New Zealand Banking Association
Te Rangapū Pēke

Submission

to the

Ministry of Business, Innovation and Employment

on the

Discussion Documents: *Fit for purpose Financial Services Reform (Credit and Conduct Papers)*

19 June 2024

NEW ZEALAND BANKING ASSOCIATION – TE RANGAPŪ PĒKE
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About NZBA

1. The New Zealand Banking Association – Te Rangapū Pēke (**NZBA**) is the voice of the banking industry. We work with our member banks on non-competitive issues to tell the industry's story and develop and promote policy outcomes that deliver for New Zealanders.

2. The following eighteen registered banks in New Zealand are members of NZBA:

- ANZ Bank New Zealand Limited
- ASB Bank Limited
- Bank of China (NZ) Limited
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- China Construction Bank
- Citibank N.A.
- The Co-operative Bank Limited
- Heartland Bank Limited
- The Hongkong and Shanghai Banking Corporation Limited
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- KB Kookmin Bank Auckland Branch
- Kiwibank Limited
- MUFG Bank Ltd
- Rabobank New Zealand Limited
- SBS Bank
- TSB Bank Limited
- Westpac New Zealand Limited

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Introduction

4. This submission sets out NZBA's response to two of the three Ministry of Business, Innovation and Employment (**MBIE**) fit for purpose financial services reform discussion papers released on 22 May 2024:

   4.1. Fit for purpose consumer credit legislation (**Credit Paper**); and

   4.2. Fit for purpose financial services conduct regulation (**Conduct Paper**).

5. NZBA looks forward to engaging further with MBIE about these papers in the coming weeks to provide any further assistance possible to help the Government best achieve the stated objectives of phase two of the financial services reform programme.

6. NZBA's response to MBIE's third discussion paper, Effective financial dispute resolution (**Dispute Resolution Paper**), is set out in a separate submission.

Executive Summary

Overview

7. NZBA fully supports the consumer protection purpose of the Credit Contract and Consumer Finance Act 2003 (**CCCFA**) and the Financial Markets (Conduct of Financial Institutions) Amendment Act 2022 (**COFI Amendment Act**), and we appreciate the opportunity to respond to MBIE’s consultation on phase 2 of the financial services reforms.

8. NZBA welcomes initiatives in line with the stated objectives of the Government's reform programme, being to:

   8.1. simplify and streamline regulation of financial services (including reducing duplication);

   8.2. remove undue compliance costs for financial market participants; and

   8.3. improve outcomes for consumers.

9. NZBA's feedback in this submission has taken those three objectives into account. We also submit that it is imperative that:

   9.1. consumer protection legislation should impose only proportionate penalties and avoid creating risks to solvency and financial stability;

   9.2. the reforms do not inadvertently add further compliance burden; and

   9.3. sensible prioritisation and staging of regulatory reform initiatives occurs.

10. Related to this, while NZBA is appreciative of MBIE's attempts to address a wide range of matters, some of the options raised in the papers do not appear to fit with the Government focus in Phase 2 on simplification and removing compliance costs. There is already a full regulatory reform agenda for the banks (and regulators). In this regard,

10.1. The process of regulatory reform itself (even before implementing any regulatory changes) places a significant burden on banks because of the time needed to consider proposals and then consult and engage internally and externally. This focus and time is required from the outset to ensure that any new regulatory design settings are appropriate, workable and do not have unintended consequences.

10.2. As has been identified in the draft Commerce Commission Market Study report dated 21 March 2024, the CCCFA is commonly referred to as an example of regulatory burden and the Commission considers that the regime overall has had unintended negative consequences for competition. It appears to us, therefore, that suggestions to add complexity to the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**) at this stage (eg such as through adding a licencing overlay to the CCCFA) and expansion of FMA powers are ill timed. In particular, any addition of obligations to the CCCFA should only occur in the context of a wider review of the CCCFA - bearing in mind the observations in the draft Market Study report that each time the CCCFA or associated regulations and responsible lending code have been amended, lenders have had to change their internal processes and systems and that "it appears that changes are being made faster than providers can keep up with".[1]

Approach to submissions and reform

11. Given the short consultation period and the objectives of Phase 2, this submission focusses on the key areas where reform is needed and on how those reforms (and related review work) should be prioritised and staged – with an initial focus on reforms that can be easily implemented.

12. NZBA considers there are two priority issues requiring immediate reform to the CCCFA:

12.1. Section 99(1A) (and ss 95A and 95B) which provide that a debtor is not liable for the costs of borrowing (interest and fees) in relation to any period during which the creditor has failed to comply with its initial or agreed variation disclosure obligations. On one interpretation (set out in the Credit Paper), s 99(1A) requires the lender to repay all interest and fees received from

[1] See Personal Banking Services Market Study Draft Report, pages 181 to 182.

borrowers during a period of non-compliance. NZBA proposes the retrospective repeal of these sections of the CCCFA; and

12.2. Section 59B which requires directors and senior managers to exercise due diligence to ensure that the creditor complies with its duties and obligations under the CCCFA. NZBA proposes the repeal of this section of the CCCFA.

13. These issues currently present the greatest barrier to banks providing access to consumer credit in a timely, efficient and safe manner. In addition, the forfeiture interpretation of s 99(1A) creates solvency and financial stability risks in some scenarios. Accordingly, addressing these issues offers the greatest opportunity to improve the current regulatory regime for the benefit of all New Zealanders.

14. NZBA is also supportive of other potential reforms that have been highlighted by the issues and options set out in the Credit and Conduct Papers, but subject to appropriate prioritisation and staging. NZBA's views on a properly planned approach, with reforms divided into phases as summarised in the table below:

Phase	Changes
Phase 2 changes being changes that should be introduced into the House by December 2024 (**Phase 2 Bill**) and/or can be achieved through secondary legislation.	As above, NZBA submits that Phase 2 should as a priority include: • *Critical changes relating to s 99(1A) (and ss 95A and 95B) in the CCCFA which pertains to lender liability in the event of breach of the CCCFA disclosure obligations.* • *Critical changes relating to s 59B in the CCCFA which pertains to senior manager and directors' duties.* Other changes that NZBA submits should be included in the Phase 2 reforms are: • *Targeted amendments to certain disclosure provisions in the CCCFA in order to provide a timely fix to key concerns (prior to a more fulsome review of the CCCFA disclosure provisions occurring in Phase 3)* • *Amendments to the COFI Amendment Act to simplify the minimum requirements for fair conduct programmes and to right size the liability settings for breaches of the new COFI requirements by removing private rights of action and/or removing civil liability consequences entirely.* • *Amendments to (i) provide the FMA with jurisdiction for the CCCFA in a way that mirrors the Commission's current jurisdiction; (ii) provide the FMA with fair dealing powers under the Financial Markets Conduct Act 2013 (**FMCA**) relating to credit contracts; and (iii) remove the overlapping jurisdiction between the FMA (under the fair dealing provisions in the FMCA) and the Commerce Commission (**Commission**) (under the Fair Trading Act 1986 (**FTA**)).*

Phase	Changes
	• *Amendments to require the FMA to issue a single conduct licence under the FMCA (together with any other related changes enabling regulators to rely on each other's assessments (to the extent appropriate), albeit with an appropriate lead in time for financial market participants for this change.* The NZBA would also be content for the FMA to be provided an on-site inspection power in Phase 2 (subject to that power having appropriate checks and controls). MBIE has previously sought NZBA's feedback on this power which means that, while it was unexpected for it to appear as an option in the Phase 2 materials, members are not opposed to its inclusion in the Phase 2 reforms.
Changes that should be advanced in a further financial services reform review commencing July 2026 (**Phase 3 Review**).	A wider review of the CCCFA, including the potential for licensing and a review of areas such as (i) enforcement powers generally, (ii) other disclosure aspects (outside of the targeted improvements) in order to improve the regime for borrowers and lenders, (iii) the insurance-related provisions in the CCCFA (against the background of the COFI regime and changes to insurance law); (iv) the high-cost lending requirements; and (v) the fees requirements.

15. We have grouped our feedback in the rest of this submission into two sections:

    15.1. Section 1 deals with the issues and potential reforms identified in the Credit Paper; and

    15.2. Section 2 deals with the issues and potential reforms identified in the Conduct Paper.

16. While we appreciate that MBIE had indicated a preference for submitters to use the submission templates supplied, we have, instead, set out our views only in this submission. We apologise for any inconvenience that this causes but we found that the design of the templates limited our ability to clearly explain our views on both papers and on Phase 2 (and 3) more broadly. We, nevertheless, look forward to working with the MBIE team on any particular further points that would be helpful to discuss in the submission templates themselves.

17. In terms of future engagement, as you will see, we have signalled an intention to provide MBIE with suggested re-drafting to assist in the targeted reform of certain disclosure provisions of the CCCFA. We will be in touch with you shortly about this exercise to ensure our planned approach is as helpful as possible.

Section 1: Credit Paper submissions

18. The table below sets out NZBA's feedback on the specific obligations and liabilities raised within the Credit Paper. It is followed by a table addressing the specific regulatory design points raised in the Credit Paper relating to the FMA's jurisdiction.

Obligations and liabilities

	Initiative	Timing
1.1	**Change is required regarding s 99(1A) of the CCCFA**: The problem with s 99(1A) of the CCCFA, addressed at pages 22 to 25 of the Credit Paper, is that, if the interpretation adopted by some parties (and which is embedded within the Credit Paper) is correct, it has added to the CCCFA a grossly disproportionate liability in respect of disclosure failures. Further to separate engagements with MBIE, NZBA does not support any of options E1 to E4 as detailed in the Credit Paper; instead, NZBA proposes a modified version of option E3. NZBA's proposal is that s 99(1A) (and ss 95A and 95B) of the CCCFA should be repealed retrospectively, for the following reasons: (1) NZBA agrees it is important that consumers receive accurate disclosure in relation to their credit contracts and there should be appropriate regulatory obligations and penalties to support this objective. However, other provisions of the CCCFA already provide: • appropriate protections to compensate consumers for any harm caused by non-compliant disclosure; and • adequate penalties for lenders to ensure proportionate liability in respect of disclosure failures (which in turn act as sufficient incentives for lenders to comply with their disclosure obligations under the CCCFA). (2) NZBA considers that the discussion paper overlooks, and/or does not sufficiently emphasise, the full range and extent of the issues raised by s 99(1A), namely: • s 99(1A) (as interpreted by MBIE) cuts across the otherwise detailed and carefully calibrated regime in the CCCFA; • s 99(1A) was introduced in 2015 with little review or consultation. It was intended to address a minor perceived gap in the CCCFA, namely a concern that recent Court decisions (the *Norfolk Nominees* litigation) meant that enforcement could occur in relation to a period of non-disclosure once corrective disclosure had been made (including retention of interest and fees already paid in relation to this period), and that this consequence was unintended in the original CCCFA and unjust. NZBA submits that	Priority change to be included in Phase 2 Bill.

	Initiative	Timing
	the ability to retain fees and interest in this way – given the other penalties for lender disclosure errors under the CCCFA – was neither unintended nor unjust; • although MBIE has noted that s 99(1A) gives rise to disproportionate impacts, the extent of these impacts on lender stability and solvency requires greater emphasis. NZBA anticipates scenarios in which the amount of potential liability arising from s 99(1A) (as interpreted by MBIE) could put a lender in breach of its capital ratios or other prudential requirements, or even threaten its solvency and stability. By way of example, if a lender makes a disclosure error or omission in its standard form disclosure statements for each contract in a $2 billion loan book, and the disclosure issue goes undetected for three years, then (at current interest rates, and applying MBIE's interpretation of s 99(1A)) the lender would face cost of borrowing liability of $500 million; • in such a scenario, the lender would be faced with a potential liability that could put it in breach of its capital ratios or other prudential requirements, or even threaten its solvency. Indeed, the costs of borrowing amounts have the ability to undermine an otherwise sound lender's balance sheet and threaten its solvency with adverse outcomes for depositors, shareholders and the financial system as a whole; • the forfeiture approach is not simply "profit" disgorgement. That is, the interest and fees also reflect the lender's financing (including interest to depositors) and administrative costs. The penalty associated with s 99(1A) has the potential to be an order of magnitude higher than the highest penalties imposed for misleading and deceptive conduct under the FTA or for hard core cartel behaviour under the Commerce Act, and is grossly disproportionate; and • as noted above, other CCCFA remedies already allow consumers to recover compensation in respect of the full amount of any loss or harm caused by non-compliant disclosure. That is, s 99(1A) is not required to ensure consumers do not suffer harm from disclosure issues and rather it creates a windfall. (3) While it is uncommon for legislative amendments to apply retrospectively, here it is the only way to neutralise the financial stability risks caused by the introduction of s 99(1A). In our view, debtors would not be prejudiced by making the change retrospective. The amendment would not affect a debtor's entitlement to statutory damages or the Court's power to award additional compensatory damages. Accordingly, debtors would not suffer loss or damage as a result of the amendment being made retrospective. All that debtors would lose is the chance of receiving a windfall. (4) NZBA considers that any new limits or qualifications to s 99(1A), as anticipated under options E1 or E2, will not fully address these issues.	

	Initiative	Timing
	• In terms of the possibility of limiting s 99(1A) to material breaches (option E1), the difficulty with this is that it leaves an open-ended issue (materiality) to be determined by litigation and even if the disclosure issue is material, the liability may still be disproportionate. • In terms of putting a limit on a lender's total liability under s 99(1A) for a single disclosure error (option E2), it is difficult to see how this could be allocated between borrowers and would result in contention about whether there was one or several disclosure errors in a particular situation, with each giving rise to its own cap. Indeed, NZBA is concerned that options E1 or E2 would end up simply adding complexity to the operation of s 99(1A) and give rise to new/different questions around its proper interpretation. As an alternative to retrospective repeal of s 99(1A), NZBA proposes prospective repeal of s 99(1A) and extension of s 95(A) back to June 2015 (the date of implementation of s 99(1A)). However, this is NZBA's far less preferred alternative. This is because s 95A (which was introduced in 2019 in an attempt to mitigate the potential impacts of s 99(1A)) does not resolve the potential solvency and stability issues noted above because it is a "just and equitable" discretion which requires a proactive application for relief by the lender prior to confirmation of the reduction available under the discretion. In addition to the changes required promptly to s 99(1A), as above, NZBA submits that a broader review of the enforcement provisions of the CCCFA should occur as part of a more fulsome Phase 3 review of the CCCFA. That is, at the same time as consideration of whether any change or expansion of the FMA's powers in relation to the CCCFA is undertaken.	
1.2	**CCCFA Senior Managers & Directors Duty & Liability should be removed**: This is a priority issue where change is needed. NZBA proposes that s 59B of the CCCFA should be repealed and liability imposed at entity level only. This is a modified version of option A2 in the Credit Paper; this modified version avoids the potential downsides of having competing obligations for licensed and non-licensed lenders, noted at paragraph 21 of the discussion paper, and increased compliance costs, noted at paragraph 22. As explained in NZBA's separate engagements with MBIE, the NZBA has observed the due diligence duty and personal liability resulting in overly conservative approaches to complying with the CCCFA, particularly for larger lenders where directors and senior managers are less likely/able to participate in, and/or closely supervise or know about, day-to-day operational matters (at least, without gross inefficiencies and/or underperformance of their other roles and responsibilities as directors).	Priority change to be included in Phase 2 Bill.

	Initiative	Timing
	NZBA considers that option A1 (removal of restrictions on indemnities and insurance) is a bare minimum (and less preferable) level of reform because it would mitigate, not resolve the onerous standards and consequences faced by directors and senior managers under s 59B. Directors and senior managers would still have other professional and reputational reasons (ie risks) to continue to discharge the due diligence duty. Further, NZBA agrees with MBIE's observation at paragraph 18 of the discussion paper that indemnities and insurance, on their own, seem unlikely to address cases of overly conservative lender decision-making given both directors and senior managers retain lender liability exposure.	
1.3	**CCCFA Disclosure Obligations require changes as to both the content of disclosures and how disclosure can be made**: The NZBA views changes to the disclosure regime in the CCCFA as critical. Changes would improve outcomes for customers through the receipt of disclosures that are simple, timely, and made through an appropriate channel, while also simplifying and streamlining regulation and reducing compliance for lenders. Simplifying the disclosure regime would enable lenders to focus on customer outcomes more holistically – including the broader and complimentary obligation to assist informed decision making (albeit this is separate from and prior to the disclosure obligations in the CCCFA). Assisting informed decision making is where full information about the change, including any impacts of the change, is of most use to the borrower and will already have been provided. The current regime (including given the liability settings) causes an extreme focus on meeting prescribed, yet equivocal, disclosure requirements, which risks clouding a more balanced assessment around what information consumers need, including to assist customers to make informed decisions and to ensure information is presented in a manner which is, or is likely to be, misleading, deceptive, or confusing (s 9C(3)(b)(iii) CCCFA). The current CCCFA disclosure regime is over-engineered, ambiguous, internally inconsistent, complex, and outdated. Significant compliance burdens are put on lenders for no meaningful benefit for customers and, indeed, in some instances the disclosure required by the CCCFA causes confusion and complaints from customers. By way of example, in relation to agreed variation disclosure (under s 22 of the CCCFA), customer feedback received has been that customers only want to know at a high level how a change will affect them. For most changes, this means, within disclosures, basic details about the change. Instead, the content of the regulation 4F of the CCCF Regulations prescribes a wide range of information which is not helpful to the majority of customers at the point they receive it, because the change has already been made, and because much of the information provided is likely to change over time, particularly for home lending (eg estimated interest	Some critical disclosure changes are priority changes and should be included in Phase 2 Bill. A more fulsome review of all disclosure provisions should then be scheduled as part of a Phase 3 Review.

	Initiative	Timing
	amounts to the end of the loan, final repayment amount and dates and number of payments remaining). Some of the complications have arisen over time from the bolting on of additional obligations without proper consideration of the whole, including the role of the responsible lending principles, and/or the evolving needs and preferences of customers. Related to this, while attempts have been made previously to try to modernise the CCCFA's provisions as to how customers receive disclosures, the changes have not provided a workable regime for the current environment. This means that, to ensure compliance, it is often simpler (albeit more expensive and not sustainable) to post disclosure to all borrowers. Some lenders take this approach because of the current uncertainties in the CCCFA regarding consent requirements. Lenders should be able to contract to provide disclosure electronically and enable customers who prefer to receive paper to do so. However, NZBA's preferred view is that consent should be implicit by the nature of the channel the customer is communicating with the lender through or is using to service/access information about their lending i.e. internet banking and/or a mobile app. Most customers expect to receive communications electronically. Given the above, NZBA seeks targeted reforms of certain disclosure provisions in Phase 2 followed by a full review of the disclosure provisions in the CCCFA as part of Phase 3. It seeks a targeted review initially due to the urgency in relation to some provisions and the time a full review will take to do properly. In relation to the targeted reforms sought, the Credit Paper broadly identifies the key areas of current concern. The key areas of concern for NZBA being: (a) Agreed and unilateral variation disclosure requirements are (as touched on above) often confusing to customers and not targeted to their needs. Further, timing of these disclosures should be aligned and the content focussed on reflecting the new contractual terms, rather than assisting informed decision making (which will have happened before the change was agreed by the borrower). In addition, as the MBIE paper identifies, there is a current interpretation tension as to how regulation 4F of the CCCF Regulations fits with "full particulars of the change" requirement in s 22(1)(a). (b) Disclosure before debt collection (**DBDC**) requirements are unwieldy, repetitive and can cause customer distress. Customers in hardship/financial difficulty are often experiencing stress already and NZBA members are concerned that the current level of information and frequency of disclosure that is required in DBDC can cause customers to disengage and withdraw or add further stress. Simplification of the disclosure requirement would make it easier for	

	Initiative	Timing
	customers to understand and manage, including as the current content is disjointed. Further, DBDC is repetitive often leading to customer complaints: (i) There are a high volume of communications with customers in financial difficulty/arrears, with a significant amount of communications over short periods – payment reminders, final warnings, disclosure before debt collection, demand, referral to debt collection agency, etc. All of those contacts include repeated information like how to pay, how to seek help/support etc. (ii) The content required in DBDC also replicates information that is readily available online, including statement information, fees and interest etc. (iii) In addition, for those customers who receive it, DBDC can be triggered repeatedly. For example, a customer receives DBDC, demand, then enters a payment arrangement, breaches that arrangement triggering DBDC again, and so on. (c) The electronic disclosure provisions in the CCCFA including, as described above, as they relate to consent are not fit for purpose and create barriers to lenders communicating electronically with borrowers. The current provisions relating to electronic means of communicating with borrowers being split across ss 21, 32 and 35 is also unhelpful. NZBA will provide MBIE separately (but as soon as possible in the next few weeks) further information about its concerns and with a proposal to re-write: (i) the s 22, s 23 and the DBDC requirements in a way that provides simpler and clearer key information to borrowers at appropriate times; and (ii) the provisions relating to how disclosure is made included within ss 21, 32 and 35 of the CCCFA in a way which will address concerns regarding the current electronic disclosure provisions and customer's agreement to the receipt of disclosures by electronic means.	
1.4	**No evidence of need to expand definition of high-cost consumer credit contract or change other aspects of high-cost lending regime**: The high-cost lending section of the Credit Paper is not directly relevant to the core operations of NZBA members. NZBA members are currently not classified as high-cost lenders and it would only be in rare or extreme situations in which banks' interest rates for consumer credit contracts would be in the range of 30-50%. Nevertheless, while (i) NZBA members are generally unlikely to be impacted by the proposals; and (ii) NZBA generally supports all initiatives to support customers in vulnerable circumstances, NZBA questions whether any change is currently required to the high-cost lending provisions. This is particularly given a key focus in Phase 2 is to reduce, not add, complexity to the CCCFA regime. In this regard, NZBA notes that it cannot identify clear evidence in the MBIE materials (Chapter 3 or Appendix A of the Credit Paper) to support an expansion of the definition of a high-cost credit contract to contracts	Requires more consideration. NZBA current view is that this further consideration ought to occur within Phase 3 (unless evidence emerges of a more pressing, and so earlier, need for change to support borrowers).

	Initiative	Timing
	with an interest rate above 30% or 45%, nor is it aware of other reasons to support such a change. NZBA is also concerned that the paper itself does not fully explore the potential unintended consequences of any change. NZBA, nevertheless, continues to support regular reviews of the high-cost lending provisions to ensure they are operating appropriately and addressing customer harm and is happy to engage further with MBIE in relation to the current review if MBIE continues to be of the view that amendments are required. NZBA says that factors to consider before determining any changes to the high-cost lending rules include: (i) international and national interest rates are themselves uncapped so the interest rate profiles of some products can change over time (and potentially, in a worst case scenario rapidly); (ii) the CCCFA already places a limit on "credit fees" (with the policy rationale being that lenders should only make profit in their interest rates and that interest rates themselves can then be the primary point of price comparison for consumers); (iii) lenders under the CCCFA are subject to responsible lending obligations; and (iv) the COFI Amendment Act will add an additional lens for some lenders in relation to the design of appropriate products. If the intention is to capture annual interest rates above 30%, NZBA also submits that other aspects of s 45C may require revisiting. For example, the potential removal of s 45C(b). That sort of change would make it more straightforward for a lender to understand whether any consumer credit contracts may be high-cost consumer credit contracts or not. We understand that this position would also be consistent with that adopted in the United Kingdom.	
1.5	**Other CCCFA issues exist and require consideration in a Phase 3 review**: There are a range of other obligations and liability provisions within the CCCFA that NZBA submits ought to be revisited and streamlined. As above, this includes the need for a full review of the disclosure provisions in the CCCFA and the need for a broader review of the enforcement provisions in the CCCFA. Other areas of the CCCFA which NZBA says ought to be included in the review are the credit fees requirements and the insurance related provisions. In relation to the latter, the relevant provisions are s 9C(5) and, in so far as it relates to insurance, s 70. These provisions have not kept up with the evolving regulatory environment relating to insurance as they overlap with the obligations in the COFI regime (which puts primary responsibilities on the product provider), the financial advisers regime and proposed obligations on insurers within the Contracts of Insurance Bill. These provisions, therefore, now place an unnecessary compliance burden on lenders.	Review to occur in Phase 3

19. NZBA is supportive of the Cabinet decision to move jurisdiction for the CCCFA to the FMA. That change, however, requires careful management and staging in order not to impose an unnecessary burden on lenders. NZBA's views on the appropriate approach and staging are set out in the table below.

	Initiative	Timing
1.6	**FMA should take CCCFA jurisdiction but in a staged way**: NZBA submits that the FMA should take jurisdiction for the CCCFA in a way that mirrors, at least at the outset, the current jurisdiction of the Commerce Commission. This approach would require limited legislative amendments and enable a sensible staged transition from the Commission to the FMA. In this regard, while NZBA's view as to the approach required is most akin to Option B2 at page 2 of the Credit Paper, it considers that the minimum legislative changes can be less than those described at paragraph 32 of the Credit Paper. Specifically, the key changes could be: (i) replacing all references to the Commission in the CCCFA with references to the FMA; and (ii) updating s 113 of the CCCFA to reflect specific provisions of the Financial Markets Authority Act 2011 (**FMA Act**), rather than provisions in the Commerce Act. We do not consider that any other changes to the FMA Act itself or FMCA would be required in Phase 2. Under this proposed approach, the FMA would have the equivalent tools to the Commission, and so would be able to undertake the equivalent work of the Commission from the outset of the transition. That is, no other tools would be required for the FMA to carry out its role effectively from the outset. NZBA then suggests that a consultation process could be scheduled to commence in July 2026. In that review, thought could be given to the need for any greater structural changes, such as licencing. This staged approach would: • enable a swift and efficient transition to the FMA (eg commencement at the start of the FMA's next financial year on 1 July 2025); • remove the immediate burden from banks and lenders, in the context of an already packed legislative reform and regulatory change agenda, to engage with a consultation regarding aspects that are likely to increase, rather than decrease, the regulation of financial services and compliance costs; and • provide an opportunity for appropriate reflection on how the CCCFA's existing provisions ought to fit within the FMA Act and FMCA context and any potential licencing regime. This includes enabling time for a full review of certain aspects such as those set out at row 1.5 in the table above.	Move of basic jurisdiction to the FMA could be put in motion by the Phase 2 Bill. This could enable the FMA to take over jurisdiction for the CCCFA at the beginning of its financial year in 2025 (1 July). Licencing could be considered as part of Phase 3.

	Initiative	Timing
1.7	**FMA should be provided jurisdiction for fair dealing breaches for credit contracts**: The NZBA agrees that, as part of the FMA taking jurisdiction for the CCCFA, the FMA should also obtain the jurisdiction to bring fair dealing proceedings under Part 2 of the FMCA for credit contracts. This will require an amendment to the Financial Markets Conduct Regulations 2014 (**FMCR**) (reg 14). The FMA not having this power is causing inefficiencies leading to financial service providers being subject to investigations and (possibly) proceedings by two regulators for the same or similar breaches.	NZBA is supportive of this change occurring, at least, by the time the FMA obtains jurisdiction for the CCCFA (eg in July 2025 based on NZBA's views on prioritisation).
1.8	**The overlapping jurisdiction between the FMA (under the fair dealing provisions in the FMCA) and the Commerce Commission (under the FTA) should be removed**: Related to the above, both the Credit Paper and the Conduct Paper are largely silent as to the ongoing role of the Commission. NZBA's view is that, once the FMA is able to take action in relation to fair dealing breaches relating to credit contracts (as discussed above), the overlap between the jurisdiction of the FMA and Commission should be removed to ensure clarity going forward. This ought to involve the removal of the Commission's jurisdiction under ss 9 to 13 of the FTA in relation to conduct that is in relation to a financial product or financial service. The NZBA does not consider that the existing provisions of the FTA (eg s 48P of the FTA) and/or a Memorandum of Understanding between the FMA and Commission provide sufficient clarity. It is unusual and unnecessary for there to be "primary" and "secondary" jurisdiction between regulators. One regulator should be provided sole jurisdiction. The FMA is now, as a result of the planned reforms, the right regulator to have that jurisdiction. The FMA also has a much more modern tool kit than the Commission to take on this role (with the Commission having, for example, no ability to seek civil pecuniary penalties). As above, at present, this overlap is leading to financial service providers being subject to investigations and (possibly) proceedings by two regulators for the same or similar breaches. This is extremely inefficient and does not drive better compliance by financial service providers, or outcomes for consumers. Consequential amendments would need to be made to the FMCA to reflect this change, including an amendment to s 446N of the FMCA (as inserted by s 12 of the COFI Amendment Act.	Ideally, included in Phase 2 Bill. Otherwise, to be included in Phase 3 Review.

Conduct Paper

20. The table below addresses the options for amendments to the COFI Amendment Act included in the Conduct Paper.

	Initiative	Timing
2.1	**Removal of certain minimum requirements**: NZBA agrees with MBIE's preferred proposal to remove certain minimum requirements in s 446J(1) discussed at pages 11 and 12 of the Conduct Paper. This includes s 446J(1)(a), about which NZBA Members feel particularly strongly, and (c)(i)-(iii), (f)-(h) and (k). NZBA members also suggest, in a similar vein, the removal of 446J(1)(b)(v) and (b)(vi). In relation to each of these provisions: <u>(a):</u> NZBA considers that this paragraph should be removed because: (i) it imposes an additional obligation on financial institutions to document effective policies, processes, systems and controls for compliance with the FMCA, CCCFA, FTA, Consumer Guarantees Act 1993 and the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (**FSPA**), in each case, that is not imposed by the legislation itself and will not apply to non-financial institutions subject to those regimes; (ii) in many cases, financial institutions will already have policies, processes, systems and procedures in place to comply with the relevant legislation and so the work involved in incorporating those policies, processes, systems and procedures into the financial institution's fair conduct programme (**FCP**) is likely to be duplicative; and (iii) it creates the possibility of a financial institution incurring liability under both the relevant legislation (eg the CCCFA) and the COFI regime for a single legislative breach, which is potentially duplicative and a disproportionate outcome. <u>(c)(i)-(iii)</u>: NZBA considers that subparagraphs (i)-(iii) should be removed from paragraph (c) on the basis that subparagraphs (i) and (iii) are overly prescriptive (ie it should be open to a financial institution to determine how best for it manage and report risks in relation to its FCP) and subparagraph (ii) is duplicative to the record keeping market services licence condition that applies to several licence categories. <u>(f)-(h)</u>: NZBA supports the deletion of paragraphs (f) to (h), as suggested by MBIE, on the basis that those paragraphs are overly prescriptive and potentially duplicative between the paragraphs.	Change should be included in Phase 2 Bill.

	Initiative	Timing
	(k): NZBA supports the removal of this paragraph on the basis that it is duplicative to the requirement in s 446G(1), as noted by MBIE. (b)(v)-(vi): NZBA considers that subparagraphs (v) and (vi) of paragraph (b) should be removed on the basis that they are overly prescriptive. For the avoidance of doubt, NZBA does not support a total removal of the minimum requirements in s 446J(1) (ie. as is discussed at Option A3 in the Conduct Paper).	
2.2	**Addition of certain minimum requirements**: NZBA agrees with MBIE that the addition of other minimum requirements is not necessary in s 446J(1) (as discussed at paragraph 39 of the Conduct Paper). That is, it agrees that both matters are likely already within the scope of an FCP. In relation to the suggested fees content, NZBA submits that the addition of a requirement for FCPs to cover establishing transparent fee structures and charging arrangements at this stage may add confusion and does not meet the objectives of the review to simplify and reduce duplication. For example, a new minimum requirement relating to fees may cause confusion by implying that the FMA could intervene in new ways on substantive questions of pricing and value. In terms of the Minister's comments noted at paragraph 37 of the Conduct Paper, Section 446J(1)(j) already includes an obligation to communicate in a timely, clear, concise and effective manner. Further, NZBA notes that (i) in addition to the existing provisions in the COFI Amendment Act relating to incentives and intermediaries, there are fees provisions within the CCCFA (Subpart 6); (ii) existing obligations under the fair dealing provisions in the FMCA and in the FTA which the regulators use to enforce fees related conduct; (iii) separate requirements in the financial advisers regime relating to commissions; (iv) provisions relevant to disclosing commissions in the Secret Commissions Act 1910; and (iv) bank fees in New Zealand have been declining in value in New Zealand over the last 10 years based on the outcomes of a review undertaken by the RBNZ.[2] In relation to the suggestion of an additional minimum standard about complaints, while the NZBA agrees that having a complaints system is a key part of an FCP, the addition of an express requirement for an FCP to cover complaints handling is unnecessary. As discussed in more detail in our separate submission regarding the MBIE Dispute Resolution Paper, the COFI Amendment Act itself refers to complaints in other sections	No change required.

[2] See the May 2022 RBNZ Financial Stability Report, Box B at pages 36-37.

	Initiative	Timing
	(eg s 446H) and financial institutions also have other obligations concerning complaints and disputes that arise from other legislation.	
2.3	**Retain status quo on fair conduct principle**: NZBA agrees with MBIE that no changes are required to the status quo on the fair conduct principle (as discussed at paragraph 53 of the Conduct Paper). However, it again notes that the non-exhaustive nature of the principle, which financial institutions are then required to operationalise within their fair conduct programmes, is why it is being sought that, at least at the outset of the regime, only the FMA has powers in relation to financial institutions compliance with the fair conduct programme related aspects of the regime.	No change required.
2.4	**At the outset of the COFI regime, the FMA should be given exclusive rights of supervision and action in relation to any fair conduct programme consequences**: The NZBA submits that the FMA should be responsible for monitoring financial institutions' compliance with the new COFI obligations and no private rights of action should be given to third parties. NZBA, accordingly, seeks that this aspect is included in the review with a view to: • removing private rights of action for certain COFI obligations; and/or • removing civil liability consequences entirely (ie, so that the FMA would rely only on its licensing related powers in relation to breaches concerning FCPs). In this respect, the position in the COFI Amendment Act at present is that, in addition to consequences arising from licensing obligations: • The COFI Amendment Act makes certain new obligations on financial institutions "civil liability provisions". This is through: ○ the definition of "a Part 6 services provision" at s 449 of the FMCA being amended to add, among other things, ss 446G, 446H, and 446I (duties to have effective fair conduct programme, to make information about it publicly available, and to comply with it). (See s 13 of the COFI Amendment Act); and ○ the existing s 485 of the FMCA defining "a Part 6 services provision" as a "civil liability provision". • The FMCA then provides that the Court may, on the application of the FMA *<u>or any other person</u>*:	Change should be included in Phase 2 Bill.

	Initiative	Timing
	○ make a declaration of contravention if it is satisfied that a person has contravened or been involved in a contravention of a civil liability provision (s 486); and ○ make a compensatory order if there has been such a contravention and a person (the aggrieved person) has suffered or is likely to suffer, loss of damage because of the contravention (s 494(1)). While NZBA has previously raised concern about this setting in an earlier submission during the COFI legislative process, that was not acknowledged by officials and there have been no indications that it has been properly considered at all. For example, there was no apparent consideration as to: (i) whether compensatory orders would ever be an appropriate remedy for third parties to seek and have awarded in relation to the COFI obligations. In contrast, there was robust consideration of this point in the United Kingdom in relation to the introduction of the Consumer Duty and a decision made that there ought to be no private rights of action at the outset of the regime. That is, only the FCA can pursue action for breaches of it.[3] (ii) whether pecuniary penalties are an appropriate tool for obligations of this nature; and (iii) the process implications for financial institutions if facing such claims in the Court and in BOS (for example, potential discovery obligations to consumers relating to the steps taken to comply with policies within fair conduct programmes). NZBA's concerns with the private right of action included in the COFI Amendment Act include: • The novel and non-exhaustive principles-based nature of the regime which the MBIE paper recognises means that financial institutions have to exercise judgment as to what, for example, should and should not be included in their FCP and what compliance with their FCP will look like in practice. • As a matter of good regulatory design, it is highly unusual to give customers a civil right of action against organisations in relation to the terms of their own systems, processes and controls. This has the effect of a FCP becoming a self-written law and places a huge burden on institutions when drafting their FCPs (and the related policies, systems and processes). • Related to the above, in order not to fall foul of complying with their own FCPs, institutions may limit the scope of the programmes (ie. to the potential detriment of customers). • There was no suggestion at the outset of the regime that customers required additional rights of action against financial institutions. NZBA submits that the FMA is the appropriate	

[3] See, for example, [fscp_report_final_version_23_july_20.pdf (fca.org.uk)](fca.org.uk).

	Initiative	Timing
	person to consider organisations FCP related conduct, including in the context of the licensing arrangements in place and against the background of the Conduct and Culture review work commenced in 2018. NZBA is happy to engage further with MBIE in relation to this aspect. We note that limiting rights of action to the FMA would, for example, be analogous with provisions in the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 which requires reporting entities to establish, implement and maintain a compliance programme but only the relevant regulator can take action in relation to potential breaches of that obligation. In terms of the appropriate action for the FMA to be able to take here, NZBA submits that proper consideration is required as to whether the FMA's licensing powers in the event of FCP related breach ought to be sufficient, rather than retaining civil liability consequences for these breach types. As in the United Kingdom, if private rights of action are removed and/or other changes are made to the consequences of breaches of certain COFI obligations, the NZBA submits that how the provisions were operating could be the subject of a later review. For example, s 46W of the COFI Amendment Act could be amended to include this aspect in the required review of the COFI regime to occur five years after commencement.	

21. The table below addresses what the NZBA sees as key regulatory design features requiring feedback that are raised within the regulatory framework and powers section of the Conduct Paper.

	Initiative	Prioritisation
2.5	**Twin peaks model needs to be properly embedded**: Paragraphs 60, 63 and 75 of the Conduct Paper highlight the importance of (i) both the RBNZ and the FMA having a clear mandate and acting in a coordinated and coherent way and (ii) there being a clearer and more effective twin peaks model for financial regulation. However, the paper does not address the respective prudential and conduct roles of the RBNZ and the FMA in any detail (other than to note at paragraphs 80 and 86 the work needs to be done) and instead dives straight into specific consultation topics. In NZBA's view, while some of these specific topics may represent opportunities for regulatory improvements to be made, it is necessary to better delineate the regulators' roles before other regulatory settings can be finalised. We would suggest MBIE first undertakes a mapping exercise which explains what each regulator's role and responsibilities are (including by reference to the other regulator where appropriate), where those roles may overlap, and who the 'lead regulator' is in relation to certain topics. For example,	This map should be developed as soon as possible and consulted upon, including to provide background to the Phase 2 Bill.

	this map would clearly articulate what, in practice, is the FMA's particular interest in topics like cybersecurity and business continuity). This could also be accompanied by a more detailed memorandum of understanding (to the extent required). In this regard, although the RBNZ and the FMA have entered into a memorandum of understanding dated 13 August 2021, that MoU focuses on regulator cooperation rather than delineating the role and responsibilities of each regulator. Similarly, the memorandum of understanding dated 14 September 2021 between the members of the Council of Financial Regulators (including the RBNZ and the FMA) does not include, as a part of the Council's focus, mapping out each regulator's role or reducing regulatory overlap and duplication. NZBA sees the benefit of such a map being that it would enable: • understanding and transparency of the regulators' intended roles and responsibilities, including an opportunity for consultation across all stakeholders on areas of uncertainty and duplication; • consideration as to whether changes are required to any enactment and/or the FMA or RBNZ powers to better reflect the intended twin peaks model; • a clear explanation of what is left with the Commerce Commission and the rationale for that; • ongoing monitoring by the Minister, and a potential tool for others to enable challenge or escalation of concerns about the way in which the twin peaks model is operating; and • a better base going forward to provide clarity as to how the regulators are to supervise dual regulated entities. In relation to potential changes to enactments, we note that the mapping exercise should explicitly consider existing legislative roles and whether any changes are required. Further, in relation to the ongoing role of the Commission, NZBA submits that this should include re-testing the logic for the Commission having responsibility for the Retail Payment System Act 2022.	
2.6	**Single Conduct Licence ought to be progressed but care required**: NZBA supports the idea of requiring the FMA to issue a single conduct licence, as set out at pages 20 and 21 of the Conduct Paper, in principle. However, the FMCA market services licence regulatory burden will not be reduced for NZBA members if the underlying standard conditions and reporting requirements remain unchanged. Key matters that would need to be addressed include:	Change is one that could be put in motion by the Phase 2 Bill.

	• The FMA would need to (i) consolidate its standard conditions that apply to all licencees to remove duplication both between market services and within market services and (ii) prepare additional market service specific conditions. For example, substantially the same business continuity and outsourcing standard conditions apply to all non-trustee market services licences (including the proposed COFI conduct licence) and compliance and governance conditions also apply to most licence classes. • The FMA's application requirements and licence conditions should be tailored and limited to its role as conduct regulator and should not duplicate requirements or conditions which are already imposed by the RBNZ. For example, registered banks are subject to governance and (in the case of banks with net liabilities exceeding $10bn) outsourcing requirements pursuant to their conditions of registration and related RBNZ policies. These matters are also standard market services licence conditions. As noted above, it is difficult to sensibly tailor application requirements and licencing conditions to the FMA's role without first clearly defining its boundaries. NZBA's view, however, is that the FMA should rely on, and not duplicate, RBNZ requirements in terms of operational aspects of a bank. Further, it should not be adding its own operational requirements unless there is a clear rationale for why the requirement is needed by the FMA, but not the RBNZ. • Existing licencees would need to be automatically granted a licence covering each market service for which it is currently licenced (ie any requirement to re-apply for a conduct licence would increase, rather than decrease, regulatory burden). • Obligations which are related to, or derived from, licencing conditions should also be streamlined. For example, the requirement to deliver regulatory returns in respect of each market service should be streamlined so that only one return is required to be delivered and the same applies in respect of the general reporting requirement under regulation 191 of the FMCR. Consideration also needs to be given to the impact of a breach of a consolidated market service licence standard condition (ie to what extent (i) multiple licenced market services could be affected if there is a breach of a standard condition that is common across the market services or (ii) the breach of a standard condition, in relation to a single market service, would impact on a consolidated licence).	

2.7	**Enabling reliance on another regulator's assessment a potentially sensible change but care required**: NZBA agrees in principle that a regulatory change to enable the FMA to rely on the RBNZ's assessment of a matter in relation to a licenced entity, and vice versa, may improve regulatory efficiency (as discussed at pages 21-23 of the Conduct Paper). However, consistent with our comments above regarding the twin peaks model, to achieve this efficiency we consider foundational work is still required to map the roles and responsibilities of the FMA and RBNZ to minimise overlap and clearly demarcate areas of interest in particular topics. For example, this may demonstrate that, rather than the FMA relying on the RBNZ's assessments, some areas should simply be handled by one regulator. Further, to the extent that a registered bank is required to provide information to both regulators, the bank should only be required to deliver that information once (ie both regulators receive the same information) in order to avoid duplication. This could involve ensuring a "lead regulator" is appointed for whom responsibility would primarily sit for information gathering and assessment of any genuinely overlapping aspects.[4]	Change reliant on mapping process being complete to ensure proper consideration. Depending on the outcome of that exercise, change is one that may be able to be put in motion by the Phase 2 Bill.
2.8	**FMA Tools: Change in control approvals – requires further consideration**: The NZBA is currently not in support of the FMA obtaining this tool. The FMA has an existing right to be notified that a transaction involving a change in control has been entered into and, if it considers the change in control constitutes a material change of circumstances, it can exercise certain powers in respect of the relevant licensee or its licence (including suspension or cancellation if the licencing requirements are no longer met). In the context of financial institutions, the NZBA understands that the primary purpose of the RBNZ having change in control approval rights is because the ownership of a licenced entity is directly relevant to prudential considerations (eg the entity's access to capital). The NZBA queries the extent to which a change in ownership of a licenced entity is likely to impact on its continuing compliance with its conduct obligations (and how the FMA would assess this at the time of any notification). If a change in control approval requirement were to be granted to the FMA in respect of financial institutions, this would also seem to be contrary to the general direction of this consultation (ie to reduce regulatory overlap and duplication). Paragraph 67 of the Conduct Paper notes that there are approximately 1,650 market service licensees that are not financial institutions. Given this, and in the context of relatively high levels of merger and acquisition activity in the financial sector in recent years, NZBA notes too that granting the FMA a	No change required. Include for re-consideration in Phase 3 if the FMA maintains that it does require this power.

[4] This, for example, appears to be the approach taken in the UK. See paragraph 24 of the FCA/BoE MoU.

	change in control approval requirement in relation to such firms would (i) likely require additional resourcing for the FMA to be able to assess applications in a timely manner and (ii) could have a dampening effect on merger and acquisition activity in the financial sector by imposing an additional regulatory condition that would need to be met. Further, NZBA understands that retaining the status quo would be consistent with the position in Australia where the Australian Securities and Investments Commission (**ASIC**) has a similar power to the FMA.	
2.9	**FMA Tools: Onsite inspection powers – alignment with RBNZ powers**: Further to earlier engagement between NZBA and MBIE on this point in past years, NZBA does not object to the FMA acquiring onsite inspection powers so long as appropriate checks and controls are put in place. These powers should be aligned with the RBNZ's under the DTA, as twin peaks regulators. For example, checks should include: • ensuring that the power is subject to Part 4 of the Search and Surveillance Act 2012 (as is the case for the RBNZ where it obtains a search warrant under the Banking (Prudential Supervision) Act 1989 (or the DTA following its commencement) or (currently) the Commerce Commission exercises its powers of search and seizure under the CCCFA); • a restriction that the power can only be used for defined purposes (eg see ss 111 and 112 of the DTA); • the power can only be used where there is no other power that would be more appropriate available and the FMA is otherwise unable to obtain the information it expects to gain from an onsite inspection by another means; and • the exercise of the power being subject to reasonableness requirements in respect of the time and manner in which it is exercised (eg see s 111(2)(a) of the DTA).	So long as appropriate checks and controls are in place, this could be included in the Phase 2 Bill. Otherwise, this change could be included in the Phase 3 Review.
2.10	**FMA Tools: FMA does not require expert report power**: The NZBA has serious concerns about the provision of an expert report power to the FMA and does not support it. There is not sufficient evidence that the FMA needs a power of this kind, including as it can request information using existing powers in the FMA Act and receives information within regulatory returns. As the paper recognises, firms are already instructing experts and providing their analysis to the FMA on a voluntary basis without a dedicated statutory regime. NZBA members are particularly concerned at some of the description in MBIE's discussion paper which suggests an appetite for the use of the power for general monitoring and diagnostic purposes. The NZBA's view is that the FMA should	No change required. Include for re-consideration in Phase 3 if the FMA maintains that it does require this power.

	be staffed in a way that it has appropriate expertise to monitor the conduct areas for which it is responsible, rather than market participants themselves being required to find experts (potentially from offshore to ensure independence in a small market), commission, and pay for reviews.	