COMMERCE COMMISSION NEW ZEALAND
Te Komihana Tauhokohoko

Submission to the Finance and Expenditure Committee

Credit Contracts Legislation Amendment Bill

14 June 2019

CONTENTS

Introduction

1. This submission sets out the Commerce Commission's (**the Commission**) views on the Credit Contracts Legislation Amendment Bill (131-1) (**the Bill**).

2. The Commission is New Zealand's primary competition, consumer and regulatory agency. We are responsible for enforcing the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**), which regulates consumer credit.

3. The Commission has found that the CCCFA is an important tool for regulating the provision of consumer credit, however we have also found that its complexity reduces its effectiveness. Many lenders report difficulty in interpreting and applying the CCCFA, and at times, enforcement of the CCCFA is complicated and resource intensive.

4. The Commission continues to see credit related consumer harm, particularly among vulnerable borrowers. It is therefore supportive of considered reform aimed at improving the effectiveness of and compliance with the CCCFA.

5. The Commission's submission is intended to assist the Finance and Expenditure Committee (**Select Committee**) to ensure that the Bill:

   5.1 gives effect to the policy objectives that underly it; and

   5.2 is clear, coherent and consistent so that the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**) can be easily:

      5.2.1 understood by consumers;

      5.2.2 complied with by lenders; and

      5.2.3 effectively enforced.

6. A summary of this submission, which references the relevant clauses in the Bill and sections in the principal Acts, is at **Attachment A.**

7. **Attachment D** details a small list of drafting errors, technical issues and proposed solutions that we consider would assist in making the legislation clearer and would assist in meeting the Bill's policy objective.

Amendments that the Commission supports

8. The Commission supports amendments that are likely to address credit related consumer harm and improve compliance with the CCCFA. These amendments will:

    8.1 clarify obligations for lenders so that they are easier to comply with;

    8.2 better deter non-compliance; and

    8.3 provide the Commission with tools that will assist in effectively enforcing the CCCFA.

Civil pecuniary penalties and statutory damages for breaches of the responsible lending provisions

[Clauses 24, 25 and 36 - proposed new subpart 5A and amendments to sections 88 and 89]

9. The Commission strongly supports the introduction of civil pecuniary penalties and statutory damages for breaches of the Lender Responsibility Principles (**LRPs**). The Commission considers that such penalties are necessary to incentivise compliance and deter breach and will lead to more effective enforcement of the LRPs.

10. However, we recommend a full review of the penalty and remedial regime to ensure there is clarity and consistency in relation to penalties and remedies available for breaches of the Act. We elaborate further on this in a later section of this submission.

Penalties for non-compliance with the LRPs are necessary

11. The LRPs are central to the consumer protections provided by the CCCFA and set the standard for lender conduct. Despite their significance, there are no penalties for failure to comply with the LRPs at present. The Commission is able to apply for declarations, orders for compensation, injunctive relief and, in extreme cases exemplary damages. The Commission is required to prove loss or damage suffered by borrowers in order to obtain orders for compensation at present.

12. Sufficient penalties incentivise compliance with consumer protection laws. As we set out in our submission on the Ministry of Business Innovation and Employment *Discussion Paper: Review of consumer credit regulation* (June 2018), the current lack of penalties provides almost no incentive for lenders to comply.[1]

13. New Zealand is well behind Australia in the level of penalties applied to incentivise compliance. The Australian Government has recently increased penalties for breaches of the National Consumer Credit Protection Act 2009 (Cth) (**the Australian Consumer Credit Protection Act**) including for breaches of the Responsible Lending

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[1] Commerce Commission "Submission on Discussion paper: Review of consumer credit regulation" (1 August 2018) https://comcom.govt.nz/__data/assets/pdf_file/0025/98260/Submission-to-the-Ministry-of-Business-Innovation-and-Employment-on-the-Review-of-Consumer-Credit-Regulation-1-August-2018.pdf.

provisions.[2] For example, the civil pecuniary penalty applicable when a body corporate has failed to comply with its obligation to assess the suitability of a credit contract has increased from 2,000 penalty units ($420,000) to 50,000 penalty units ($10,500,000) **plus** three times any benefit derived or detriment avoided because of the contravention **plus** 10% of the annual turnover of the body corporate for the last 12 months to a maximum of 2.5 million penalty units ($525,000,000).[3]

14. When considering whether the regulatory tools available to Australian Securities and Investments Commission (**ASIC**) prior to the increase were enough to enable it to perform its functions adequately Treasury noted:

> In recent years, there have been widespread concerns about misconduct and consumer outcomes in the financial services sector. The Financial System Inquiry concluded that the current penalties in ASIC's legislation are unlikely to act as a credible deterrent against misconduct by large firms …. These shortcomings have contributed to a decline in consumer confidence in the sector.[4]

15. Without any penalties for breaching the LRPs the Commission is not as well placed to promote compliance with them as it would be if an appropriate sanction applied. Currently, the Commission encourages compliance with the LRPs primarily through advocacy and outreach to lenders and through publication of enforcement responses.

Civil pecuniary penalties are appropriate for LRPs breaches

16. The Commission considers that civil pecuniary penalties are the appropriate sanction for non-compliance with the LRPs. We consider that civil pecuniary penalties are likely to make the Commission's enforcement of the CCCFA more effective.

17. We support the imposition of civil pecuniary penalties in preference to criminal sanctions because:

    17.1 the LRPs do not explicitly define the conduct required for compliance. These requirements are subject to interpretation by lenders and by the Commission and/or Court and this can provide a degree of uncertainty for lenders about when they may be in breach of the LRPs. The Legislation Design and Advisory Committee (**LDAC**) *Legislative Guidelines: 2018 Edition* state that conduct subject to criminal sanction should be precisely defined.[5]

    17.2 corporate entities usually breach the LRPs rather than individuals. Most lenders that are the subject of our enforcement outcomes are incorporated

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2 (Australian) Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018

3 National Consumer Credit Protection Act 2009 (Cth), ss 128 and 167B.

4 ASIC Enforcement Review Taskforce Report, Australian Government December 2017.

5 The Legislation Design and Advisory Committee (LDAC) *Legislative Guidelines: 2018 Edition* (March 2018) at 118 provide that because criminal law marks the legal boundary of individual liberty, if conduct is subject to criminal sanction, the legislation must precisely define the prohibited conduct.

companies and not individuals.[6] Arguably the stigma associated with a criminal conviction is less for corporate bodies than for individuals and the effect of a civil pecuniary penalty as opposed to a criminal fine is the same.[7]

18. Civil pecuniary penalties are also consistent with remedies available to the Commission under other legislation and in other jurisdictions. Civil pecuniary penalties are available in New Zealand in the Commerce Act 1986 and Financial Markets Conduct Act 2013. They are available in Australia for breaches of credit laws and are used effectively by ASIC.[8]

Civil pecuniary penalties will enable more streamlined enforcement

19. The introduction of civil pecuniary penalties generally will create efficiencies by reducing the need for the Commission to take criminal and civil proceedings in relation to the same conduct.

20. Criminal prosecution is pursued by the filing of criminal charges and while compensation orders can be sought at the same time, this usually requires the filing of a separate civil proceeding, sometimes in a different court. It is not always straightforward for the Commission to take proceedings for compensation orders as well as obtaining conviction and a fine in criminal proceedings. Difficulties arise particularly where the amount of compensation sought is high[9] and/or where there is a large pool of affected borrowers. To overcome these difficulties the Commission has, from time to time, initiated concurrent but separate civil and criminal proceedings. Concurrent proceedings of this nature have generally been costly and slow to progress. Because they generally raise the same factual issues it is usually appropriate that one (in most cases the criminal case) is heard first. But there is generally duplication of effort and court time. In some cases, the Commission chooses between the pursuit of criminal conviction and a fine, or compensation for borrowers, rather than pursuing both at the same time.

21. In these ways, the Commission frequently must make choices about the form of proceedings it takes. When making those decisions we consider resourcing requirements, the efficiency of one form of proceedings over another in any case and we weigh considerations such as the importance of obtaining compensation against obtaining a penalty sanction. Introducing civil pecuniary penalties would

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6 In the enforcement outcomes currently recorded on our Enforcement Response Register relating to the CCCFA since 2015, 31 outcomes have involved incorporated companies, only four outcomes have involved individuals.

7 Law Commission *Pecuniary Penalties: Guidance for Legislative Design* (NZLC R133, 2014) at 38.

8 ASIC's penalties were reviewed in 2017. The Government in the *ASIC Enforcement Review*: *Positions Paper 7 – Strengthening Penalties for Corporate and Financial Sector Misconduct* (October 2017) considered that even with a maximum penalty of $420,000 for an individual and $2.1m for a company under the National Consumer Credit Protection Act 2009 (Cth) "the maximum civil penalties … should be increased to ensure that ASIC can seek and the courts are empowered to impose penalties that: reflect community perceptions of the seriousness of engaging in … misconduct and expectations as to the associated consequences".

9 And therefore either outside the District Courts' monetary jurisdiction or at a level that the District Court is not accustomed to awarding.

mean that the Commission would be able to obtain both compensation and a penalty in one set of proceedings. While we would forfeit the ability to obtain a criminal conviction in such a case, for the reasons outlined above, this may not unduly compromise the punitive and deterrent impact of what might otherwise be a civil case for compensation only under current law.

Statutory damages will create a streamlined method for compensating breaches of the LRPs

22. The Commission also supports the introduction of statutory damages for breaches of the LRPs. The availability of statutory damages:

    22.1 creates efficiencies for the Commission by quantifying amounts payable to affected borrowers without having to establish loss or damage for individual borrowers. Statutory damages provide a straightforward remedy for affected borrowers because they are calculated using defined methodologies; meaning that the Commission (or affected party) is not required to undertake the potentially difficult, time consuming and resource intensive task of proving that each affected borrower suffered loss or damage caused by the lender's conduct. The Commission often takes cases seeking orders for a sample of affected borrowers in order to prove loss or damage.[10] This means however, that remediation is not ordered by the court for everyone affected. Introducing statutory damages for responsible lending breaches means that a court can make orders for payments to be made to all affected borrowers;

    22.2 may also make it easier for individual borrowers or their advocates to pursue statutory damages direct from lenders without assistance from the Commission; but

    22.3 will not affect the ability of borrowers who have suffered loss or damage in a sum exceeding the statutory damages amount to seek orders under section 93 and 94 for compensation for actual loss or damage. We would expect the court to take the amount of statutory damages awarded into account when making additional compensation orders (or imposing civil pecuniary penalties).

23. Statutory damages already can be awarded for other contraventions of the CCCFA and introducing such damages for LRPs breaches will enable the Commission and affected borrowers to more easily obtain a remedy.

24. We also support the proposal that the level of statutory damages for breaches of the LRPs is set at costs of borrowing, particularly for failures to assess affordability and suitability. In our view, this approach is consistent with a tortious approach to damages and would put the borrower in the position that they would have been in had the lender not breached the LRPs. In our view, where affordability and suitability

[10] The Commission takes this approach in order to expedite the proceedings and, on the basis, that other affected borrowers can take their own action following a successful outcome.

enquiries have not been made, the lender should not have entered into the loan and the borrower would not have paid or become liable to pay costs of borrowing. The measure of damages is also consistent with other provisions of section 89 of the CCCFA.

The inter-relationship between civil pecuniary penalties and statutory damages

25. We see benefit in having both civil pecuniary penalties and statutory damages available. Statutory damages are a remedy primarily designed to compensate borrowers for breaches and civil pecuniary penalties, which are payable to the Crown, are primarily designed to punish breaches. We suggest that the Bill clarifies that the Court can make more than one civil liability order for the same conduct.[11]

26. We also recommend that the Bill is clear about the relationship between civil pecuniary penalties and statutory damages. For example:

    26.1 if the Bill seeks to prioritise addressing harm to consumers arising from irresponsible lending, then it could provide that payments to borrowers take priority over the payment of civil pecuniary penalties if a lender does not have enough resources to pay both. We note that a similar provision has been recently introduced in the Australian Consumer Protection Act.[12]

    26.2 Statutory Damages could also be argued to have a punitive value. So, the Bill should also clarify whether the level of civil pecuniary penalties is intended to be affected by an award of statutory damages or vice versa.

27. Other issues arise that relate to the inter-relationship between remedies that we discuss later in this submission.

Enforceable undertakings and compliance orders

[Clause 39 and 31 - proposed amendment to section 113 and new section 98A]

28. The Commission strongly supports the proposal to introduce an ability for the Commission to obtain enforceable undertakings and compliance orders as these will assist with our enforcement of the CCCFA:

    28.1 There are clear benefits in aligning the Commission's powers across the legislation it enforces. Currently there are differences in the various statutory schemes and these can cause enforcement problems. For example, where an investigation raises both Fair Trading Act 1986 (**FTA**) and CCCFA issues the Commission can accept enforceable undertakings to resolve its FTA concerns but it cannot currently accept enforceable undertakings to resolve the CCCFA issues. It is required to resolve them in another way.

    28.2 In our view the practice of accepting undertakings or entering into settlements is efficient in avoiding prolonged litigation for the parties and the

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11 For example, section 505 of the Financial Markets Conduct Act 2013.

12 National Consumer Credit Protection Act 2009 (Cth), s 181.

courts and helps to provide prompt outcomes that are advantageous to consumers. The court enforceable undertaking regime goes some way to expressly recognising these benefits.

28.3 In addition, enforceable undertakings ensure that any resolution is enforceable by the courts. Settlement agreements on the other hand, are not straightforward to enforce as a matter of contract.

28.4 We expect that enforceable undertakings will provide general deterrence if properly publicised. Research in Australia reports a general deterrent effect on the wider credit and financial services industries when an enforceable undertaking is entered into by another member of that sector.[13]

28.5 Compliance orders will provide an additional tool to enable courts to require that a lender takes positive steps to comply with the CCCFA where it has found that conduct breaches the Act. We see such orders as being particularly useful where the Commission has concerns about a lender's conduct, but the lender declines to provide enforceable undertakings. Compliance orders should enable the Commission to ensure compliance in a timely and cost-effective way.

Explicit obligations for directors and senior managers

[Clause 23 - proposed new Subpart 9 and section 59B]

29. The Bill proposes to introduce provisions that will create a positive obligation on directors and senior managers to ensure that the lender has systems in place to assist with compliance and to identify and address non-compliance (**directors' duties**).

30. While the extent to which directors and senior managers should have statutory duties relating to a lender's compliance with the CCCFA is a matter of policy, the Commission acknowledges that these provisions encourage a top-down approach to compliance. We support the provisions as currently drafted.

31. The provisions place duties on those within the organisation who are best placed to influence the strategic direction of the lender, and to ensure that the company has the resources, systems and policies to ensure compliance. We would expect that director's duties would also have a general and specific deterrent effect in that they will discourage directors and senior managers from taking a hands-off approach to compliance.

32. There are cases in which the Commission may have had recourse to directors' duties if they had been available. For instance, the High Court in *Budget Loans Limited* v *Commerce Commission*[14] raised the issue of whether Mr Allan Hawkins or Mr Wayne

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13 *The General Deterrence Effects of Enforceable Undertakings on Financial Services and Credit Providers:* Nehme M; Anderson J; Dixon, O; Kingsford-Smith D Law Faculty of the University of New South Wales 2018.

14 *Budget Loans v Commerce Commission* [2018] NZHC 3442.

Hawkins should have faced charges for breaching the FTA. While the Commission chose not to file charges in light of the evidence available it may have sought orders against Messrs Hawkins for breaching directors' duties if they had been available.

33. Finally, the introduction of directors' duties may well assist us in undertaking our certification function. For example, the fact that we have issued proceedings against directors or senior managers who have failed to comply with their statutory duties is likely to be relevant in assessing whether they are fit and proper to perform their role.

Prescriptive requirements for affordability and suitability assessments, and advertising

[Clauses 10 and 43 - proposed amendments to sections 9C(3)(b)(i) and 138 and new section 9C(5A)]

34. The Commission supports the introduction of a regulation making power to set advertising standards and prescribe the kinds of inquiries that lenders must make when undertaking affordability and suitability assessments for the purpose of complying with the LRPs.

35. Any regulations are likely to provide greater certainty to lenders as to the steps they must take to comply with their obligations and will enable the provisions to be more easily enforced by the Commission.

36. Currently, the Responsible Lending Code (**RLC**) provides useful guidance about what lenders can do to comply with the LRPs. However, the RLC is not binding and leaves open questions about exactly what is sufficient for compliance. For example**:**

    36.1 whether breaches of the RLC are, in fact, breaches of the LRPs;

    36.2 the extent to which lenders are required to obtain information directly from potential borrowers about their expenses and the extent to which they can rely on benchmarks or income/expense ratios;

    36.3 what inquiries a lender should make about the suitability of a loan when offering second and subsequent high-cost short-term loans.

Record keeping requirements

[Clauses 11 and 21 - proposed new sections 9CA and 41A]

Records as to affordability and suitability

37. The Commission strongly supports the introduction of requirements that lenders keep records of the affordability and suitability assessments they conducted when lending to borrowers. Lenders will be required to provide this information to the Commission (and other parties) on request.

38. At present, there is no legal requirement for a lender to keep a record of any of its affordability/suitability assessments which makes it difficult for the Commission to

obtain evidence about inquiries were actually made.[15] A lender can, for example, say that it asked the borrower about their expenses and, if that is disputed by the borrower, it is difficult for the Commission to form a view about which party's evidence is to be preferred. If lenders are required to keep records of their assessments, the Commission will be able to more quickly obtain those records and focus its investigation on whether the inquiries were reasonable and whether they were enough to satisfy the lender rather than trying to ascertain what inquiries actually were made.

39. Given that lenders are required to make inquiries, and, in our experience, those inquiries are generally recorded on application forms or e-mails we would not expect that this requirement would significantly increase compliance costs for lenders.

Records as to how fees are calculated

40. The Commission also strongly supports the proposed requirement that lenders must keep records about how fees are calculated (new section 41A).

41. One of the main enforcement challenges for the Commission has been the assessment of the reasonableness of the fees charged by lenders. Many lenders do not keep thorough records of how they calculate and justify their fees. Some analyse and justify them only when the Commission begins investigating their reasonableness. In some cases, lenders have changed their explanation about how fees are set during our investigation. At least one lender analysed its fees but declined to disclose its record of analysis to the Commission. An obligation that lenders keep records and provide these records to the Commission will greatly assist us in our enforcement of the existing fees provisions.

42. The Commission does have some concerns about the drafting of the proposed section 41A. These are discussed in more detail below and suggestions are made to help to ensure that the purpose of the new provision is achieved.

Amendments that will enable a court to modify the effect of section 99(1A)

[Clause 29 – new sections 95A and 95B]

43. The Bill proposes to enable a court to modify the effect of a creditor's failure to comply with disclosure obligations that apply before a contract is entered into and when a contract is varied. Section 99(1A) provides that, where a lender has failed to comply with their initial disclosure obligations (section 17) or has failed to provide disclosure after agreeing to vary a consumer credit contract (section 22), the borrower is not liable to pay any costs of borrowing until remedial disclosure has been provided.

44. The Commission considers that section 99(1A) is important because it provides an incentive for lenders to comply with sections 17 and 22. Accordingly we support the

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[15] While the RLC recommends that lenders should keep records that show how they have complied with the LRP, the RLC is not binding.

policy objective underpinning section 99(1A) that lenders should be not be able to enforce contracts where a borrower has received insufficient or incorrectly disclosed information. However, we acknowledge that the absolute nature of section 99(1A) can create substantial financial consequences for minor or technical breaches. The Commission therefore supports the introduction of new provisions which will allow courts to reduce a lender's liability under section 99(1A) in certain prescribed circumstances.

45. In making this submission, we note that the Commission will continue to be faced with complex enforcement decisions in relation to disclosure breaches. For example, the Commission will be able to seek either or both statutory damages and costs of borrowing to be paid to borrowers in relation to the same breach. The Court will be able to extinguish or reduce one or both, taking into account the same factors. As discussed below, the Commission recommends that the interrelationship between section 99(1A) and statutory damages is considered as part of a broader review of the remedial regime to further clarify the application of the CCCFA's remedial regime.

Recommended amendments to the Bill

Commencement dates and transitional provisions

[Clause 2 and Schedule 2]

Issue

46. We are concerned that the current commencement dates:

    46.1 limit the time the Commission will have to publish guidance so that borrowers and lenders understand what their rights and obligations are under the amended law before it comes into force; and

    46.2 limit the time lenders will have to ensure their lending practices comply with the amendments proposed by the Bill before they come into force; and

    46.3 do not align with timing of the redesign of the Financial Services Providers Register.

47. We also are concerned that the effect of the timing of the commencement of the certification provisions, transitional provisions and commencement of consequential amendments to the Financial Service Providers Register (**FSPR**) mean:

    47.1 mobile traders will need to be certified by 1 April 2021. Where an application cannot be processed in time, existing mobile traders will need to cease providing mobile trading services until the Commission determines their application. Requiring mobile traders to cease business pending registration will cause significant disruption to existing businesses;

    47.2 where a lender is registered on the FSPR on 31 March 2021 they will need to be certified by their next annual renewal date. Again, if their application cannot be processed in time, lenders will need to cease providing services until the Commission determines their application. Requiring lenders to cease business pending registration will cause significant disruption to existing businesses.

48. We elaborate on these matters further below, following summary of our recommendations.

Recommendations

49. We recommend:

49.1 that the date for coming into force of provisions relating to accumulation limits, directors' duties and substantiation/record keeping should be extended to six months after the date the Bill receives Royal assent;

49.2 the introduction of civil pecuniary penalties and statutory damages for responsible lending breaches take effect from the day after the date that the Bill receives Royal assent.

49.3 that persons who are in the business of providing mobile trading services before 1 April 2021 and who apply for certification before 1 February 2021 can continue to provide those services until the application is disposed of;

49.4 that financial service providers registered on the FSPR on 1 April 2021 and who apply for certification no later than two months before their annual renewal date can continue to provide financial services until the application is disposed of; and

49.5 the commencement date for the certification provisions be extended to November 2020.

50. We support the proposal that amendments to section 99(1A) and the introduction of enforceable undertakings take effect the day after the date that the Act receives Royal assent.

Reasons

Current commencement dates do not give enough time

51. If the Bill receives Royal assent in December 2020, there will be a three-month period between the enactment of the legislation and the commencement of most of its new provisions. This provides very limited opportunity to allow:

51.1 the Commission to extend effective outreach to lenders, borrowers and mobile traders so that they can build compliance off a sound knowledge-base ; and

51.2 lenders to ensure their practices are compliant before the provisions come into force.

52. As part of the Commission's outreach to lenders, mobile traders and borrowers, we will need to create new guidance material for the newly introduced rights and obligations, including the cap on the total cost of high-cost consumer credit contracts, substantiation requirements and directors' duties. We will also need to update existing guidance to reflect any amendments to current provisions of the CCCFA. These are important functions of the Commission, particularly in relation to new and amended laws.[16] The same work will inform our enforcement strategy relating to the new laws. The Commission will also need to actively engage with lenders through outreach to encourage compliance with these new laws and this activity will need to follow the preparation of guidance. While we are currently working on the expectation that the provisions of the Bill will become law, the scope and content of this work cannot be finalised or rolled out until there is certainty about the amendments being made to the principal Act.

53. To enable the Commission to update its guidance and communicate effectively with lenders and borrowers, we consider that the date for coming into force of provisions relating to accumulation limits, directors' duties and substantiation/record keeping should be extended to six months after the date the Bill receives Royal Assent.

54. Lenders may also need to implement changes to ensure they are compliant with any new obligations and/or amendments to existing obligations. We anticipate this is likely to be sequential, in that lenders will make changes in response to our guidance and outreach. We recommend an extended timeframe for provisions to come into force to provide lenders the opportunity to understand and comply with their new obligations or for the Commission to be able to fully develop its enforcement strategy.

Timing of civil pecuniary penalties and statutory damages for responsible lending breaches

55. The introduction of civil pecuniary penalties and statutory damages for breaches of the LRPs could come into force immediately upon the Act receiving Royal assent. Lenders presumably do not need any lead-in time to change their systems and processes as they should be complying with the LRPs already.

Unintended consequences of the transitional provisions

56. The requirement that lenders and mobile traders be certified[17] takes effect from **April 2021** together with the amendments to the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (**FSPA**) that introduce being a "mobile trader" as a financial service.[18] Section 11 of the FSPA makes it an offence to be in the business of providing financial services without being registered.

57. The Bill contains provisions that allow lenders who are already certified to maintain that certification while their application is being considered.[19] These provisions

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[16] CCCFA, s 111(2)(d).
[17] Contained in clause 131B.
[18] Clause 2 (5)(a).
[19] Clause 131O(2)(3).

mitigate the risk to the lender that it applies for certification within a reasonable period but the Commission (for whatever reason) is not able to dispose of the application before the existing certification expires. Without these provisions the lender, although it has made an application for certification that might ultimately be granted, would not be able to continue to provide financial services after the date their certification expired.

58. However, these "status-quo" provisions do not apply to certification applications made by mobile traders or to lenders who are registered on the FSPR as at 31 March 2021. The effect is that:

58.1 Mobile traders must have applied for **and** had their application for certification determined by 1 April 2021 or they cannot provide services;

58.2 Lenders registered on the FSPR on 31 March 2021 must apply for **and** have their application for certification determined by their annual renewal date.

59. The Commission will encourage mobile traders and registered lenders to submit applications for certification in plenty of time. The Commission also will take proper steps to consider and dispose of applications within appropriate timeframes. Nevertheless, the consequences for a lender or mobile trader of a failure by the Commission to dispose of an application in time are significant. We suggest that the Bill is amended to allow mobile traders and registered lenders to provide services providing they have made an application:

59.1 In the case of mobile traders by 1 February 2021;

59.2 In the case of registered lenders, no later than 2 months before their annual renewal date.

Commencement date for the certification provisions

60. We also ask that the commencement date for the certification provisions be pushed out until 1 November 2020. We expect to have systems in place that will enable us to accept applications by November 2020 (rather than June 2020) and we suggest that the Bill should be amended to reflect that date.

The policy objective relating to language disclosure can be met more simply

[Clause 14 - proposed new section 17A]

Issue

61. The Commission is supportive of amendments that will require lenders to make disclosure in a manner that borrowers are more likely to understand. However, we do not consider the proposed provisions will achieve that objective in a manner that is clear and easy to comply with.

Recommendation

62. The Commission considers the policy intention behind the proposed new section 17A (Clause 14) would be better, and more simply, achieved by amending the LRPs and

RLC to require lenders who advertise in a particular language to make disclosure available in that language, and borrowers should be advised that disclosure in that language is available.

63. We consider the proposed amendments will:

63.1 achieve the policy objective of ensuring that when advertising is provided in a language other than English, disclosure for the credit contract must also be provided in that language; and

63.2 provide clearer and simpler obligations to comply with and enforce.

Reasons

64. The proposed wording in section 17A is complex, potentially difficult to comply with and potentially difficult to enforce. For example, under the proposed section 17A, a creditor will be required to make disclosure in the second language if:

64.1 the second language is not the language the creditor **mostly** uses in its disclosure statements (the first language); and

64.2 the creditor **suspects or ought to reasonably suspect** that a debtor:

64.2.1 does not have a **sufficient understanding** of the language the creditor mostly uses in its disclosure statements (to be reasonably aware that of the implications of the contract); but

64.2.2 has a **better understanding** of the second language.

65. These provisions present enforcement and compliance challenges.

66. First, lenders must make a case-by-case assessment of each borrower's proficiency in each language and form a judgment about which is sufficient to communicate the matters that must be disclosed.

67. Second, the Commission must either inquire into the lender's state of mind, or assess whether, in the circumstances, the lender ought to have "suspected" that a borrower did not have a sufficient understanding of the first language but had a better understanding of the second language. Assessments of the circumstances of each loan transaction and each borrower's language abilities would be required. Evidence about these matters may be limited.

68. Alternatively, a new obligation to provide disclosure in the same language that a lender has advertised in, could form part of the LRPs and be further informed by amendments to the RLC. Section 9C(3)(b) of the LRPs already requires a lender to assist the borrower to reach an informed decision as to whether or not to enter into the agreement and to be reasonably aware of the full implications of entering into the agreement. Ensuring disclosure is available in any languages a lender has advertised in seems to be a natural extension of this responsibility. We also consider it reasonable to assume that if a lender advertises in a language, it can reasonably

expect that a borrower, attracted by that advertising, also may prefer or require disclosure in that language.

Limitations of cap on the total cost of high-cost consumer credit contracts

[Clause 22 – proposed new section 45A]

Issue

69. The Commission considers that, with some minor amendments to the proposed section 45A, the provisions will achieve the policy objective of limiting the costs of borrowing recoverable under high-cost loans and any statutorily defined refinancing of a high-cost loan by the same lender or associated person (as that term is defined in the CCCFA).

70. However, we are concerned that the proposed provisions will not achieve the intended protection for vulnerable consumers because the provisions:

    70.1 create loopholes that lenders will be able to exploit; and

    70.2 do not capture the type of refinancing that some high-cost lenders already offer.

Recommendation

We recommend considering:

70.3 extending the definition of "related consumer credit contract" to include any contract entered into within a defined period (say two weeks) of another contract coming to an end to ensure that the total cost cap captures back-to-back lending.

70.4 extend the definition of "associated person" to ensure that the types of scheme discussed below are captured; and

70.5 make minor amendments to the section for clarity.

Reasons

Avoidant behaviour by lenders could undermine policy objectives

71. Although the Commission considers that the proposed provisions (with the minor amendments set out below) will limit the costs of borrowing recoverable on a high-cost loan and any statutorily defined refinancing of a high-cost loan by the same lender or an associated person (as that term is defined in the CCCFA), we are concerned that the proposed provisions will not achieve the protection for vulnerable consumers they is intended because the provisions:

    71.1 create loopholes that lenders will be able to exploit; and

    71.2 do not capture the type of refinancing some high-cost lenders already offer.

72. We see two possible ways in which this can occur:

72.1 Rather than refinance an existing high cost credit contract (which would bring the refinanced loan within the scope of the proposed provisions because it is a related consumer credit contract) a lender can avoid those requirements by encouraging the borrower to find a way to pay the outstanding amount (for example by going into overdraft, using money set aside for living expenses etc) and then immediately enter into a new “back-to-back” high cost credit contract. This is not a hypothetical concern. Many of the high-cost lenders we have investigated since 2016 offer “back-to-back” loans. Some of these lenders require borrowers to “pay back” their original loan before they will provide additional credit. But the additional credit is available **immediately** after the first loan is paid back. We see this as a relatively easy way for lenders, including those who do not already offer these types of loans, to circumvent the proposed provisions which constrain the amounts recoverable under a series of high-cost credit contracts; and

72.2 Lenders who enter into a high-cost credit contract can avoid the restrictions placed on the amounts recoverable under subsequent related consumer credit contracts by ensuring that the next subsequent contract is entered into by another closely linked lender that does not meet the strict definition of “associated lender”.

73. We understand the purpose of these provisions as attempting to prevent vulnerable consumers becoming trapped in a debt spiral by limiting the costs of borrowing recoverable on a high-cost consumer credit contract and related consumer credit contracts. We consider that the methods of avoidance outlined above mean the proposed provisions may not always achieve this goal.

74. A potential solution is to:

74.1 extend the definition of “related consumer credit contract” to include any contract entered into within a defined period (say two weeks) of another contract coming to an end to ensure that the back-to-back lending discussed above is captured within the definition of a high-cost consumer credit contract; and

74.2 extend the definition of an “associated person” to ensure that the types of scheme discussed above are captured.

75. While we acknowledge that these changes will still leave some scope for avoidance, we consider they provide a simple means of closing some of the loopholes left open with the proposed new law.

Minor amendments

76. We suggest two minor amendments to the existing provisions that will clarify the section so that the provisions will better achieve the policy objective of limiting the costs of borrowing recoverable under high-cost loans and any refinancing of a high-

cost loan by the same lender or associated person (as that term is defined in the CCCFA):

76.1 First, we recommend the preface “unless the context otherwise requires” should be removed from section 45A(6), which defines terms that are essential to the application and effect of these provisions. We make this recommendation because:

76.1.1 **The preface is unnecessary.** We cannot contemplate a situation that would require a different definition of these defined terms.

76.1.2 **The preface creates uncertainty**. Because the application and effect of the accumulation limit provisions turn on these defined terms, the terms need to be clear and provide a sufficient level of certainty for the provisions to be understood, complied with and enforced.

76.1.3 **The preface creates a potential compliance loophole**. We think it is possible that lenders may seek to avoid these provisions by claiming that their context requires that the definitions of section 45A(6) do not apply. Irrespective of the merits of such an argument, the Commission would have to prove that the context did not require otherwise. Removing the preface would close this loophole.

76.2 Secondly, in the event that our proposed solution to the avoidance risk discussed above is not adopted, we recommend that the definition of “related consumer credit contract” in section 45A(6) be amended by removing section 45(6)(c)(i). We think that section 45A(6)(c)(i) could be interpreted as meaning that only a series of contracts that starts with a high-cost consumer credit contract will be captured by the accumulation limit provisions. Such an interpretation would provide a loophole for lenders, who could avoid the provisions by ensuring that the first loan in a series of contracts had an interest rate of less than 50% (e.g. 49.9%). The lender could then refinance that loan at much higher rates, but the subsequent loans would not be “related consumer credit contracts” for the purpose of the provisions.

Provisions relating to the substantiation of fees should be amended

[Clause 21 – new section 41A]

Issue

77. The Commission supports the inclusion of the proposed new section 41A which will support its enforcement of the existing requirement that lenders charge fees which are reasonable. We explain our support in more detail above. However, we have concerns that the current wording of the proposed substantiation provisions may not maximise their effectiveness.

Recommendation

78. The Commission recommends that clause 21 be amended so that section 41A requires lenders to keep records that demonstrate their consumer credit contracts do not *provide for unreasonable fees* rather than demonstrate that the fee was not unreasonable *at the time it was set*. In our view this would ensure that the substantiation requirement is consistent with the reasonable fee requirements in section 41 of the CCCFA. It would, for example, capture a requirement that fees are regularly and appropriately reviewed after they have been set.

79. There also appears to be some substantive overlap between section 41 and the proposed section 41A(2). Inasmuch as duplication of the obligation not to charge unreasonable fees seems undesirable we recommend further consideration is given to this matter so that a clear distinction is drawn between these associated provisions.

Reasons

80. As discussed above, the Bill proposes to introduce a requirement that lenders must keep records about how they calculated these fees and these records must demonstrate that the fee is not unreasonable at the time the fee was set (**the substantiation provision**).

81. The Commission supports a substantiation provision for fees and sees an effective substantiation provision as being an important tool in significantly reducing the time and cost involved in many of our fees investigations. This would help to address concerns raised in the 2018 review of the CCCFA which highlighted concerns about the nature and amount of fees charged. An effective substantiation provision is also likely to become more important in the scheme of the CCCFA if the accumulation limits, or any other interest rate cap, provision is implemented. For example, if the accumulation limits provisions are introduced, we see a real risk that high cost lenders may seek to avoid those provisions by charging interest rates below 50% and seeking to offset any lost revenue by increasing their fees.

82. However, the current wording of the proposed substantiation provisions means they may not be as effective as they could be. In particular, although section 41 of the CCCFA (which sets the rules around the reasonableness of credit and default fees) states that a consumer credit contract must not provide for a credit fee or a default fee that is unreasonable, the proposed substantiation provisions do not create a matching obligation that the lender must hold information to show that the fees provided for in the contract were reasonable. Instead, section 41A simply requires that the lender must hold information to show that the fee was reasonable at the time the fee was set (i.e. at the time the fees were calculated).

83. This conceivably could have occurred many months, if not years, before the relevant contract was entered into. The lender's business may have changed significantly in that time, (for example because it entered into more loans than forecast or its costs increased). Its fee calculation may be out of date and of limited use in determining whether the fee included in the contract is reasonable. Nevertheless, as currently

drafted, if the information the lender holds shows that the fee was reasonable when set many months or years before, the lender has complied with the proposed substantiation requirement in section 41A. For example, one lender entered into contracts in 2018 which charged fees that had been calculated using 2016 data. There had been a 233% increase in the number of customers (the denominator) which impacts the reasonableness of the fee charged. In a case such as this, we would expect the lender to have documented the original fee setting process as well as any steps taken to review it to ensure it remained reasonable over time.

84. The potential benefit of a substantiation provision is lost if it focuses only upon the time the fee was originally set, because the Commission must then conduct the potentially costly and lengthy investigations to establish that it is reasonable when provided for in the contract. In this way, the benefit of the substantiation provision may be lost.

85. This proposal is consistent with the CCCFA as it currently stands. We believe that section 41 already contains an implicit obligation that lenders should regularly review their fees to ensure they are not unreasonable. The RLC recommends a lender considers reviewing fees to ensure they are not unreasonable:

85.1 Prior to or as soon as practicable following **any material changes to the lender's costs.**

85.2 As soon as practicable after becoming aware that the lender **generated a material profit through fees** in certain situations.

86. Because section 41 already contains an implicit obligation to review fees, these more comprehensive requirements should not impose any additional burden on lenders and would ensure that lenders are appropriately calculating their fees and ensuring that they hold documentation to then justify the amounts they charge.

Penalty and remedial regime

Issue

87. As discussed above, the Commission supports the expansion of the range of sanctions and remedies already available under the CCCFA. However, we are concerned that this should be accompanied by a broader review of the remedial scheme of the Act because:

87.1 The CCCFA already produces some anomalous outcomes. Breaches of similar or related provisions may attract very different penalties and remedies. There are also often various options and combinations of penalties and remedies available for any given breach and there is no direction or guidance about the appropriate approach to take in any given circumstance. For example, which available remedy is to be preferred; and

87.2 When the Bill introduces civil pecuniary penalties into the CCCFA, they will be available for breaches of the LRPs and other new statutory obligations introduced by the Bill. However, all existing offences will remain subject to criminal sanction only. Some existing breaches may more appropriately be subject to civil pecuniary penalties. The form of penalty available will not depend on the nature of the conduct or the nature of the obligation, but instead on when the relevant provision was introduced.

88. The Commission considers that the appropriate form of penalty (emphasis added):

> Must be based on a robust and transparent assessment of how appropriate the option is in relation to the purpose of the legislation and the particular circumstances and **regulatory system in which it will operate**.[20]

89. Anomalies, inconsistencies, and uncertainties would ideally be removed to improve the Commission's work on compliance and enforcement.

Recommendation

90. We recommend that:

    90.1 breach of the unreasonable fee provisions is subject to civil pecuniary penalties;

    90.2 a full review of the penalty and remediation provisions of the CCCFA is undertaken to ensure clarity and consistency including clarifying the relationship between statutory damages, s99(1A) and civil pecuniary penalties.

Reasons

Importance of an effective penalty and remedial regime

91. To ensure the interests of consumers are protected, the CCCFA needs an effective penalty and remedy regime.[21] While different types of penalties and remedies may be needed to address all forms of non-compliance, we agree with comments by LDAC that any penalty and remedial regime must create a cohesive system where any penalty or remedy is proportionate to the conduct that is intended to address.[22]

92. The penalty and remedial regime also needs to clearly provide for the consequences of non-compliance so that:

    92.1 lenders have certainty over the consequences of their actions;

    92.2 penalties and other remedies provisions that carry significant financial consequences deter non-compliance; and

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20 The Legislation Design and Advisory Committee (LDAC) *Legislative Guidelines: 2018 Edition* (March 2018) at 111.

21 CCCFA s 3, provides that the primary purpose of the Act is to protect the interests of consumers in connection with credit contracts, consumer leases, and buy-back transactions of land.

22 The Legislation Design and Advisory Committee (LDAC) *Legislative Guidelines: 2018 Edition* (March 2018) at 105.

92.3 the provisions can be effectively enforced by the Commission and consumers.

The existing remedial regime creates some anomalous, inconsistent and uncertain outcomes

93. Currently beaches of similar provisions of the CCCFA may attract very different penalties and remedies. For example, a diagram which illustrates the inconsistent remedies available for different breaches of the disclosure regime is at **Attachment B**.

94. For example,

94.1 **incomplete** disclosure of the information required by section 17 is an infringement offence (not subject to conviction) carrying a maximum of a $30,000 fine, but the offence also triggers section 99(1A) and the statutory damages provisions which may require millions of dollars of remediation.

94.2 The offence of providing **unclear or misleading disclosure** (which breaches section 32) is a criminal offence subject to a $600,000 penalty and the statutory damages provisions, but it does not trigger section 99(1A).

95. In addition, there are also often various options and combinations of penalties and remedies available for any given breach and there is no direction or guidance about what is the appropriate combination to take in any given circumstance.

96. For example, the CCCFA is clear that no award of exemplary damages may be made if a criminal penalty has been imposed (section 94(2)) and any award of statutory damages should take into account any compensation paid to borrowers (section 92(e)). However, in some cases both statutory damages and return of costs of borrowing are available as a remedy and the CCCFA provides no guidance on which is to be preferred or whether or how the quantum awarded in one ought to affect the other. The difference in quantum between the two can often be significant.

The Bill has the potential to compound the complexity and inconsistency

97. The introduction of pecuniary penalties has the potential to add further inconsistencies and complexities to the remedial regime. For example:

97.1 a lender who fails to comply with the substantiation of fees provision (proposed section 41A) is subject to pecuniary penalties but providing for an unreasonable fee is subject to criminal sanction (and the higher standard of proof); and

97.2 a failure to provide information to the Commission relating to affordability and/or suitability assessments is subject to pecuniary penalties which have a maximum penalty of $600,000. Conversely, a failure to comply with a compulsory notice has a maximum penalty under the Commerce Act of $100,000.

98. A table showing the overlapping and complex proposed penalty regime for new provisions is at **Attachment C**.

99. Furthermore, while the Bill makes clear that a civil proceeding seeking civil pecuniary penalties can-not co-exist with a criminal prosecution under which a criminal penalty is sought, the relationship between civil pecuniary penalties, and the availability of statutory damages and awards made with reference to section 99(1A) is not clear. This makes it potentially difficult to assess what is an appropriate enforcement outcome for a particular breach of the Act.

100. We recommend that finalisation of the Bill includes a full review of the penalty and remedial provisions of the existing and proposed provisions of the CCCFA to ensure that the Act takes a consistent, principled and clear approach to penalties and remediation.

Layby sales and credit contracts should be treated as separate and distinct transactions

[Clauses 6(3), 47 and 48 – amendments to definition of "layby sale agreement" "credit fees" in Section 5 and amendments to sections 36B and 36C of the FTA].

Issue

101. Layby sale agreements are currently regulated by both the CCCFA and the FTA. The Bill proposes amendments that help clarify the obligations that lenders have under the CCCFA for a layby sale that is also a credit sale and a consumer credit contract, but these amendments do not cure the complexity that arises by these overlapping statutory regimes.

102. These provisions and overlap of the CCCFA and FTA create unnecessary complexity particularly in relation to truck shops who sell goods on deferred payment terms (under either layby sale transactions or credit sales or both).

103. It is undesirable for traders to have to look to across two pieces of legislation to work out which provisions apply. Simplification of these regimes will also assist consumers and consumer advocates to understand their rights and obligations.

Recommendation

104. We recommend that the FTA and CCCFA are amended to create two separate and distinct types of transaction.

Agreements that should be covered by the FTA

105. The FTA layby sale provisions should apply to all arrangements where the customer makes regular payments toward the payment price and takes possession when the goods are **paid for in full** regardless of whether a cancellation fee is payable. This is the traditional layby sale model, and the necessary consumer protections for this model are currently contained in the FTA and include:

105.1 the lender must provide disclosure at the time the agreement is entered into;

105.2 the consumer can cancel the arrangement at any time up until they take possession of the goods; and

105.3 the retailer is only able to charge a cancellation fee and the cancellation fee must reflect the costs arising directly from the agreement.

Agreements that should be covered by the CCCFA

106. All other deferred payment options where the borrower takes possession of the goods before full payment of the purchase price is made and where fees (except cancellation fees) and/or interest are charged, should then be subject to the CCCFA. That is because the transaction is a credit contract and most of the necessary consumer protections are already present in the CCCFA; for example:

106.1 disclosure of key information is required before the agreement is entered into (section 17); and

106.2 where interest or credit fees are charged lenders must comply with the LRPs (section 9).

107. Additional provisions can then be inserted into the CCCFA to ensure consumers do not lose the safeguards that are otherwise present in the FTA, including:

107.1 a provision that a consumer can cancel the transaction at any time before receiving the goods.

107.2 a provision that the risk in the goods remains with the lender until full payment is made.

108. The Commission sees this proposal as a simple and principled way of addressing the complexities that arise where the same layby transaction can be subject to two different sets of rules.

Reasons

109. The amendments proposed in the Bill will mean that an arrangement where a retailer agrees to "hold" goods for a consumer pending payment of all or part of the full purchase price will be treated as a layby sale. If interest or credit fees (including a cancellation fee) are charged the arrangement is ***also*** likely to be a consumer credit contract. Where a contract is both, the amendments in the Bill mean:

109.1 a lender will:

109.1.1 need to comply with the lender responsibility obligations under the CCCFA;

109.1.2 need to make CCCFA disclosure; and

109.1.3 have the ability cancel the contract up until the consumer takes possession of the goods under the FTA; and

109.2 the risk in the goods will remain with the retailer until the full purchase price is paid under the FTA.

110. The only transaction that will be a layby sale agreement only (without also being a consumer credit contract) and subject **only** to the FTA provisions is where the retailer does not charge a credit fee. Every other arrangement for the sale of goods where possession passes after partial or full payment will be subject to both the CCCFA and FTA provisions.

111. In our view, sales on deferred payment terms where possession passes before full payment should be covered by the primary provisions of the CCCFA. Traditional layby sales where possession does not pass until full payment is made should be covered by the FTA.

Attachment A: Summary of submission

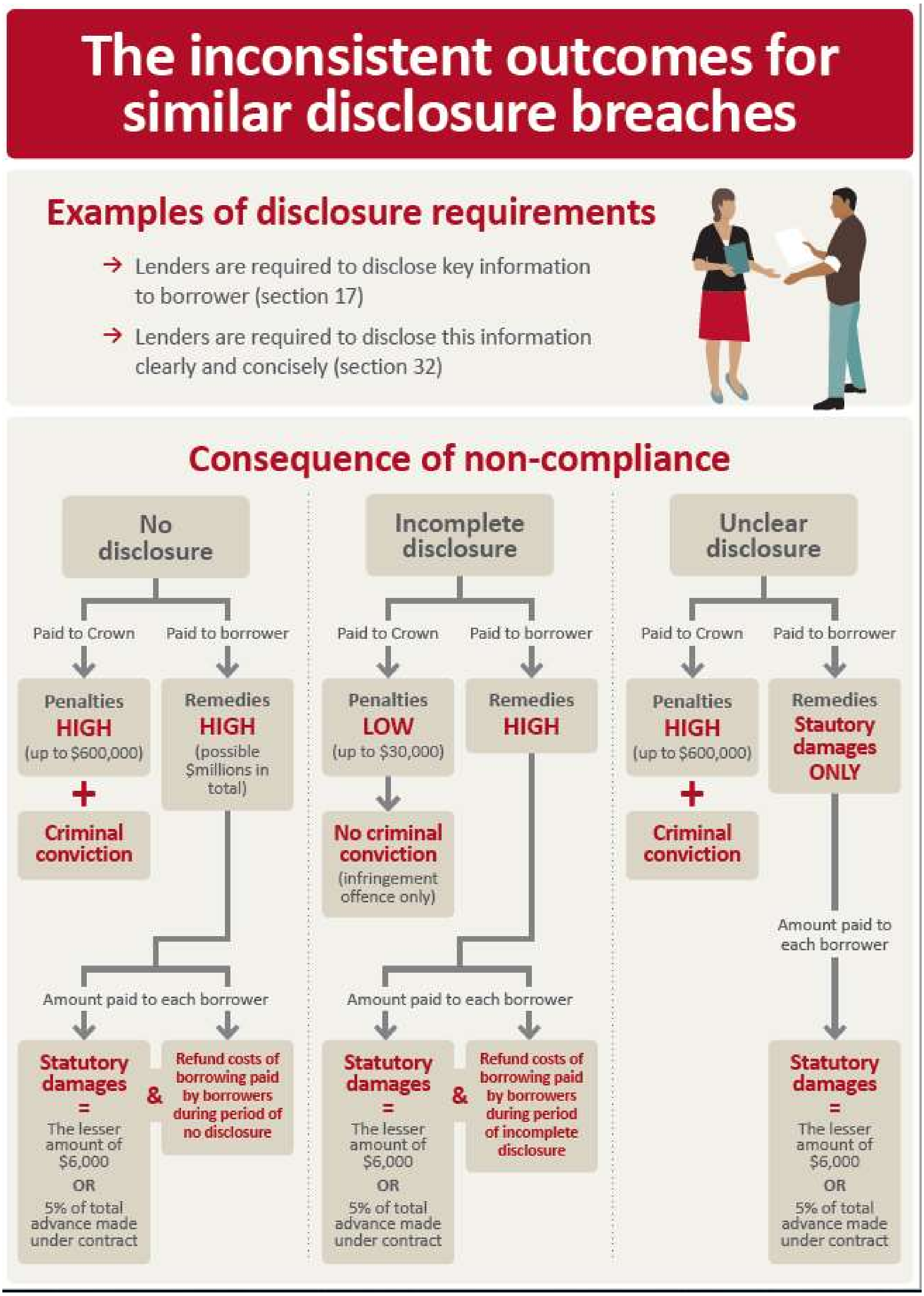
Submission	Clause in Bill[23]	Section in principal Act	Paragraphs in submission
Commencement and transitional provisions			
We recommend that most provisions come into force six months after the Bill receives Royal assent to allow time for the Commission to extend effective outreach to lenders, borrowers and mobile traders so they understand what their rights and obligations are under the amended law.	2	N/A	46 – 60
We consider that civil pecuniary penalties and statutory damages should be available for breaches of the LRPs from the day after the date the Act receives Royal Assent.	2	N/A	46 – 60
We recommend amending the date for introduction of the certification provisions so that it aligns with the redesign of the Financial Service providers Register.	2	N/A	46 – 60
We consider the transitional provisions for certification have unintended consequences and need amending.	2	FSPA, schedule 1AA	46 – 60
Lender responsibilities			
We support a regulation making power to set advertising standards and prescribe inquiries that lenders must make when undertaking affordability and suitability assessment for the purpose of complying with the LRPs.	10, 43	CCCFA, sections 9C and 138	34 – 36
We strongly support a requirement that lenders keep records about inquiries made as	11	CCCFA, new section	37 – 39

[23] 131-1.

to affordability and suitability of a loan before it is entered in to.		9CA proposed	
New disclosure requirement for when a creditor advertises in another language			
We consider the drafting of section 17A is complex, potentially difficult to comply with and potentially difficult to enforce. We suggest that amendments are made to the LRPs and the RLC to more simply achieve the policy objective behind the proposed section 17A.	14	CCCFA, new section 17A proposed	61 – 68
Records about how fees are calculated			
We strongly support a requirement that lenders keep records about how their fees are calculated but we have some concerns about the drafting of the proposed section 41A.	21	CCCFA, new section 41A proposed	40 – 42, 77 – 86
Costs of borrowing must not exceed loan advance			
We consider that, with some minor amendments, the proposed section 45A will achieve the policy objective of limiting the costs of borrowing recoverable under high-cost loans and any statutorily defined refinancing of a high-cost loan by the same lender. However we are concerned that the provisions do not capture the type of refinancing that some high-cost lenders already offer and also contain loopholes that lenders may exploit.	22	CCCFA, new section 45A proposed	69 – 76
Duty of directors and senior managers			
We support the introduction of explicit director and senior manager obligations.	23	CCCFA, new section 59B proposed	29 – 33
Enforcement and remedies			

We recommend that finalisation of the Bill includes a full review of the penalty and remedial provisions of the existing and proposed provisions of the CCCFA to ensure that the Act takes a consistent, principled and clear approach to penalties and remediation.	23 – 36	CCCFA, Part 4	87 – 100
We strongly support the availability of civil pecuniary penalties and statutory damages for breaches of the LRPs.	24, 25, 36	CCCFA, sections 88, 89 and new 107A proposed	9 – 27
We strongly support the introduction of enforceable undertakings and compliance orders.	31, 39	CCCFA, section 113 and new section 98A proposed	28.
We support amendments that will enable a court to reduce the effect of section 99(1A).	29	CCCFA, new sections 95A and 95B proposed	43 – 45
We recommend that a breach of section 41 (unreasonable fees) is subject to civil pecuniary penalties rather than a criminal offence.	N/A	CCCFA, new section 107A	87 – 100
The overlap between layby sales and consumer credit contracts			
We recommend that the CCCFA and FTA are amended to create two separate and distinct types of transaction.	6(3), 47, 48	CCCFA, section 5 FTA, section 36B and 36C	101 – 111

Attachment B



Attachment C: Remedies available for new CCCFA breaches

Key:

Remedy available for all breaches	
Remedy available for some breaches	

Provision Breached	**Remedies available**					
	Statutory damages	*Civil pecuniary penalties*	*Compensation orders*	*Compliance orders*[24]	*Criminal offence (fine, conviction)*	*Infringement offence (lower fine, no conviction)*
Section 9C (lender responsibility principles)	**9C(1) with respect to 9C(3)(a) to (e) <u>or</u> (5)** (lender responsibilities in relation to - an agreement with a borrower; or - a relevant insurance	**9C(1)** (lender responsibility principles) **except for 9C(3)(f)** (meeting legal obligations under other Acts).				

[24] Pecuniary penalties will be available for contraventions of compliance orders.

	contract)					
*Section 9CA (*record keeping of affordability/ suitability assessments*)*						
Section 17A (advertising in language other than English)						
Section 41 (unreasonable fees) *and* *Section 41A* (record keeping of fee calculations)		**41A** only			**41(1)** only	
Section 45A (cap on cost of borrowing)						
Section 59B (directors' duties)						
Section 131B (when person needs to be certified)						
Section 131D (prohibition on holding out that certified)						

Section 131K(2)[25] (person must comply with conditions)						
Section 131R (duty to notify Commission of changes)						
Section 131A (offence to provide false or misleading information in relation to certification)						
Section 132A (disclosure before debt collection starts)			Note: these orders are available for all other disclosure breaches	Note: these orders are available for all other disclosure breaches		

25 Proposed section 131P provides that the Commission may suspend or cancel certification if the Commission is satisfied that the certified person has materially contravened a condition of the certification.

Attachment D: Drafting errors and technical issues

Clause in Bill[26]	Section in CCCFA	Issue	Recommended amendment
Clause 10	Section 9C(3)(b)(i)	The proposed new obligation to ensure that advertising comply with advertising should be a separate, standalone obligation from that the existing obligation in section 9C(3)(b)(i) to ensure that advertising is not, or is not likely to be misleading deceptive or confusing.	Clause 10 should read: (1) Replace section 9C(3)(b)(i) with: (ia) any advertising complies with the advertising standards set in the regulations; and (i) is not, or is not likely to be, misleading, deceptive, or confusing to borrowers; and
Clause 10	Section 9C(3)(c)	There is no express requirement that lenders make reasonable inquiries as to affordability and suitability where a variation materially changes an existing consumer credit contract. The Commission considers that where a variation materially changes an existing consumer credit contract (for example, by increasing a credit limit or advancing further credit) a responsible lender would make reasonable inquiries to be satisfied that the credit provided will meet the	The Commission recommends there is an express requirement in the CCCFA that requires lenders to undertake affordability and suitability before the agreement is materially varied.

26 131-1.

		borrower's requirements and objectives, and that the borrower can make the payments without suffering substantial hardship. We have said as much in our guidance on making variations to consumer credit contracts.[27]	
Clause 11	Proposed new s 9CA(3)	The Commission is concerned that there is no explicit provision that a person cannot refuse to provide records on the grounds of self-incrimination. Although section 113 of the CCCFA states that s 106(4) of the Commerce Act (which prohibits this ground of refusal) applies to the CCCFA, section 106(4) is in the context of "complying with a requirement" whereas the proposed section 9CA(3) is framed as a "request".	Section 9CA should explicitly state that s 106(4) of the Commerce Act applies.
Clause 11	Section 9CA(8)	This proposed new section of the CCCFA provides that the Commission doesn't need to use its powers under section 98 of the Commerce Act to make a request. We are concerned this may limit our ability to use Notice powers to obtain this information if required.	Insert: but this subsection does not limit the application of section 98 of the Commerce Act 1986.
Clause 24	Section 88(1)(a)	This subsection incorrectly refers to "lender responsibility principles". Sections 9C(3)(a) to (e) or (5) set out the "lender responsibilities".	Replace "lender responsibility principles" with "lender responsibilities"

[27] Commerce Commission "*Fact Sheet: The Credit Contracts and Consumer Finance Act – Making variations to consumer credit contracts*" (July 2018) at 2.