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

Your name and organisation

Name	Bruce Sheppard ONZM, CPA
Organisation (if applicable)	Personal as a market advocate and advisor investors and businesses.
Contact details	Privacy of natural persons

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Responses to discussion document questions

	1. Options to amend the CCCFA to enable the FMA to carry out its role effectively **A. Options for liability settings**
1	*Do you have any evidence or experience of the due diligence duty and personal liability resulting in overly conservative approaches to complying with the CCCFA? What impact did this have on consumers? How common do you think this is?*
2	*Do you have any observations about how the impact of the due diligence duty and personal liability works may or may not depend on the size of the lender?*
3	*Are you aware of any other problems with these liability settings?*
Option A1: Retain the due diligence duty but remove restrictions on indemnities and insurance (preferred)	
4	*If lenders were able to indemnify their directors and senior managers from liability for pecuniary penalties (and costs), what difference (if any) would you expect that to make to how those individuals and the company as a whole approach the due diligence duty?*
	It is noteworthy that personal responsibility for directors for breach of workplace health and safety issues, has changed corporate behaviour favourably. This tends to indicate that personal responsibility does impact organisational behaviour. It also means that boards tend to overly focus on risk and board agendas are dominated by risk monitoring and process rather than productivity and return. There is no free lunch obviously. So on balance Limited liability in company law and commercial law should be just that, save for criminal behaviour. However this does favour meaningful corporate penalties to encourage better behaviour by lenders.
5	*If insurance were available for pecuniary penalties liability, what difference (if any) would you expect that to make to how directors and senior managers and the company as a whole meet their due diligence duty? Do you have any information about how affordable that insurance might be for different types of lenders?*
Option A2: Remove due diligence duty for licenced lenders	
6	*Do you agree that the due diligence duty is less likely to be needed for lenders who are sophisticated enough to be licensed under the CoFI Act? Why/Why not?*
7	*How well do you think licensing and ongoing supervision by the FMA could replace the need for due diligence and personal liability? Does this depend on the kind of lender? If so, how?*

	I do not think regulatory monitoring can replace personal ethics accountability and responsibility without significant penalties. If penalties were reduced and replaced with Monitoring without consequence likely the behaviour within major lenders would deteriorate. You need simply to look to FMA conduct reports arising from their monitoring programme of the major banks to observe that bad behaviour by major, systemically important participants is generally treated with a lighter touch than the smaller players.
8	*What impacts might options A1 and A2 have on lenders and consumers compared to the status quo? For lenders, how would you expect lender decision-making and compliance cultures to change under these options?*
	B. Options for regulatory model
9	*Do you agree that these are a fair reflection of the minimum legislative changes that are required to transition credit to the FMA? If not, please explain*
	.
Option B1: Transition to a market services licence and apply all FMA core and licencing powers to consumer credit (preferred)	
10	*What implications would you expect from adopting a licencing approach and the associated regulatory tools for credit?*
11	*What modifications to the FMA's existing regulatory tools, such as stop orders, should we consider if extending them to the CCCFA under this option?*
12	*What do you think about the transitional licence approach, including what time periods are appropriate?*
Option B2: Retain 'Fit and proper' certification (status quo) and add FMA core tools for enforcing the regulatory perimeter	
13	*Do you agree with our analysis about the relative benefits and risks of the certification model? Why/ why not?*
14	*Are there additional tools that you consider the FMA should have to regulate credit, for examples tools like action plans or censures that are usually only available under a licensing model?*
	2. Options to amend disclosure requirements

	C. Options for what and when information must be disclosed
15	*As a consumer, do you receive the right kind and amount of information to make informed decisions? Why/why not?*
	Personally I do not consume consumer credit. However based on the current disclosure mandated, borrowers currently receive the right kind and amount of information under the disclosure provisions. It is notable that individual consumers are far less likely to engage in the consultation process than lenders. Accordingly, the submissions are likely to be one sided in a two sided issue. It is a mistake to assume that lenders views of what is appropriate for borrowers is free form self interest. It may be necessary to undertake additional research on consumers experience.
16	*Do you consider any of the disclosure obligations to be irrelevant, confusing, or inappropriate? If so, please tell us what obligations you are referring to and what impact this has.*
	No. Claims by lenders that providing information to borrowers is or can be counterproductive should not be accepted in the absence of evidence that it is in fact the case based on consumer research. It seems to me that complying with ss 9C and 32 should eliminate the risk of disclosure statements being confusing to the average borrower.
17	*How could disclosure obligations be more targeted to the consumer's circumstances to ensure only relevant information is disclosed?*
	The disclosure requirements under the Act are already targeted to consumers' circumstances to the extent that the information required to be disclosed varies depending on the disclosure type (initial, continuing, variation, etc.). Overall, reducing the disclosure provided to borrowers based on assumptions about their circumstances and therefore their informational needs seems highly likely to result in borrowers being arbitrarily deprived of necessary information, and creates a gateway for defending deliberately withheld disclosure and will increase enforcement costs. Further, it is difficult to see how Option C2 could reduce compliance costs relative to the status quo. Assumptions about a borrowers circumstances would inevitably add additional complexity for lenders.
18	*Is the information set out in Regulations 4F and 4G both sufficient and do sections 22 and/or 23 require the right information to be disclosed when a contract is varied?*
	Yes
19	*Are there any other concerns or issues you would like to raise related to disclosure obligations?*
	As MBIE notes (at paragraph 51), one of the key ways the CCCFA protects the interests of consumers is by imposing disclosure obligations on lenders. These obligations are critical to ensuring that consumers are able to make informed decisions in circumstances where lenders have significant power, knowledge and resource advantages. Any changes to the

	disclosure requirements must therefore be made based on the needs of the borrower, based on reliable data in respect of what borrowers need to make informed decisions. They should not be made based on reducing compliance costs for the lender – rather on the basis that it improves the information provided to consumers.
	D. Options for how information must be disclosed
20	*As a lender, do you identify any barriers in the Act to the use of electronic methods of disclosure? If so, can you explain what are these barriers and how they impact your processes?*
21	*As a lender, are there any practical difficulties with obtaining the borrower's consent for electronic forms of disclosure (section 32(4)(b))?*
22	*What would be the implications of removing the requirement to obtain borrower's consent for electronic communication and forms of disclosure (section 32(4)(b))?*
	The population is aging. Not all consumers have computers or smart phones. Some still prefer to receive, and often only have the means to receive documents in the traditional manner. Lenders should not be able to provide borrowers with disclosure in ways that mean borrowers will never in fact receive it without the borrowers consent.
	E. Options for penalties for incomplete disclosures by lenders
23	*Do sections 95A and 95B meet their objectives? Why/why not?*
	Yes. Sections 95A and 95B effectively mitigate any risk of s 99(1A) having disproportionate or otherwise problematic effects, while also ensuring that s 99(1A) continues to strongly incentivise lenders to comply with their ss 17 and 22 obligations. The banks say that even with ss 95A and 95B, the effects of s 99(1A) may be disproportionate (paragraph 77). That is effectively a claim that the courts cannot be relied on to apply ss 95A and 95B effectively so as to achieve their well-known and understood purposes. The existing legislative framework mitigate any risk of disproportionate liability, there is no justification for any "*excessive risk aversion*" on behalf of lenders (paragraph 78). Given the size and resources imbalance, it is appropriate that the onus is on a lender to apply to the courts for relief. The banks and other lenders have significant resources and legal teams available and are much better able to navigate the courts – rather than impose the obligation on consumers.
24	*As a lender, to what extent does section 99(1A) impact the time, effort, and costs you dedicate to initial and variation disclosures?*
	As discussed above, disclosure is one of the key ways the CCCFA protects the interests of consumers. Banks and other lenders should be taking their disclosure obligations seriously

and dedicating the requisite levels of resource to achieving compliance. They will not do that unless the consequences of failing to do so are sufficiently substantial – otherwise, those consequences become just another cost of doing business. It is a bit like a thief only having to make good the items stolen. Steal three cars get caught on one, give back that car and the thief is up two cars.

Note the media release, "Kiwibank faces criminal charges following issues that caused over $7m in overcharges", 11 June 2024. Also note the offending has been on going since 2002. It seems that the prospect of the existing penalties was not enough to encourage Kiwibank to address the issues fast. Those who were out of pocket in 2002, 22 years have effectively been deprived on any meaningful redress.

Inadvertent system errors or deliberate actions, have the capacity to cause undetected issues affecting large numbers of consumers seriously. If lenders are going to take advantage of automatized processes and systems (which presumably contribute to substantial profits) they must also bear the burden of ensuring those systems work.

The penalty for these kinds of breaches of disclosure obligations must incentivise lenders to establish and maintain systems that are effective and reliable. If these systems are not reliable it undermines the trust and confidence we have in banks , and that represents a greater threat to the banking systems stability than the penalties imposed by the law for a breach of the CCCFA.

25	*Under option E1, what should a materiality test look like?*
	Materiality is subjective. It is different for the consumer, and indeed each separate consumer and for the lender. Drafting and applying a materiality test are likely to be fraught with problems and complexities. Whatever guidance the FMA provides, uncertainty as to how the amended provision applies is likely to prevail for a considerable period of time posing risk for consumers, who in the interim are the least financially capable.
26	*Under option E1, which party should have the burden of proof and what would this mean for the effectiveness of the option? If the onus is on borrowers to show materiality would that deter them from seeking redress under section 99(1A)?*
	This is impractical and will effectively render all penalties mute. The burden should absolutely be on the lender who has breached its disclosure obligations. If the burden is on the consumer to establish, the reality is that few, if any, breaches will be enforced by consumers due to the resources required to pursue their lender.
27	*Under option E2, how should the maximum amount the lender forfeits be calculated?*
	The existing regime of revenue forfeiture, is simple easy to calculate for the lender and the borrower, and scales with the breach. The penalty should be mandatory, and in my view not subject to judicial reduction at all. Any reduction should be formulaic to avoid or at least minimise litigation costs. Any such deductions from the maximum should be designed to induce the behaviour we expect from lenders. Those behaviours should be anchored in the behaviours necessary to maintaining confidence and trust in our financial institutions. .

	To incentivise early disclosure and redress, Discounts should be allowed for voluntary disclosure and voluntary compliance. Ie once detected a discount of x% if promptly reported., Post reporting if the consumers are paid out within y days a further discount. Justice delayed is justice denied, thus incentivising voluntary compliance and redress, is worth considering.
28	*Under option E3, would there be the right incentives in place to ensure lenders comply with their disclosure obligations?*
	No.
29	*What would be the risks associated with each option? How could they be mitigated?*
	The status quo already meets the Government's objectives of balancing compliance costs with good consumer outcomes. Options E1 and E2 are unworkable. Option E3 is inconsistent with ensuring good consumer outcomes as it will result in lenders being insufficiently incentivised to comply with ss 17 and 22. The status quo strikes the right balance. It ensures s 99(1A) motivates lenders to invest in compliance without exposing them to disproportionate liability. In short, there is nothing wrong with the status quo, which carefully balances the rights and interests of consumers and lenders. The fact that lenders would prefer their interests to be given more weight is not a reason to change it. The lenders interests and the borrowers are best served by certainty and incentives to disclose and redress claims early should be considered and arguable prescriptive penalties not subject to arguments over fairness and proportionality before a court should be considered to reduce compliance and enforcement costs.(in effect not dissimilar to the Income tax penalty regime.)
	3. Review of the high-cost credit provisions
30	*What specific provisions (high-cost or other) have most impacted lenders' willingness or ability to offer high-cost consumer credit?*
31	*In the absence of high-cost loans, what other avenues are borrowers turning to?*
32	*Is the unavailability of high-cost consumer credit having positive or negative effects on would-be borrowers?*
33	*What evidence, if any, is there of debt spirals and/or continued repeat borrowing for vulnerable borrowers across credit contracts with interest rates of 30 per cent to 49.9 per cent?*

F. Options to amend the high-cost credit provisions

Option F1: Expanding the definition of a high-cost consumer credit contract to contracts with an interest rate above 30 per cent	
34	*Are there any other issues associated with loans in the 30 per cent and 50 per cent interest rate range that we should be aware of?*
35	*Are there examples where loans with interest rates between 30 per cent and 50 per cent would breach the 0.8 per cent rate of charge cap?*
Option F2: Expanding the definition of a high-cost consumer credit contract to contracts with an interest rate above 45 per cent	
36	*What evidence, if any, is there of debt spirals and/or continued repeat borrowing for vulnerable borrowers across credit contracts with interest rates of 45 per cent to 49.9 per cent? Are there any other issues associated with loans in this interest rate range that we should be aware of?*
37	*For lenders: If the government extended the high-cost provisions to loans with annual interest rate of 30 per cent or more, what would be the impact on your operations (if any)? Are there any changes to the high-cost provisions we should consider to enable those loans to remain profitable, and on what terms?*
38	*How is a revised definition of a high-cost consumer credit contract interest rate threshold likely to affect access to credit for borrowers?*
39	*Do you recommend considering another interest rate threshold? If yes, please explain why.*
Option F3: Status quo	
40	*Do you have any other feedback on any of the high-cost credit provisions? Have they been effective in reducing financial harm caused by the excessive cost of credit for some types of loans and repeat borrowing by vulnerable consumers?*
Option F4: Other high-cost provisions	

41	*Is there evidence of certain industry lending practices that are causing harm which the high-cost credit provisions could address?*
42	*Are there any other industry lending practices that you believe are harmful to consumers?*
43	*Do you agree with the suggested impacts of each of the identified options? Why/why not?*
44	*Do you have any information or data that would support our assessment of the impacts of each of the options?*
45	*Do you think that the CCCFA could be strengthened to protect consumers who are sold lending products or add-ons that exceed the value of the product? If so, how?*
46	*Finally, are there any other areas and options for change that we should consider that have not been addressed in this discussion document?*

Other comments

Consumer legislation is similar to financial markets regulation. It is important that the benefits for consumers are not watered down by the desire to reduce compliance costs. The focus should always be on the customer or potential victim in all regulation, which in consumer law is - the consumer not the provider. In financial markets conduct, the consumer is the investor and they are entering a risk market The consumers of consumer credit are taking a risk on borrowing, but are not expecting to take additional risk from lender misconduct. The issue is sophistication and the needs of regulating financial markets and consumer markets and the motivation for such regulation and the societal outcomes are quite different. This paper suggest an adoption of Financial markets principles to a consumer market ,and in my opinion the models need to be different.

The benefits to society by having good compliance is wider than just the individual consumer lender relationship. Effective enforcement against one lender sends the message to all lenders that they need to take compliance seriously.