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

Your name and organisation

Name	Aneleise Gawn
Organisation (if applicable)	Consumer NZ
Contact details	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?*
	No comment.
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?*
	No comment.
3	*Are you aware of any other problems with these liability settings?*
	No comment.
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?*
	No comment.
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?*
	No comment.
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?*
	No, we do not. Although those licensed under the CoFI Act will be the subject of greater conduct regulation and scrutiny, we do not consider it is appropriate to remove the due diligence duty from these lenders because it could provide a competitive advantage to some lenders and reduce their incentives to comply with the legislation.
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?*
	We do not agree licensing and supervision by the FMA could replace the need for due diligence and personal liability. The due diligence duty deters misconduct and should be

	retained. In our view, licensing and supervision are complementary to the due diligence duty and personal liability.
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?*
	Option A1 (retaining the duty but removing restrictions on indemnities and insurance) or A3 (retain the status quo) are our preferred options because we consider consumers would have less protections if option A2 (remove the due diligence duty for licenced lenders) is adopted.
	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*
	No comment.
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?*
	No comment.
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?*
	We recommend the inclusion of a super-complaint mechanism for the FMA, similar to that in the UK. This would be useful for organisations that have gathered evidence of a breach impacting large numbers of consumers.
12	*What do you think about the transitional licence approach, including what time periods are appropriate?*
	No comment.
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?*
	No comment.
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?*
	See our answer to question 11 above.
	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?*
	Information disclosure is important for consumers and their advocates and is one of the key ways the Act protects the interests of consumers. Consumers need to have access to comprehensive and timely information to confidently participate in the market and to address information asymmetries. The current rules mean consumers are entitled to receive the right kind and amount of information to make informed decisions. However, at times, the way disclosure is made can impact on a consumer's ability to make an informed decision. For example, we have heard from financial mentors that car salespeople can use high pressure sales tactics, rendering initial disclosure ineffective at times.
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.*
	No, we consider the current disclosure obligations are appropriate. There may be a small number of people who feel overwhelmed or confused by the information they are provided. However, we don't think this information should be withheld from consumers on the basis that a small number may find it confusing or difficult to understand. Also, we do not think there is any strong evidence to suggest the type or amount of information being disclosed is detrimental to consumers.
17	*How could disclosure obligations be more targeted to the consumer's circumstances to ensure only relevant information is disclosed?*
	We do not support option C2 (taking a more targeted approach). Reducing the disclosure of information provided to borrowers based on assumptions about their circumstances seems problematic as the assumptions may be incorrect, or intentionally overstated, resulting in borrowers being provided with insufficient information. We also think this option is likely to result in greater complexity for lenders as they will have to assess the consumer's individual circumstances before making the disclosure.
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?*
	No comment.
19	*Are there any other concerns or issues you would like to raise related to disclosure obligations?*
	No comment.
	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?*

	No comment.
21	*As a lender, are there any practical difficulties with obtaining the borrower's consent for electronic forms of disclosure (section 32(4)(b))?*
	No comment.
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 do not support the removal of the requirement to obtain consent for electronic communication and forms of disclosure. Electronic communication is not a suitable for some consumers and lenders should not be able to disclose information to consumers in a way that is not accessible to them. This is a form of digital exclusion and would result in borrowers being unaware of critical information about their loans.
	E. Options for penalties for incomplete disclosures by lenders
23	*Do sections 95A and 95B meet their objectives? Why/why not?*
	We think they meet their objectives and seem to effectively mitigate the risk of section 99(1A) having disproportionate consequences. In our view, nothing has changed to negate the reason for the existence of these provisions. Also, we are not aware of any lenders that have faced disproportionate liability or have had their financial stability compromised as a result of section 99(1A).
24	*As a lender, to what extent does section 99(1A) impact the time, effort, and costs you dedicate to initial and variation disclosures?*
	No comment.
25	*Under option E1, what should a materiality test look like?*
	We do not support option E1 (limiting section 99(1a) to breaches that are material or have potential to mislead). Instead, we support option E4 (retaining the status quo).
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)?*
	The burden of proof should be on the lender who has breached its disclosure obligations. It will be best placed to bring proceedings and discharge that burden. If the burden is placed on consumers, it is unlikely they will attempt to seek redress under section 99(1A), rendering the provision ineffective.
27	*Under option E2, how should the maximum amount the lender forfeits be calculated?*
	We do not support option E2 (putting a limit on total liability under section 99(1a)). However, if this is the option selected, rather than setting a cap, the courts should have the power to decide what is proportionate, on a case by case basis, like 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 don’t consider the right incentives would be in place. We therefore support option E4 (retaining the status quo).
29	*What would be the risks associated with each option? How could they be mitigated?*
	We consider there are risks with options E1, E2 and E3. In our view, the status quo (option E4) already meets the government’s objectives of balancing the rights and interests of consumers and lenders. The fact lenders’ want their interests to be given more weight is not a good reason to move away from the status quo.
	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?*
	No comment.
31	*In the absence of high-cost loans, what other avenues are borrowers turning to?*
	Borrowers often turn to Buy Now Pay Later (BNPL), WINZ, no interest loan schemes and people they know. Given the risks involved with BNPL, we have been calling for this to be brought under the CCCFA for a number of years. We consider this needs to be addressed urgently.
32	*Is the unavailability of high-cost consumer credit having positive or negative effects on would-be borrowers?*
	We consider the unavailability of high-cost consumer credit is having positive effects on would-be borrowers. Organisations, such as FinCap will be able to provide more detailed information on the impact it is having.
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?*
	No comment.
	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?*
	No comment.
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?*
	No comment.

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?*
	No comment.
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?*
	No comment.
38	*How is a revised definition of a high-cost consumer credit contract interest rate threshold likely to affect access to credit for borrowers?*
	In our view, it is unlikely to affect access to credit for borrowers. Given the lack of complaints to our office and the lack of up to date evidence released by MBIE we do not think there have been any significant access to credit issues since the CCCFA amendments were introduced in 2022 and 2023.
39	*Do you recommend considering another interest rate threshold? If yes, please explain why.*
	We strongly support expanding the definition of a high-cost consumer credit contract to contracts with an interest rate above 30 per cent (option F1).
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?*
	We have heard from organisations such as FinCap that the provisions have been effective at reducing harm to borrowers from the highest-cost loans in the market.
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?*
	Yes, we are very concerned about car lending causing harm to consumers. For example, we recently wrote a story about Jimmy, who was going to be charged nearly $30,000 for a $7,000 car[1]. We consider this type of lending is predatory and highlights the need for change to how car finance and add-on products are sold. We think there should be: • a ban on car dealers deciding on interest rates for finance deals.

[1] Rebecca Styles and Imogen Wara, 'Customer charged nearly $30k for a $7k car', 9 May 2023, ***https://www.consumer.org.nz/articles/customer-charged-nearly-30k-for-a-7k-car***

	- set limits on commissions from add-on insurance products being rolled into the finance deal. - compulsory pauses between the promotion and sale of add-on insurance products. - a ban on immobiliser devices. As mentioned above, we are also concerned about BNPL.
42	*Are there any other industry lending practices that you believe are harmful to consumers?*
	Yes, we have previously commented that telcos selling high cost phones to consumers (payable in instalments) should be captured under the CCCFA.
43	*Do you agree with the suggested impacts of each of the identified options? Why/why not?*
	We agree option 1 is the best option (expanding the definition of high-cost consumer credit contract to contracts with an interest rate above 30 per cent).
44	*Do you have any information or data that would support our assessment of the impacts of each of the options?*
	No comment.
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?*
	Yes, we agree the CCCFA could be strengthened to protect consumers who are sold lending products or add-ons that exceed the value of the product. See our answer to question 41 above.
46	*Finally, are there any other areas and options for change that we should consider that have not been addressed in this discussion document?* No comment.

Other comments