Regulatory Impact Statement: Whether to apply legislation retrospectively to give courts discretion when considering consequences for disclosure failures by lenders

Coversheet

Purpose of Document	
Decision sought:	Cabinet approval to amend the Credit Contracts and Consumer Finance Act with retrospective effect
Advising agencies:	MBIE
Proposing Ministers:	Minister of Commerce and Consumer Affairs
Date finalised:	5 March 2025

Problem Definition

Lenders who, before December 2019, breached certain requirements to disclose information to borrowers (under loan agreements entered into after June 2015) are subject to a law that arguably makes them liable to forfeit all interest and fees paid on the loan, accumulated over the full period of non-compliance, to all affected borrowers. Active class litigation is expected to reveal whether the courts are bound to award this remedy to borrowers. That possible outcome could significantly impact the financial position of an unknown number of lenders with compliance issues during that period. Accordingly, it poses a potential threat to the long-term supply of consumer credit and degree of competition in the market.

Executive Summary

Section 99(1A) of the Credit Contracts and Consumer Finance Act 2003 took effect in June 2015, applying to loan agreements entered into after that date. It (and comparable provisions in relation to consumer leases and buy-back transactions of land) provides that the borrower is not liable for the costs of borrowing over any period in which the lender failed to make compliant initial or agreed variation disclosure.

Full forfeiture of the costs of borrowing to all affected borrowers could be grossly disproportionate to the nature and circumstances of a disclosure failure. Reforms in December 2019 recognised this by enabling the courts to extinguish or reduce the effect of section 99(1A), on application by the lender, if it would be 'just and equitable' to do so. However, this discretion was only provided prospectively (i.e. for the costs of borrowings after December 2019).

In September 2024, Cabinet agreed to some further changes to these provisions, aimed at more clearly protecting lenders from liability where the disclosure failure was harmless. These changes would also apply prospectively only.

In 2021, class litigation was brought against ANZ and ASB for alleged disclosure failures pre-dating the 2019 reforms. A possible outcome in this litigation is that the court finds it is bound to require

full forfeiture of the costs of borrowing in relation to any disclosure failure from this period. This creates the potential for significant losses for ANZ and ASB in the first instance, but also for lenders in a more precarious position than ANZ and ASB. This could threaten effective and competitive supply of credit to consumers over the long-term.

A direct way to address this problem is to make the 2019 reforms apply retrospectively. This would ensure the courts have discretion to consider what remedy is just and equitable in the circumstances, no matter when the disclosure failure occurred.

A key choice is whether this amendment should affect litigation that is already afoot, notably the proceedings involving ANZ and ASB. Doing so (Option Three) best improves on the counterfactual (no intervention) when assessed against our criteria. Providing the court with explicit discretion to deliver a just and equitable outcome is not, in our view, an objectionable kind of interference with proceedings already before a court. Option Three would ensure liability of a lender for any disclosure failure under section 99(1A) is able to be determined on the same legal basis.

This proposal would be included in a Credit Contracts and Consumer Finance Amendment Bill and its impact monitored by both the Financial Markets Authority and MBIE.

Limitations and Constraints on Analysis

This is a commercially sensitive matter for a range of lenders who may have liability under the law that is proposed to be amended with retrospective effect. How this area of the law applies is being actively considered by the courts in class litigation against two of the largest banks in New Zealand.

Although we were able to undertake some consultation on this issue, these two factors have limited the nature and extent of consultation we could appropriately undertake.

Relatedly, uncertainty about the number of lenders with liability under the historical law in question, and the extent of that liability, is a notable constraint on our understanding of the problem. The problem arises from a possible outcome of active litigation which has unknown implications for an unknown number of lenders other than the defendants. We have not been able to ascertain whether those implications would be on a scale that undermines the supply of credit, but rather have assumed this is a credible possibility.

The only relevant data we have are investigations opened by the Commerce Commission that appear to concern the conduct (and period) in question. These data are subject to various constraints and the reporting of issues (including self-reports of issues that may create significant liability for the lender).

A constraint on our ability to compare outcomes under the counterfactual and the legislative options is that they materially depend on how a court would apply the law with or without amendment. Outcomes will turn on questions of statutory interpretation that have not been directly answered by any case law to date, as far as we are aware. These questions create uncertainty relevant to our analysis, including whether a court would apply the preferred option in a manner that avoids the concerns ultimately motivating legislative change.

We also need to exercise restraint in speculating as to how the current or proposed law would be interpreted, given proceedings are currently before the courts.

Responsible Manager	
Glen Hildreth Manager Consumer Policy Ministry of Business, Innovation and Employment 5 March 2025	
Quality Assurance (completed by QA panel)	
Reviewing Agency:	MBIE
Panel Assessment & Comment:	A quality assurance panel with representatives from MBIE has reviewed this Regulatory Impact Statement (RIS). The panel has determined that the RIS meets the quality assurance criteria.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem?

Section 99(1A), introduced in 2015, provides that borrower is not liable for the costs of borrowing over a period of non-compliant disclosure

1. Section 99 of the *Credit Contracts and Consumer Act 2003* (**CCCFA**) prohibits lenders from enforcing consumer credit contracts before they have made 'initial' disclosure[1] or 'agreed variation' disclosure.[2]

2. Section 99(1A) was added in June 2015, and applies to loan agreements entered into after that date. It was developed in response to a High Court judgment from 2013,[3] where a finance company had failed to make a compliant initial disclosure and sought to 'enforce' the contract after making compliant disclosure two and half years into the contract. The High Court found that the finance company was then, having remedied its non-compliance, entitled to recover all the interest and fees (the costs of borrowing) that should have been paid during the period of non-compliance.

3. Section 99(1A) was an attempt to reverse this position. It provides that the borrower is not liable for the costs of borrowing (i.e. interest and any fees) over any period in which the lender has failed to make initial or agreed variation disclosure, until they make corrective disclosure. Equivalent provisions were added for consumer leases and buy-back transactions (if similar disclosures were not made). This is essentially the position that a consumer should not incur any costs from a contract they entered into or varied without full information they are legally entitled to.

[1] This is 'key information' about the lender and the agreement being entered into, such as the interest and fees payable, and the details of the lender's dispute resolution scheme.

[2] This is disclosure of the details of the change to the agreement the parties have agreed and its effect on other terms of the agreement (such as the total interest that will be charged, if that changes).

[3] *Norfolk Nominees Ltd v King* [2013] NZHC 398

4. The limitation periods on damages/redress under the CCCFA were also amended in June 2015.[4] Prior to that, they used to extinguish a lender's liability three years after a breach occurred. Since 2015, they instead extinguish liability three years after the breach was discovered or "ought reasonably to have been discovered". As with section 99(1A), this only applied to new agreements, meaning lenders today have no liability to pay damages/redress for breaches preceding June 2015.

Section 99(1A) did not clearly allow for differential treatment of different circumstances

5. The original 2015 reforms did not expressly provide the courts with any discretion over what amount (if any) lenders should forfeit to affected borrowers. They did not clearly account for the fact that some disclosure failures affect the borrower's ability to make informed decisions less than others, or that the the full costs of borrowing could be excessive in some circumstances. Where a relatively immaterial failure affected a large number of borrowers, and was not noticed (and therefore able to be corrected) until many years later, the full costs of borrowing could amount to a significant sum.

6. Section 48 of the CCCFA requires lenders to refund money wrongly paid to them as soon as practicable. There is uncertainty about how the courts would apply these provisions, as there has not been any court judgments that we are aware of directly on the matter. It is possible that the combined effect of section 99(1A) and section 48 is to immediately require the lender to forfeit all interest and fees paid by the borrower over the period of defective disclosure.

Reforms in 2019 gave the court explicit discretion to consider the nature and circumstances of a disclosure failure

7. In December 2019, the CCCFA was amended to address the risk of disproportionate consequences. The reforms gave the courts explicit discretion, on application, to extinguish or reduce the effect of section 99(1A) (and equivalent provisions for consumer leases and buy-back transactions) if they consider it just and equitable to do so (section 95A). The court must consider certain factors in reaching this decision. These factors relate to the objective of incentivising compliance with the CCCFA, how the breach occurred, the prejudice it caused and what the lender did in response, as well as "any other matters the court thinks fit" (section 95B).

8. The Government of the day, supported by MBIE's advice at the time[5], made this relief available only for liability arising on or after the commencement of the change (i.e. from December 2019 onwards), and not retrospectively to liability arising between June 2015 and December 2019. This was a choice actively made at the time, with the result that the law appears to operate differently depending on whether the disclosure breach occurred before or after December 2019.

9. MBIE's advice was based largely on general legal principles. Although the policy rationale for the reforms did not extend back in time, there was no clear and specific policy reason the same discretion should not have been available for earlier disclosure failures.

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[4] Sections 90(3) and 95(2) of the CCCFA

[5] MBIE's advice was based on regulatory impact analysis in 2017, that can be found here: Regulatory impact statement

Policies agreed by Cabinet in 2024 included prospective changes to consequences for incomplete disclosure

10. The Government is progressing a range of financial services reforms aimed at streamlining regulation of the sector. Cabinet made policy decisions on these reforms on 2 September 2024 [*CAB-24-MIN-0334* refers]. These decisions include legislative changes to the CCCFA.

11. One of these policy changes was to limit the effect of section 99(1A) to cases "where a person can show the borrower was harmed by the failure to make initial or agreed variation disclosure" [*ECO-24-MIN-0178*, paragraph 8, refers].[6] This means the starting point will no longer be as described by section 99(1A). The borrower's liability for the costs of borrowing can only be removed if a court is satisfied harm resulted from a lender's failure to make initial or agreed variation disclosure and accordingly makes an order requiring the lender to return some or all of the costs of borrowing.

12. The September policy change would apply prospectively. However, the Minister of Commerce and Consumer Affairs indicated to Cabinet he was expecting further advice on disclosure failures that occurred between 2015 and 2019.

13. A table showing how this part of the CCCFA applies differently to disclosure failures over time (as a result of reforms, including those agreed by Cabinet in 2024) is provided as **Appendix one**.

Litigation will determine how the courts apply section 99(1A) without explicit discretion over the 2015 – 2019 period

14. Since 2015, lenders and their representatives have raised with MBIE and successive Ministers their concerns over section 99(1A), and the potential for disproportionate consequences relative to the seriousness of the disclosure failure.[7] While the changes made in 2019 reduced these concerns, lenders continue to raise concerns regarding the 2015-2019 period.

15. Proceedings against ANZ and ASB began in 2021. The litigants allege breaches of disclosure requirements for agreed variations affecting a class of borrowers. This followed settlements between each bank and the Commerce Commission relating to breaches of lender responsibility principles, which included compensation to affected borrowers.[8] As the alleged disclosure failures pre-date the 2019 reforms, the litigants argue that section 99(1A) and section 48 required the lenders to forfeit the full costs of borrowing to all affected borrowers.

16. This would be a sum of potentially Free and frank opinions (or, in any case, an amount substantially greater than the compensation already paid). It is not obvious from the nature of the alleged disclosure failures that they caused real harm to borrowers' ability to make informed decisions about those loans. This case is proceeding through the courts. It will likely be a few years or more before a judgment is delivered.

17. This litigation has renewed concern from a range of lenders about potential liability in the consumer lending market for disclosure failures in the 2015-2019 period if the court finds in

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[6] The RIS supporting this decision, and providing further background on the financial services reforms as well as the CCCFA, can be found here: Regulatory Impact Statement: Fit for purpose consumer credit law (mbie.govt.nz)

[7] See for example: New Zealand Banking Association's submission on MBIE's 2018 discussion paper: Submission on discussion document: Consumer Credit Regulation Review

[8] Details of both settlements can be found on the Commerce Commission's case register: Commerce Commission - ANZ Bank New Zealand Limited and Commerce Commission - ASB Bank Limited

favour of these litigants. The Court of Appeal has recently decided the class of affected borrowers in this case is determined on an 'opt out' basis, which increases the potential quantum of any settlement.

How is the status quo expected to develop?

18. It is not clear how the pre-2019 law would be applied by the courts without retrospective legislative change. The range of possible outcomes from this litigation, and implications for other lenders, depend on questions that include:

    a. what is required to make agreed variation disclosure (disclosure required when a lender and borrower agree to vary the loan terms)

    b. whether section 99(1A) applies to incorrect (as well as incomplete) disclosures

    c. whether there is a de minimis exception to disclosure breaches

    d. whether section 99(1A) only applies in circumstances where a loan is in distress, meaning it only applies to prevent a lender going to court to seek to enforce the costs of borrowing during a period where disclosure breaches are occurring (i.e. does not give rise to an obligation to refund the costs of borrowing where they have been paid by a borrower)

    e. when claims being made by the plaintiffs are out of time, based on statutory limitation periods

    f. whether the court already had inherent discretion (prior to section 95A) not to make an order requiring payment of the full costs of borrowing to affected borrowers.

19. One possible outcome is a finding that the law required lenders to forfeit the full costs of borrowing, no matter how inconsequential the disclosure failure (the '**full-forfeiture scenario**').

20. The full-forfeiture scenario has the potential to affect other lenders who had issues complying with the relevant disclosure requirements prior to December 2019. This would likely happen through subsequent litigation against those lenders (assuming the lender denies liability for a relevant disclosure failure).

21. Both the number of other lenders affected and the amounts they could be required to forfeit under this scenerio are very uncertain:

    a. As of 12 August 2024, the Commerce Commission had resolved compliance issues with disclosures from this period with 15 active lenders, and has open investigations into four lenders. Many of these cases involve banks. However, it is possible other lenders have either not identified disclosure failures from this period or have chosen not to take any remedial steps that would draw attention to them.

    b. A key factor that would determine which of these lenders are affected is the relevant statutory deadline for filing a claim. It is uncertain both how and whether the CCCFA's limitation period of "three years after the date on which the loss or damage was discovered or ought reasonably to have been discovered" would apply to disclosure failures triggering section 99(1A):

Free and frank opinions

c. The losses suffered by other lenders affected by a full-forfeiture scenario would depend on:

   i. the number of loans affected by that lender's disclosure failure

   ii. the amount of interest and fees charged under the loans affected (which depends on the period of time between the disclosure failure and when the lender corrected it, as well as the size of the loan)

   iii. the amount the lender has already paid to compensate affected borrowers for the failure.

22. Uncertainty about their potential liability for disclosure failures and costs of borrowing predating 2019 is generally unsettling for lenders.

What is the policy problem?

23. The law that applies to relevant disclosure breaches between 2015 and 2019 appears to make lenders liable for forfeiture of the full costs of borrowing, with a court having no explicit discretion to adjust or extinguish this result based on what it considers just and equitable.

24. This creates the possibility of a full-forfeiture scenario arising from active litigation. A full-forfeiture scenario would involve a transfer of wealth from lenders to their customers. Although this transfer could be considered somewhat arbitrary, it does not involve a direct cost to the New Zealand economy. The key question is what impact the transfer could have on the market for supply of consumer credit and the interests of consumers.

25. Our assessment is that it involves potential to reduce access to credit and reduce competition in the market, which ultimately affects consumers. This assessment is explained below.

The potential impact on ANZ and ASB is significant but probably not existential

26. Constitutional conventions

27. Constitutional conventions

Impact on the wider market is of greater concern

28. If smaller, domestically-owned deposit-takers or other lenders are found to have made relevant disclosure failures, they could be affected by the full-forfeiture scenario either because they are required to forfeit large sums or where they need to hold cash against the risk of such forfeiture. Some are co-operative companies and would need to consider raising capital from their customers (who are its shareholders).

29. Smaller lenders are less likely than ANZ and ASB to be able to manage similar losses as a proportion of their balance sheet. A disclosure failure that took years to correct and which affected a large proportion of their loan book could more easily present a threat to their solvency. Lenders who rely more heavily on consumer lending as a revenue source (i.e. whose income is less diversified) would also be more greatly affected than others.

30. The potential impact on small deposit-takers is a particular concern given the important role they play in servicing a diversity of consumers' needs and placing competitive constraint on larger lenders, notably banks. The Commerce Commission recently found a lack of strong competition in the market for the supply of personal banking services[9], which overlaps with the consumer lending market.

31. To the extent a full-forfeiture scenario does affect smaller lenders, it could constrain the availability of credit in two main ways:

    a. affected lenders either exit the consumer lending market or, if they stay, are less able to compete (i.e. put price pressure on their rivals, invest in improving their services, etc.), which may (if the effect is widespread) cause prices to increase overall

    b. affected lenders who stay in the market have reduced lending capacity (i.e. cashflow) and may therefore have to be more selective about who they lend to (which may disproportionately affect borrowers with worse credit histories).

What objectives are sought in relation to the policy problem?

32. The Government's general reform objectives for financial services are as follows:

    a. simplify and streamline regulation of financial services (including reducing duplication)

    b. remove undue compliance costs for financial market participants

    c. improve outcomes for consumers.

33. This issue particularly relates to two of those three wider reform objectives:

    a. *Improving outcomes for consumers* – All consumers stand to be affected if the market for supply of consumer credit is constrained or competition reduced.

    b. *Simplifying regulation* – Although regulation is normally aimed at incentivising beneficial conduct in the present, the fact the law determines consequences for disclosure failures differently depending on how far in the past a disclosure failure occurred potentially runs against the objective of simplification.

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[9] The Commission's final competition report can be accessed here: Final-report-Personal-banking-services-market-study-20-August-2024-Amended-27-August-2024.pdf

Section 2: Deciding on an option to address the policy problem

What criteria will be used to compare options to the status quo?

34. We have analysed options against the following criteria:

    a. protects the interests of consumers in connection to credit contracts (including access to credit[10])

    b. facilitates just outcomes (including compliance with legal principles relating to natural justice / procedural rights / constitutional factors)

    c. provides a straightforward and streamlined approach to consequences for lenders.

35. We are weighting each criterion equally. The criteria are intended to elicit key trade-offs and judgments. An explanation of how we are applying each criterion follows. While criterion A) is the primary purpose of the CCCFA, we have weighted this evenly with the other criteria for consistency with our 2024 RIS. Where any policy would require legislation with retrospective effect, careful consideration of legal principles is relevant to the analysis.

A) Protects the interests of consumers

36. This criterion reflects the primary purpose of the CCCFA (see section 3(1)). The main interests we see as relevant to this issue are the interests of all consumers in:

    a. being able to make informed decisions

    b. having access to safe credit by virtue of a well-functioning and competitive market

    c. being protected from the harm that can be caused by irresponsible lending.

37. However, these interests vary for different consumer groups (e.g. are greater for consumers with poor financial literacy or other vulnerabilities). To avoid overlap with the second criterion below, we have not included under this criterion the special interests of borrowers affected by disclosure failures during the 2015-2019 period in receiving redress for those failures over and above any redress that would be just in the circumstances.

B) Just outcomes

38. This criterion concerns the likelihood of the CCCFA producing consequences for lenders that are just, in the sense of being proportionate to the nature and circumstances of the disclosure failure. It also involves analysis of legal principles and conventions relating to retrospectivity[11], including:

    a. the presumption that legislation is prospective

    b. the convention that parliamentary legislation should not generally interfere with the judicial process in particular cases before the courts, and the entitlement of litigants to

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[10] Relevant here is the CCCFA's purpose of promoting and facilitating 'fair, efficient and transparent markets for credit'.

[11] See the Legislation Act 2019, section 12 in respect of civil legislation, and the Legislation Design Advisory Committee Guidelines (chapter 12).

have their case determined on the basis of the law as it stood at the time of the events at issue (including their *interest* in their case being so determined).

39. If legislation is being considered that would alter the law at issue in existing proceedings, such legislation should be justified as being in the public interest and impairing the rights of litigants no more than is reasonably necessary to serve that interest.[12]

C) Provides a straightforward and streamlined approach to consequences for lenders

40. This criterion reflects the Government's objective of simplifying regulation of financial services. We have treated it as relevant to our analysis of options given the complexity created by the potential for section 99(1A) to operate differently depending on when a relevant disclosure failure occurred, and the uncertainty this creates for lenders about their liability over time.

What scope will options be considered within?

41. We have identified options directly relevant to the problem of courts lacking explicit discretion to moderate the effect of section 99(1A). As this problem was addressed by reforms in December 2019 (for all disclosure failures not rectified before that time), the options are limited to legislative changes that reach back in time and extend this solution to earlier disclosure failures (i.e. legislation with retrospective effect).

42. We have not considered retrospective repeal of section 99(1A) as an option in this RIS. Cabinet has actively decided to retain this form of redress, but change how/when it is available prospectively as part of the Government's financial services reforms.[13] This followed public consultation and regulatory impact analysis on options that included prospective repeal.

43. We have also not considered retrospective application of the changes recently agreed by Cabinet. They are intended to address a distinct problem, which is concerned with incentives these consequences provide for lenders in the present (and therefore cannot be influenced through retrospective legislation).

[12] Legislation Design Advisory Committee (chapter 12, part 2).

[13] See recommendation 8 of the Cabinet minute: https://www.mbie.govt.nz/dmsdocument/29098-cabinet-minute-financial-services-reforms-policy-approvals-minute-of-decision-proactiverelease-pdf and MBIE's preferred option in the Regulatory Impact Statement: Fit for purpose consumer credit law (mbie.govt.nz).

What options are being considered?

Option One – the counterfactual

44. As discussed above, on the face of the provision, the courts may be bound to require full forfeiture of the costs of borrowing for a breach of relevant disclosure obligations during the 2015-2019 period, no matter how insignificant the breach.

Options Two and Three – legislative options with retrospective effect

45. Both Options Two and Three involve providing the court with explicit discretion (on application by the lender) to consider whether relief from section 99(1A) (and equivalent provisions) should be provided to the lender based on the nature and circumstances of the disclosure failure, regardless of when the failure took place. In other words, they involve backdating the effect of the reforms that took effect in December 2019.

46. The options differ in terms of whether they affect active litigation or not:

    a. Option Two – Amendment only affects proceedings that have not been filed before the date this policy is announced. Active litigation would run its course, unaffected.

    b. Option Three – Amendment also affects proceedings that have not been finally resolved by the courts before the commencement date.

How do the options compare to the counterfactual against the criteria?

The counterfactual: assessment against the criteria

Interests of consumers

47. The counterfactual risks undermining the long-term interests of consumers in having access to safe credit by virtue of a well-functioning and competitive market. If the full-forfeiture scenario were to arise, and to the extent this outcome spills over to a range of smaller lenders, consumers could be affected by higher borrowing costs and reduced availability of credit (including through reduced competition in the market).

Just outcomes

48. The counterfactual's ability to produce just outcomes appears to be reduced by the absence of explicit discretion for the courts to extinguish or modify the effect of section 99(1A), particularly given that discretion was provided by the 2019 reforms and not applied retrospectively. This may mean the courts are bound to require lenders to forfeit the full costs of the costs of borrowing to all affected borrowers, even where that would be unjust in the circumstances.

49. On the other hand, the counterfactual does not alter any of the legal rights or duties that applied at the time the disclosure failures occurred. It does not offend the presumption against retrospective legislation nor the entitlement of affected borrowers to have disclosure failures dealt with based on the law that applied at the time.

Straightforward and streamlined approach to consequences for lenders

50. Lenders may still have liability for disclosure failures under the pre-2019 law. That liability is uncertain until the courts determine how to apply section 99(1A) under that law. Additionally, lenders face uncertainty about how a court would use its discretion to provide relief from section 99(1A) as a result of the 2019 reforms.

51. Assuming consequences under section 99(1A) are determined differently by the courts under the two time periods, the counterfactual is not particularly straightforward. How redress for a relevant disclosure failure is determined would depend on whether it occurred before or after the 2019 reforms (and, if it occurred before those reforms, whether it was corrected before them).

52. This difference in treatment is likely to be greater the longer it was before the lender identified the failure. Long delays in identifying a failure that occurred before December 2019 make this difference in treatment somewhat arbitrary. Lenders can only determine their liability after the fact, and this involves trying to account for the difference in the law that applied before and after December 2019.

Option Two: comparison with the counterfactual

Interests of consumers

53. We do not know how or whether Option Two would change the way the courts apply sections 99(1A) and 48. This option only increases or makes more explicit their discretion to extinguish or vary the effect of section 99(1A) if they consider it just and equitable to do so. This means it is not possible to compare the impact of this option on the interests of consumers with that of the counterfactual.

54. Nevertheless, we consider it reasonable to assume that Option Two makes it less likely that lenders would be required to forfeit the full costs of borrowing in respect of relatively minor disclosure failures. Therefore, we would expect this option to improve on the counterfactual overall because it reduces the likelihood of negative consequences for consumers that could arise from the full-forfeiture scenario (see discussion at paragraph 31).

55. Option Two does not entirely remove this risk, as it would be open to a court to consider what law applied at a relevant time in deciding what is 'just and equitable' in the circumstances. At the very least, the ability for lenders to seek relief under the 2019 provisions would entitle them to have the particular circumstances of their disclosure failure considered. This would seem to reduce the likelihood of the problem arising.

Just outcomes [Legally privileged]

56. Option Two improves on the counterfactual in one sense, and performs worse in another.

57. On one hand, providing the courts with explicit discretion to vary or extinguish the effect of section 99(1A) can only improve their ability to reach a 'just and equitable' outcome for all parties. This is the stated purpose of the discretion they may use under section 95A (Court may reduce effect of failure to make disclosure) after considering the factors in section 95B (Guidelines for reducing effect of failure).

58. On the other hand, providing that discretion retrospectively would appear to conflict with the presumption against retrospectivity and relevant legal principles. These principles are not absolute, and our assessment is that the degree of conflict in the case of Option Two is minimal. Option Two would not affect any legal right or duties being asserted in active proceedings. Where Option Two affects any person's legal rights or duties as asserted after its commencement, it only affects them to the extent they would be considered unjust by a court.

Straightforward and streamlined approach to consequences for lenders

59. Option Two would provide greater consistency over how consequences under section 99(1A) are determined over time. It would remove the distinction made under the counterfactual

between how section 99(1A) operates for disclosure failures that pre-dated the December 2019 reforms and how it operates for disclosure failures unresolved or occuring after those refoms. However, to the extent proceedings are brought in relation to disclosure failures prior to December 2019, it would instead create a distinction between how those failures are treated depending on whether proceedings commenced before or after a date specified by Option Two.

60. Option Two could also be seen as making the approach to determining consequences less straightforward, in that it involves greater uncertainty about how a court might use its discretion under section 95A. However, this discretion increases the likelihood of parties settling out of court, without the need for complex court proceedings.

Option Three (preferred by MBIE): comparison with the counterfactual

61. Option Three improves on the counterfactual in largely the same ways as Option Two, with some differences noted as follows:

   a. *Interests of consumers* – Despite also applying to active litigation against ANZ and ASB, Option Three does not materially improve on Option Two in avoiding the consequences of concern under the counterfactual, given that concern is predominantly associated with how a finding in that litigation could disproportionately affect any other lenders/deposit-takers who had compliance issues before December 2019.

   b. *Just outcomes* – By including active litigation, Option Three involves greater potential for a just and equitable outcome than Option Two, but would also appear to involve greater conflict with legal principles. Legal professional privilege

[14] Advice was provided by the Crown Law Office at a high-level and at short notice.

Legal professional privilege

c. *Straightforward and steamlined approach to consequences for lenders* – Option Three would go further than Option Two in providing a consistent basis for the application of section 99(1A) by including active litigation. Option Two could be considered less streamlined in the sense that it replaces the current pre or post-2019 distinction with a distinction relating to when litigation was brought.

62. In summary, Option Three involves a greater trade-off than Option Two between the interests of borrowers affected by historical disclosure failures (by including those borrowers represented in active litigation) and the wider public interest in having consequences determined in a just and equitable manner, consistently over time.

	Counterfactual: pre-2019 law continues	Option 2: retrospective amendment excluding active litigation	Option 3: retrospective amendment including active litigation
Interests of consumers	0	+ The potential for impact on consumers' long-term interests arising from a full-forfeiture scenario is made less likely where the court has explicit discretion.	+ Same as for Option 2, given the active litigation has very little potential to negatively affect the interests of consumers.
Just outcomes	0	0 Improves the courts' flexibility to arrive at just outcomes in any **future** litigation concerning pre-2019 failures. Minimal conflict with convention against retrospective legislation.	0 Improves the courts' flexibility to arrive at just outcomes in **current and** any future litigation. Greater, but still minor, conflict with convention against retrospective legislation and other legal principles.
Straightforward approach to consequences	0	0/+ Slightly more straightforward approach than under the counterfactual. However, does not prevent the law differentiating treatment of different disclosure failures.	+ Provides a consistent legal basis for determining consequences irrespective of when the disclosure failure occurred and when proceedings were brought.
Overall assessment	0	+/++	++

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

63. Our view is that the courts should have explicit discretion to arrive at a just and equitable outcome by extinguishing or reducing the effect of section 99(1A) regardless of whether or not the disclosure failure preceded reforms in 2019.

64. We find it inoffensive to extend this position to active litigation. The fact Option Three would affect proceedings that are before the courts does not put it beyond what might be considered an appropriate use of retrospective legislation. Given Option Three is necessary to put all disclosure failures on the same legal footing, we consider it is justified and impairs the rights of litigants no more than is reasonably necessary.

Key for qualitative judgements:

++	much better than doing nothing/the status quo/counterfactual
+	better than doing nothing/the status quo/counterfactual
0	about the same as doing nothing/the status quo/counterfactual
-	worse than doing nothing/the status quo/counterfactual
- -	much worse than doing nothing/the status quo/counterfactual

What are the marginal costs and benefits of the option?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Lenders who failed to make disclosures as required	None identified	N/A	N/A
Borrowers affected by these failures	Less likelihood of borrowers being awarded the full costs of borrowing in relation to the period in question where the circumstances and nature of the disclosure failure do not justify this outcome.	Unknown. However, to illustrate the maximum potential costs of borrowing (before deducting compensation already paid), someone with a $500,000 mortgage may have paid in the order of $120,000 in interest over four years.	Low. The potential for a difference in outcome is assumed, but depends how the current law and proposed change would be applied by the courts.
Consumers generally	None identified	N/A	N/A
The regulator	Potential for some disruption to enforcement activities relating to the relevant period.	Low.	Low. This is a possibility the Commerce Commission has raised.
Total monetised costs	N/A	N/A	N/A
Non-monetised costs	As above	Unknown	Low
Additional benefits of the preferred option compared to taking no action			
Lenders who failed to make disclosures as required	Potential for reduced/avoided losses arising from these failures	Unknown. However, could be significant if there is a material difference between what amount a court would award under the counterfactual and what it would award under the preferred option.	Low. The potential for a difference in outcome is assumed, but depends how the current law and proposed change would be applied by the courts.
Borrowers affected by these failures	As below	As below	As below
Consumers generally	Less potential for future supply of consumer credit to be negatively affected	Unknown.	Low. The likelihood and scale of the threat to the market is highly uncertain and requires speculation.
The regulator	None identified	N/A	N/A
Total monetised benefits	N/A	N/A	N/A
Non-monetised benefits	As above	Unknown	Low

Section 3: Delivering an option

How will the new arrangements be implemented?

65. The preferred option would require changes to the CCCFA. The legislative vehicle for the amendment will be a CCCF Amendment Bill that is likely to be introduced to Parliament in early 2025.

66. There will be an opportunity to reconsider aspects of this proposal in view of submissions made during the select committee process for the Bill. This Bill will also contain the prospective amendments to section 99(1A) agreed by Cabinet in September 2024.

67. We consider it unlikely that the active proceedings could be finally disposed of before this Bill is passed. The Minister is committed to having this Bill passed as quickly as possible given the uncertainty it creates for staff affected by the transfer of regulatory functions from the Commerce Commission to the Financial Markets Authority, and for industry.

68. We see no reason to delay commencement of this change once the Bill is passed.

69. The Commerce Commission entered into full and final settlements with several lenders for disclosure breaches during the 2015-2019 period. It also has some open investigations following complaints and self-reports of potential issues with relevant disclosure requirements over this period. We will work with the Commission to manage any impacts of the policy change.

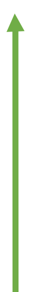
How will the new arrangements be monitored, evaluated, and reviewed?

70. Our approach to monitoring, evaluating and reviewing the preferred option would be consistent with that being used for other consumer credit law reforms being implemented through the same legislation. This was outlined in the original RIS[15] and includes the Financial Markets Authority's role in monitoring and responding to market conduct issues and enforcing the CCCFA. It also includes an intention to review these reforms in 3-5 years following commencement (subject to resource constraints).

71. No new data collection activity specfic to this amendment is proposed at this stage but will be considered if issues arise.

[15] This RIS can be found here: https://www.mbie.govt.nz/dmsdocument/29099-regulatory-impact-statement-fit-for-purpose-consumer-credit-law

Appendix one: Laws determining consequences of the relevant disclosure failures over time



Time period	Law that operates	Relevant sections	Which disclosure failures this law applies to
Before 6 June 2015	The law provided only that the loan agreement would be unenforceable until disclosure is correctly made. In the *Norfolk Nominees Ltd v King 2013* case, the High Court found this meant the lender had no enforceable right to interest and fees during the period of the lender's non-compliance, but that they could recover interest and fees from that period once non-compliance is corrected.	99(1), 48	Any disclosure failure that arose from an agreement entered into before 6 June 2015.
6 June 2015 – 20 December 2019	The borrower is not liable for the costs of borrowing during any period of non-compliance with initial and agreed variation disclosure requirements (and likewise for consumer leases and buy-back transactions for land). The courts have no clear discretion to deviate from this outcome.	99(1), 48 99(1A), 101(2) and 102(2)	Any disclosure failure that arose from an agreement entered into on or after 6 June 2015, to the extent it was not corrected before 20 December 2019.
20 December 2019 – commencement of reforms agreed by Cabinet in 2024	The lender (lessor or transferee) can seek relief from the effect of section 99(1A) and the court then considers a range of factors in deciding whether it is just and equitable to grant that relief (by either extinguishing or reducing the effect of the provisions).	99(1), 48 99(1A), 101(2), 102(2), 95A and 95B	Any disclosure failure that was not corrected before 20 December 2019 or occurred after that date, relating to any loan agreement entered into before the commencement of reforms agreed by Cabinet in 2024.
After commencement of reforms agreed by Cabinet in 2024	Same as the law prior to 6 June 2015, except that it would be possible to seek an order for redress comprising any or all of the costs of borrowing where a court finds a person suffered loss or damage from a breach of initial or agreed variation disclosure.	99(1), 48, 93 and 94 (as amended by the Bill)	Any disclosure failure that relates to a loan agreement entered into after the commencement date.
The preferred option would eliminate the 6 June 2015 – 20 December 2019 law by extending the application of the law that applies after that period back in time.			