While a comprehensive licensing regime for consumer credit providers would raise the bar to entry and operation significantly, and would improve monitoring and enforcement and result in a decrease in irresponsible lending, it would also involve substantial upfront and ongoing costs to both lenders and the licensing agency. These compliance costs could well be passed down to consumers in the form of higher borrowing costs and may also have a negative impact on participation in the industry by lenders and suppress innovation.

28. A limitation of both options is that those currently lending irresponsibly may simply choose to operate unlawfully, where monitoring is harder.

29. Overall, our view is that most of the impact of comprehensive creditor licensing on irresponsible lending could likely be achieved with a fit and proper person test and streamlining of banning orders, with less risk of over-regulating and a lower cost to all parties.

Appropriate regulator

30. In our analysis of the registration options, we considered which agency or entity (i.e. the FMA, Commerce Commission, the Ministry of Justice Licensing Authority or MBIE) would be the most appropriate regulator for any new assessment or licensing regimes. We are of the view that a fit and proper person assessment is best administered by the Commerce Commission, as it holds information about historic CCCFA and FTA enforcement against firms and individuals and are thus in a better position to assess the risks of non-compliance. The Commission would also gain substantial information benefits for its monitoring and enforcing from administering testing or licensing.

31. Another agency which already performs fit and proper person assessments could potentially establish this new function more cost effectively. However, a separate assessment authority would regularly need to request information from the Commerce Commission, which would add extra cost for both agencies on an ongoing basis. The two organisations would need to share historical information, assessment information and 'live' information from investigations, to be able to perform their respective functions, but also to detect and act on cases where individuals have failed to disclose past misconduct. This creates a significant risk of information gaps and problems around any differences in interpretation of requirements.

Final recommendation

32. We recommend adopting a fit and proper person test as a pre-requisite to lender registration, and that this be administered by the Commerce Commission.

33. If you agree, MBIE will work with the Commission to refine the likely cost of implementing this requirement, for inclusion in the Cabinet paper.

34. We do not recommend a comprehensive creditor licensing scheme.

Communications and risks

35. We have not yet engaged with stakeholders, including the Commerce Commission, on our recommendation. The Commission is likely to have concerns about whether it has the appropriate systems, capability and resourcing to conduct assessments, and may suggest that this function would be better performed elsewhere.

36. A response to these concerns could be to note that (if you agree) you will seek budget increases for additional resourcing for the Commerce Commission. Further, performing assessments can enhance the Commission's ability to perform its current monitoring and enforcement functions.

37. Other stakeholders may express concerns that this recommendation does not go far enough to prevent harm to vulnerable consumers from irresponsible lenders. A response could be to note that the test will work to prevent irresponsible and inappropriate persons from operating in the market and, combined with changes to the penalties (below), will likely result in better regulated consumer credit markets with lower consumer harm.

Strengthen penalties and enforcement powers for existing obligations

Problem and proposed options

38. Across credit markets, there appear to be inconsistent levels of compliance, and irresponsible lending by some lenders. An underlying cause may be that there are relatively weak incentives for lenders to comply with some CCCFA obligations (combined with a perception of a low probability of enforcement action).

39. Currently, there are no penalties for breaches of the lender responsibilities. The courts can order compensation for any loss to borrowers, and issue injunctions, but there are no offences or civil pecuniary penalties (unlike disclosure requirements, which have offences for breach). Injunctions for irresponsible lending under the CCCFA are limited to "restraining a

person from engaging in conduct" that would breach the CCCFA. Injunctions cannot require that lenders undertake any particular steps to achieve compliance with the lender responsibilities. They can only demand that lenders do not breach the lender responsibilities (which are a legal requirement in any case).

40. The discussion paper proposed a combination of measures to strengthen penalties and enforcement powers for existing obligations: introducing civil pecuniary penalties, statutory damages and expanded injunctive relief powers for the Commerce Commission.

41. Civil pecuniary penalties would provide stronger incentives for creditors to comply with lender responsibilities. We propose the maximum civil pecuniary penalties could be $200,000 for an individual or $600,000 for a body corporate. This would ensure civil penalties match the existing maximum penalties for offences in the CCCFA, and creates a significant deterrent to breach of lender responsibilities.

42. Statutory damages would make it easier for borrowers to claim compensation where lender responsibilities were breached. Where lending has been made in breach of responsible lending requirements, a standard level of statutory damages would be paid equal to the interest and fees that had already been charged. If the amount of statutory damages is less than $200, the amount to be paid would be $200, to ensure there are appropriate consequences. The court could also order that the credit contract be amended to provide for affordable repayment of the loan.

43. The Commerce Commission would be able to seek injunctions and other orders for the purpose of ensuring that the lender is compliant. For example, the court could temporarily prohibit the lender from undertaking further lending, require a lender to obtain and scrutinise bank statements from a borrower before entering into a loan, require a lender to include a warning in advertising of high-cost loans, or require a lender to advise a borrower if lower cost loan types might be available elsewhere.

Stakeholder views

44. Most stakeholders supported strengthening the incentives for lenders to comply by expanding penalties, statutory damages and injunctions. A handful of lenders and their representatives, such as the Financial Services Federation, opposed the proposal on the grounds that existing penalties are sufficient and that more enforcement, rather than greater penalties, is needed to ensure compliance.

High-level costs and benefits

45. The prospect of a monetary penalty and higher levels of damages for irresponsible lending would increase the incentives to comply with the law and therefore reduce non-compliance. Civil pecuniary penalties and injunctions could make it easier for the Commerce Commission to take cases. Statutory damages would also increase the benefits for borrowers taking action in cases of irresponsible lending.

46. A potential concern of the proposal is that the burden of proof for civil pecuniary penalties is on the balance of probabilities, which is perhaps less appropriate for breaches that incur significant financial penalties. However, this burden of proof would not be unusual. Civil pecuniary penalties are used in the Commerce Act and Financial Markets Conduct Act, where the penalties are even larger.

Final recommendation

47. We recommend implementing these proposals together, to increase incentives for lenders to comply with the lender responsibilities, and therefore reduce non-compliance. However, the effectiveness of these proposals depends on enforcement action being taken to send a signal to the industry that there is a real threat of significant financial penalties being incurred. Furthermore, more serious penalties for a breach of responsible lending are best implemented alongside clearer legal obligations, which could take the form of more

prescriptive, binding requirements for fulfilling those responsibilities. These options are discussed below.

Communications and risks

48. Criticism from lenders is likely to focus on the need for the Commerce Commission to take more enforcement action and enforce existing penalties, rather than create new ones. You could note that as part of this review you are also looking at ways to increase the Commission's ability to take more enforcement action of breaches and non-compliance.

Directors and senior managers' duties

Problem and proposed options

49. Unlike some other financial markets regimes, penalties and other liability across the CCCFA sit almost exclusively with the creditor organisation and other bodies corporate with limited liability. This means that duties and incentives on directors and senior managers to comply are relatively weak. This lack of strong deterrence is contributing to non-compliance.

50. The discussion paper proposed that directors and senior managers could be subject to duties to take reasonable steps to ensure that the creditor complies with its CCCFA obligations. Expectations of reasonable steps would be based on the reasonable scope of the person's role in the organisation. Directors and senior managers who breached duties would be personally liable for civil pecuniary penalties and compensating borrowers. A breach of duties would also be grounds for a banning order under the CCCFA.

Stakeholder views

51. The majority of stakeholders supported this proposal. There was particular support for the extension of the duties to senior managers, as these are the people more likely to oversee responsible lending decisions and who are responsible for the day-to-day operations of a creditor.

52. Some stakeholders emphasised the need for any directors' duties to be clearly spelled out, so that expectations are clear. The Commerce Commission stated that each set of duties should be described, as otherwise they would create ambiguity and enforcement difficulty.

53. Save My Bacon noted that many insurers do not sell directors' liability insurance for finance companies, which could make it difficult to recruit high calibre directors if we introduce directors' duties.

High-level costs and benefits

54. Introducing personal liability would create much stronger incentives for directors to ensure that there are systems in place to support the creditor to comply with its CCCFA obligations. It could make enforcement of non-compliance easier for the Commerce Commission.

55. However, personal liability may create a disincentive for skilled, professional directors to serve on creditor boards.

56. The duties would be fairly high-level and principles-based, rather than a list of what directors or senior managers must do. This could result in differing interpretations of the law, and promote more risk-averse governance.

Final recommendation

57. We recommend introducing this proposal. Directors' duties would increase incentives on directors to ensure the creditor is compliant, and reduce the ability of non-compliant creditors to 'regenerate' as new creditors, with the same directors in place. Duties placed on senior managers, meanwhile, would target persons whose position allows them to exercise significant influence over the management or administration of the creditor. Overall this option is likely to reduce non-compliance.

Communications and risks

58. The main criticism of this proposal is likely to be that it will create disproportionate personal liability and therefore serve as a disincentive for directors to serve on creditor boards. However, directors and senior managers already have duties under other legislation, such as health and safety and financial services regulatory regimes (e.g. the Financial Markets Conduct Act). We would not expect duties under consumer credit regulation to be the tipping point which would convince directors not to serve on creditor boards.

Non-compliance – require creditors to work with consumers' advocates in good faith

Problem and solution

59. We have heard that some advocates struggle to deal with lenders where lender's policies are strict regarding disclosing loan details to individuals other than who the loan is to. This lack of access to key loan details and/or documents can hinder advocates from fully understanding a borrower's situation and from being able support them.

60. This option would require that in dealing with a loan, creditors must work with consumers' advocates where requested, and must do so in good faith (Enforcement Option E).

Stakeholder views

61. A large number of submitters did not consider this proposal as beneficial to any party, partly due to the subjective nature of 'good faith' and the complexity of enforcing such a requirement. Those who supported the proposal generally commented on the likely improvements to the creditor-borrower relationship, and the fact that working with consumers' advocates would be beneficial for all parties and that doing so is a responsible lending practice. Borrower representatives also emphasised that consumer advocates are critical for vulnerable consumers and are often the only way that issues in the market are brought to the attention of the lender, dispute resolution services and the Commerce Commission.

High-level costs and benefits

62. A lender working with a consumer's advocate is likely to result in better outcomes – either the lender is more likely to receive repayment of their loan and the consumer is more likely to be able to repay their debt at an affordable rate, or the consumer's concerns are more likely to be pursued and addressed. In this sense, working with consumers' advocates is the type of practice expected of responsible lenders. Some costs may arise when lenders who are not already engaging with advocates spend time negotiating or communicating with advocates.

63. It is not clear how often lenders refuse to work with advocates and there is also concern around the enforcement issues with, and subjective nature of, a requirement to work in good faith. As a result, such a proposal is likely to be most appropriately located in the Responsible Lending Code where it can act as guidance on how lenders can interact responsibly with borrowers and their advocates (as opposed to including it in primary legislation as an obligation).

Final recommendation

64. We recommend that you direct officials to work with the Code Advisory Group to add a requirement to the Responsible Lending Code, for creditors to work with consumers' advocates in good faith. This work would likely be done once any amending legislation is passed, as we anticipate there will be other adjustments required to the Code in response to the reforms.

Prescriptive requirements for affordability and suitability

Problem and proposed options

65. We heard that the area of affordability assessments is a particular area of non-compliance by some lenders. In some cases the underlying cause is a lack of clarity about CCCFA obligations. When legal obligations are not clear, they are difficult to apply and for the regulator to enforce. Some lender stakeholders said that there is considerable uncertainty about how to comply with the lender responsibilities, or what is an acceptable standard of compliance. When lenders do not lend in a responsible manner – for example, if they do not carry out appropriate assessments of how affordable a loan is likely to be for a borrower –, a borrower may be unable to repay the loan, which could worsen their financial hardship.

66. The Responsible Lending Code offers some guidance on how lenders might satisfy the requirement to make reasonable affordability inquiries. However, the Code does not hold lenders to account if they do not behave exactly as specified in the Code's guidance.

67. Mandatory minimum standards could be introduced for some or all types of lenders and loans to assess affordability in accordance with a defined procedure. Under this proposal (Responsibility Option A) there would be a new regulation-making power in the CCCFA, providing the Minister with the ability to recommend regulations to prescribe how lenders or classes of lenders must satisfy the requirements under section 9C(3)(a). The regulations could be used to prescribe requirements for agreements or classes of agreements.

Stakeholder views

68. Most consumer advocates, consumers and the Commerce Commission supported more prescriptive affordability assessments. Many submitters thought that minimum standards should apply to all types of lenders and loans. However, different types of loans would need different levels of affordability assessments.

69. Many submitters proposed certain criteria or assessments that lenders should undertake as part of any mandatory requirements. A common request from consumer advocates such as the NBFCCT and Christians Against Poverty was that items not deemed to be taxable income by the Internal Revenue (eg. Family Tax Credits, Child Support, Disability Allowances) should not be taken into account as income for affordability assessments.

70. Some lenders opposed prescriptive requirements, preferring more detailed guidance rather than inflexible rules.

High-level costs and benefits

71. This option would make it easier for borrowers, consumer advocates and advisers, financial dispute resolution schemes and the Commerce Commission to identify breaches of lender responsibilities and take enforcement action.

72. This option would provide more clarity about lenders' legal obligations, which could support compliance. This option would have the largest effect on lenders who genuinely intend to comply, but who do not currently do so due to an inadequate understanding of the principles-based requirements.

73. Risks include that prescriptive requirements could make case-by-case discretion difficult to apply, which could create negative consequences for consumers either through increased processing time or via less accessible credit. Lenders who are currently compliant would incur additional costs to the extent that any new mandatory requirements were inconsistent with their existing practices. There is also the risk of limiting innovation in the way that credit products are provided. We will seek to minimise these risks via careful drafting of the regulation.

74. Another risk is that creating these regulations could undermine the perceived status of requirements in the Responsible Lending Code. The practice to date from dispute resolution schemes and many lenders is to treat a 'should' as more-or-less mandatory. Adding regulations means that the Code guidance might be seen as less important and more optional. We believe the risk of compliant lenders placing less weight on the Code is outweighed by (a) the likelihood that non-compliant lenders will be motivated to comply when there are bright-line requirements set out in regulation and (b) the improved ability to enforce these requirements if lenders do not comply.

Final recommendation

75. We recommend proceeding with a new regulation-making power in the CCCFA that provides the Minister with the ability to recommend regulations to prescribe how lenders or classes of lenders must satisfy the requirements under section 9C(3)(a).

Communications and risks

76. There is likely to be criticism from lenders that new requirements will make it more difficult and take longer for consumers to access credit, and increase the cost of credit for consumers. However, lenders are already required to comply with the responsible lending principles and we do not think that costs incurred by lenders to bring them up to existing expectations of compliance is a valid argument against a proposal that could result in more consumers being protected from irresponsible lending.

Ability of lenders to rely on information provided by the borrower

Problem and proposed options

77. As noted above, affordability assessments have been identified as a particular area of non-compliance, which can lead to irresponsible lending and resulting consumer harm.

78. Section 9C(7) of the CCCFA provides that for affordability and suitability requirements, "the lender may rely on information provided by the borrower or guarantor unless the lender has reasonable grounds to believe the information is not reliable". The threshold of "reasonable grounds" is high, and in practice this means that lenders are permitted to accept borrower statements about income and expenses at face value, unless they are inconsistent with other information the lender holds about the borrower, or are unrealistic. This is likely to be a barrier to requiring lenders to undertake reasonable inquiries to assess the affordability of repayments.

79. This option (set out in paragraph 74 of the discussion paper) proposes to remove this provision. Lenders would need to obtain objective verification of key borrower information, where it was warranted as part of undertaking "reasonable inquiries".

Stakeholder views

80. The majority of submitters who commented on this proposal were in support of it. These submitters agreed that lenders should verify the information provided by a borrower, as borrowers have incentives to present information in a way that supports their application.

81. A number of lenders (including some banks and Cash Converters) opposed the proposal, citing additional costs and processing times for lenders, as well as the risk of allowing the borrower to avoid the responsibility of answering questions truthfully.

High-level costs and benefits

82. This proposal may increase compliance with responsible lending and protect consumers from irresponsible lending, as it:

- may promote lender enquiries into the affordability of credit where these are not already happening, and

- will better enable the Commerce Commission to take enforcement action where suitable enquiries are not being made.

83. The requirement for a borrower to provide verified information may deter or prevent some potential borrowers from accessing credit. However, if the credit is necessary for a borrower they should be motivated to provide this information.

84. There may be a slight increase in costs for those lenders who are not currently verifying information provided by borrowers.

Final recommendation

85. We recommend proceeding with the proposal to remove section 9C(7) of the CCCFA.

86. Overall it would probably have a small impact on reducing irresponsible lending, as we would expect responsible lenders to already be verifying information. However, it may increase compliance in the segment of the industry that is not currently compliant, by removing a provision that limits the obligation to verify information.

Communications and risks

87. There is likely to be criticism from lenders that this proposal will make it more difficult and take longer for consumers to access credit, and increase the cost of credit for consumers. However, lenders are already required to comply with the responsible lending principles and we do not think that costs incurred by lenders to bring them up to existing expectations of compliance is a valid argument against a proposal that could result in more consumers being protected from irresponsible lending.

Prescriptive requirements for responsible advertising

Problem and proposed options

88. The obligation to advertise responsibly was another area found to have high non-compliance rates. The Responsible Lending Code provides guidance on how lenders can meet their responsibility to advertise responsibly. This includes guidance on particular practices, such as displaying an annual percentage rate and the total amount payable under the agreement (if ascertainable). Specific guidance is provided for high-cost credit agreements, such as risk warnings (that high-cost credit should not be used for long-term borrowing).

89. MBIE's desk based review of lender websites found that the Code's guidance on advertising is poorly adhered to by some lenders. The study found that 20 per cent of finance company websites failed to disclose their interest rates, while 65 per cent of high-cost lender websites failed to include risk warnings.

90. We consulted on a proposal to make regulations which reflect the current Responsible Lending Code guidance for advertising. This would make those requirement binding. A key feature would be making it mandatory for high-cost lenders to include a warning about high-cost credit, and for lenders to advertise their annual interest rate. The requirements would also specifically address direct marketing to borrowers. The technical detail of this would be prescribed through regulations, with a new regulation-making power created in the Act to empower them.

Stakeholder views

91. Some lenders commented that the critical information such as interest rates should be mandatory in all advertising. However, there should be different guidelines for different media – for example, an online banner advertisement does not have the same space for disclaimers as a finance company's website.

92. The Association of New Zealand Advertisers opposed prescriptive requirements, arguing that we should not impose additional costs on lenders who are already responsible. It said that it sees no evidence that responsible lenders are not compliant.

93. More rules were needed specifically around direct marketing to borrowers. The Commerce Commission suggested that the rules could address direct advertising to borrowers that are in default, repeat direct advertising, and advertising to borrowers who have already requested that they not receive any further offers.

High-level costs and benefits

94. This option would clarify the requirements of responsible advertising, and therefore increase compliance with lender responsibilities relating to advertising. It would make non-compliance easier to identify and prove, and therefore make enforcement easier.

95. More informative advertising across the credit market could increase borrower understanding and help them to compare products.

96. Lenders would benefit from having clearer legal obligations as this would help to create a level playing field.

97. However, prescriptive requirements could limit innovation in the advertising of credit products. There may be some costs for lenders but we would not expect these to be significant.

Final recommendation

98. We recommend creating a regulation-making power to prescribe how lenders or classes of lenders must satisfy the requirement to advertise responsibly. In making legal obligations clearer, this option has a greater chance at deterring non-compliance compared to the status quo.

Communications and risks

99. There may be criticism from lenders that this will impose additional compliance costs. However, the key objective of this option is to set expectations of how lenders should be complying with existing legal obligations. As such, responsible lenders should be complying with these expectations already.

Require disclosure to be in the same language as advertising

Problem and proposed options

100. When advertising is provided in a language other than English, but the credit contract is provided in English, this increases the likelihood of lenders not complying with the requirement to advertise responsibly and assist borrowers to make an informed decision.

101. The Responsible Lending Code's guidance states that where a lender reasonably suspects that the borrower does not have a good understanding of the English language, a lender should provide, or refer the borrower to, alternative methods or mechanisms for receiving the relevant information. This can include providing access to the information in that borrower's language. However, some lenders are not following this guidance. Borrowers for whom English is not their first language are vulnerable in this circumstance. There is a risk that the requirement to assist the borrower in making an informed decision is not being met for this category of vulnerable consumer.

102. We consulted on the option of creating a mandatory requirement that disclosure statements be provided in the language that the borrower is most comfortable communicating in, if the lender advertised in that language. This change aims to ensure borrowers are assisted in making an informed decision.

Stakeholder views

103. Most submitters supported this proposal, even some of those lenders who opposed more prescriptive advertising requirements in general.

104. Some lenders appear to have misunderstood the proposal. They opposed it on the basis that lenders would incur significant costs if they were required to provide disclosure in a number of languages. However, the proposal would only require this of lenders who choose to advertise in other languages.

High-level costs and benefits

105. This proposal may reduce incentives for predatory lending that is targeted at vulnerable consumers who do not understand contractual terms. It may also assist vulnerable consumers in making better informed decisions, which would in turn reduce consumer harm.

106. Lenders who advertise in other languages would have to produce disclosure documents in a those languages, which would add to their costs. There may be less advertising of credit products in other languages as a result.

107. Overall this option would have a greater effect in enabling responsible lending compared to the status quo.

Final recommendation

108. We recommend proceeding with this option. It could be implemented in regulation alongside other prescriptive requirements relating to responsible advertising (if these are agreed).

Communications and risks

109. The key criticism of this option is likely to be that lenders will incur significant costs if they were required to provide disclosure in a number of languages. However, the proposal would only require this of the small segment of the industry who choose to target specific groups by advertising in other languages.

Debt collection

Problem and proposed options

110. Some debt collectors engage in undesirable and irresponsible behaviour. In particular, MBIE has heard concerns around conduct including:

    a. False and misleading claims. The most common types of misleading and false claims being made by debt collectors relate to the right to collect debt (including non-existent debts, debts owed to a different person, or statute-barred debt) and the amount of the debt.

    b. Unaffordable repayment schedules, excessive charges (fees and interest) for debt collection, and harassment being used by some collectors as part of their normal business practice.

111. Vulnerable consumers are highly unlikely to raise complaints with Police or use existing protections in criminal law. Pressure from debt collectors can perpetuate debt spirals.

112. A range of options were proposed in the discussion paper. These included:

    a. Debt collection option A (disclosure): This option would require key loan information to be shared with the debtor at the commencement of debt collection. The exact information to be disclosed would be established in regulations.

    b. Debt collection option B (affordable repayment plans): This option would require a debt collector, in any communication with a borrower in default (as far as practicable), to offer the borrower a new affordability assessment. The debt would crystallize once an affordable repayment plan was entered into (ie no further interest or fees could be charged).

c. Debt collection option C (limit contact): This option would specify appropriate limits regarding contact between the debt collectors, borrower and other persons. A debtor would also have the right to nominate a representative who the debt collector must contact instead.

d. Debt collection option E (cost-based fees): Under this option, only the actual costs incurred by debt collectors acting as agents of creditors could be passed on to borrowers. Any additional fees or commissions charged by the debt collector would need to be paid by the creditor.

Stakeholder views

113. Consumer advocates confirmed that debt collection problems were common, and gave numerous case examples. They were strongly supportive of more regulation. The Commerce Commission also submitted in favour of greater regulation of the debt collecting industry. However, it noted that a large number of debt collection complaints are not related to consumer credit, and that reforming the CCCFA to address some issues would not solve all debt collection issues.

114. Debt collectors and the Financial Services Federation generally noted that they and their members already voluntarily undertake some of the options recommended above. On this basis, they were not in favour of any additional regulation.

115. Some submissions said we should consider providing responsible debt collecting guidance. This guidance could be added to the Responsible Lending Code, to demonstrate how responsible debt collecting is a necessary part of fulfilling responsible lending obligations under section 9C of the CCCFA. The Financial Services Federation stated that it "would support the development of such guidance for collectors". They further stated an intention to develop their own guidance for their members.

High-level costs and benefits

116. Engagement and submissions from debt collectors and other stakeholders did not provide us with a clear understanding of how options might play out in practice. In particular, we are not confident we understand the potential unintended consequences.

117. We examined the costs and benefits of the legislative options, to the extent possible. We also looked at the alternative option (described above) of working with debt collectors and the FSF to prepare additional guidance in the Responsible Lending Code on these subjects.

118. In our view additional guidance in the Code would be beneficial, by making it clear that lenders are be responsible during the full cycle of lending, including during debt collection. Creditors are understood to be a major influence on third party debt collector behaviour. Therefore, guidance in the Responsible Lending Code is expected to influence both assignee and third party debt collection behaviour towards upholding responsible lending (and collection) standards.

119. Similar guidance exists in Australia[1] and several debt collectors indicated that this guidance is helpful for them in developing internal business processes.

120. Currently, the Responsible Lending Code is used by dispute resolution schemes to establish whether creditors have complied with their responsibilities. However, this option would not

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[1] See Debt Collection Guideline for Collectors and Creditors (jointly produced by ASIC and ACCC) published at https://www.accc.gov.au/publications/debt-collection-guideline-for-collectors-creditors.

have the bright-line status of requirements set in legislation. Its success would rely on assignee debt collectors (or lenders, where debt collectors act as agents) proactively adopting this guidance, and on the continuing work of consumer advocates and others in supporting vulnerable consumers to report on and pursue complaints about inappropriate behaviour. In our view, proactive adoption of the guidance can be fostered by jointly developing these with sector representatives.

121. We were able to more confidently establish the costs and benefit of implementing debt collection option A (disclosure) through legislative amendment:

a. This option has significant benefits, especially around improved transparency and enhanced self-enforcement opportunities. Accurate information would benefit debtors, who could more readily understand the debt, work with debt collectors to establish a repayment plan, and challenge the debt if necessary. It would also benefit debt collectors, who could resolve the debt more readily if all parties understood key facts of the debt.

b. It has comparatively few costs, given that debt collectors indicated in their submissions that they already undertake a level of disclosure. Compliance costs will be higher for all debt collectors, and there is a small risk that some debt collectors will use fraudulent documents.

Final recommendation

122. We recommend amending the CCCFA to increase disclosure requirements at the commencement of debt collection activity (debt collection option A).

123. On the information available MBIE does not recommend legislative change to implement the other options relating to debt collection.

124. We recommend implementing these options via work with the sector and the Code Advisory Group, to develop additional guidance in the Responsible Lending Code on debt collection, including on the following topics:

- offering and managing affordable repayment plans
- ensuring the nature and frequency of contact (with debtors or their advocates) is appropriate
- requiring that debt collection fees not be oppressive.

125. If you agreed, additions to the Code would be developed for your approval.

Communications and risks

126. Amendments to the Responsible Lending Code would not be binding on debt collectors. There may be concerns that this recommendation does not fully address the range of issues around debt collection. In particular, it is unlikely that small, currently irresponsible debt collectors who work for irresponsible lenders would proactively follow guidance in the Responsible Lending Code.

127. In response to these concerns, you could note that – given the relatively low level of existing regulation in the debt collection industry – this is an important first step towards more responsible debt collection, and that you are pleased to see that the industry has proactively recommended a range of solutions.

128. You could also note to add that your top priority is to reduce irresponsible practices at the outset of the lending cycle, by addressing the cost of credit and affordability requirements.

Proposals to expand the scope of application of the CCCFA to part-payment services, family trusts, small business and retail investors.

Problem definition and options

129. The discussion paper sought feedback on the need for, and merits of expanding the scope of application of the CCCFA, in the following ways:

    a. Scope Option A: include credit contracts that charge default fees in the definition of consumer credit contracts (including e.g. Afterpay). This would also include an unknown range of other credit contracts.

    b. A question seeking feedback on what (if any) problems arise from the fact that small businesses, retail investors and family trusts are not included in the definition of 'consumers'.

    c. Debt collection option D (third parties): make third party debt collection agencies directly subject to the CCCFA. Currently, the lenders they act for are liable under the CCCFA.

Stakeholder views

130. In relation to Scope Option A, many lenders and consumer advocates were in favour of the expansion, because it included 'buy now pay later' products. Lenders in favour of the extension identified these products as competitors who should be regulated to ensure an even playing field. In the case of many consumer advocates, support for the extension appears to have been a matter of principle (on the basis that all consumer transactions should be protected). Submitters did not reference or provide supporting evidence regarding the extent of harm being caused. Some advocates supported the extension due to the belief that all 'buy now pay later' models rely on default in order to be profitable (based on the submissions of Afterpay and PartPay, this does not appear to be the case).

131. In relation to small business, family trusts and retail investors*:* Financial Services Complaints Limited submitted that it had seen complaints around small business loans in which the business is in the same position as consumers. The extension was opposed by the NZBA and Business NZ among others, on the grounds that the considerations relating to business lending were very different and not well suited to CCCFA requirements.

132. In relation to debt collection by third parties, some submissions raised questions about how these reforms would impact on debt collection that was not related to consumer credit. This type of debt collection falls outside of the scope of this review. We believe that both consumer credit and non-consumer credit debt collection is carried out by the same or similar third party agencies. Therefore, it is possible that addressing debt collection in relation to consumer credit – and not other markets – might create incentives for debt collectors to carry out irresponsible debt collection in those other markets.

High-level costs and benefits

133. In relation to all scope options, responses to the discussion document did not provide sufficient evidence of either widespread harm to consumers or vulnerable consumers, or serious harm to consumers which could not be addressed via other proposals. Meanwhile, there would be significant costs and complexity involved in drafting and implementing these changes to the scope of the CCCFA.

134. Problems with excessive default or late payment fees can already be addressed using existing remedies for oppression in credit contracts.

135. Disputes relating to small business, retail investors, and family trusts can already be considered via dispute resolution services.

136. Problems with third-party debt collection are also already within the scope of dispute resolution services.

Final recommendation

137. Because of the lack of evidence of significant problems which could be addressed by these proposals, as well as the complexity of the issues, and the short timeline for implementing the results of the review, we do not recommend that the scope of the CCCFA be expanded to include any of the following at this time:

    a. credit contracts that charge default fees

    b. borrowers who are a small business, retail investor or family trust

    c. third-party debt collectors.

138. However, in light of rapid innovation in the credit markets, we consider there is merit in creating regulation-making powers to adjust the scope of the CCCFA to address harms caused by new, unregulated products in the future. These powers could be used to address avoidance, and also to clarify the treatment of particular credit products (for example, to clarify that a new product is *not* a consumer credit contract). We suggest that these powers be modelled on the designation power the FMA has under the Financial Markets Conduct Act. This enables the FMA to declare that a product is a regulated financial product and also to declare that product is *not* a regulated financial product.

139. We recommend a new regulation-making powers to enable the Governor-General, by Order in Council, to:

    a. declare that an agreement that would not otherwise be a consumer credit contract is a consumer credit contract

    b. declare that an agreement that would otherwise be a consumer credit contract is not a consumer credit contract

    c. declare that a person, or type of person is a creditor under a credit contract, or is not a creditor under a credit contract.

140. We note that Australia is considering new anti-avoidance provisions in its National Consumer Credit Protection Act.

Enable levy to fund advocacy, monitoring and enforcement by the Commerce Commission

Problem and proposed option

141. There has been a strong call by almost all stakeholders to increase advocacy, as well as the Commerce Commission's monitoring and enforcement activity in the consumer credit market. The consensus is that there has been insufficient enforcement of the current law (both public enforcement and private 'self-enforcement' by consumers via complaints). As noted above, any further changes to the law that involve new functions or greater activity for the Commission as the regulator will require appropriate resources.

142. Currently, a levy of around $500 is paid by all financial service providers upon registration on the FSPR, and the same amount is then paid annually to the FMA. This is used for the general regulation of financial markets.

143. The discussion paper proposed that the current levy on creditor companies be increased to help fund additional advocacy, monitoring and enforcement activity by the Commerce Commission.

144. We note that as the levy is currently collected by the Companies Office and then distributed to the FMA, for the Commission to benefit from an increase a legislative change would need to be made so that the Commission can receive part of the levy.

Stakeholder views

145. The submissions and feedback on increasing the levy were split. Lenders and their representatives generally opposed the proposal of increasing the levy, while those who borrow or represent borrowers generally supported the proposal. However, some registered banks are supportive of the increase to the levy.

146. Some submitters emphasised the risks of overlapping regulatory regimes across the Commission and the FMA. Those who were against an increase to the levy generally focussed on the greater cost burden on lenders, or considered that there were other ways to fund enforcement than simply increasing the levy. There were also concerns raised by the Financial Services Federation about the fact that the FMA currently receives an industry levy from companies which they ultimately do not directly regulate or monitor under the CCCFA. The FMA have, however, identified that creditors, as financial market participants, pay the levy as they benefit from well-regulated and monitored financial markets.

High-level costs and benefits

147. An increase to the industry levy would increase financial costs on lenders, the degree of which would depend on the amount of the levy. An increase to the levy also raises equity issues since it does not distinguish between complying and non-complying lenders. An increase to the levy may also be passed down to consumers in the form of higher interest rates or fees, worsening the excessive cost of borrowing from some lenders.

148. As emphasised by the Commerce Commission, it is important to note that without an increase in enforcement funding for the Commission, many of the options presented in the discussion paper will not be feasible due to their resource cost.

Final recommendation

149. We recommend an amendment so that a portion of the levy paid by financial service providers can fund the Commerce Commission (rather than solely funding the FMA).

150. Once this change is made, we would consult on the specific increases to be made to the levy paid by creditors. Development of a levy proposal would need to be considered alongside potential requests to increase Crown funding of the Commerce Commission's consumer activities.

Stakeholder recommendations to promote financial inclusion

Problem and proposed options

151. A number of contributors to the Review noted that a strict, risk-averse reading of the affordability requirements in the CCCFA and of the Responsible Lending Code meant that responsible lenders were:

   a. less likely to lend to people who are income poor but asset rich (such as retirees)

   b. unlikely to refinance or lend to people who are struggling to meet current debts

   c. unlikely to refinance customers who have high-cost lending.

152. This in effect means that responsible lenders are excluding some vulnerable consumers from access to their lower-cost finance, leaving these consumers more likely to seek out higher-cost or less scrupulous lenders when borrowing or refinancing existing debts. The same issues can also be regulatory barriers to expanded microfinance services or products.

153. After the Financial Inclusion Industry Forum, the NZBA sent some follow-up thoughts to your Office about ways of reducing such barriers. These included high-level proposals to:

- amend current affordability requirements, and to
- create a 'regulatory sandbox' with a separate regulatory regime for low or no-cost loans.

Final recommendations

154. We do not recommend any amendments to the CCCFA to address these matters. Rather, where particular elements of the legislative requirements are identified as an obstacle to a product or service for vulnerable consumers, MBIE can work to develop suitable exemptions.

155. The CCCFA has a broad exemption power, under which regulations may be made "exempting any credit contract or other agreement or class of credit contract or other agreement from the application of any provision or provisions of this Act, and prescribing the terms and conditions (if any) of the exemption."

156. MBIE will be working with the microfinance and inclusive banking groups on initiatives to address financial exclusion. As part of this, we will proactively seek to identify and address regulatory barriers to the creation or expansion of specific inclusive products and services.

Consultation

157. We have not consulted with other agencies on these proposals, pending your decisions on policy direction.

Next steps

158. The next steps are as follows:

a. 23 August – MBIE provides advice on mobile traders, and minor amendments relating to online disclosure and other technical matters

b. 20 August – MBIE circulates draft Cabinet paper and RIS for cross-agency comment, due 25 August

c. 31 August – MBIE submits a draft Cabinet paper and RIS to your office for consultation with your colleagues

d. 13 September – target lodgement date for Cabinet paper.

Annexes

Annex 1: Package of recommendations for regulatory reform

Annex 1 – Map of package of recommendations for regulatory reform