

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

Your name and organisation

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Responses to discussion document questions

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?

To properly consider the suitability of the existing CCCFA disclosure regime and identify possible improvements to the regime, it should be recognised that:

- A. Consumers may be the primary intended users of disclosure, but they are not the sole users.
- B. Disclosure can serve purposes other than informing an individual consumer's borrowing decisions.
- C. Consumer borrowing decisions vary over the lifetime of a loan and differ according to loan type and consumer circumstances.

Better defining the users and purposes of disclosure, including the types of decisions that disclosure may inform, helps to determine:

- What information to disclose.
- The amount of information to disclose.
- When to disclose.
- The form of the disclosure.
- The manner of the disclosure.

A. Users of Disclosure

The users of CCCFA disclosure may include:

- The consumer
- Advisors to the consumer – including financial mentors, legal advisors and other lenders offering refinancing.
- Lenders. Frontline staff should know how to navigate, read and explain disclosure to consumers in response to loan applications and enquiries. Disclosure can also be used to compare the loan products of competitors.
- Courts and tribunals may refer to disclosure in proceedings related to loan enforcement or challenge to the loan.
- Regulators and policymakers may refer to disclosure to get insights into the loan market, monitor compliance of lenders and assess the performance of existing consumer credit regulation.

B. Purposes of Disclosure

In addition to informing consumer decision-making, disclosure may have the following purposes:

- Providing a record of key loan terms, including changes to these terms, over the history of the loan for subsequent reference.
- A standardised form of calculating and presenting the true cost of loans to aid comparison between lending products and foster fair competition in the loan market.
- A standardised form of presenting prescribed information that is easily recognised as relating to a consumer loan and allows easier navigation

and comparison, especially by professionals including financial mentors.

- For consumers, standardised disclosure can signify that a lender is 'legit' and build trust and confidence in the lender.
- Disclosure, together with the overall credit contract, is an artefact that provides material evidence of the loan agreement. In other words, disclosure, particularly initial disclosure, makes a loan feel more 'real' and enforceable.

C. Informed loan decisions

During the lifetime of a loan, a consumer may be required to make several decisions that are at least partly based on the information that is or should be disclosed to them. These decisions include to:

- Enter a loan.
- Cancel a loan under section 56, CCCFA.
- Arrange the consumer's affairs in order to make the required payments and meet other loan obligations.
- Get advice about options if they have a change in circumstances.
- Get advice about CCCFA compliance of the loan.
- Contact the lender with questions about fees, charges or other loan-related matters.
- Consider options if they default on their loan.
- Consider whether to refinance the loan.

Consumers are currently provided with most of the information they require to make these decisions via CCCFA disclosure. However, the information is not necessarily provided in a way that is designed with the users in mind and, therefore, is not readily accessible or understandable to consumers in particular.

FinCap, MBIE and others have produced valuable research into the experiences of consumers within the loan market, identifying patterns and areas of concern. However, there is currently a lack of research or publicly available information on:

- The use of model disclosure statements by lenders and disclosure practices generally – particularly for non-bank lenders.
- The impact of online lending upon disclosure practices, particularly when loans are applied for on mobile phones.
- User testing of the readability, accessibility and comprehensibility of the current disclosure regime to provide a baseline against which changes can be measured.¹

I note that the Consumer Survey that is part of the 'fit for purpose consumer credit' review asks consumers to self-report their satisfaction and understanding of the existing disclosure regime. The Survey assumes that

¹ One limited exception is: Jeremiah McLanahan "A Law and Behavioural Economics Analysis of High-Cost Lending in New Zealand" (2021) 52 Victoria University of Wellington Law Review 373.

consumers are aware of the current disclosure requirements and that they will accurately report their level of understanding.

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.

Disclosure can be confusing because it seeks to convey potentially complex financial and legal information to consumers who often lack the time, inclination, background knowledge and literacy to interpret and apply it.

The limitations of disclosure as a consumer protection tool are well-understood.² The lender responsibility principles should be seen as one way of addressing the limitations of disclosure. Lender responsibility principles should be seen as complementing existing disclosure requirements, not diluting the role of disclosure as suggested in the discussion document. However, somewhat paradoxically, the introduction of lender responsibility principles has been accompanied by increases in types and amounts of disclosure. In this context, it is unsurprising that lenders are now concerned about the amount of regulation, and the question is asked if the amount of disclosure can be reduced.

The Model Disclosure Statements that provide a safe harbour for lenders are ripe for redesign. The model disclosure statements appear to be designed to be printed in A4 form and not designed with electronic disclosure in mind. Reading the multipage model disclosure forms on a small screen can be difficult, even for those with good eyesight and technical skills.

17

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

Personalisation vs Standardisation

It may be possible to redesign standardised disclosure for the nominal 'average' consumer or allow lenders to personalise disclosure according to the consumer's circumstances. Either change should be based on evidence that the information provided is the most 'relevant'. Currently, this evidence is lacking.

One counter-argument to the personalisation of disclosure is the value of standardisation and consistency to allow the comparison of loans and loan products. If consumers just skim disclosure, then borrowers will just look for the same information in the same place. Personalised disclosure would make it harder for consumers to compare loans between different providers and with the loans offered to other consumers.

User Understanding and Testing

Influenced by legal design, better targeting of disclosure requires considering how disclosure is currently used and experienced by all users of disclosure

² See for example: *Consumers and repossession: a review of the Credit (Repossession) Act 1997* (124 Law Commission 2012).

across the lifetime of a loan, with a particular focus on consumers. This can assist in determining what information is relevant at what time, how users currently access this information and any ‘pain points’ along the way.

As noted above, user testing should be conducted on the current disclosure obligations, including the extent to which they are currently used and understood, rather than relying upon self-reporting or observations from third parties such as financial mentors. Any proposed changes to disclosure, including changes to what information is provided, the form of this information and content, should also be subject to user testing.

More Plain Language

The CCCFA prescribes the use of plain language, but disclosure requirements include terms that are not necessarily easily understood by consumers. Released in 2023 as part of the National Strategy for Financial Capability, De-Jargoning Money suggests plain language versions for common terms associated with consumer credit, including referring to ‘credit’ as a ‘loan’, a ‘credit contract’ as a ‘loan agreement’, and ‘principal’ as the ‘amount owing’.³

Layering information

One way to make disclosure less confusing and overwhelming is by layering the information provided.⁴ Layering information refers to providing the most relevant information upfront to consumers and providing access to more detailed information later in a document, by request or via the Internet.⁵ Disclosure can be layered, with the most important information provided in clear headings with further information or commentary alongside or below the headings.⁶ Additional explanation layers information, such as definitions of keywords, can also be provided.⁷

Use of Visualisations

Disclosure could also be redesigned and better targeted using visualisations such as icons, interactive tools and calculators and diagrams to represent the costs associated with borrowing, the term of the loan, consequences of default etc.

The increased availability of information online means that many people now expect information to be provided to them in an accessible manner.⁸ Providing large amounts of information in an accessible manner requires new forms of

³ Te Ara Ahunga Ora Retirement Commission De-jargoning Money A financial glossary of plain language for the finance sector and beyond (2023).

⁴ Productivity Commission *Review of Australia’s Consumer Policy Framework Final Report* 45 (Australian Productivity Commission, Rep 45, 2008)

⁵ At 266

⁶ Robert Waller, Stefania Passera and Helena Haapio “Layered Contracts: Both Legally Functional and Human-Friendly” in Kai Jacob and others (eds) *Liquid Legal – Humanization and the Law* (Springer International Publishing, Cham, 2022) 269 at 274.

⁷ At 275. Waller, Passera and Haapio refer to the three layers for contracts as the Action layer (key information), the Reference layer (detail and commentary) and the Explanation layer.

⁸ At 48

communication and new technology.⁹ New forms of communication include visualisations such as diagrams, graphs and flowcharts.¹⁰ Technology can be used to create these visualisations, integrate them with text if required, and share the results.¹¹

McLachlan and Webley identify four visualisation benefits they believe may apply to law and legal documents.¹² First, visualisation assists people in understanding patterns and relationships in data that would not otherwise be apparent.¹³ Second, visualisations can better communicate risk to people, especially those with low numeracy skills, than words or numbers.¹⁴ Third, visualisations can help professionals to “focus on, assimilate, and recall issue-relevant aspects”.¹⁵ Finally, visualisations can improve problem-solving and decision-making abilities.¹⁶

Overall, legal visualisations have improved understanding and recall of complex legal concepts.¹⁷ Legal visualisations can assist legal professionals, and laypeople in making better decisions and avoid or mitigate legal problems' consequences.¹⁸

- ⁹ Adam L Rosman “Visualizing the Law: Using Charts, Diagrams, and Other Images to Improve Legal Briefs” (2013) 61(1) J Leg Ed 70 at 71,
- ¹⁰ Tania Leiman “Where are the Graphics? Communicating Legal Ideas Effectively Using Images and Symbols” (2016) 26 Legal Education Review 46 at 48.
- ¹¹ At 53.
- ¹² Scott McLachlan and Lisa C Webley “Visualisation of law and legal process: An opportunity missed” (2021) 20 Information Visualization 192 at 193.
- ¹³ At 193.
- ¹⁴ At 193.
- ¹⁵ At 193.
- ¹⁶ McLachlan and Webley above n 12 at 193 See also: WH Levie and Richard Lentz “Effects of Text Illustrations: A Review of Research” (1982) 30(4) Education Communication and Technology Journal 195, and Margo A Mastropieri and Thomas E Scruggs “Constructing More Meaningful Relationships: Mnemonic Instruction for Special Populations” (2989) 1(2) Educational Psychology Review 83, cited in Camilla Baasch Andersen and Robert de Rooy “Employment Agreements in Comic Book Form—What a Difference Cartoons Make” in Marcelo Corrales Compagnucci, Helena Haapio and Mark Fenwick (eds) *Research Handbook on Contract Design* (Edward Elgar Publishing, Cheltenham, UK ,2022) 329 at 333 n 22.
- ¹⁷ Karen Koch “What did I just do? Using student created concept maps or flowcharts to add a reflective component to legal research assignments” (2010) 18 (2 & 3) Perspectives 119, Solie Pohjonen and Marika Noso “Contracts - a twist of pearls: a new metaphor to enable a novel perception” (paper presented to Integrating contract theory, law, and organisation studies, Copenhagen, June 2014) 46, Angela Passalacqua “Using visual techniques to teach legal analysis and synthesis” (1997) 3 Leg Writ J Leg Writ Inst 203, cited in McLachlan and Webley above n12. at 192.
- ¹⁸ Leiman, above n 10., and J Fang “12 confused men: using flowchart verdict sheets to mitigate inconsistent verdicts” [2014] Duke Law J 287 cited in McLachlan and Webley above n 12 at 193.

No comment.

19

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

No comment.

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?

I am not a lender.

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))?

E. Options for penalties for incomplete disclosures by lenders

23

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

No comment.

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

No comment

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

No comment

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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)?

No comment.

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

No comment.

28

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

No comment.

29

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

While not directly on point, I would note that it is possible that the risks associated with incomplete disclosure may also inhibit lenders from attempting to create the disclosure they currently provide. As long as the risk of incomplete disclosure remains, the primary way that there will be innovation in disclosure practices is going to be via legislation – either in the CCCFA or regulations.

3. Review of the high-cost credit provisions

Option F4: Other high-cost provisions

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

In summary, in my submission, I advocate:

- Considering the implications of a move to end-to-end online lending upon consumer credit regulation generally and disclosure particularly. an increasingly large section of Aotearoa’s population accessing the internet using their mobile phones. For example, the application of existing disclosure requirements to Buy Now Pay Later (BNPL) apps that have a mobile-first app interface compared to online personal loans which are primarily access using a browser.
- Taking a user-centred view of consumer credit disclosure.
- Recognising that borrowers are not the only users of consumer credit disclosure. Lenders, competitors, regulators, consumer advisors and courts/tribunals may also use disclosure and benefit from improvements to disclosure.
- Considering the role, form and content of disclosure in the context of the users' consumer credit journey.
- Updating the regulations governing disclosure and redesigning the model disclosure form to reflect that disclosure is now commonly accessed and read on a screen, sometimes a mobile phone screen.
- User testing of current and proposed disclosure requirements

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