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

Your name and organisation

Name	Jonathan Woodhams
Organisation (if applicable)	LPF Group Limited
Contact details	***jj@lpfgroup.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?*
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?*
3	*Are you aware of any other problems with these liability settings?*
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?*
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?*
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?*
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?*
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?*

	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*
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?*
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?*
12	*What do you think about the transitional licence approach, including what time periods are appropriate?*
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?*
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?*
	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?*
	LPF considers that borrowers currently receive the right kind and amount of information under the disclosure provisions. It is notable that lenders, rather than borrowers, have raised concerns regarding the disclosure requirements (Discussion Paper, paragraph 56). Lenders and borrowers naturally have different experiences and interests when it comes to disclosure. While borrowers are

	motivated to ensure that they receive all of the information they need when they need it, lenders have a legitimate interest in reducing their compliance costs and risk. In these circumstances, it is imperative that MBIE hears and takes into account consumer experiences and views. Individual consumers are far less likely to engage in the consultation process than lenders, MBIE should consider undertaking additional steps to proactively ascertain consumers' perspectives on this issue.
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. As stated in response to question 15, LPF considers that borrowers are currently provided with the right kind and amount of information under the disclosure provisions. Further to our observations above regarding the potential for the interests of lenders and borrowers to diverge, claims by lenders that providing information to borrowers is, or can be, counterproductive should not be accepted in the absence of cogent evidence that this is in fact the case (as MBIE implicitly acknowledges at paragraph 58). As a general point, there will always be a subset of borrowers who are easily overwhelmed or confused by financial information. That is not a reason to reduce the amount or complexity of the information disclosed under the Act. Many (perhaps the majority of) borrowers are able to understand and use disclosure unaided. Borrowers who find it difficult to understand particular information can talk to their lenders about it, or seek independent advice. Borrowers should not be deprived of information they need to make fully informed decisions about their credit contracts on the basis that some of them may require more assistance to understand it. Finally, we note that complying with ss 9C and 32 should substantially reduce if not completely eliminate the risk of disclosure statements being confusing to the average borrower.
17	*How could disclosure obligations be more targeted to the consumer's circumstances to ensure only relevant information is disclosed?*
	LPF does not support Option C2. The disclosure requirements under the Act are already targeted to consumers' circumstances to the extent that the information required to be disclosed varies depending on the disclosure type (initial, continuing, variation, etc.). It is far from obvious that there are any other circumstances that so clearly and consistently affect borrowers' informational needs that they should determine lenders' disclosure obligations. Overall, reducing the disclosure provided to borrowers based on (potentially inaccurate) assumptions about their circumstances and therefore informational needs seems highly likely to result in borrowers being arbitrarily deprived of necessary information. Further, C2 appears to make the false assumption that reducing the amount of information that has to be disclosed would lead to reduced compliance costs. Requiring lenders to identify information that is more likely to be relevant to the consumer's particular circumstances at the time of disclosure would require lenders to make tailored disclosure assessments for every customer, increasing compliance costs and the likelihood of errors being made.

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?*
	Yes. However, to the extent there is genuine uncertainty as to what information must be disclosed under ss 22 and/or 23, LPF supports amendments to clarify the current position.
19	*Are there any other concerns or issues you would like to raise related to disclosure obligations?*
	As MBIE notes (at paragraph 51), one of the key ways the CCCFA protects the interests of consumers is by imposing disclosure obligations on lenders. These obligations are critical to ensuring that consumers are able to make informed decisions in circumstances where lenders have significant power, knowledge and resource advantages. Any changes to the disclosure requirements must therefore be demonstrably justified based on objective and reliable data and advance the purposes of the Act. They should not be made based on the unsupported claims of lenders concerned primarily with reducing their compliance costs rather than ensuring consumers are informed. Overall, LPF supports Option 1C (maintain status quo). The information currently required to be disclosed is relevant and useful and there is no evidence to suggest that the type or amount of information being disclosed is having a detrimental effect on consumers such that change is required. That said, if there is genuine uncertainty as to exactly what information must be disclosed under ss 22 and/or 23, we support amendments to clarify the position.
	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?*
21	*As a lender, are there any practical difficulties with obtaining the borrower's consent for electronic forms of disclosure (section 32(4)(b))?*
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))?*
	LPF does not support the removal of the requirement to obtain borrowers' consent under s 32(4)(b). As MBIE itself observes (at paragraph 71), electronic communication may not be a suitable or user friendly option for some consumers. Indeed, some consumers (many of whom may be particularly vulnerable) may not use electronic communication at all. Lenders should not be able to provide borrowers with disclosure in ways that mean they will never in fact receive it.
	E. Options for penalties for incomplete disclosures by lenders
23	*Do sections 95A and 95B meet their objectives? Why/why not?*

Yes. Sections 95A and 95B effectively mitigate any risk of s 99(1A) having disproportionate or otherwise problematic effects, while also ensuring that s 99(1A) continues to strongly incentivise lenders to comply with their ss 17 and 22 obligations.

The provisions are the result of a comprehensive, three year legislative process. Nothing has changed or happened in the last four and a half years to undermine the compelling policy reasons that led to their introduction.

The banks say that even with ss 95A and 95B, the effects of s 99(1A) may be disproportionate (paragraph 77). That is effectively a claim that the courts cannot be relied on to apply ss 95A and 95B effectively so as to achieve their well-known and understood purposes. There is no basis whatsoever for such a claim. To the best of LPF's knowledge, the courts are yet to determine a single application for relief under s 95A (applications have been made in the *Simons v ANZ* class action litigation, but are yet to be heard). It therefore cannot be said that the provisions do not operate as intended.

Given that ss 95A and 95B mitigate any risk of disproportionate liability, there is no justification for any "*excessive risk aversion*" on behalf of lenders (paragraph 78). Given the size and resources imbalance, it is appropriate that the onus is on a lender to apply to the courts for relief. The banks and other lenders have significant resources and legal teams available and are much better able to navigate the courts – rather than impose the obligation on consumers.

We note that MBIE does not give (and LPF is not aware of) any examples of lenders facing disproportionate liability under and/or having their financial stability compromised as a result of s 99(1A), notwithstanding the availability of relief under ss 95A and 95B.

24 *As a lender, to what extent does section 99(1A) impact the time, effort, and costs you dedicate to initial and variation disclosures?*

To the extent that s 99(1A) causes lenders to dedicate more time and effort to ensuring compliance with their ss 17 and 22 obligations than they otherwise would, that is entirely appropriate and consistent with the purpose of the provision.

As discussed above, disclosure is one of the key ways the CCCFA protects the interests of consumers. Banks and other lenders should be taking their disclosure obligations seriously and dedicating the requisite levels of resource to achieving compliance. They will not do that unless the consequences of failing to do so are sufficiently substantial – otherwise, those consequences become just another cost of doing business. Indeed, as MBIE notes (paragraph 86), the Commerce Commission observed that some lenders did not start paying due attention to their disclosure obligations until s 99(1A) was introduced.

The banks say that s 99(1A) poses particular risks for them, because they rely heavily on automated systems (paragraph 77(b)). That is not a reason to repeal or amend s 99(1A). As the Commission recently commented, banks can be expected to make the necessary investment in the systems that support their compliance obligations so that they get things right for consumers (media release, "Kiwibank faces criminal charges following issue that caused over $7m in overcharges", 11 June 2024).

Inadvertent system errors that have the capacity to cause undetected issues affecting large numbers of consumers are serious. If lenders are going to take advantage of automatized processes and systems (which presumably contribute to reducing their operating costs) they must also bear the burden of ensuring those systems work. The penalty for these kinds of breaches of disclosure obligations must incentivise lenders to establish and maintain systems that are effective and reliable (see *Walker v Members Equity Bank* [2024] FCA 15 and *SIC v BT Funds Management* [2021] FCA 844).

25	*Under option E1, what should a materiality test look like?*
	LPF does not support Option E1. Fundamentally, it makes little sense to say that information is sufficiently material that it must be disclosed under ss 17 or 22, but not sufficiently material that it matters whether it is missing or incorrect. As noted above, if there is any uncertainty as to what information must be disclosed under ss 17 or 22, we support that being clarified. Drafting and applying a materiality test are likely to be fraught with problems and complexities. What is material will depend on a range of factors, including the circumstances of the individual consumer. How those factors will or may apply will be difficult for both lenders and consumers to predict and hard for consumers to understand. Whatever guidance the FMA provides, uncertainty as to how the amended provision applies is likely to prevail pending clarification by the senior courts, which may not come for many years (as has been the case with, for example, s 22).
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)?*
	If this option is to preferred (and it should not be), the burden should absolutely be on the lender who has breached its disclosure obligations. Lenders are patently better placed to bring proceedings and discharge any burden of proof. If the burden is put on consumers, they will not seek redress under s 99(1A) and the provision will cease to have any meaningful deterrent effect. Once it is accepted that the burden must be on lenders, it is difficult to see what advantages this option has over the status quo, given ss 95B already requires the courts to have regard to matters such as the nature and extent of the breach and the extent to which any person has been prejudiced.
27	*Under option E2, how should the maximum amount the lender forfeits be calculated?*
	LPF does not support Option E2. Rather than setting a legislative cap (which may well turn out to be at the wrong level), the obvious solution is to give the courts discretion to ensure that the consequences of s 99(1A) are proportionate on a case by case basis, per the status quo.
28	*Under option E3, would there be the right incentives in place to ensure lenders comply with their disclosure obligations?*
	No. See LPF's answer to question 24 above.
29	*What would be the risks associated with each option? How could they be mitigated?*
	LPF supports Option E4 (retain the status quo). The status quo already meets the Government's objectives of balancing compliance costs with good consumer outcomes. Options E1 and E2 are unworkable. Option E3 is inconsistent with ensuring good consumer outcomes as it will result in lenders being insufficiently incentivised to comply with ss 17 and 22. The status quo strikes the right balance. It ensures s 99(1A) motivates lenders to invest in compliance without exposing them to disproportionate liability. It gives the courts the flexibility to grant relief on a case by case basis. It is entirely appropriate for lenders who

	have breached their disclosure obligations and are more sophisticated and well-resourced than borrowers to be the ones who have to bring court proceedings seeking relief. In short, there is nothing wrong with the status quo, which carefully balances the rights and interests of consumers and lenders. The fact that lenders would prefer their interests to be given more weight is not a reason to change it. Although not directly raised in the Discussion Paper, for the avoidance of doubt and for the reasons identified in the course of the first review of s 99(1A), LPF considers that any amendments to s 99(1A) and/or ss 95A and 95B (or the disclosure provisions) should only apply prospectively in the usual way.
	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?*
31	*In the absence of high-cost loans, what other avenues are borrowers turning to?*
32	*Is the unavailability of high-cost consumer credit having positive or negative effects on would-be borrowers?*
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?*
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?*
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?*
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?
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?*
38	*How is a revised definition of a high-cost consumer credit contract interest rate threshold likely to affect access to credit for borrowers?*
39	*Do you recommend considering another interest rate threshold? If yes, please explain why.*
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?*
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?*
42	*Are there any other industry lending practices that you believe are harmful to consumers?*
43	*Do you agree with the suggested impacts of each of the identified options? Why/why not?*
44	*Do you have any information or data that would support our assessment of the impacts of each of the options?*
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?*
46	*Finally, are there any other areas and options for change that we should consider that have not been addressed in this discussion document?*

Other comments

The banking industry in New Zealand funds a very well-resourced and influential lobby group on behalf of the banks in the form of the New Zealand Banking Association. As an example of the privileged access this lobby group has, we note that the NZBA CEO recently joined the Minister of Commerce Hon Andrew Bayley as part of an Australian Banking Association led delegation to Singapore. It's clear the banking industry has no trouble communicating its views to government which leaves an obligation on MBIE to ensure it makes a significant effort to actively seeking out consumer views, using channels that are best suited to achieving that.

The proposed changes need to recognise that consumers need to be protected, given the power imbalance and significant resources held by the lenders, particularly the major banks. Consumers need to have adequate disclosure of the transactions they are entering into and of any changes so that they can understand what they are agreeing to. History shows us that lenders simply will not apply the resources needed adequately comply with their obligations unless the consequences of not doing so are substantial.

As Hon Nicola Willis recently said when announcing a government inquiry into rural and business banking: "Change needs to happen and change will happen so that New Zealanders are better served and I know the banks are powerful but democracy is more powerful."

Finally, although not directly raised in the Discussion Paper, for the avoidance of doubt and for the reasons identified in the course of the first review of s 99(1A), LPF considers that any amendments to s 99(1A) and/or ss 95A and 95B (or the disclosure provisions) should *only* apply prospectively in the usual way.