Submission on discussion document: *Fit for purpose consumer credit legislation*

Your name and organisation

Name	Karen Hodgson
Organisation (if applicable)	Community Law Centres Aotearoa
Contact details	*karen@clca.co.nz*; Privacy of natural persons

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Responses to discussion document questions

	1. Options to amend the CCCFA to enable the FMA to carry out its role effectively **A. Options for liability settings**
1	*Do you have any evidence or experience of the due diligence duty and personal liability resulting in overly conservative approaches to complying with the CCCFA? What impact did this have on consumers? How common do you think this is?*
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2	*Do you have any observations about how the impact of the due diligence duty and personal liability works may or may not depend on the size of the lender?*
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3	*Are you aware of any other problems with these liability settings?*
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Option A1: Retain the due diligence duty but remove restrictions on indemnities and insurance (preferred)	
4	*If lenders were able to indemnify their directors and senior managers from liability for pecuniary penalties (and costs), what difference (if any) would you expect that to make to how those individuals and the company as a whole approach the due diligence duty?*
	See below at question 5.
5	*If insurance were available for pecuniary penalties liability, what difference (if any) would you expect that to make to how directors and senior managers and the company as a whole meet their due diligence duty? Do you have any information about how affordable that insurance might be for different types of lenders?*
	We are of the view that personal liability acts as a strong incentive for individuals to act appropriately, and that indemnity and insurance should not be available. We are also of the view that indemnifying individuals or insuring against pecuniary penalties would not alleviate the apparent concern that lenders have that the threat of penalties is causing them to act conservatively. Both would likely just have the effect of shifting the burden from the individual to the lender company and the concern remaining. We also think this would dilute the motivation of individuals to act appropriately. Having said that, we would prefer indemnities and insurance to be allowed rather than removal of personal liability altogether.
Option A2: Remove due diligence duty for licenced lenders	
6	*Do you agree that the due diligence duty is less likely to be needed for lenders who are sophisticated enough to be licensed under the CoFI Act? Why/Why not?*
	We strongly oppose removal of the due diligence duty and personal liability. This acts as an incentive and a reminder for individuals of their obligations.

7	*How well do you think licensing and ongoing supervision by the FMA could replace the need for due diligence and personal liability? Does this depend on the kind of lender? If so, how?*
	See above, we strongly oppose the removal of the due diligence duty and personal liability. Licensing would not have the same effect, in part, because it does not have the same consequences.
8	*What impacts might options A1 and A2 have on lenders and consumers compared to the status quo? For lenders, how would you expect lender decision-making and compliance cultures to change under these options?*
	Our preference is option A3, status quo. We currently see lenders risking personal liability by not complying with the CCCFA, the Regulations and the Code. If adjustments are made or personal liability is removed, we would expect even more unaffordable and irresponsible lending.
	B. Options for regulatory model
9	*Do you agree that these are a fair reflection of the minimum legislative changes that are required to transition credit to the FMA? If not, please explain*
	We do not have firm views on options B1 and B2.
Option B1: Transition to a market services licence and apply all FMA core and licencing powers to consumer credit (preferred)	
10	*What implications would you expect from adopting a licencing approach and the associated regulatory tools for credit?*
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11	*What modifications to the FMA's existing regulatory tools, such as stop orders, should we consider if extending them to the CCCFA under this option?*
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12	*What do you think about the transitional licence approach, including what time periods are appropriate?*
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Option B2: Retain 'Fit and proper' certification (status quo) and add FMA core tools for enforcing the regulatory perimeter	
13	*Do you agree with our analysis about the relative benefits and risks of the certification model? Why/ why not?*
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14	*Are there additional tools that you consider the FMA should have to regulate credit, for examples tools like action plans or censures that are usually only available under a licensing model?*

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	2. Options to amend disclosure requirements
	C. Options for what and when information must be disclosed
15	*As a consumer, do you receive the right kind and amount of information to make informed decisions? Why/why not?*
	Each of the disclosure requirements serves a purpose and they are there to protect and inform the consumer. Our CLCs frequently see situations where the client has received no disclosure at all. We see this often in situations of car finance. There are usually other issues at play as well, such as a lack of suitability assessment and affordability assessment, and/or add-on insurances that are of little value to the consumer.
16	*Do you consider any of the disclosure obligations to be irrelevant, confusing, or inappropriate? If so, please tell us what obligations you are referring to and what impact this has.*
	We think that sometimes the information is repeated resulting in confusing over-disclosure (for example, repeated disclosure of terms and conditions where there has been no change). It may be possible to refer back to the original disclosure of terms and conditions if nothing has changed. Generally speaking, disclosure documents could be simplified and put into plain English.
17	*How could disclosure obligations be more targeted to the consumer's circumstances to ensure only relevant information is disclosed?*
	As mentioned, repeated disclosure of the same thing can be confusing for consumers. It may be possible to refer back to the original disclosure of terms and conditions if nothing has changed, and highlight what has changed for the consumer.
18	*Is the information set out in Regulations 4F and 4G both sufficient and do sections 22 and/or 23 require the right information to be disclosed when a contract is varied?*
	We haven't had any feedback from our CLCs about these Regulations.
19	*Are there any other concerns or issues you would like to raise related to disclosure obligations?*
	No.
	D. Options for how information must be disclosed
20	*As a lender, do you identify any barriers in the Act to the use of electronic methods of disclosure? If so, can you explain what are these barriers and how they impact your processes?*
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21	*As a lender, are there any practical difficulties with obtaining the borrower's consent for electronic forms of disclosure (section 32(4)(b))?*
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22	*What would be the implications of removing the requirement to obtain borrower's consent for electronic communication and forms of disclosure (section 32(4)(b))?*
	We are concerned about removing the requirement to obtain consent to provide disclosure electronically. Consumers should be given a choice about how they wish to receive disclosure. We do not see why obtaining consent to electronic disclosure can't be a routine part of the lender's information gathering process. We think taking this choice away has particular risks where the lender provides electronic disclosure by way of a login to a website with links to documents that can be downloaded. Some of our clients lack regular access to the internet and/or computer literacy which would inhibit their access to the disclosure documents and result in digital exclusion.[1] Our observation is that electronic disclosure via attachment to an email is a preferable method of electronic disclosure where consent is given. We also take issue with the removal of the conditions at section 35(1A) where the document is not an attachment to an email but is provided via a link. Sometimes the link is no longer active after a period of time. If the consumer gives consent to electronic disclosure, and the disclosure is provided as a link, there should be a requirement to ensure that the link remains available throughout the life of the contract.
	E. Options for penalties for incomplete disclosures by lenders
23	*Do sections 95A and 95B meet their objectives? Why/why not?*
	As mentioned above, the situations our CLCs have seen are where there has been little or no disclosure, and other issues are at play. The penalties in these situations relating to disclosure have been appropriate and proportionate.
24	*As a lender, to what extent does section 99(1A) impact the time, effort, and costs you dedicate to initial and variation disclosures?*
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25	*Under option E1, what should a materiality test look like?*
	We do not have suggested wording for a materiality test. CLCA supports option E4: retain the status quo. If option E1 (materiality test) is pursued, we recommend the threshold is a low one.
26	*Under option E1, which party should have the burden of proof and what would this mean for the effectiveness of the option? If the onus is on borrowers to show materiality would that deter them from seeking redress under section 99(1A)?*

[1] CAB's report on digital exclusion outlines many of the same issues CLCs see: **Face-to-face-with-Digital-Exclusion.pdf (cab.org.nz)**

	In our view, if a materiality approach is taken, the onus should be on the lender to show that the outcome of the breach was not material. Consumers experience enough barriers in bringing complaints to lenders and dispute resolution schemes, without having to also be required to prove the materiality of a breach.
27	*Under option E2, how should the maximum amount the lender forfeits be calculated?*
	We do not have a suggested calculation and do not think that this option should be progressed. We support option E4: retain the status quo.
28	*Under option E3, would there be the right incentives in place to ensure lenders comply with their disclosure obligations?*
	No, we do not think that there would be enough incentives on lenders to comply with disclosure obligations.
29	*What would be the risks associated with each option? How could they be mitigated?*
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	3. Review of the high-cost credit provisions
30	*What specific provisions (high-cost or other) have most impacted lenders' willingness or ability to offer high-cost consumer credit?*
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31	*In the absence of high-cost loans, what other avenues are borrowers turning to?*
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32	*Is the unavailability of high-cost consumer credit having positive or negative effects on would-be borrowers?*
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33	*What evidence, if any, is there of debt spirals and/or continued repeat borrowing for vulnerable borrowers across credit contracts with interest rates of 30 per cent to 49.9 per cent?*
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	F. Options to amend the high-cost credit provisions
	Option F1: Expanding the definition of a high-cost consumer credit contract to contracts with an interest rate above 30 per cent
34	*Are there any other issues associated with loans in the 30 per cent and 50 per cent interest rate range that we should be aware of?*
	CLCA supports lowering the high-cost consumer credit interest rate to 30% (option F1).

35	*Are there examples where loans with interest rates between 30 per cent and 50 per cent would breach the 0.8 per cent rate of charge cap?*
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Option F2: Expanding the definition of a high-cost consumer credit contract to contracts with an interest rate above 45 per cent	
36	*What evidence, if any, is there of debt spirals and/or continued repeat borrowing for vulnerable borrowers across credit contracts with interest rates of 45 per cent to 49.9 per cent? Are there any other issues associated with loans in this interest rate range that we should be aware of?*
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37	*For lenders: If the government extended the high-cost provisions to loans with annual interest rate of 30 per cent or more, what would be the impact on your operations (if any)? Are there any changes to the high-cost provisions we should consider to enable those loans to remain profitable, and on what terms?*
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38	*How is a revised definition of a high-cost consumer credit contract interest rate threshold likely to affect access to credit for borrowers?*
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39	*Do you recommend considering another interest rate threshold? If yes, please explain why.*
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Option F3: Status quo	
40	*Do you have any other feedback on any of the high-cost credit provisions? Have they been effective in reducing financial harm caused by the excessive cost of credit for some types of loans and repeat borrowing by vulnerable consumers?*
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Option F4: Other high-cost provisions	
41	*Is there evidence of certain industry lending practices that are causing harm which the high-cost credit provisions could address?*
	We are pleased to see that car finance and add-ons are highlighted in the discussion document. Many of the credit contract issues our CLCs see are related to car finance. Often, suitability and affordability assessments have not been properly carried out and the car loan is unaffordable from the start. In addition, consumers have purchased add-on insurance products at the same time that are neither suitable nor affordable. We do not have a firm view of how the high-cost credit provisions could address these practices, but support MBIE exploring this.

	Along with others in the financial capability sector, we have been advocating for these related changes:[2] (a) Add-on insurances are being widely mis-sold. There are stories of clients who have misunderstood what their insurance actually covers, they have poor recollection of what they have purchased, and they have been sold a product that is of little value. We recommend a mandatory four-day cool-off period between the sale of a car and the sale of add-on insurance.[3] This would avoid consumers buying add-on insurance under pressure and give them a chance to consider the products' usefulness and affordability. (b) Flex commission adds a percentage to the base interest rate charged by the lender, which is then paid (or part is paid) to the dealer as commission. Flex commission is banned in both Australia and the UK, and it should be banned here. (c) We recommend introducing a cap on add-on insurance commissions: (I) Mark-ups on the wholesale price of add-on products inflate the final retail price. A meaningful cap on commissions will help disincentivise the mis-selling of insurances. (II) Consumers cannot easily compare the price of add-ons between providers. A cap on commissions will allow consumers to compare costs more appropriately across different providers with confidence in the retail cost offered. (d) The use of immobilisers/disabling devices for enforcement purposes should be prohibited. These can be dangerous. One CLC reported a client who was driving when the device on their car was activated. These devices are also extremely costly and create further risk of financial hardship.
42	*Are there any other industry lending practices that you believe are harmful to consumers?*
	We have discussed these issues above.
43	*Do you agree with the suggested impacts of each of the identified options? Why/why not?*
	We have discussed our position on the options above.
44	*Do you have any information or data that would support our assessment of the impacts of each of the options?*
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[2] Other agencies have produced papers on the problems with vehicle finance and add-on insurances. In 2021, the Commerce Commission produced a paper entitled "Motor Vehicle Finance and Add-ons Review, ***Motor-vehicle-financing-and-add-ons-review-10-November-2021.pdf (comcom.govt.nz)***. The Commission interviewed lenders, dealers and consumers about their experiences of vehicle finance and add-ons, noting that the ability for dealers to earn a sales commission may mean that dealers prioritise selling add-ons over adequately assessing suitability for the consumer or assisting them to make an informed decision (p 40). See also the Salvation Army Social Policy and Parliamentary Unit's paper on add-on insurances (May 2022) ***sppu_addoninsurance_may2022_v4.pdf (salvationarmy.org.nz)*** ***sppu_addoninsurance_may2022_v4.pdf (salvationarmy.org.nz)***, and Christians Against Poverty's paper on vehicle finance (August 2022) ***Vehicle_finance_2022_f_UPDATED.pdf (capnz.org)***.

[3] In 2021, the Australian Securities and Investments Commission introduced this four-day pause.

45	*Do you think that the CCCFA could be strengthened to protect consumers who are sold lending products or add-ons that exceed the value of the product? If so, how?* See our comments above in relation to question 41. A simple approach would be to prohibit the practices identified.
46	*Finally, are there any other areas and options for change that we should consider that have not been addressed in this discussion document?* • Debt collection agencies should be brought within the regulation framework and be required to subscribe to a dispute resolution scheme. Far too often we see debt collectors stonewalling our CLCs and clients by not responding to requests for information or complaints. • We also recommend clearer requirements for fair debt collection practices, and for penalties to be added to the Fair Trading Act for harassment. Our CLCs have reported debt collectors who have misled clients by claiming a debt is owed when there is no evidence of liability, debt collectors harassing clients, and also filing proceedings in the District Court on the basis of incomplete documents and (what appears to be) a hope that the debtor does not respond. • Fair remediation where a lender has breached the CCCFA needs to be clearly outlined in legislation. In particular, the legislation should include a clear expectation that a borrower is at least put back in the position they were in before an unaffordable loan was approved. Consumers are often left with the burden of residual debt after the car from an unaffordable loan has been sold, for example.

Other comments

We have reviewed FinCap’s submission and support it. In particular, we agree that if some of the options are progressed to change due diligence and personal liability settings, and disclosure requirements, these be subject to a statutory review process.