MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT
HIKINA WHAKATUTUKI

Regulatory impact statement

Consequences for lenders of non-compliant information disclosure: section 99(1A) of the Credit Contracts and Consumer Finance Act 2003

Agency disclosure statement

This regulatory impact statement has been prepared by the Ministry of Business, Innovation and Employment ("MBIE").

It concerns the legal consequences that arise in the case of a breach, by a lender, of its information disclosure obligations under sections 17 and 22 of the Credit Contracts and Consumer Finance Act 2003. More specifically, it sets out problems with section 99(1A).

There have been no significant time constraints affecting the development of this RIS.

The RIS has incorporated information and comments made by respondents to a discussion paper on the issue at hand. Because no cross-submission process was undertaken (or judged necessary), MBIE has not been able to fully test some of the claims made. Instead, where claims appear unlikely or are contradicted by other submissions, MBIE has used its own judgment to determine where the truth is likely to lie.

Evidence for the problem defined has been limited by the fact that section 99(1A) has only been in force for two years.

The precise legislative wording of the preferred option has not been determined. This is because it will require consultation with the Parliamentary Counsel Office (PCO) to ensure the formulation chosen not only remedies the problem as defined, but also remains as consistent as possible with PCO practice.

The preferred option involves applications by lenders to the courts. The costs of court action to lenders and borrowers (in terms of financial expense and time requirements), and added demands on the court system, have not been fully explored yet with the Ministry of Justice.

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Executive summary

Background

Firms that lend to consumers have certain obligations towards those consumers under the Credit Contracts and Consumer Finance Act 2003 (the “CCCF Act”), in particular an obligation to disclose certain key information (such as the annual interest rate, the existence of any fees, etc.).

If the lender fails to disclose such information properly, the CCCF Act sets out a number of legal consequences. For example, the borrower has certain rights to cancel the loan; the lender may be liable to the borrower for statutory damages and may have to pay a fine; and, under section 99(1A) of the Act, a borrower is not liable for any ‘costs of borrowing’ (interest or fees) that fall due between the date of the failure and the date that failure is remedied. In other words, a lender forfeits the interest and fees that fall due during the period the information disclosure obligations are breached.

The requirement under section 99(1A) to forfeit 100% of interest and fees for the period of non-compliance has been criticised by lenders as inappropriate, because it applies regardless of how significant the non-compliance is.

Problem definition

Section 99(1A) has been in force for less than two years, but in that time a number of concrete problems have become apparent.

Section 99(1A), as drafted, has the potential to create highly damaging consequences. The viability of some lenders could be put at risk by the continued existence of section 99(1A) in its current form. In addition, undue effort is being expended on checking and rechecking disclosure documents, which has the potential to lead to slower loan processing times and added expense for lenders (that could translate into higher interest rates and fees for borrowers).

Assuming a similar rate of issues emerge with section 99(1A) in future, we consider the problem to be a large one. A number of lenders are claiming that – where breaches remain undetected for many years – the size of the forfeiture could be such as to pose prudential risks.

Options

MBIE officials identified seven main options, which can be grouped into four categories:

Category	Option	Description
Retain	A	the status quo – lenders face 100% forfeiture
Amend	B	amendment to section 99(1A) – lenders face varied levels of forfeiture (caps)
	C	amendment to section 99(1A) – lenders can rebut presumption of forfeiture
	D	amendment to section 99(1A) – onus on borrowers to prove materiality
Replace	E	replacement of section 99(1A) – lenders no longer face forfeiture but face increased statutory damages
	F	replacement of section 99(1A) – lenders no longer face forfeiture but face increased fines
Repeal	G	simple repeal of section 99(1A)

Assessment of options

No option considered is perfect. However, officials consider that Option C (lender relief) is materially better than the other options, including the status quo. This is because Option C:

- by reducing the risk of disproportionate and damaging financial impacts on lenders, sets an appropriate level of deterrence and penalisation for breaches of information disclosure obligations;
- by eliminating the risk of over-compensation for borrowers, ensures borrowers are entitled to an appropriate level of compensation only (notably through their right to statutory damages);
- broadly balances the ability of both borrowers and lenders to enforce their rights.

Option C can be criticised for creating some uncertainty as to the ultimate outcome for the parties. While both will know that lenders are presumed to forfeit the relevant interest and fees, the lenders' right to seek relief means that – except in the most serious or most minor cases – neither can be certain exactly where they stand.

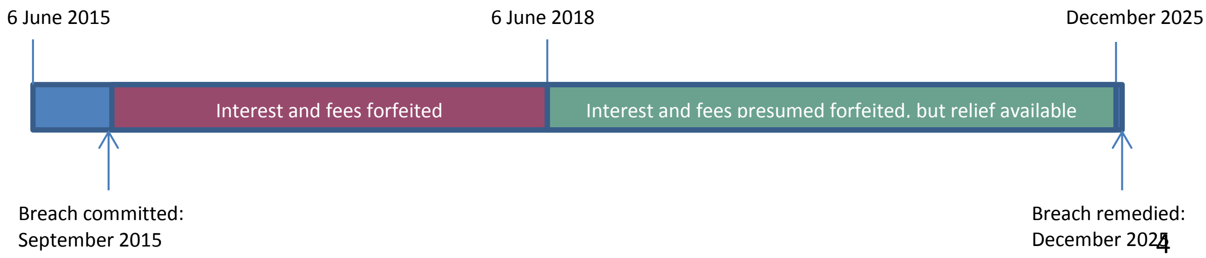
Retroactive application of amendments

Where a lender breaches its disclosure requirements before section 99(1A) is amended (say, in September 2015), but only discovers and remedies that breach after the amendment (say, in December 2025), officials consider it fair to all parties that:

a. in respect of any interest and fees forfeitable prior to the entry into force of the amended section 99(1A), the lender *should not* have the right to apply for relief from the courts;

b. in respect of any interest and fees forfeitable after the entry into force of the amended section 99(1A), the lender *should* have the right to apply for relief from the courts.

Assuming entry into force of the amended section 99(1A) on 6 June 2018, the proposed approach can be illustrated as follows:



1 Status quo and problem definition

1.1 Background

1. Under section 17 of the CCCF Act, a creditor under a consumer credit contract “must ensure that disclosure of as much of the key information set out in Schedule 1 as is applicable to the contract is made to every debtor under the contract before the contract is entered into”. Disclosure under section 17 is known as ‘initial disclosure’.

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

3. If a lender fails to properly disclose the information required by section 17 (at the time the loan is taken out) or by section 22 (at any time the loan agreement is modified), the CCCF Act sets out five main legal consequences. Section 99(1A) concerns the last of these consequences.

1.2 Status quo

4. Under the status quo, the five main consequences of non-compliant disclosure are as follows.

Borrower has right to cancel the loan

5. If proper disclosure has not been given, the borrower has certain rights under section 27 of the CCCF Act to cancel the loan agreement.

Lender may have to pay a fine

6. If proper disclosure is not given, the lender will have committed an infringement offence under section 102A of the CCCF Act, and will be liable (upon conviction by a court) to a fine of up to $10,000 (if an individual) or $30,000 if a company.[1] However, the Commerce Commission can instead issue infringement notices (without the need to go to court) requiring the lender to pay an immediate $1,000 fine.[2]

[1] Alternatively, if no disclosure is given at all, the lender will have breached section 103 of the CCCF Act, and so be liable, unless it can establish a ‘reasonable mistake’ defence under section 106, to a fine of up to $200,000 (if an individual) or $600,000 if a company.

[2] See section 105C of the CCCF Act and regulation 4 of the Credit Contracts and Consumer Finance (Infringement Offences) Regulations 2015.

Lender may have to pay damages to the borrower

7. If proper disclosure is not given, the borrower is entitled to recover statutory damages from the creditor under sections 88 and 89 of the CCCF Act. Statutory damages are damages set by legislation, rather than being determined by a court. The amount set under the CCCF Act is the lesser of $6,000 or 5% of the amount of the loan (so, for a $100,000 loan, the statutory damages would be $5,000).[3] The lender has a defence under section 106 if it can prove that the failure to make proper disclosure was a 'reasonable mistake', and under section 91 can also ask a court to reduce the amount of statutory damages.

Lender cannot enforce loan agreement

8. If proper disclosure has not been given, the lender is prohibited under section 99(1) from enforcing the credit contract, until corrective disclosure is made. This means, for example, that the lender cannot force the borrower to make repayments on the principal or the interest until the correction notice is sent.

Lender forfeits interest and fees during period of non-complaint disclosure

9. Section 99(1A) provides that, even after a corrective disclosure has been issued, "neither the debtor nor any other person [e.g. the debtor's guarantor] is liable for the costs of borrowing [i.e. interest and fees] in relation to any period during which the creditor has failed to comply with section 17 or 22". In other words, the lender must forfeit any and all interest and fees that fall due during a period of non-compliant disclosure. In practice, this means that the borrower will enjoy a period of "interest-free" lending.

10. According to the Commerce Commission, "section 99(1A) has been used by the Commission to ensure that traders with significant disclosure breaches return the costs of borrowing to borrowers". For instance, the Commerce Commission forced a Napier lender (Cash In A Flash) to refund money to its borrowers in 2016. In addition, according to the Commerce Commission, "budget advisors and other consumer advocates are using the provision to achieve negotiated outcomes for borrowers".

11. MBIE is aware of a current Commission investigation into a financial provider which involves potential forfeited costs of borrowing of S 9 (2) (b) (ii)

1.3 Problem definition

Policy rationale for section 99(1A)

12. Section 99(1A) was introduced into the CCCF Act in 2014 and only took effect from 6 June 2015. It was designed to remove ambiguity surrounding section 99(1).

13. As noted above, if proper disclosure has not been given, the lender is prohibited under section 99(1) from enforcing the credit contract, until corrective disclosure is made. This means, for example, that the lender cannot force the borrower to make repayments on the principal or the interest until the correction notice is sent.

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

14. An issue arose in the 2013 court case of *Norfolk Nominees v King* [4] as to the precise meaning of this enforcement ban: once the corrective disclosure was made, could the lender enforce payment of the interest and fees that had fallen due during the period of non-compliant disclosure, or could the lender only enforcement payment of the interest and fees that would fall due after the period of non-compliant disclosure?

15. In the *Norfolk* case, the original information disclosure had been non-compliant, and a corrective disclosure was not made for two and a half years into the contract. The issue was whether the finance company, having made the corrective disclosure, could now "enforce" the contract by recovering all the interest and fees that should have been paid during the period of non-compliance (which by now was a substantial sum).

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

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

17. MBIE at the time considered that this outcome could in some circumstances be unjust to the borrower. They therefore inserted section 99(1A) into the CCCF Act. Section 99(1A) reversed the position that the High Court took.

Nature of the problem

18. Section 99(1A) brooks no exception. If a lender breaches its information disclosure obligations in any way, it must forfeit 100% of the interest and fees that fall due during the period of non-compliance. This consequence is likely in all but the most serious cases to be disproportionate to the seriousness of the non-compliance and to the harm caused to the borrower.

19. This can have a number of deleterious consequences.

20. First, except in the most extreme cases (such as deliberate obfuscation by a lender of the effective interest rate or fees), a borrower will be over-compensated, enjoying an interest-free loan for the entire period of non-compliant disclosure. This is illustrated by the case of the medium-sized lender who responded confidentially to the public consultation. S 9 (2) (b) (ii)

21. Second, lenders will (on paper) face the risk of a disproportionate – and in some cases highly damaging – financial hit. For example, in a confidential submission the finance company Linsa

[4] *Norfolk Nominees Ltd v King* [2013] NZHC 398

[5] *Ibid.* at para [87].

states: S 9 (2) (ba) (i)

22. The effects of a disproportionate penalty will be felt by both lenders and borrowers:

    a. Damage to lenders: If an error slips through into the disclosure information, it could conceivably put the lender's business at risk, particularly if it affects a large number of loans or if it is not discovered for several months. The NZBA set out a hypothetical example in its submission where a lender makes a mistake reproduced in 30,000 mortgage document which is not picked up for 12 months; it estimated the lender's liability under section 99(1A) at over $670 million. A fit-for-purpose regulatory regime should only put a lender out of business if this is justified by the gravity of the wrong. By treating all breaches the same, section 99(1A) does not allow for an assessment of that gravity;

    b. Damage to borrowers: The severity of the provision can lead to "over-compliance" by lenders determined to avoid even the slightest error in their disclosure information. Undue effort expended on checking and rechecking disclosure documents has the potential to lead to slower loan processing times and added expense for lenders (that could translate into higher interest rates and fees for borrowers).

Size of the problem

23. Section 99(1A) has been in force for less than two years, but in that time a number of concrete problems have become apparent.

24. For example, S 9 (2) (b) (ii)

25. We understand that this is the second occasion on which the Commerce Commission has negotiated a settlement with a lender under section 99(1A), the first being a lender called cash In A Flash which agreed in 2015 to reimburse over $120,000 to its consumer borrowers.

26. In addition, evidence of over-deterrence emerged in submissions in which lenders described expending excessive resources on ensuring compliance with their information disclosure obligations. Evidence of over-penalisation also emerged: first, the simple acknowledgement (including by the Commerce Commission) that the current rule involves a risk of disproportionate consequences;[6] and second, a confidential submission S 9 (2) (b) (ii)

[6] In its submission, the Commerce Commission stated that "there may be some unusual cases in which the application of s 99(1A) could result in lenders forgoing revenues in an amount which is disproportionate to the nature of the breach and likely consumer harm".

S 9 (2) (b) (ii)

27. Assuming a similar rate of issues emerge with section 99(1A) in future, we consider the problem to be a large one. Certainly a number of lenders are claiming that – where breaches remain undetected for many years – the size of the forfeiture could be such as to pose prudential risks.

2 Objectives / Criteria for assessment

2.1 Introduction

28. MBIE has identified a number of options for reform. These options must be assessed against the status quo, using a given set of criteria.

29. In this section, MBIE sets out the criteria it has concluded should be used to assess the different options. These criteria have been selected having regard to the objectives of the CCCF Act and the best way of achieving those objectives.

30. In this regard, section 3(1) provides that the "primary purpose of this Act is to protect the interests of consumers in connection with credit contracts…"

31. However, section 3(2) provides that it is also the purpose of the Act:
    a. to promote the confident and informed participation in markets for credit by consumers;
    b. to promote and facilitate fair, efficient, and transparent markets for credit;
    c. to protect the interests of consumers under credit contracts, both when those agreements are entered into and for their duration; and
    d. to provide remedies for debtors in relation to oppressive credit contracts and oppressive conduct by creditors under credit contracts

32. Officials consider that these purposes will be best promoted when the consequences of non-compliant disclosure are such that:
    a. lenders are appropriately deterred from, or penalised for, breaching their information disclosure obligations;
    b. in the event of a breach, borrowers are appropriately compensated; and
    c. borrowers are lenders can enforce their rights.

2.2 Criteria

33. As noted in Section 1 of this Regulatory Impact Statement, there are various consequences attached to a lender's failure to make proper information disclosure (such as the borrower having a right to cancel, and the lender risking a fine). Although the focus of this Regulatory Impact Statement is on amending or removing just one of those consequences (whereby the lender forfeits 100% of the relevant interest and fees), the ultimate measure of success must be whether – under any given option – the full range of consequences functions effectively as a whole.

34. Officials use the following criteria to determine whether, under each option, the full range of consequences functions effectively. These criteria have been selected following analysis of the concerns raised by various respondents to the Discussion Paper of November 2016 (see Section 4.1 below).

Criterion 1: Does the option appropriately deter and penalise breach?

35. Each option will be assessed to determine the extent to which it would appropriately deter and penalise breaches of the information disclosure requirements in sections 17 and/or 22 of the CCCF Act.

36. Options should avoid the over-deterrence / over-penalisation associated with the status quo, but also under-deterrence / under-penalisation that might lead to increased lender breaches.

37. An 'appropriate' level of deterrence and penalisation is one that ensures lending activity is not unduly (or 'inefficiently') chilled by the fear of punishment. This can be avoided by ensuring that the penalties 'envelope' is proportionate to the harm that incomplete or misleading information disclosure can have.

Criterion 2: Does the option appropriately compensate the borrower?

38. Each option will be assessed to determine the extent to which it would entitle the borrower to an appropriate level of compensation, in the event of a breach by the lender of sections 17 and/or 22 of the CCCF Act.

39. An 'appropriate' level of compensation is one that avoids the over-compensation associated with the status quo, but also under-compensation that might leave borrowers in an unfair position.

40. Note that this criterion is concerned with what compensation the borrower is entitled to legally, not what compensation (if any) a borrower is likely to receive in practice. The latter depends on a borrower's need and ability to take action. This variable is accounted for in Criterion 3 below.

Criterion 3: Does the option ensure enforceability?

41. Each option will be assessed to determine the extent to which it would facilitate (or inhibit) the ability of a borrower or lender to enforce its rights, in the event of a breach of sections 17 and 22 of the CCCF Act.

42. Borrowers in particular may suffer under options which demand significant knowledge and means to have their rights recognised.

3 Options and impact analysis

3.1 Description of the options

43. MBIE officials have identified seven main options, which can be grouped into four categories:

Category	Option	Description
Retain	A	the status quo – lenders face 100% forfeiture
Amend	B	amendment to section 99(1A) – lenders face varied levels of forfeiture (caps)
	C	amendment to section 99(1A) – lenders can rebut presumption of forfeiture
	D	amendment to section 99(1A) – onus on borrowers to prove materiality
Replace	E	replacement of section 99(1A) – lenders no longer face forfeiture but face increased statutory damages
	F	replacement of section 99(1A) – lenders no longer face forfeiture but face increased fines
Repeal	G	simple repeal of section 99(1A)

Option A: status quo

44. Option A is the current regime. Under the current regime, even after a corrective disclosure has been issued, "neither the debtor nor any other person [e.g. the debtor's guarantor] is liable for the costs of borrowing [i.e. interest and fees] in relation to any period during which the creditor has failed to comply with section 17 or 22". In other words, the lender must forfeit any and all interest and fees that fall due during a period of non-compliant disclosure. In practice, this means that the borrower will enjoy a period of "interest-free" lending.

Option B: amendment to section 99(1A) – varied levels of forfeiture (caps)

45. Option B is to amend section 99(1A) by setting different proportions of interest and fees that must be forfeited, according to the 'importance' of the information improperly disclosed.

46. By way of explanation, the information that must be disclosed to borrowers under sections 17 and 22 of the CCCF Act is set out in Schedule 1 of the same legislation. It could be argued that some items of information are more important to a borrower than others.

47. Information that appears highly important (because it is likely to affect a borrower's decision to enter a credit agreement)[7] includes the total of all money to be lent, the annual interest rate, and a description of any fees payable. Information that appears perhaps less important includes the method of calculating the interest charges, and the registration number of the lender.

48. In this context, it would be possible to amend section 99(1A) so that a lender must forfeit, say:

[7] ANZ stated in its submission that "[w]e strongly believe that there is some information that must be given under Schedule 1 that is unlikely to sway a debtor's decision to enter the credit contract…" (at para 136).

a. 100% of the relevant interest and fees when the breach concerns the total amount of money to be lent, the annual interest rate, or the fees payable;
b. 50% of the relevant interest and fees when the breach concerns the borrower's rights of cancellation or the name and details of the relevant dispute resolution provider;
c. 10% of the relevant interest and fees when the breach concerns other items of information included in Schedule 1 of the CCCF Act

Option C: amendment to section 99(1A) – lenders can rebut presumption of forfeiture

49. Option C is to amend section 99(1A) in a way that allows lenders the potential for relief from 100% forfeiture of interest and fees in certain circumstances.

50. The precise formulation of the relief provision would be subject to drafting. However, it would likely require the lender to seek a court order.

51. One issue would be whether the lender's defence should have an 'all or nothing' outcome (0% forfeiture if successful; 100% forfeiture if not) or whether it should allow the court to set a level of forfeiture that reflected the seriousness of the non-compliance.

52. It may be that a combination of the two is possible. For instance, an amended section 99(1A) might provide that a court could, on application by a lender, order that the proportion of interest and fees the lender must forfeit be reduced from the 100% level, to a level the court deems fit.[8] However, it might also provide that, if a lender can prove a number of key elements, then the court is obliged to order 0% forfeiture.[9]

Option D: amendment to section 99(1A) – onus on borrowers to show materiality

53. Option D is to amend section 99(1A) so that there are additional tests that must be met before there is forfeiture of interest and fees by the lender.

54. This would require the borrower (or, in some cases, the Commerce Commission on a borrower's behalf) to prove that the non-compliance by the lender was in some way "material".

55. In this regard, Russell McVeagh noted in its submission that "[t]he concept of materiality is commonly used in other consumer legislation. With the [CCCF] Act itself, s 32(1)(d) relates to disclosure that is likely to deceive or mislead a reasonable person with regard to any particular that is material to the contract. Other relevant examples include the Financial Markets Conduct Act 2013 [ss 13, 79 and 82] and the Fair Trading Act [ss 22, 36N and 36V]."

56. While the precise test would be a matter of drafting, this could require that the disclosure statement be deficient in a way that would be likely to result in a borrower:
    a. lacking information needed to make an informed decision about whether or not to enter into the credit contract

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[8] More precisely, it would provide that the court could order that the amount of 'costs of borrowing' for which a debtor is not liable under section 99(1A), be reduced to an amount specified by the court.

[9] Those elements might include: that, at the time of the breach, the lender had an appropriate compliance programme in place; that the breach was due to a reasonable mistake or to events outside the creditor's control; that the lender remedied the breach as soon as practicable after it was discovered; and that the lender has notified the borrower of (i) the breach and (ii) the borrower's right to cancel the loan and to seek damages.

b. lacking information needed to identify or resolve problems that could arise subsequent to entering the credit contract.

Option E: repeal of section 99(1A) with change to statutory damages

57. Option E is to repeal section 99(1A) – so that a lender need no longer automatically forfeit the interest and fees associated with a period of non-compliant disclosure – but to increase the amount of statutory damages to which a borrower is entitled.

58. As we have seen in section 1.2 above, the amount of statutory damages for a breach of section 17 [initial disclosure] or 22 [disclosure when contract is altered] is currently 5% of the amount of the loan, up to a maximum of $6,000. It so happens that the level of statutory damages for a breach of section 18 of the CCCF Act [continuing disclosure at least every 6 months] is "an amount equal to the interest charges, credit fees, and default fees payable under the consumer credit contract during the period to which the breach relates".[10] This is the same amount as is currently forfeited by the lender under section 99(1A).

59. It would be a simple matter to align the level of statutory damages for a breach of sections 17 and 22 with the level of statutory damages for a breach of section 18.

60. It is important to remember that, under section 106 of the CCCF Act, "every person has a defence to a claim for statutory damages … if the person proves that(a) the breach was due to a reasonable mistake or due to events outside of the person's control; and (b) the breach was remedied (to the extent that it could be remedied) as soon as practicable after the breach was discovered by the person or brought to the person's notice; and (c) the person has compensated or offered to compensate any person who has suffered loss or damage by that breach".

61. Similarly, unlike the amount that a lender must forfeit under the current section 99(1A), statutory damages under the CCCF Act can be reduced or even extinguished upon application by a lender. Under section 91 of the CCCF Act, "the court may, on the application of a creditor … order that the statutory damages payable in connection with a breach or breaches … be extinguished or reduced to an amount specified by the court if the court considers that it is just and equitable that an order be made".

62. Option E would therefore have a similar effect to Option C (lenders can rebut presumption), in that:

    a. The borrower would potentially recover 100% of the interest and fees that fell due during the period of non-compliant disclosure; and
    b. The lender:
        i. if it met certain conditions, would have a complete defence; and
        ii. if it did not meet those conditions, would have the right to apply to a court for a reduction in the amount that it must forfeit.

63. Option E would differ from Option C, in that:

    a. Under Option C, the lender will continue (as under the status quo) to automatically forfeit the interest and fees affected (in legal terms). The borrower need do nothing. So, for example, a lender that notices an error in its initial disclosure, and sends out a corrective disclosure notice, will know that it has no legal entitlement to any interest and fees that it has received in the interim, and will have an obligation to pro-actively

[10] See section 89(1)(a) of the CCCF Act

return that interest and those fees (under the doctrine of restitution / unjust enrichment);

b. Under Option E, by contrast, the borrower must actively request the statutory damages from the lender. For example, if the lender in the example above notices an error and sends out a corrective disclosure notice, it will have no obligation to pro-actively reimburse the borrower (or even to draw the borrower's attention to the fact that the borrower is entitled to the statutory damages). The lender retains a legal right to the interest and fees received during the period of non-compliance, until such time as the borrower asserts its right to statutory damages.

64. Of course, these differences are legal and may not be reflected in practice, if an unscrupulous lender seeks to cover up a breach of its information disclosure obligations.

Option F: repeal of section 99(1A) with change to fines

65. Option F is to repeal section 99(1A) – so that a lender need no longer automatically forfeit the interest and fees associated with a period of non-compliant disclosure – but to increase the amount of the fine to which a lender is exposed.

66. By way of reminder, if proper disclosure is not given, the lender will have committed an infringement offence under section 102A of the CCCF Act, and will be liable to a fine of up to $10,000 (if an individual) or $30,000 if a company. The lender cannot raise any defence.

67. It would be possible to amend section 102A so that a lender was liable to a fine of, say, $30,000 if an individual, or $100,000 if a company. Fines are paid to the State rather than to the borrower.

Option G: simple repeal of section 99(1A)

68. Option G is to repeal section 99(1A) without any further changes to the CCCF Act. This would mean that a lender would no longer forfeit the interest and fees that fall due during a period of non-compliant information disclosure.

69. The other consequences of non-compliant disclosure would remain:
    a. the borrower would have certain rights under section 27 of the CCCF Act to cancel the loan agreement;
    b. the lender would be liable to an infringement notice of up to $10,000 (if an individual) or $30,000 if a company;
    c. the borrower would be entitled to recover statutory damages of 5% of the loan amount, up to a maximum of $6,000; and
    d. the lender would be prohibited under section 99(1) from enforcing the credit contract, until corrective disclosure is made. This would mean, for example, that the lender could not force the borrower to make repayments on the principal or the interest until the correction notice was sent.

3.2 Assessment of options

70. In this section, we assess the seven options against the criteria outlined in Section 2. Options are assessed against each other, rather than relative to the status quo.

Option A: status quo

71. Option A has been assessed as follows:
    - CRITERION 1 (APPROPRIATE DETERRENCE): Because of the high amount at stake (100% of interest and fees for the entire period of non-compliant disclosure), and the lack of a defence for the lender under which minor breaches could be excused, officials consider that Option A (status quo) leads to over-deterrence and over-penalisation of breaches of sections 17 and 22 of the CCCF Act.

    - CRITERION 2 (APPROPRIATE COMPENSATION): Option A (status quo) will, except in the most extreme cases,[11] lead to over-compensation for consumer borrowers. It would be a rare case indeed where an error in a loan agreement led to harm to the borrower that would amount to the entirety of the interest and fees that fell due during the period the error went uncorrected.

    - CRITERION 3 (ENFORCEABILITY): Legally, under Option A, without having to make a claim to any adjudicative body, the borrower is no longer "liable for the costs of borrowing [i.e. interest and fees] in relation to any period during which the creditor has failed to comply with section 17 or 22". However, in practice, unless a lender brings the issue of forfeiture to the borrower's attention and pro-actively refunds the relevant interest and fees, borrowers will need to know their rights under section 99(1A) and have the confidence to assert them.

72. Overall, this option is highly unsatisfactory.

Option B: amendment to section 99(1A) – varied levels of forfeiture (caps)

73. Option B has been assessed as follows:
    - CRITERION 1 (APPROPRIATE DETERRENCE): Option B (caps) would offer some advantages over the status quo, simply because some breaches of the lender's information disclosure obligations would attract lower levels of forfeiture. However, the lack of a defence for minor errors suggests that lenders, though reducing the resources they expended on compliance verification, would likely continue to spend excessive resources on such verification.

    - CRITERION 2 (APPROPRIATE COMPENSATION): Option B (caps) incorporates some measure of proportionality into the amount of money a borrower receives, by reducing the amount that the lender must forfeit under the provision, according to the importance of the information the lender has failed to properly disclose. However, choosing which information is more important and which is less important would be a somewhat arbitrary decision, as would setting the corresponding proportion of interest and fees (e.g. 100%, 50%, 10%) that the lender forfeits.

    - CRITERION 3 (ENFORCEABILITY): Under this option, as under the status quo, the borrower's liability would be legally extinguished (or, in other words, the lender would automatically forfeit), even if the borrower were unaware of the lender's breach. However, once again, whether a borrower will get back the relevant interest and fees will in many cases depend on the lender's willingness to pro-actively comply with the obligation to forfeit.

[11] Such as wilful obfuscation by a lender of key terms of the loan.

74. Overall, despite its strength in terms of criterion 3, this option is unsatisfactory.

Option C: amendment to section 99(1A) – lenders can rebut presumption of forfeiture

75. Option C has been assessed as follows:

- CRITERION 1 (APPROPRIATE DETERRENCE): Option C (lender relief) would deter and penalise a breach of information disclosure requirements to an appropriate degree. While ensuring lenders took care to make proper information disclosure, the existence of a defence is likely to free them from excessive verification.

- CRITERION 2 (APPROPRIATE COMPENSATION): Option C (lender relief) would ensure, better than Options A and B, that borrowers were entitled to an appropriate level of compensation (that they are not over-compensated). As envisaged, under this option the lender would have the right to ask the court to reduce or extinguish the amount it has to forfeit. It is likely, in such a context, that parties would agree to (or the court would set) a level of forfeiture that reflected the seriousness of the non-disclosure. However, there remains a risk of over-compensation, inasmuch as borrowers could receive compensation under section 99(1A) above and beyond the compensation they are entitled by way of damages.

- CRITERION 3 (ENFORCEABILITY): Option C raises some enforcement risks for consumer borrowers. Some borrowers may be unaware of the presumption of forfeiture in their favour, and some lenders may not draw it to their attention. Even if the lender does inform the borrower, it may also raise the prospect of seeking relief in court. For any consumer borrower, a threat of court action could be quite an intimidating prospect, and he or she may feel reluctantly compelled to accept the lender’s assertion that it has a valid defence.

76. Overall, despite some concerns over enforceability, this option appears broadly satisfactory.

Option D: amendment to section 99(1A) – onus on borrowers to show materiality

77. Option D has been assessed as follows:

- CRITERION 1 (APPROPRIATE DETERRENCE): Option D (onus on borrower) would, on paper, also appropriately deter and penalise a breach of information disclosure requirements. Lenders would be freed from the presumption of forfeiture for non-material breaches, which would reduce the over-compliance associated with the status quo. However, a lender would understand that a material breach would result in forfeiture of the relevant interest and fees.[12] This should ensure that the lender remained aware of the importance of compliance.

- CRITERION 2 (APPROPRIATE COMPENSATION): Option D (onus on borrower) would protect against over-compensation for borrowers, as a lender would be able to show that a minor breach was non-material, to reduce the amount that it must forfeit to the borrower.

- CRITERION 3 (ENFORCEABILITY): Option D raises significant issues of enforceability for

[12] Of course, whether a borrower would be in a position to do so is another matter, but that is assessed under Criterion 3 below.

borrowers. Borrowers are likely to find proving the materiality of a breach difficult in many cases. To paraphrase the Commerce Commission in its submission, such an approach “places the consequences of non-disclosure and non-compliance onto the party who is [least] able to bear it”.

78. Overall, this option appears unsatisfactory.

Option E: repeal of section 99(1A) with change to statutory damages

79. Option E has been assessed as follows:

- CRITERION 1 (APPROPRIATE DETERRENCE): Option E (statutory damages) would, like Option D, appropriately deter and penalise a breach of information disclosure requirements, at least on paper. The right balance is struck because the lender would risk having to pay to the borrower (by way of statutory damages) an amount equal to all the relevant interest and fees, but – crucially – would have defences available under both sections 91 and 106 of the CCCF Act.

- CRITERION 2 (APPROPRIATE COMPENSATION): Option E (statutory damages) would ensure that borrowers were entitled to an appropriate level of compensation (that they are not over-compensated). As envisaged, under this option the lender would have the right to invoke a defence under section 91 or section 106, in order to reduce (or even extinguish) the amount of statutory damages to which a borrower is entitled.

- CRITERION 3 (ENFORCEABILITY): Option E raises some issues of enforceability for consumer borrowers. Except where a case is taken by the Commerce Commission, Option E would require a borrower to personally assert his or her right to statutory damages. This would require knowledge of that right, as well as the confidence to assert it to the lender. However, unlike Option D, the borrower would not have to prove anything as complex as the “materiality” of the lender’s breach.

80. Overall, this option appears broadly satisfactory, except for some enforceability issues.

Option F: repeal of section 99(1A) with change to fines

81. Option F has been assessed as follows:

- CRITERION 1 (APPROPRIATE DETERRENCE): Option F (increased fines) would also appropriately deter and penalise a breach of information disclosure requirements. While the lender would no longer face the risk of forfeiting the interest and fees associated with the period of non-compliance, it would face the risk of paying a substantially higher fine. Importantly, the level of the fine could be set at a level that, while encouraging compliance with the law, did not risk financial ruin for a lender.

- CRITERION 2 (APPROPRIATE COMPENSATION): Option F (increased fines) would, on paper, leave borrowers entitled to an appropriate level of compensation. In the first instance, a borrower would be entitled to claim statutory damages. If statutory damages were not sufficient, a borrower could apply under sections 93 and 94 of the CCCF Act for further compensation to reflect the borrower’s actual losses.

- CRITERION 3 (ENFORCEABILITY): Enforceability of the fine will be an issue under this option, as – barring a private prosecution – it relies on the Commerce Commission issuing an infringement notice under section 105C of the CCCF Act. Due to the need to prioritise its limited resources, the Commission is unlikely to do so in cases of one-off breaches.

Enforceability of the borrower's compensation will also be an issue, because it will rely on the borrower claiming (if necessary before a dispute resolution provider or a court) the damages to which it is entitled.

82. Overall, this option appears unsatisfactory, due to the enforceability issue.

Option G: simple repeal of section 99(1A)

83. Option G has been assessed as follows:
    - CRITERION 1 (APPROPRIATE DETERRENCE): Option G (repeal) would mean there was insufficient incentive for lender compliance. While we acknowledge that, under this option, "there [would] remain for the lender serious permanent consequences",[13] we accept the Commerce Commission's submission that a minority of lenders only began paying full attention to their disclosure obligations as a result of section 99(1A). As the Commerce Commission put it, repeal of section 99(1A) would represent an "over-correction" of the problems under the status quo.

    - CRITERION 2 (APPROPRIATE COMPENSATION): Option G (repeal) would, like Option F, leave borrowers entitled to an appropriate level of compensation (through statutory and actual damages).

    - CRITERION 3 (ENFORCEABILITY): Option G would face the same enforceability issues as Option F: enforceability of a fine will depend on the Commerce Commission prioritising the case in question; and enforceability of compensation by the borrower will depend on the borrower asserting his or her right to statutory damages.

84. Overall, this option appears unsatisfactory.

Overall assessment of different options

85. No option considered is perfect. However, officials consider that Option C (lender relief) is materially better than the other options, including the status quo. This is because Option C:
    a. by reducing the risk of disproportionate and damaging financial impacts on lenders, sets an appropriate level of deterrence and penalisation for breaches of information disclosure obligations;
    b. by eliminating the risk of over-compensation for borrowers, ensures borrowers are entitled to an appropriate level of compensation only (notably through their right to statutory damages);
    c. broadly balances the ability of both borrowers and lenders to enforce their rights.

86. Option C can be criticised for creating some uncertainty as to the ultimate outcome for the parties. While both will know that lenders are presumed to forfeit the relevant interest and fees, the lenders' right to seek relief means that – except in the most serious or most minor cases – neither can be certain exactly where they stand.

87. Option C will also create costs – both in terms of financial expense and time – for both lenders and borrowers. The extent of these costs will depend on which court is designated as the appropriate tribunal (e.g. District Court or High Court) and how often lenders are likely to seek court orders. Our initial view is that lenders will only seek relief in cases where the amount at risk of forfeiture materially exceeds the lender's cost of court action. In our opinion, this is likely

[13] See *Norfolk v King* [2013] NZHC 398 at [92] per Associate Judge Osborne.

to be around one case per year. However, as lenders become more familiar with section 99(1A) – it only entered into force in June 2015 – this rate could drop.

Overall assessment of different options

	Retain	Amend			Replace		Repeal
	Option A: Status quo	Option B: caps	Option C: lender relief	Option D: onus on borrower	Option E: increased statutory damages	Option F: increased fines	Option G: Repeal
Appropriate deterrence / penalisation	✗✗ Over-deterrence	✗ Over-deterrence	✓	✗ Under-deterrence	✓	✓	✗ Under-deterrence
Appropriate compensation for borrower	✗✗ Windfall gains	✗ Arbitrary	✓	✓	✓	✓✓	✓✓
Enforceability for parties	✓✓	✓✓	✓	✗ Difficult for borrower	✗ Difficult for borrower	✗ Depends on Commission	✗ Depends on Commission

Application of preferred option

88. Under the preferred option, when a lender breaches its information disclosure obligations, it is likely, if it considers forfeiting the relevant interest and fees is disproportionate to the breach, to inform the borrower that it wishes to contest the presumption of forfeiture by applying for court relief. This may trigger a period of negotiation and potentially dispute resolution.

89. If the matter remains contested, the lender could make its request for relief from the court. The court would consider any mandatory factors listed in the legislation. These factors might include:
    a. Whether the lender had an appropriate compliance programme; and
    b. Whether the breach was a minor breach that had no material impact on the debtor's decision to borrow under the contract; and
    c. whether the breach was remedied (to the extent that it could be remedied) as soon as practicable after the breach was discovered by the lender or brought to the lender's notice; and
    d. whether the debtor has been prejudiced by the breach and, if so, whether the lender has compensated or offered to compensate any person who has suffered loss or damage by that breach; and
    e. any other matters that the court thinks fit.

90. Where there is more than one borrower affected by a single breach, the court could potentially tailor the reduction in the amount forfeited to different categories of borrower. For example, if the breach was a failure to mention a borrower's right to apply for a change in repayment terms in case of financial hardship, then lenders may have to forfeit more interest and fees in respect of those borrowers adjudged to have experienced financial hardship during the period of the breach.

3.3 Application of amended section 99(1A) to past breaches

Introduction

91. Section 99(1A) entered into force on 6 June 2015. If we assume for the moment that an amended form of section 99(1A) enters into force on 6 June 2018 then, for the purposes of this Regulatory Impact Statement, the period from 6 June 2016 to 5 June 2018 will be known as the "Period Before Amendment".

92. A number of respondents submitted that any amended form of section 99(1A) should apply to non-compliant disclosures that occur during the Period Before Amendment. In other words, they argue that any reform of section 99(1A) should apply not just prospectively but also to the past.

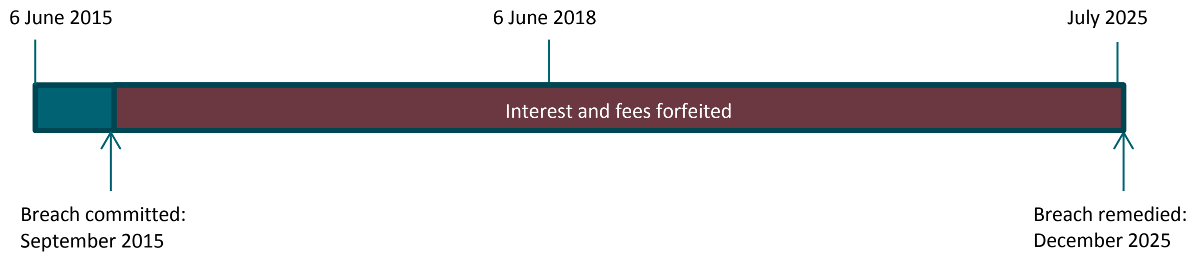
Options

93. MBIE has considered four options for the application of the amended section 99(1A) to breaches committed during the Period Before Amendment. For the sake of clarity, we assume here that Option C (lender relief) is the substantive change adopted. However, the analysis below applies to any amended form of section 99(1A).

i) Lender has no right to apply for relief under section 99(1A) rule

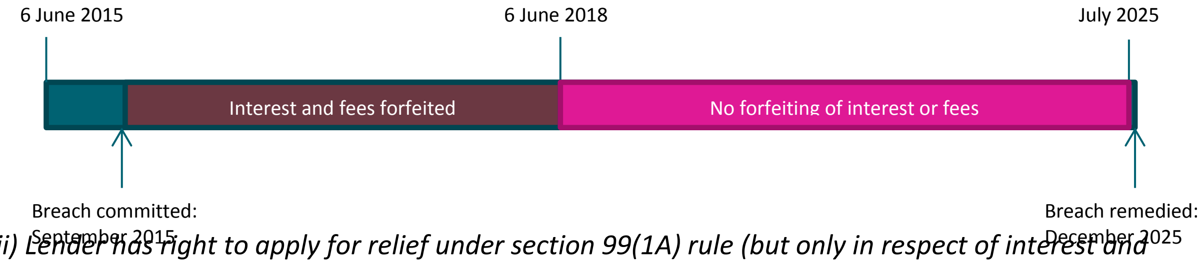
94. Under this option, if a non-compliant initial disclosure or non-compliant variation disclosure is issued during the Period Before Amendment, then the current section 99(1A) will apply i.e. the lender will have no right to claim any relief from 100% forfeiture of the relevant interest and fees. If, for example, an error committed during the Period Before Amendment is not discovered for, say, ten years (long after section 99(1A) was amended), then the lender would forfeit ten years' worth of interest and fees.

95. This option is illustrated by the example below, where we imagine a breach of section 17 or 22 occurs in September 2015, but is not remedied until December 2025. We assume that an amended section 99(1A) comes into force on 6 June 2018:



ii) Lender has no right to apply for relief under section 99(1A) rule (but amount forfeited is capped)

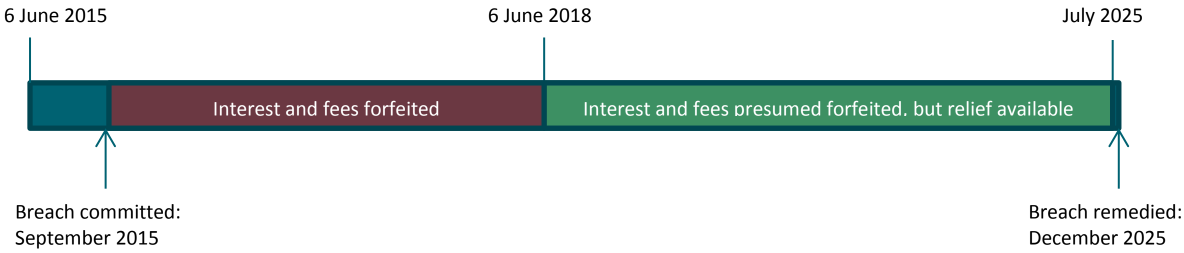
96. This option is the same as the first, except that a time cap would be placed on the amount of a lender's forfeiture. If, for example, an error committed during the Period Before Amendment is not discovered for, say, ten years, the lender would forfeit interest and fees only for the period between the date it issued the non-compliant disclosure and the date that an amended section 99(1A) entered into force (say, 6 June 2018).



iii) Lender has right to apply for relief under section 99(1A) rule (but only in respect of interest and fees that fall due after the amendment)

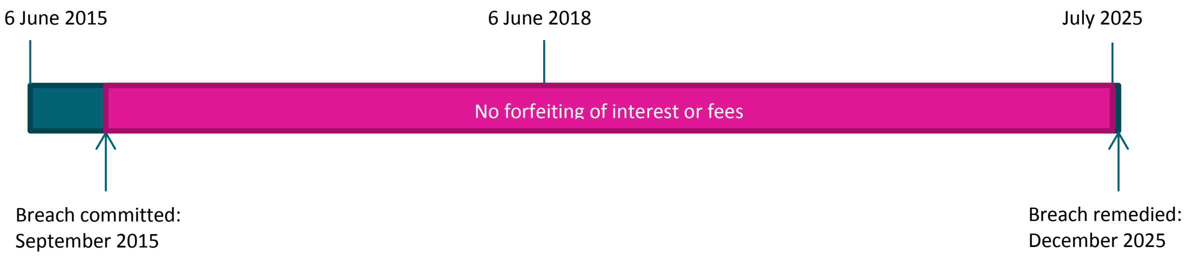
97. Under this option, where a lender breaches section 99(1A) in the Period Before Amendment, the lender:
    a. in respect of any interest and fees forfeitable prior to the entry into force of the amended section 99(1A), *should not* have the right to apply for relief from the courts;
    b. in respect of any interest and fees forfeitable after the entry into force of the amended section 99(1A), *should* have the right to apply for relief from the courts.

98. This option is illustrated by the example below, where we imagine a breach of section 17 or 22 occurs in September 2015, but is not remedied until December 2025:



iv) Lender has right to apply for relief under section 99(1A) rule (in respect of all interest and fees)

99. Under this option, the amended section 99(1A) applies with full retroactive force. Where there has been a breach of the information disclosure obligations committed during the Period Before Amendment, the lender will have the right to apply for relief from the 100% forfeiture rule in respect of both interest and fees that fall due before section 99(1A) is amended and interest and any fees that fall due after section 99(1A) is amended.



Criteria for assessment

100. According to the Legislative Advisory Council guidelines, "the general rule is that legislation should have prospective, not retrospective, effect".[14] However, the guidelines also acknowledge

[14] 2014 edition at p.15

that the strict application of this rule can lead to "injustice".[15] In particular, the guidelines state that retrospective application "might … be appropriate where it is intended to be entirely to the benefit of those affected".[16] In the present case, 'those affected' are lenders and borrowers.

101. The criteria for assessment of the options are therefore the impact of the option on lenders and the impact of the option on borrowers. This has been confirmed following discussions with the Legislative Design Advisory Committee.

Assessment of options

i) Lender has no right to apply for relief under section 99(1A) rule

102. This option will expose lenders to ongoing risk of forfeiture, long after the law has changed. An error in information disclosure made during the Period Before Amendment may lie undiscovered for several years. Lenders would need to set aside (potentially substantial) funds for such an eventuality.

103. This option could also create some confusion, for borrowers in particular, about what legal consequences flow from a given breach of disclosure rules. It may be too much to expect a borrower to know that, for breaches committed prior to (say) 6 June 2018, the lender has no right to apply for relief, but that for breaches committed after that date, the lender does.

104. On the other hand, under this option, lenders and borrowers that have settled disputes can be certain that the decisions made will stand. Those that are in the process of settling disputes (if any) can rest assured that they have not been expending resources unnecessarily.

ii) Lender has no right to apply for relief under section 99(1A) rule (but amount forfeited is capped)

105. This option mitigates the negative impact on lenders of the previous option. Even if an error committed during the Period Before Amendment lies undiscovered for years, the lender's exposure will be limited. For the period between committal and the date the amended section 99(1A) enters into force, the lender will automatically forfeit the relevant interest and fees. However, for any interest and fees that fell due during the period thereafter, the lender will (under Option C (lender relief)) have the right to apply for relief.

106. This option would also ensure that cases that have been dealt with or are being dealt with remain unaffected. It would, however, do little to mitigate the risks of confusion for borrowers over what remedies apply to their particular situation.

iii) Lender has right to apply for relief under section 99(1A) rule (but only in respect of interest and fees that fall due after the amendment)

107. This option limits the risks for lenders, as they would have the right to apply for relief under section 99(1A) for any interest and fees that fell due after the amended section 99(1A) entered into force.

108. This option is less favourable than the status quo to borrowers, but remains in our view acceptable. For example, it is conceivable that a serious breach might be committed during the Period Before Amendment, but not discovered until later. In such a situation, the borrower might not benefit from 100% forfeiture by the lender, as the lender could successfully apply for

[15] Ibid., at p.42
[16] Ibid., at p.43

relief in respect of interest and fees that fell due after the amendment took effect. However, in such a situation, the borrower would still be entitled to an appropriate level of compensation through statutory damages.

109. This option would also ensure that, as at the date that an amended section 99(1A0 comes into force, cases that have been dealt with or are being dealt with remain unaffected.

iv) Lender has right to apply for relief under section 99(1A) rule (in respect of all interest and fees)

110. This option would equate to assuming that a lender's right to apply for relief has existed in section 99(1A) since that provision came into force on 6 June 2015.

111. Parliament has previously introduced provisions with similar retroactive effect. For example, the Securities Act 1978 (now repealed) was amended in 2004 in order to address inadvertent breach by fund managers of rules requiring the filing of certain documents, which had exposed them to significant penalties. The amendments allowed a court – on the application of "the issuer of a security" – to make an order for relief from the penalties set out in the Act. In effect, they introduced a "fund manager defence".

112. In addition, the amendments provided that an order could be made under the new relief provisions "regardless of whether the contravention ... occurred before or after this section comes into force".[17] In other words, a defence would be available even for breaches which took place before the defence provision was in place. The Select Committee that recommended this provision stated (over the objections of some investors) that "[t]he retrospective nature of this process is fair to all parties affected by the breaches of sections 37(1) and 37A".[18]

113. What appears to be different in the present case is that cases involving section 99(1A) forfeiture have already been taken and settled (such as the Cash in a Flash case). Allowing for full retroactive application of the 'lender relief' would mean that firms such as Cash in a Flash could attempt to 'undo' settlements, on the basis that they were negotiated under rules that never actually applied. It could also interfere with enforcement being considered by borrowers and/or the Commerce Commission in respect of other lenders. We consider that such an outcome would be unfair to the borrowers concerned. They should be entitled to retain the fruits of their litigation.

Conclusion

114. Officials are aware that there is a presumption against legislation applying to past events. However, this presumption against retroactive application is strongest in the case of introducing or enhancing criminal responsibility and penalties. Section 99(1A), for its part, provides for a civil penalty. In addition, under Option C (lender relief), we are not proposing to increase the penalty, but to temper it. This suggests that some form of retroactivity might be appropriate.

115. The alternative is to expose lenders to ongoing risk of forfeiture, long after the law has changed. For example, imagine that a lender makes non-compliant disclosure in September 2015. Breach is only discovered in May 2025. If no retrospectivity is applied, the lender will have no ability to claim relief, so will have to forfeit interest and fees that fell due from September 2015 – May 2025: in all likelihood over-compensation for the borrower and a serious financial hit for the lender.

[17] See sections 37AC(2), 37AH(2) and 37C(2) of the Securities Act 1978.
[18] Report of the Commerce Committee on the Business Law Reform Bill, February 2004, at pp.7-8

116. In this context, assuming section 99(1A) is amended so that lenders have the right to apply for relief, officials consider that the appropriate solution, fair to all parties, is that where a lender breaches section 99(1A) in the period before its amendment, the lender:

   a. in respect of any interest and fees forfeitable prior to the entry into force of the amended section 99(1A), *should not* have the right to apply for relief from the courts;

   b. in respect of any interest and fees forfeitable after the entry into force of the amended section 99(1A), *should* have the right to apply for relief from the courts.

4 Consultation

4.1 Public consultation

Discussion paper

117. Following Cabinet approval in October 2016 [EGI 16-MIN-0276 refers], a discussion paper (the "Discussion Paper") was released on 2 November 2016. The Discussion Paper asked respondents whether section 99(1A) should be amended and, if so, how.

118. In the event amendment was favoured, the Discussion Paper presented a number of alternatives to the status quo for discussion.

Stakeholder response to options outlined

119. Submissions closed on 9 December 2016. Nineteen submissions were received, of which two were confidential. MBIE published the seventeen non-confidential submissions on the MBIE website on 14 December 2016.

120. The respondents can be categorised as follows:

Category	Respondent names
Consumers	Paul King[19]
Consumer advocates	Raewyn Fox (New Zealand Federation of Family Budgeting Services), Citizens Advice Bureau
Agencies	Commerce Commission, FS Complaints Ltd
Academic	Barry Allan
Law firms	Alan Liddell, Russell McVeagh, Minter Ellison, Simpson Grierson
Lender organisations	NZBA, Co-op Money, Financial Services Federation, Motor Trade Association[20]
Lenders	ANZ, EB Loans, DCO Finance, Linsa (confidential), XXX[21] (confidential)

121. The respondents' preferred options were as follows:

[19] Paul King was a party to the *Norfolk Nominees v King* court case referenced earlier in this Regulatory Impact Statement.
[20] Many members of the Motor Trade Association are associated with lenders from the Financial Services Federation
[21] This respondent has asked that its name not be noted.

<table>
<tr><th>Paper Option</th><th>Corresponding RIS Option</th><th>Description</th><th colspan="2">Option preferred by…</th></tr>
<tr><td>Status quo</td><td>A</td><td>Lender forfeits 100%</td><td colspan="2">Citizens Advice Bureau, Raewyn Fox, Paul King</td></tr>
<tr><td>i</td><td>B</td><td>Cap on amount lender must forfeit</td><td>EB Loans, Alan Liddell</td><td rowspan="2">Barry Allan (combination of Option A and Option B)</td></tr>
<tr><td>ii</td><td>C</td><td>Onus on lender to go to court: relief if forfeiture is disproportionate</td><td>FS Complaints Ltd, DCO Finance, Commerce Commission[22]</td></tr>
<tr><td>iii</td><td>D</td><td>Onus on borrower to go to court:[23] forfeiture if lender's failure had materially adverse effect</td><td colspan="2">None</td></tr>
<tr><td>iv</td><td>-</td><td>Onus on borrower to go to court to prove materiality, but lender has defence if forfeiture is disproportionate</td><td colspan="2">None</td></tr>
<tr><td>v</td><td>G</td><td>Repeal</td><td colspan="2">Financial Services Federation, Co-op Money, NZBA, ANZ, Motor Trade Association, Linsa (confidential), Russell McVeagh, Minter Ellison, Simpson Grierson, XXX (confidential)</td></tr>
</table>

122. As can be seen, consumers and consumer advocates argued for retaining section 99(1A) without amendment (RIS Option A), while many lenders and their trade associations argue for the complete repeal of the provision (RIS Option G).

123. Within these extremes, two respondents support capping the proportion of interest and fees that a lender must forfeit (RIS Option B), while three others support allowing lenders to retain interest and fees if they can prove that forfeiture would be disproportionate to the harm caused (RIS Option C).

124. No respondents had as their preferred option any approach that placed the onus on the borrower to go to court for relief (RIS Option D).

Stakeholder response to retroactivity

125. The Discussion Paper asked respondents to consider whether an amended section 99(1A) – such as one where lenders can apply for relief from a court – should apply only to breaches that occur after the amendment is introduced, or if there was scope for applying it to breaches that occurred in the Period Before Amendment.

[22] The Commerce Commission added a rider that lenders should only have a limited time period (perhaps six months after discovering a breach) to go to court (after which the forfeiture becomes automatic).

[23] Paul King: "The CCCFA is useless if the borrower has to take the lender to Court when the lender is at fault. There is a considerable power imbalance with respect to money, legal representation and time."

126. Respondents were evenly split on the issue of the retroactive application of an amended section 99(1A).

127. Supporters of applying the amended provision to pre-amendment breaches included two lender associations (NZBA and FSF), two lenders (ANZ and the finance company Linsa), two law firms (Russell McVeagh and Minter Ellison) as well as the Motor Trade Association.

128. Those opposed included one lender association (Co-Op Money), two lenders (EB Loans and DCO Finance), a dispute resolution provider (FS Complaints Ltd), as well as the Law Society, the Commerce Commission and the Citizens Advice Bureau.

4.2 Agency consultation

129. The Treasury, the Reserve Bank and the Ministry of Social Development have been consulted on the conclusions in this RIS. The Legislative Design Advisory Committee has been consulted on the issue of the temporal application of an amended section 99(1A). The Ministry of Justice and the Ministry for Pacific Peoples were informed.

130. The Treasury is comfortable with MBIE's recommendations. The Ministry of Social Development agrees with MBIE's recommendations. The Reserve Bank has no concerns about MBIE's recommendations. The Ministry of Justice and the Ministry for Pacific Peoples have expressed no opposition to MBIE's recommendations.

131. The Legislative Design Advisory Committee has noted that the provision being considered by MBIE is not criminal. As a result, it considers that "the stricter presumptions against retrospective effect are not engaged here" and that "the overall question to be considered … is fairness" to the parties affected (both lenders and borrowers).

132. In this regard, the Committee adds that "it seems relevant to assessing overall fairness that the amendment to section 99(1A) would only allow lenders to apply for relief, and the court could deny the application in appropriate circumstances. In other words, retrospective application would not completely extinguish borrowers' entitlement to interest and fees…"

133. MBIE has kept the Ministry of Justice fully informed during the development of this process. It advised MBIE to engage with the Legislative Design Committee.

5 Conclusions and recommendations

134. On the basis of its assessment of the options against the three criteria retained, MBIE considers that the best options are:
    a. in respect of substantive reform of section 99(1A), Option C (lender relief); and
    b. in respect of breaches of sections 17 or 22 in the Period Before Amendment, Option iii (lender has right to apply for relief but only in respect of interest and fees that fall due after the amendment).

6 Implementation plan

135. MBIE has recommended that section 99(1A) be amended. To do so, we would expect the following steps to be followed:

- The Minister of Commerce and Consumer Affairs, if she agrees, will take the recommendation to Cabinet in May 2017;
- Assuming Cabinet agreement, MBIE officials will then work with PCO to prepare appropriate amending text;
- The legislative vehicle for the amendment will be the Financial Services Legislation Amendment Bill, which is likely to be introduced to Parliament in June or July 2017;
- MBIE officials will likely serve as advisors to the relevant select committee;
- Before the Financial Services Legislation Amendment Bill is adopted, officials will work with the Commerce Commission and key stakeholders to discuss the practical impact of the law change.

7 Monitoring, evaluation and review

136. We propose to evaluate the change to section 99(1A) three years after implementation. The evaluation would be based on the use made of the amended provision (e.g. comparing that use against use prior to amendment) as well as on interviews with the Commerce Commission and industry.