

# CCCFA Reforms: Section 99(1A)

## Aims of the CCCFA Reform

The government has stated its aims are to:

- **Improve Access to Lending:** Facilitate access to home loans and other forms of credit.
- **Reduce Unnecessary Compliance Costs:** Ensure that compliance requirements are proportionate to risk.
- **Strengthen Consumer Protections:** Prevent predatory lending while maintaining consumer access to credit.
- **Avoid Overly Risk-Averse Lending and Commercial Decisions:** Ensure that the CCCFA does not inadvertently stifle responsible lending and innovation in the industry.

## We have considered section 99(1A) in light of these reform aims and our experience, and have the following observations:

- **Disproportionate Consequences:** The risks posed by Section 99(1A) on the credit industry are severe and disproportionate to the harm it seeks to protect against. While important, disclosure is not itself the most important aspect of the CCCFA, however s99(1A) potentially imposes the most serious consequences of any enforcement provision in the Act for imperfect disclosure.
- **Cumulative Effect of Automation:** The risks are felt acutely by lenders providing large volumes of credit (such as home loans). These lenders use automated systems and processes that mean errors or deficiencies could be systemic (but not material).
- **Uneven Playing Field:** Smaller lenders, and particularly those concentrated in Consumer lending are disproportionately impacted by the potential fiscal impacts due to reduced scale creating significant cost, capacity and time impacts even in non-material errors. This serves to disadvantage smaller lenders and deter them from providing alternative consumer finance options.

## Observations (cont)

- **No Scaleability:** The section does not include any scaleability i.e. the consequences are potentially the same for failing to make disclosure altogether and making a small error which has no impact on consumers. The reference in section 99(1A) to the costs of borrowing without reference to the materiality of the disclosure failure, the circumstances of the breach or whether any harm has been caused to the consumer without regard to the value that a borrower has derived from the provision of credit has the potential to be inherently disproportionate.
- **Unjust:** No express distinction is made in Section 99(1A) between responsible lenders and those who take little or no care to meet their obligations (such as predatory lenders).
- **Section 95A and 95B Ineffectiveness:** The introduction of Sections 95A and 95B, which allow the court to reduce the impact of Section 99(1A) if 'just and equitable,' has not solved the problem both because they only apply to costs of borrowing incurred from 20 December 2019 and because they require a judicial process.

## Observations (cont)

- **Endless tail:** The potential threat to a lender's balance sheet is existential and on one interpretation there is no time limit for historical breaches. On this interpretation, lenders could still be exposed to deficiencies in disclosure between June 2015 and December 2019.
- **Stifle Innovation:** The potentially extreme consequences of error coupled with the complex disclosure requirements operate as a disincentive to the introduction of new channels to market and use of technology.
- **Legislative History:** Section 99(1A) was a late addition to the amendment bill when it was introduced, and it was not subject to normal consultation. In our view the rationale behind its original inclusion was not sound, because existing protections were adequate. The rushed process and lack of consultation has proven to be very significant.
- **Adequate consumer protection elsewhere in the Act:** There is more than adequate consumer protection from other remedies under the CCCFA including civil pecuniary penalties, statutory damages and criminal offences. In particular, the CCCFA has always provided for compensation where a borrower suffers any harm from imperfect disclosure.

## Recommendation

Against this background, we recommend the repeal of Section 99(1A) with effect from 1 June 2015.

## Why Retrospective Repeal is Justified

Retrospective Legislation is generally only appropriate in exceptional circumstances. In this case, retrospective repeal is justified due to the following reasons:

- 1. Exceptional Burden on Lenders:** Section 99(1A) imposes extraordinary risk on lenders, particularly in regard to their financial stability and solvency. As previously explained, lenders are potentially subject to high financial penalties over an uncertain timeframe. The potential disproportionate consequences are anomalous and unjust, and should be corrected for the past as well as for the future. This is quite different from retrospectively imposing a liability.
- 2. Restoring legislative intent:** The stated purposes of the CCCFA include promoting the confident and informed participation in markets for credit by consumers as well as promoting and facilitating fair, efficient and transparent markets for credit. Section 99(1A) was a mistake from its introduction because it has had the effect of undermining the CCCFA's legislative intent.
- 3. Potentially Harsh Consequences:** Although the correct interpretation has not been definitively determined, some argue that lenders are required to refund all interest and fees, irrespective of the severity or harm caused by the breach. Conversely, the potential for a windfall gain for borrowers (even in the case of minor or technical breaches) is significant. Retrospective legislation in this case serves the legitimate public interest of preventing unjust enrichment and excessive penalties.

## Effectiveness of Sections 95A and 95B:

- **Court's Role:** Sections 95A and 95B allow the court to extinguish or reduce the impact of Section 99(1A) if 'just and equitable.'
- **Limited Mitigation:** This mechanism has had limited real impact due to the need for recourse to the court and its discretionary nature. It is not economically appropriate or efficient that lenders must actively seek a court order in relation to any or all breaches, noting that a breach or issue:
  - o may not have resulted in customer harm and/or
  - o may have been already addressed (or otherwise 'resolved') through non-judicial enforcement response and remediation.

## Conclusion

Fixing the problem of section 99(1A) is crucial to achieving the government's aims for reform in this sector. Retrospective repeal is justified to increase confidence in the market and ensure proportionate penalties. If full retrospective repeal is not considered, significant changes to its operation are essential for a balanced and effective regulatory framework.

## Proposed Legislative Drafting: Repeal (with retrospective effect)

### [#] Section 99 amended

(1) Repeal sections 99(1A) and 99(1B).

### [#] Schedule 1AA amended

In Schedule 1AA, insert the cross-headings and clauses set out in Schedule 1 of this Act as the last provisions in Schedule 1AA and make all necessary consequential amendments.

### Schedule 1

Amendments to Schedule 1AA of Credit Contracts and Consumer Finance Act 2003.

### [#] Interpretation

In clauses 7 to 11, unless the context otherwise requires,—

2024 Act means the Credit Contracts Legislation Amendment Act 2024

agreement means any credit contract, security agreement, lease, buy-back transaction, or other contract or arrangement to which the principal Act applies

commencement in relation to any provision of the 2024 Act, or any provision inserted into the principal Act by the 2024 Act, means the commencement of the relevant provision, as the case may be

existing agreement means an agreement entered into before the commencement of the relevant provision

new agreement means an agreement entered into after the commencement of the relevant provision

principal Act means the Credit Contracts and Consumer Finance Act 2003 as it read before the relevant provision of the 2024 Act commenced.

### [#] Application to existing agreements

**The amendment made by section [#] of the 2024 Act applies to all agreements including existing agreements and to disclosure required to be made under section 17 or section 22 of the principal Act at any time after 6 June 2015.**