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Consumer Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
Wellington

RE: Fit for purpose consumer credit legislation Discussion document
Preventing or effectively remedying harm caused by irresponsible lending is crucial to the financial wellbeing of our communities. The Credit Contracts and Consumer Finance Act (**CCCFA**) and settings for enforcement can be much more fit for purpose where 30 per cent per annum and above loans are correctly identified as high-cost loans that need additional consumer protections.

FinCap welcomes the opportunity to comment on the Ministry of Business, Innovation & Employment (**MBIE**) Fit for purpose consumer credit legislation Discussion document (**Discussion document**). We strongly support expanding the definition of a high-cost consumer credit contract to contracts with an interest rate of above 30 percent. We also support the introduction of more regulator tools for addressing lending issues but caution diluting penalties for misconduct and requirements for disclosure.

The 'phase two' of the Financial Services Reforms 2024 being progressed by Minister Bayly are a great opportunity for some blue sky thinking. With this in mind FinCap also recommends:
- Actions towards smooth transition between the regulators responsible for credit law.
- Fully applying the CCCFA to Buy Now Pay Later lenders and other lenders causing harm but currently out of scope.
- Prohibiting car lender's use of disabling devices/immobilisers.
- Making changes where the CCCFA is enabling rather than helping remedy family harm.
- Considering whether requirements for hardship assistance from lenders could be improved.
- Steps towards appropriate regulation for fair conduct from debt collectors.

We expand on these comments in the submission below.

About FinCap
FinCap (the National Building Financial Capability Charitable Trust) is a registered charity and the umbrella organisation supporting the 185 local, free financial mentoring services across Aotearoa. These services supported over 69,000 whānau facing financial hardship in 2023. We lead the sector in the training and development of financial mentors, the collection and analysis of client data and encourage collaboration between services. We advocate on issues affecting whānau to influence system-level change to reduce the causes of financial hardship.

General comments
Transition between Commerce Commission and Financial Markets Authority
The Minister has announced that the enforcement of our credit laws will move from the Commerce Commission to the Financial Markets Authority (**FMA**). Financial mentors have long worked with the Commerce Commission to improve the regulator's visibility of issues in lending markets. In February 2024, the Commerce Commission reported it had taken action on 79% of the complaints so far

assessed from financial mentors that were received in the previous quarter.[1] This demonstrates the ability of financial mentors to report relevant issues and improve regulator visibility.

Financial mentors are aware of, and invested in, multiple open investigations at the Commerce Commission involving lenders who have caused avoidable harm to whānau as well as additional strain on our sector. It is important that we have confidence that this work from the regulator is not compromised in the transition to the FMA.

The Commerce Commission has also rightly invested in community engagement and this has seen regular engagement with financial mentors to encourage the identification and reporting of potential CCCFA breaches. It is important that the FMA builds on this work from the Commerce Commission and even invests further to directly reach more communities who are disproportionately harmed by lending issues but far less likely to know their rights or complain about a breach.

FinCap has been contacted by a community leader concerned that mobile traders may no longer be bound to comply with the CCCFA. It would be good to have a fact sheet or media release to reference in such situations. For the general public, the transition between regulators is a fairly technical subject. Communications need to be unambiguous to reassure stakeholders that regulatory coverage will not reduce.

FinCap also puts forward the below principles towards decision making around any changes to the way enforcement of financial services. These principles are based on problems currently observed by financial mentors. An example is the years it can take between a strong complaint about a breach and the regulator's actions remedying and preventing the misconduct continuing.

Principles for better financial services enforcement:

- The process for transition between regulators, and communications about it, should give consumers confidence that regulated traders will constantly be held to account.
- The coverage of different financial services should only increase rather than reduce in any change of settings.
- Tools should be available, and the regulator should have a culture of making use of them, towards timely enforcement of a fair outcome and the halt of misconduct to prevent consumers facing further harm.
- Addressing and preventing significant harm to vulnerable borrowers, should be a priority for the regulator through the appropriate application of a vulnerability policy consistent with the Council of Financial Regulator's (**CoFR**) Consumer Vulnerability Framework.[2]
- Supports and resources should be made available so that vulnerable complainants are more likely to engage through formal processes which could be intimidating, such as court or interviews with investigators.
- Regulators should have the resourcing and skills to proactively seek insights from communities more likely to be harmed by misconduct.
- Transparency is improved through increased disclosure of when the regulator has received multiple complaints and what action has been taken (NSW Fair Trading's approach is an example).[3]
- CoFR organisations should share intelligence about potential breaches to the correct agency or unit of their organisations so there is no wrong door for complaints.

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[1] See: https://us5.campaign-archive.com/?u=87ea106f06f694a3960d42f63&id=96d25d822a

[2] https://www.fma.govt.nz/assets/CoFR/CoFR-Consumer-Vulnerability-Framework-April-2021.pdf

[3] See: https://www.fairtrading.nsw.gov.au/help-centre/online-tools/complaints-register

- Financial disputes resolution schemes should be required to refer breaches and systemic issues to relevant regulators and government policy departments without delay where identified.

Recommendation: MBIE and decision makers consider the above principles in determining the best regulator settings for credit law.

Other changes or reviews are needed
Given that 'Phase Two' of the 2024 financial services reforms are across a broad area, we recommend the following actions are progressed and the scope of the work programme at MBIE include them.

Bring all lenders causing harm into CCCFA requirement for affordability assessments
The most common issues causing financial hardship for borrowers reported by financial mentors to FinCap since December 2021 are those relating to unaffordable Buy Now Pay Later loans. Financial mentors report debt spirals emerging where those they support have taken out multiple loans and continued to pay them, while going without essentials, to keep the facilities open. Another issue is that those supported by financial mentors who can no longer access loans from CCCFA bound responsible lenders end up in substantial hardship to make repayments on further Buy Now Pay Later loans that did not comprehensively check affordability. Two real examples of such common scenarios are below.

Jobseeker support income.
One budget showed a person in Auckland with a Jobseeker Support income and very modest expenses each week, month and year facing a deficit of $191.70 per week with repayments on seven Buy Now Pay Later loans across four lenders which made up $220.80 per week of their expenditure. The financial mentor commented this reflected common circumstances for many whānau coming through the door.

Buy now pay later access compounding hardship with other lending.
Another budget showed a person in Auckland with otherwise 'maxed out credit cards' with a $612.61 per week deficit. Repayments of $139.12 per week from 10 separate loans from a single Buy Now Pay Later lender were compounding that already existing deficit. The financial mentor sent this budget as example of Buy Now Pay Later issues for those in work who are coming for their assistance, increasingly.[4]

Despite efforts by the three main businesses making these loans to implement a credit reporting system to address new lending causing hardship,[5] financial mentors report the issues with multiple loans continue to present. The application of credit reporting in lieu of affordability checking for these loans, from September 2024, is a flawed solution. FinCap understands there is a seven-day lag between a missed payment and it showing up on the alternative credit reporting system, the comprehensive credit reporting system, could take a month or more. A debt spiral can get much more intense across multiple providers across these time periods as a borrower panics and increasingly 'robs Peter to pay Paul.' Previous missed payments are also only one indicator of the unaffordability of further lending. Without affordability checks a lender cannot see that someone is going without the essentials in life to meet payments on their loans. Buy Now Pay Later lending should instead have to check affordability and suitability under 9C(3) of the CCCFA like other lenders.

[4] As shared in this submission which includes much more commentary on issues with Buy Now Pay Later: https://www.fincap.org.nz/wp-content/uploads/2023/03/230309-SUB-BNPL-exposure-draft.pdf
[5] See: https://www.centrix.co.nz/centrix-paywatch-initiative-to-deepen-bnpl-customer-protections/

Financial mentors also report similar issues with the loans commonly provided for phone handsets with ongoing plans over terms of up to 36 months. There are no required affordability assessments for the repayment of thousands of dollars for the handset and an ongoing requirement for meeting monthly call and data costs to make use of the phone. Late payment charges are poorly disclosed and have been found to vary. There are also several other consumer issues that can exacerbate the harm caused as described in an early submission linked below.[6] Our hui in recent years with officials at the Commerce Commission and MBIE have not led to action to address issues with these loans. The issues with this lending mirror those that have led to additional consumer protections beyond general consumer law for borrowers from CCCFA covered lenders. We again recommend that CCCFA protections apply to these loans and prevent whānau facing substantial hardship because they are stuck with unaffordable arrangements for accessing essential communications services.

Since the requirements for mobile traders to comply with the CCCFA, financial mentors have reported repeated instances of substantial hardship arising from businesses who structure repayments to avoid being captured with the CCCFA. Common issues across the examples shown to FinCap in relation to these businesses appear to be:

- No affordability assessments.
- Large sums already paid towards goods being forfeited without goods being supplied where repayments are missed.
- Advertising weekly repayments rather than total cost.
- Charging more than the recommended retail price, which FinCap believes reflects a hidden cost of credit.

FinCap could work with MBIE to provide a list of these traders we recommend are made to comply with the CCCFA, after this consultation round. We could also prepare data from our *Client Voices* software as to the scale of borrowers from these lenders presenting in hardship.

Recommendation: The Minister use CCCFA 137A powers to apply all consumer protections from the CCCFA to Buy Now Pay Later lending, all loans for mobile handsets and lending models that hide the cost of credit through prices well above the recommended retail price.

Prohibit disabling devices/immobilisers as collection tools in vehicle lending

Lenders immobilising vehicles to coerce payment from a defaulting borrower should be prohibited. 83L-M of the CCCFA allow lenders to install and use disabling devices on secured goods.

Financial mentors have shown FinCap loans where the borrower has:

- An upfront cost included in their loan for the installation of a disabling device/immobiliser that can be used by the lender's collection team.
- A regular rental payment for the device to be active and then face a fee for removing the device at the end of the loan.

The disabling device/immobiliser has the effect of forcing someone to repay the loan over other essential costs when in hardship. People who are experiencing hardship are unable to access essential transport, which can impact their health and safety:

"From time to time the lender immobilised the car due to loan arrears meaning that Prisha found it difficult to attend hospital appointments." FSCL case study.[7]

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[6] Detailed in page 2-3 of this previous submission: https://www.fincap.org.nz/wp-content/uploads/2021/12/211215-SUB-MB-BNPL-lending.pdf

[7] See: https://fscl.org.nz/case-studies/a-lender-miscalculates-income/

Where lending was irresponsible, the disabling devices/immobilisers worsen the consequences. Financial mentors have told FinCap of a car immobilised in a hospital car park when the lender was told a child's serious health issues were the reason for hardship. They have told us of cars stopped in car parks where fines and towing costs have compounded the issue. Many have also reported their client's immense distress at a disabling device loudly signalling that it will prevent the car starting again while they are driving on a motorway.

Lenders have not shown that they can make use of disabling devices/immobilisers on cars appropriately as a debt collection tool, without unreasonable harm to borrowers. Their use of these devices/immobilisers should therefore be prohibited.

Recommendation: Prohibit lenders from using disabling devices/immobilisers on secured cars.

The CCCFA should better prevent 'debt overhang' arising

"… the law required the lender to refund the interest and fees charged on the loan but, because the residual debt was so high, we asked the lender to consider also reducing the debt to an amount that Jason and Maggie may be able to pay off over time. We thought this may be a fairer outcome in the particular circumstances of this case. We cannot require a lender to reduce a debt..." – FSCL Case Study[8]

'Debt overhang' is a systemic issue relating to unaffordable car lending that has repeatedly left those supported by financial mentors without a fair outcome. The issue generally arises where a car is sold by the lender's agent at a price beyond its value and/or with add-on insurances and other charges increasing the principle amount borrowed. When cars financed in this way are repossessed and sold, a debt remains. When a dispute resolution scheme eventually finds that a lender breached the CCCFA by incorrectly deciding a loan was affordable, the scheme then it says it is only able to award a refund of interest and fees. The borrower is left with a debt and no vehicle despite it being established the lender should have never lent to them and has broken the law.[9]

Instead, the CCCFA should clearly give a remedy that the borrower is returned to the position they were in if the loan had never occurred. If this were the case, less people supported by financial mentors would be left to face:

- Ongoing substantial hardship while paying a 'debt overhang.'
- Insolvency procedures and their ongoing impact on financial inclusion.
- An early hardship withdrawal of Kiwisaver retirement funds.

It might be reasonable for some modest amount of payments made to not be refunded in recognition of the benefit of use of a vehicle for a period of time.

Recommendation: Clearly provide a clear remedy to the 'debt overhang' issue in the CCCFA.

Make changes where the CCCFA is enabling rather than helping remedy family harm

Good Shepherd has found, and financial mentors have also reported, serious issues around lenders considering they are constrained from best assisting a victim of economic harm or other forms of family harm. Actions like hardship assistance being provided on a joint account might need consent from both parties. An issue can also arise where an ex-partner has the benefit of the loan in the form of a vehicle or home, but the other person is pursued for all of the debt.

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[8] See: https://fscl.org.nz/case-studies/residual-debt-unaffordable/

[9] This case study is another example: https://fscl.org.nz/case-studies/food-costs-underestimated/

We support Good Shepherd's recommendation to: "*Limit victims' liability on joint debts to ensure victims of family harm are only responsible for their half of the debt and in cases where a person was coerced to accrue debt, waive their share entirely.*"[10] We also encourage the government to work with lenders and community organisations to adjust the CCCFA where necessary to ensure it helps remedy rather than compound the consequences of economic harm.

Recommendation: Ensure the CCCFA helps provide solutions rather than compound economic harm.

Review whether the CCCFA could require better hardship assistance

Financial mentors regularly raise frustrations with the hardship responses of lenders. In cases where a borrower's circumstances have changed to a situation where it is very unlikely that they will ever repay, then the statutory hardship requirements are not relevant. Some lenders will go beyond this and apply Chapter 12 of the Responsible Lending Code or their own approach to exceeding the minimum standard of support. It is often most pragmatic to just waive debt, rather than have it sold to a debt collector at a fraction of its paper value, only to have it compound the borrower's hardship for years to come. That or, it is more pragmatic, to make arrangements that see someone avoid going through an insolvency procedure and save both parties the administration of doing so.

Unfortunately, a lack of compassion or training means staff at some lenders often only think about statutory hardship assistance when a borrower asks for assistance. Financial mentors see it time and time again. The reality is that any borrower can have a change of circumstances and no longer be able to pay. Reviewing whether the law should better prompt lenders to make more sustainable arrangements, including debt waivers, would help debtors avoid the consequences of ongoing substantial hardship.

Recommendation: Review how the CCCFA could be redrafted to get lenders to better assist borrowers who are unable to pay through debt waivers and other supports beyond the statutory hardship requirements.

Debt collection

No matter how robust the CCCFA and enforcement is made at this point in time, debts from before protections were effective will continue to emerge and cause substantial hardship for borrowers. This is because unfair debt collection practices go unchecked. Aotearoa does not have coherent laws or enforcement tools to effectively prevent unfair conduct from debt collectors. Common issues include unreasonable fees and charges, harassment through excessive contact, misleading claims about actions that will be taken and coercion to make unaffordable repayments. FinCap recommends the following actions to resolve these issues undermining now robust protections:

Recommendation: Amend the Fair Trading Act 1986 to better define harassment and ensure there are sufficient penalties to deter debt collector misconduct.

Recommendation: Improve mechanisms for accountability by clearly including all debt collection activities in s5 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

[10] See page 56 and wider context throughout this report: https://goodshepherd.org.nz/wp-content/uploads/2023/07/Good-Shepherd-NZ-Economic-Harm-evaluation-July-2023.pdf

Responses to consultation questions:

Q1. 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?

FinCap has seen lenders and MBIE assert this as the root cause of conservative interpretations of the requirements for affordability assessments.

Q2. 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?

FinCap and financial mentors have observed that the due diligence duty and personal liability settings are likely a factor in lenders across small and large institutions taking community concerns about potential CCCFA breaches more seriously. Although much of FinCap's commentary on the CCCFA focuses on outstanding consumer protection gaps or compliance issues, we also have perceived less irresponsible lending since the introduction of the due diligence duty and personal liability for decision makers at lenders.

Q3. Are you aware of any other problems with these liability settings?

How these settings ultimately apply are currently unclear and time for enforcement action to conclude could resolve any issues around uncertainty contributing to conservative decisions. As far as FinCap is aware, the liability settings are yet to be applied by a court. It appears they will be first tested where the Commerce Commission's proceedings against Second Chance Finance make it to court.[11]

Some financial mentors have expressed frustration about the clear breaches they have seen not having resulted in penalties in a timely fashion. They see it as an injustice that the borrower they are supporting remains in substantial hardship, potentially having had inadequate remedy (like the debt overhang issues discussed in the general comments section at the beginning of this submission). Meanwhile, decision makers at the lender are without punishment for breaking the law some years ago, and a systemic issue may continue to repeat and cause harm.

FinCap understands that penalties will likely go to government's general revenue. There could be better mechanisms to ensure sums paid by lenders who have breached the CCCFA can go towards remediation first, where this would not be realised otherwise.

Q4. 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?

FinCap recommends option A3: retain the status quo. We are concerned that adjustments like those posed in the question could weaken some lender's incentive to comply with the CCCFA requirements. Those with increased revenue or margins might have more ability to take risks that harm borrowers while shielding their directors from penalties.

Q5. 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

[11] See: https://comcom.govt.nz/news-and-media/media-releases/2024/comcom-to-launch-action-against-two-car-finance-lenders

due diligence duty? Do you have any information about how affordable that insurance might be for different types of lenders?

FinCap recommends retaining the status quo. The risk that premiums might increase on insurance against penalties is not as strong a deterrent for harming borrowers through a breach of the CCCFA in comparison to the status quo of direct liability for decision makers. Pecuniary penalties liability insurance access should not be available since it could lead to a director or senior manager being less concerned in meeting their due diligence duty.

Q6. 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?

FinCap strongly opposes removing the due diligence duty for any lenders' decision makers. While larger institutions are under more scrutiny from other enforcement regimes, a breach of the CCCFA could harm far more borrowers across their larger loan books. The due diligence duty helps deter this widespread harm arising.

Q7. 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?

FinCap strongly opposes removing the due diligence duty for any lenders' decision makers. The due diligence duty is a strong deterrent to misconduct that reminds a decision maker at a lender of their obligations. Licencing should be seen as complimentary tool rather than a replacement.

Q8. 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?

FinCap recommends option A3: retain the status quo. Borrowers would have less protection as deterrents for misconduct are reduced where option A1 is adopted and especially where A2 is adopted.

We also recommend that if A1 or A2 are progressed despite our recommendation, a statutory review of the impacts of the change and whether it should be reversed also be required. Such a review should be required to determine whether the change has contributed to greater misconduct from lenders that has harmed borrowers. If this misconduct and harm has occurred it should require that the relevant decision maker consider the reintroduction of the current settings. This might be set for four years after any change as there are often delays between a change, regulated businesses reacting to the change, loans being made with issues, complaints about any issues then arising, investigations of those complaints towards a strong evidence base on outcomes being available.

Q9. Do you agree that these are a fair reflection of the minimum legislative changes that are required to transition consumer credit to the FMA? If not, please explain why.

Please see our general comments at the beginning of this submission about our *principles for better financial services enforcement* and *transition between regulators* and then test the options against these.

Q10. What implications would you expect adopting a licencing approach and the associated regulatory tools for consumer credit?

We support option B1: transitioning to a market services licence and applying all FMA core and licensing powers to consumer credit. As described in the discussion document, applying such approach is consistent with our *principles for better financial services enforcement* set out in the general comments section at the beginning of this submission. In particular we'd support where this might lead to timelier enforcement.

Q11. 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?

FinCap recommends the consideration of a super-complaint mechanism for the FMA, similar to what has been established for the Financial Conduct Authority in the United Kingdom:

"The Financial Services and Markets Act 2000 (FSMA) provides that certain consumer bodies may complain to the Financial Conduct Authority (FCA) about a feature or a combination of features of a market for financial services in the UK that are or may be significantly damaging the interests of consumers. This process is intended to provide consumer bodies with a mechanism to raise issues with us about features of the market that may be affecting consumer interests. We must respond within 90 calendar days." FCA Guidance[12]

This super-complaint mechanism could be valuable for situations where an organisation such as FinCap holds significant evidence of a widespread breach, but vulnerable consumers are hesitant to complain directly. Our *Client Voices* software collects trader information and indicates how some lending might contribute to substantial hardship for borrowers. It can provide significant deidentified information around how different demographics are impacted too.

The super-complaint might also be a helpful mechanism for organisations to raise complaints around breaches such as an unfair fee of $5 that impacts tens of thousands of people. Although it is likely seen as uneconomical for any one borrower to put time into seeking this fee be refunded, the scale may justify an organisation raising the systemic issue with the regulator where it would not be visible otherwise.

Financial mentors have faced breaches reflected in late responses from lenders, that create barriers for a borrower they are supporting to pursue any rights. An example is requested records of an affordability assessment not having been provided within the 20 working days required. This results in the rescheduling of an appointment, which strains community sector resources. It can also lead to a lower likelihood that the borrower makes a complaint. They might instead opt for a No Asset Procedure or other solution rather than endure ongoing substantial hardship while waiting to resolve an unlawful debt.

A financial mentor has suggested automatic fines apply as a deterrent to issues like the above example. They put forward that $2,000 would be an appropriate amount in the context of the very large non-bank lender they were referencing as an example. There might be other ways to make amounts proportionate to the lender's revenue. FinCap recommends such a mechanism be considered and would welcome work with MBIE one how such a regulatory tool could be effectively designed.

[12] See: https://www.fca.org.uk/publication/finalised-guidance/fg13-01-designated-consumer-bodies.pdf

Q12. What do you think about the transitional licence approach, including what time periods are appropriate?

If a transitional approach is needed, we would not support transitional licences lasting longer than the expiry of a lender's current five-year certification. Some financial mentors have discussed challenging the re-certification of some lenders in relation to issues that have arisen in the interim and should still have the opportunity to do so at the same time they would have otherwise.

Please otherwise see our general comments at the beginning of this submission about our *principles for better financial services enforcement* and *transition between regulators* and test options against these.

Q13. Do you agree with our analysis about the relative benefits and risks of the certification model? Why/why not?

The comments that option B2 could lead to some lenders emerging who are less aware of their obligations to lend responsibly makes option B1 preferable.

Q14. 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?

Please see our above comments in response to consultation question 11.

Q15. As a consumer, do you receive the right kind and amount of information to make informed decisions? Why/why not?

Adequate disclosure of information about lending is important. Financial mentors need this information to establish a borrower's true financial position and options. However, protections that require that a 'buyer beware' and 'read the fine print' are basic and need to be complemented by more effective interventions that deal with the potential consequences of information asymmetry almost always present between a lender and borrower.

The way disclosure is provided often leads to an ineffective consumer protection. Based on the examples of irresponsible lending shown to FinCap by financial mentors, it is often the case that high pressure sales techniques render initial disclosure ineffective. A car salesperson may make it socially awkward for someone to try and comprehend disclosure documents or options to not purchase 'add-ons' before someone signs off that they are read and understood. Subsequent disclosure might be poorly communicated or lead to information overload.

132A in the CCCFA requiring disclosure before debt collection is an especially important protection. FinCap has seen many examples of debt collectors adding significant fees to a debt they are collecting. Our current laws and enforcement towards fair debt collection lag behind Australia and the UK. It is important that borrowers and their financial mentors have records that allow them to negotiate a fair repayment rate or challenge an unfair total amount for payment without excessive debt collection fees.

Q16. Do you consider any of the disclosure obligations to be irrelevant, confusing or inappropriate? If so, please tell us what impact this has.

All the disclosure requirements have a clear purpose. There may be issues around lenders messages when communicating what is being disclosed that have led to issues. These could be resolved without diluting important requirements.

Q17. How could disclosure obligations be more targeted to the consumer's circumstances to ensure only relevant information is disclosed?

As above, the way that some lenders communicate what is being disclosed, and for what purpose, may need improving in some circumstances.

At times, financial mentors also request recorded interactions between a borrower and lender's staff. This can reveal that while disclosure was technically provided, it was clearly not done so in a way that was effective for the borrower's comprehension. For instance, a person may ask leading questions to confirm a borrower has understood. A lender staff member might also speak at an unreasonably fast pace. More recording of conversations relating to disclosure, or presuming they were not sufficient where not recorded, could improve the evidence available when a dispute arises.

Q18. Is the information set out in Regulations 4F and 4G both sufficient and do sections 22 and 23 require the right information to be disclosed when a contract is varied?

These appear to be helpful; we have not received feedback to the contrary other than that all copies of past correspondence should remain available on electronic platforms.

Q19. Are there any other concerns or issues you would like to raise related to disclosure obligations?

No.

Q20. 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?

N/A

Q21. As a lender, are there any practical difficulties with obtaining the borrower's consent for electronic forms of disclosure (section 32(4)(b))?

N/A

Q22. 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))?

Everyone knows someone who struggles to login to an online resource. Many in Aotearoa face digital exclusion for a variety of reasons.[13] Removing the requirement that borrowers opt in for electronic communication will exacerbate digital exclusion and financial exclusion issues. It would risk that many borrowers do not know critical information relating to their loan, leading to greater risk of default and hardship arising. Financial mentors would also be less likely to get accurate information towards

[13]See:https://inclusioncampaign.cab.org.nz/assets/Documents/Face-to-Face-with-Digital-Exclusion-/FINAL_CABNZ-report_Face-to-face-with-Digital-Exclusion.pdf

establishing the true financial position and options for someone who cannot access their electronic disclosure documents.

Q23. Do sections 95A and 95B meet their objectives? Why/why not?

As explained in the Discussion Document, they read as an appropriate mechanism for not over penalising while continuing to deter non-compliance.

Q24. As a lender, to what extent does section 99(1A) impact the time, effort, and costs you dedicate to initial and variation disclosures?

N/A

Q25. Under option E1, what should a materiality test look like?

FinCap supports Option E4: retain the status quo. If Option E1 (to limit section 99(1a) to breaches that are material or have potential to mislead) is implemented, then the threshold for testing what is material should be low. Where progressed, Option E4 should be subject to a statutory review similar to what is described in the above response to consultation question 8.

Q26. 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)?

FinCap supports Option E4: retain the status quo. Where Option E1 is progressed then the lender should have to evidence their claim that a disclosure issue was not material. Regulators, dispute resolution schemes or borrowers should otherwise be able to proceed presuming the breach was material.

Due to information asymmetry and general power imbalances between borrowers and lenders, borrowers are often unlikely to realise a breach, or that they can complain. Adding a threshold to prove their complaint is material when the lender may challenge this with legal expertise, would be another barrier to borrowers legitimately pursuing a fair outcome from a breach of the CCCFA disclosure requirements.

Q27. Under option E2, how should the maximum amount the lender forfeits be calculated?

FinCap supports Option E4: retain the status quo. If instead option E2 to limit the total liability is progressed, then making the limit proportionate to turnover is likely a good way to consistently deter misconduct.

Q28. Under option E3, would there be the right incentives in place to ensure lenders comply with their disclosure obligations?

No. FinCap supports Option E4: retain the status quo.

Q29. What would be the risks associated with each option? How could they be mitigated?

There is some risk across some of the options that regulators prioritise enforcing disclosure over other more complex but harmful breaches of the CCCFA because disclosure issues are very simple to evidence. This could be mitigated by the FMA consulting on their enforcement priorities and making them transparent.

Q30. What specific provisions (high-cost or other) have most impacted lenders' willingness or ability to offer high-cost consumer credit?

Lending of this nature costs borrowers a lot. If borrowers have limited or no surplus available per week when applying, then a high-cost lender is more likely to correctly assess that lending is unaffordable. Regulated minimum standards as to what is required from affordability assessments therefore likely revealed many potential loans were non-compliant and not viable.

Q31. In the absence of high-cost loans, what other avenues are borrowers turning to?

Based on the concerns regularly raised by financial mentors, many borrowers have instead turned to Buy Now Pay Later lending. While these loans are nowhere near as high cost and therefore likely to create hardship compared to those charging more than 50 per cent per annum, they are still regularly the most recent loan that caused budget deficit when a financial mentor looks at the numbers. It is therefore important to note that any loan can land someone in substantial hardship and our recommendation in the earlier general comments section of this submission that Buy Now Pay Later lending be subject to affordability and suitability requirements.

Otherwise, financial mentors regularly see people borrowing through Work and Income, No Interest Loan Schemes and other personal lenders, so demand may have also shifted to these free or lower cost loans. Where someone is unable to borrow it may see them instead access financial mentoring, food support, hardship support, negotiating more affordable repayments with current creditors or adjusting other spending. These are almost always likely to lead to better outcomes than accessing an unaffordable high-cost loan.

Q32. Is the unavailability of high-cost consumer credit having positive or negative effects on would-be borrowers?

Positive. Our latest *Voices* report demonstrates that even after high-cost lenders have left the market, 1.5 per cent of credit contract categorised by financial mentors in the system are high-cost loans still unpaid by borrowers.[14] The median debt for this category is $1397.42.[15] While this had dropped from 1.8 per cent in the previous two years, the slow decline demonstrates how this debt continues to be part of the financial hardship borrowers are seeking assistance with years later. Because of the changes, new debts are not commencing and adding to these issues in the community.

Q33. 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?

FinCap did not have time during the consultation period to correlate traders in this category with *Voices* data that could show these lenders contributing to debt spirals or repeat borrowing issues. We would welcome work with MBIE to provide this evidence in the coming months, especially where MBIE can provide a comprehensive list of relevant traders. We would also welcome working with MBIE to survey financial mentors like we have in the past[16] where this could be useful.

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[14] See p.30: https://www.fincap.org.nz/wp-content/uploads/2024/05/Appendix-FinCap-Voices-report.pdf
[15] Ibid p.31.
[16] See: https://www.fincap.org.nz/wp-content/uploads/2019/02/REPORT1.pdf

Many of the lenders listed on Interest.co.nz as having headline rates just below 30 per cent (which may fit this definition when fees are factored in) are the subjects of unaffordable lending concerns from financial mentors that are shared with FinCap. Likewise, many of the credit card products currently sitting just below 30 per cent interest that might fit the definition once other charges are factored in.

FinCap has also sighted 'first loan free' adverts, clearly encouraging multiple loans from a lender with at least some lending in this interest rate range. Otherwise FinCap is aware of a personal lender usually charging between 30 to 50 per cent interest which actively encourages repeat loans from vulnerable borrowers amongst many other practices. We also have sighted multiple affordability complaints made by financial mentors with clients who had debt spiral against a lender whose rates are just below 40 percent, when default interest is added. Some lenders also offer pawnbroker loans at the same shopfront and financial mentors have reported clients having been directed pawnbroking loans when CCCFA related debt is beginning to spiral.

Q34. 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?

FinCap strongly supports option F1: Expanding the definition of a high-cost consumer credit contract to contracts with an interest rate above 30 per cent. Doing so will lower the likelihood of debt spirals and repeat borrowing from loans at these rates which are high cost for the tens of thousands of whānau supported by financial mentors. The median proportion of spend relative to income, for these clients, is 106% and over 15% of the median income dedicated to debt repayments. A loan charging 30 per cent or more per annum on the principle can be what lands whānau in this situation.

Q35. 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?

We do not have time for this analysis on contracts that financial mentors might be able to share during the short turnaround for submissions but welcome more work with MBIE to gather examples for analysis.

Q36. 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?

FinCap strongly supports option F1: Expanding the definition of a high-cost consumer credit contract to contracts with an interest rate above 30 per cent. We did check the websites of some 'payday' lenders who financial mentors have regularly raised concerns about with FinCap in recent years and saw interest rates just below 50 per cent interest. A reduction of these lender's rates down five percentage points would be an improvement to prevent harm to consumers from high costs, but nowhere near as effective as option F1 in protecting vulnerable borrowers.

Q37. 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?

N/A. However, making high-cost lending profitable and available should not be an aim of the government where it is at the expense of borrowers being put at great risk of substantial hardship.

Q38. How is a revised definition of a high-cost consumer credit contract interest rate threshold likely to affect access to credit for borrowers?

Progressing F1 to expand the definition of a high-cost consumer credit contract to contracts with an interest rate above 30 per cent as we recommend is unlikely to change the availability of suitable and affordable credit for borrowers.

Q39. Do you recommend considering another interest rate threshold? If yes, please explain why.

No, we strongly support F1: Expanding the definition of a high-cost consumer credit contract to contracts with an interest rate above 30 per cent.

Q40. 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?

The current provisions have been effective at proactively preventing extensive harm to borrowers from what were the most unaffordable loans in the market previously.

Q41. Is there evidence of certain industry lending practices that are causing harm which the high-cost credit provisions could address?

Our *Voices* report found that those presenting to a financial mentor with a vehicle loan had a median weekly shortfall of $104 compared to $17 for those without.[17] More needs to be done to prevent car lending leading to hardship.

After Buy Now Pay Later lending, issues with car lending are the most commonly raised issues around irresponsible lending by financial mentors. Borrowers are often particularly vulnerable when purchasing a vehicle through the combination of a high pressure sales environment, their need for a vehicle for essential transport, information asymmetry about the true value of the car, pressure to buy add-on insurances that may be of little value and add the premium to the loan up front, as well as other factors. The threat of repossession of a car that is almost always essential to participating in society, is a strong tool for coercing payment even if the loan was unaffordable from the start, or unaffordable since a change in circumstances. Reform of the CCCFA and stronger enforcement are critical from preventing the heightened risk of hardship that arises for many borrowers.

FinCap supports MBIE exploring if additional protections can be applied to car lending. One idea floated by a consumer was applying a cap of half the principle that can be charged in further fees and interest on a vehicle loan over 30 per cent interest per annum. This could be appropriate given the often large sums involved in car finance could otherwise lead to out of control, unreasonable and harmful charges.

FinCap also supports MBIE exploring what can be done about upfront costs for add-ons being paid for with loan principle and then having interest applied. However, we anticipate the CoFI regime should see some of these sale practices cease.

[17] See p.27: https://www.fincap.org.nz/wp-content/uploads/2024/05/FinCap-Voices-report.pdf

The Commerce Commission identified flex commissions as an issue in its motor vehicle financing and add-ons review.[18] These commissions see the lenders agent able to apply a higher interest rate and receive the proceeds which means vulnerable borrowers are more likely to pay more and be at greater risk of debt spirals. We do not have visibility as to whether these flex commissions are making loans over 30 per cent interest but it may be a factor. Either way, FinCap recommends these flex commissions are prohibited like in overseas jurisdictions.

We also just generally call for the prohibition of the use of disabling devices/ immobilisers as discussed in the general comments section at the beginning of this submission.

Q42. Are there any other industry lending practices that you believe are harmful to consumers?

FinCap has sighted many loan statements with substantial broker fees and other commissions applied up front to the principle of the loan. The sums seem generous to those who receive them relative to the work that the borrower recounts having taken place. FinCap has otherwise recommended that the Conduct of Financial Institutions requirements are applied to all lenders, and this may go some way to addressing this issue if progressed.

We also point to a number of issues with industry practice and our recommendations for resolving them in the general comments section at the start of this submission.

Some lenders continue to find ways to structure lending, so it does not meet a definition that makes it in scope for the CCCFA. FinCap recommends MBIE consider how an anti-avoidance clause could counter such practices.

Q43. Do you agree with the suggested impacts of each of the identified options? Why/why not?

We agree that option F1: to expand the definition of a high-cost consumer credit contract to contracts with an interest rate above 30 per cent is the most effective option.

Q44. Do you have any information or data that would support our assessment of the impacts of each of the options?

Please see our responses to consultation questions 33 and 35 for ways FinCap could work with MBIE to gather evidence after submissions close.

Q45. Do you think that the CCCFA could be strengthened to protect consumers who are sold lending products or add-ons that exceed the value of the product? If so, how?

Yes. The simplest approach would be to prohibit the relevant practices.

Q46. Finally, are there any other areas and options for change that we should consider that have not been addressed in this discussion document?

Please see our general comments at the beginning of this submission.

Please contact Jake Lilley, senior policy advisor at FinCap on Privacy of natural persons or at jake@fincap.org.nz to discuss any aspect of this submission.

[18] See 'interest commission' section p.14: https://comcom.govt.nz/__data/assets/pdf_file/0037/269947/Motor-vehicle-financing-and-add-ons-review-10-November-2021.pdf

Ngā mihi,

Privacy of natural persons

Ruth Smithers
Chief Executive
FinCap