NEW ZEALAND
BANKERS ASSOCIATION

Submission

to the

Ministry of Business, Innovation and Employment

on the

Discussion Paper: Section 99(1A) of the Credit Contracts and Consumer Finance Act 2003

9 December 2016

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About NZBA

1. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes that contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.

2. The following fifteen registered banks in New Zealand are members of NZBA:

- ANZ Bank New Zealand Limited
- ASB Bank Limited
- Bank of China (NZ) Limited
- Bank of New Zealand
- Bank of Tokyo-Mitsubishi, UFJ
- Citibank, N.A.
- The Co-operative Bank Limited
- Heartland Bank Limited
- The Hongkong and Shanghai Banking Corporation Limited
- JPMorgan Chase Bank, N.A.
- Kiwibank Limited
- Rabobank New Zealand Limited
- SBS Bank
- TSB Bank Limited
- Westpac New Zealand Limited.

Background

3. NZBA welcomes the opportunity to provide feedback to the Ministry of Business, Innovation and Employment (**MBIE**) on the Discussion Paper: Section 99(1A) of the Credit Contracts and Consumer Finance Act 2003 (**Discussion Paper**), and commends the work that has gone into developing it.

4. If you would like to discuss any aspect of the submission further, please contact:

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Executive Summary

5. NZBA supports the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**) and its aim to protect consumers when they borrow money. Disclosure plays an important part in protecting consumers. The right information at the right time helps consumers understand what they are agreeing to and allows them to make an informed decision.

6. It is important that the application of the CCCFA achieves the right balance by:

a. Protecting debtors' rights, including ensuring debtors have clear and relevant information to make informed decisions.

b. Encouraging appropriate creditor behaviour.

c. Ensuring the consequences for creditors of non-compliance, including the obligation to refund "as soon as practicable" under section 48, are fair and reasonable, with reference to the impact on the debtor.

d. Providing clarity regarding application and enforcement for creditors and the regulator. This includes clarity as to what objective factors are relevant in determining if a debtor has been negatively impacted by a disclosure breach.

e. Taking into account the practicalities of prescriptive disclosure obligations where there are multiple potentially impacted products and disclosable events, which are often initiated by the debtor.

7. NZBA wishes to take this opportunity to reiterate our concerns, as outlined in the Discussion Paper and in our letter of 17 May 2016 (attached to the Discussion Paper), that section 99(1A) could have serious and harsh implications for creditors, and therefore does not currently achieve the appropriate balance.

8. In light of our concerns, NZBA supports Option E in the Discussion Paper, namely the repeal of section 99(1A), with retrospective effect. NZBA submits:

a. Section 99(1A) has the potential to be unfair and punitive to creditors.

b. NZBA does not believe Parliament intended section 99(1A) to apply in the way it could.

c. Retrospectivity is warranted to avoid long-term harm.

d. There is no equivalent to section 99(1A) in overseas law.

e. Section 99(1A) is inconsistent with the other CCCFA enforcement provisions.

9. Should Option E not be acceptable to MBIE, in the alternative NZBA supports an amended form of Option D with retrospective effect. The amendments NZBA suggests are:

a. A clear and objective test of what will and will not be materially adverse.

b. Removal of section 22 from the ambit of section 99(1A).

c. Application of section 99(1A) only where the creditor has completely failed to make disclosure under section 17.

d. Removal of the words 'nor any other person'.

10. NZBA does not support Option B, the option preferred by MBIE in the Discussion Paper. NZBA submits:

    a. Option B is inconsistent with the CCCFA's enforcement provisions.

    b. Creditors will incur costs and unwarranted reputational consequences in seeking relief where it is clear a breach is immaterial or has not caused harm.

NZBA supports repeal of section 99(1A) with retrospective effect

11. Section 99(1A) has the potential to expose creditors to significant uncertainty and risk. NZBA submits that the section should be repealed, with retrospective effect, to avoid potential material and long-term risk to creditors.

Potential to be unfair and punitive to creditors

12. In NZBA's view, section 99(1A) has the potential to be punitive and goes beyond what is appropriate as an absolute liability provision applying to a commercial contract.

13. Section 99(1A) imposes liability for refunds, without any assessment of the behaviour of the creditor, the extent of any harm caused, or the impact on the continuing relationship between creditor and debtor.

14. Non-compliance with section 17 or 22 may not be discovered for some time, and in some cases, several years. The creditor and debtor may have each relied on the contract in place. The debtor will have received the benefit of funds lent and in many cases not suffered any material harm. NZBA submits that the creditor should be entitled to the return on funds lent unless there has been a serious or malicious breach, and this is best determined by the Courts.

15. Requiring creditors to refund all costs of borrowing for the period of non-disclosure presents debtors with a windfall that is not commensurate to any harm caused (if any at all). It could easily lead to the financial distress of a creditor due to a harmless mistake.

16. NZBA can best show the potential impact of section 99(1A) by example. We include three examples below that are purely hypothetical, but reflect operational risks that most creditors in the lending industry will have.

Example 1

Creditor A has an automated system which attaches copies of required disclosure and contract terms and conditions to emails sent to home loan customers as disclosure.

There is a system coding error, and the terms and conditions aren't attached to emails.

Creditor A does not pick up the system error for 2 months, and around 3,200 home loan customers are affected. 3,200 is a very conservative number of loans for a 2-month period for a large lender, like a bank.

If section 99(1A) applies, then arguably Creditor A is not entitled to any costs of borrowing for up to 2 months. Even though the debtors have enjoyed the benefit of the funds, both parties have relied on the contract, and arguably little harm has been caused.

To roughly calculate, we assume an:

- average home loan size of $400,000
- interest rate of 5.64%pa
- application fee of $500

If section 99(1A) is applied, for 3,200 customers, impacted for 2 months, Creditor A would need to refund up to:

$13,467,520

Example 2

Creditor B uses a template to produce a variation disclosure letter when customers ask for changes to their home loans.

But, there is an unforeseen fault in the template. The template displays the interest rate in the variation disclosure letter with the decimal in the wrong place. For example, 5.59%pa is displayed incorrectly as 0.559%pa.

All other information in the variation disclosure letter, including repayments, is correct.

When Creditor B loads changes in its loan system, it loads the correct interest rate and repayments. Customers receive continuing disclosure with the correct interest rates and repayments displayed.

Creditor B identifies the issue with the template in routine maintenance 1 year later. 30,000 customers have received variation disclosure letters.

If section 99(1A) applies, then arguably Creditor B is not entitled to any costs of borrowing for up to 1 year for those 30,000 loans. Even though the debtors have enjoyed the benefit of the funds lent, both parties have relied on the contract, and arguably little harm has been caused.

To roughly calculate, we assume an:

- average home loan size of $400,000
- interest rate of 5.59%pa

If section 99(1A) is applied, Creditor B would need to refund up to:

$670,800,000

Parliament did not intend section 99(1A) to apply in the way it does

17. Changes to the CCCFA aimed to better protect consumers from unscrupulous and irresponsible lending practices and curb ‘loan sharks’.

18. NZBA submits that the changes were not intended to impose unnecessary and inappropriate compliance costs or penalties on responsible lenders.

19. Paragraph 18 of the Discussion Paper states that officials considered the result in the case of *Norfolk Nominees v King* was unintended and unjust. It goes on to say that officials inserted section 99(1A) in the Amendment Bill to address this.

20. NZBA have asked officials for any documents relevant to developing the section, and in particular how it was intended to address the case of *Norfolk Nominees*. Unfortunately, we understand there is little information now held.

21. Section 99(1A) wasn't in the draft Amendment Bill released for public consultation in 2012. NZBA understands the section was also not included in the draft considered by Cabinet, but was inserted in the Bill just two days before it was introduced in March 2013. NZBA is concerned the section may have been introduced without the opportunity to fully consider its impacts.

22. While there is little information available on why it was included, importantly, there is advice on section 99(1A) in the January 2014 Officials' Report to the Commerce Select Committee on the Amendment Bill.

23. Based on this commentary from officials, it is clear that, despite statements section 99(1A) was intended to address *Norfolk Nominees*, the section was never intended to prevent creditors from ever recovering costs of borrowing, once disclosure is made.

24. In its submission on the Amendment Bill, the Commerce Commission suggested that section 99 should be amended to make it clear that fees accrued during the period of non-disclosure cannot be charged after disclosure is made.

25. In response, officials gave the following advice to the Commerce Select Committee (emphasis added):

> *Disagree. This is a difficult issue. Statutory damages apply in similar circumstances (i.e. disclosure breaches), and the amount of interest and fees that may be recovered as statutory damages is capped. Statutory damages and the prohibition on enforcement under section 99 need to sit together.* ***Statutory damages are punitive damages, and section 99 deals with 'enforcement' in relation to court action and the enforcement of securities.***
>
> ***If 'remedial' disclosure was not possible and past interest and fees were never recoverable, then lenders could not recover establishment fees, or other fees and interest, beyond the scope of the statutory damages. This would be inconsistent with the statutory damages cap, and the better way to deal with the situation is to increase the amount of the statutory damages cap (as recommended above).***

26. Statutory damages are an amount, set in law, to compensate one party for loss or damage caused because of a breach of that law by another.

27. In the CCCFA, statutory damages are capped at a set amount, reflecting what Parliament believed was a reasonable amount to compensate a debtor for a breach of disclosure duties. Debtors can apply to the Court to increase the amount if it is

insufficient to compensate for loss, and creditors can apply to the Court to decrease the amount if it is excessive in the circumstances.

28. If section 99(1A) applies, and a creditor must refund all costs of borrowing to the debtor, the amount the debtor would receive is almost always going to be significantly more than the amount of statutory damages.

29. NZBA agrees with the advice of officials to the Select Committee that this result is clearly inconsistent with the purpose of a statutory damages provision as compensation for loss or damage.

30. NZBA also notes the Select Committee did recommend increasing the level of statutory damages, as proposed by officials. In our view, it is clear the Select Committee accepted that the appropriate form of compensation for loss or damage caused by non-disclosure was statutory damages, not section 99(1A).

31. NZBA also considers Parliament could not intend section 99(1A) to have effect as an absolute liability monetary penalty, without defence or limit.

32. NZBA considers section 99(1A) is punitive, not compensatory, in nature. Section 99(1A) does not compensate a debtor for losses because of non-compliance. Instead, a creditor must refund all costs of borrowing, regardless of whether the debtor suffered any harm. This appears inconsistent with the wider CCCFA regime, and we discuss this later in our submission.

33. Section 99(1A) also does not need intent. It does not matter whether the creditor's breach was negligent or wilful, or because of something entirely outside the creditor's control. It does not matter whether the creditor was at fault or had taken all reasonable care to ensure compliance with the law. It only matters whether there is a breach.

34. Creditors have no defence to section 99(1A), and there is no cap imposed on the amount the creditor must refund to an individual debtor, or to many debtors if affected by the same or a similar breach. Again, NZBA submits this is inconsistent with the wider CCCFA regime.

35. Because section 99(1A) in effect imposes an absolute liability, monetary penalty on creditors, with no defence or limit, NZBA believes that result is inconsistent with the policy intent of the CCCFA. NZBA also believes it is inconsistent with Law Commission and Legislative Advisory Committee guidance.

36. NZBA does not believe these matters were considered in drafting or in advice to the Commerce Select Committee on the scope and purpose of section 99(1A).

37. In effect, section 99(1A) is a pecuniary penalty. The Legislative Advisory Committee guidelines on pecuniary penalties state (emphasis added):[1]

> *Pecuniary penalties are punitive in nature, not compensatory, and can severely impact a person's or entity's solvency, property interests, reputation, and opportunities. In some cases they can be imposed as an alternative to criminal penalties, and are particularly suited to regulating conduct in contexts where the intervention of the State is justified but the financial consequences serve more of a deterrent effect than criminal penalties.*
>
> ***Pecuniary penalties should not be included in legislation because they may be perceived as easier to obtain or allow higher maximum penalties. Every decision to include a pecuniary penalty should be justified having regard to the particular policy objective and purpose of the legislation.***

38. NZBA also notes the Law Commission Report on pecuniary penalties states (emphasis added):[2]

> *In assessing whether to include intention or fault as an element of the contravention,* ***it is necessary to weigh up the features of the penalty and regime, such as the nature of the conduct, potential defendants and size of the penalty involved, to ensure that the particular provision achieves the right balance between fairness and regulatory effectiveness..**.*
>
> ***Absolute liability pecuniary penalties should be used very rarely**.*

39. NZBA also questions whether the outcome in *Norfolk Nominees* was unintended or unjust as asserted in the Discussion Paper. We note the Court in *Norfolk Nominees* states (emphasis added):

> *Accordingly, and contrary to Mr Shand's submission, there is no conceptual difference in the periods of unenforceability between s 17 and s 22 of the Act – they both provide for unenforceability to come to an end at given points in time. There is accordingly no justification to distinguish the two in that regard or to suggest the Court of Appeal's observations as to corrective disclosure should be limited to one or other section. That said, it will remain the case where initial disclosure or variation disclosure does not occur within the specified period in s 17 or s 22 as the case may be, that any later corrective disclosure will not be strictly in terms of s 17 or s 22. The lender can no longer comply with the time limit. But there is a combined effect of ss 99 and 17 (and 22). Notwithstanding the literal difficulty, Parliament must be taken to have intended that corrective disclosure may be made into the future and the contract will upon late disclosure become enforceable.* ***That is also entirely consistent with the purposes of the legislation as I have discussed them. Notwithstanding the fact that the contract has become enforceable, the debtor retains the right of cancellation when (corrective) disclosure is made**.*

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[1] Chapter 23 of the Legislative Advisory Committee Guidelines.

[2] Guideline G8 at page 103 of the Law Commission Report 'Pecuniary Penalties: Guidance for Legislative Design'.

40. The Court was clearly of the view that corrective disclosure would allow a contract to be enforced and doing so was entirely consistent with the purpose of the CCCFA. The Court also notes that the debtor had other avenues of recourse under the CCCFA.

The repeal of section 99(1A) should be retrospective

41. The accepted wisdom is that changes to the law should not apply retrospectively, unless there are exceptional circumstances.

42. NZBA submits that section 99(1A) has the potential to be unfair and punitive, and it is in the public interest to repeal it retrospectively. Furthermore, in this instance the retrospective application would not apply to the *imposition* of a law, but rather its repeal, rendering many of the arguments against retrospective application less relevant.

43. In NZBA's view, section 99(1A) places the lending industry as a whole at considerable long-term risk. Inadvertent non-compliance will not always be immediately identified by either a debtor or creditor, and many years may elapse.

44. NZBA submits that the section 99(1A) should be repealed retrospectively to provide certainty that unintentional disclosure breaches since 6 June 2015 will not remain open. NZBA submits that due to the punitive nature of section 99(1A), retrospective repeal is warranted in the circumstances.

45. NZBA submits that debtors will not be adversely affected if section 99(1A) is repealed retrospectively. Repealing section 99(1A) retrospectively will not take away debtors' rights, as they still have protection under other provisions, including statutory rights to cancel, and the ability to seek statutory damages and a range of Court orders.

46. By contrast, amending with prospective effect only will lead to complexity for both creditors and debtors, as it will be unclear which loans section 99(1A) will apply to. At this juncture it is important to stress that it is not always clear what date a credit contract was formed, as it is not as simple as looking at the date the loan was entered into.

47. Many contracts, particularly revolving credit contracts, are created when the loan is drawn down or the credit facility is first used by the debtor. Determining when the contract is formed, many years later, will involve considerable investigation by debtors and creditors.

48. NZBA submits that the law should be simple and clear for both debtors and creditors — multiple enforcement rules applying to different loans will lead to confusion.

49. There are examples in New Zealand and overseas where changes to legislation have been made retrospectively.

50. Many changes to the Property Law Act in 2007 were applied to mortgages already entered into, as it was believed easier for mortgagors and mortgagees to have all contracts treated the same under the new legislation. Amending the law in relation to mortgages, with retrospective effect, was considered necessary to improve clarity in the law. NZBA believes the same argument can be made to justify the retrospective repeal of section 99(1A).

51. In amending its own consumer credit laws, the United Kingdom made a number of changes retrospective. The argument was that retrospective repeal and amendment was necessary to provide clarity and certainty for creditors about what is required and for debtors about what rights they are entitled to.

52. We also note in Australia retrospective changes to the law are more common and are not limited to extreme circumstances.

53. The Australian Law Reform Commission notes:[3]

> *Retrospective laws in the civil arena have not been as energetically condemned by judicial officers as have those in the criminal sphere, and the burden of justification is not heavy.*

54. The Commission also points to statements in 'The Morality of Law' that:[4]

> *Situations can arise in which granting retroactive effect to legal rules not only becomes tolerable, but may actually be essential to advance the cause of legality…It is when things go wrong that the retroactive statute often becomes indispensable as a curative measure*

55. In NZBA's view, this is a situation where retrospective repeal is necessary, to ensure there is no lingering effect caused by section 99(1A).

There is no equivalent to section 99(1A) in overseas laws

56. NZBA has been unable to find any equivalent to section 99(1A) in consumer laws in Australia or the United States. Enforcement is at the discretion of the Courts, and the Courts must generally have regard to the nature of the breach, the harm suffered, and the actions of the creditor.

57. A similar, draconian provision to section 99(1A) was included in the United Kingdom, but later repealed following criticism by the Courts. We discuss this further below.

Australia

[3] Australian Law Reform Commission report 'Traditional Rights and Freedoms – Encroachment by Commonwealth Laws', ALRC Report 129 at 13.54.

[4] Yale University Press, 2nd edition, 1972 at 53.

58. There is no equivalent in the Australian National Consumer Credit Protect Act 2009, which our CCCFA is based on.

59. The Court's power to grant injunctions, compensation orders, and other orders, including prohibiting enforcement, is discretionary and available only on application by the Australian Securities & Investments Commission (**ASIC**) or the debtor.

60. Importantly, under section 113 the Court must consider the prudential standing of the creditor, the conduct of the creditor, and whether there is any loss.

> *(3) The Court, in considering the imposition of a penalty, must have regard primarily to the prudential standing of any credit provider concerned, or of any subsidiary of the credit provider (within the meaning of the Corporations Act 2001), if the credit provider or subsidiary takes deposits or is a borrowing corporation (within the meaning of that Act). However, the Court is to have regard to that prudential standing only if the credit provider requests the Court to do so.*
>
> *(4) The Court, in considering the imposition of a penalty, must have regard to the following:*
>
> *(a) the conduct of the credit provider and debtor before and after the credit contract was entered into;*
>
> *(b) whether the contravention was deliberate or otherwise;*
>
> *(c) the loss or other detriment (if any) suffered by the debtor as a result of the contravention;*
>
> *(d) when the credit provider first became aware, or ought reasonably to have become aware, of the contravention;*
>
> *(e) any systems or procedures of the credit provider to prevent or identify contraventions;*
>
> *(f) whether the contravention could have been prevented by the credit provider;*
>
> *(g) any action taken by the credit provider to remedy the contravention or compensate the debtor or to prevent future contraventions;*
>
> *(h) the time taken to make the application and the nature of the application;*
>
> *(i) any other matter the Court considers relevant.*

United States

61. Similar discretion is provided in the United States:

> *Section 130 Civil liability*
>
> *(a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this chapter to be disclosed to that person is liable to that person in an amount equal to the sum of:*
>
> *(i) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1000; and*

(ii) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the Court.

(b) A creditor has no liability under this section if within fifteen days after discovering an error, and prior to the institution of any action under this section or the receipt of written notice of the error, the creditor notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to ensure that the person will not be required to pay a finance charge in excess of the amount or percentage rate actually disclosed.

(c) A creditor may not be held liable in any action brought under this section for violation of this chapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bone fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

United Kingdom

62. Similar provisions to section 99(1A) were introduced in the United Kingdom. However, they were later repealed because they led to serious and harsh implications for creditors.

63. Provisions in the Consumer Credit Act prohibiting enforcement of a contract where there was a breach led to a significant increase in consumer litigation.

64. The House of Lords criticised the provisions in *Wilson v First County Trust Ltd* (emphasis added):

> *…section 127(3) may be drastic, even harsh, in its adverse consequences for a lender. He loses all rights under the agreement, including his rights to any security which has been lodged. Conversely, the borrower acquires what can only be described as a windfall…These consequences also apply where, as in the present case, the borrower suffered no prejudice as a result of the non-compliance…*
>
> ***The unattractive feature of this approach is that it will sometimes involve punishing the blameless…On its face, considered in the context of the particular case, a sanction having this effect is difficult to justify…***

65. Section 127 now provides that:

> *In the case of an application for an enforcement order under: …*
>
> *(za) section 55(2) (disclosure of information)...*
>
> *the Court shall dismiss the application if, but only if, it considers it just to do so having regard to:*
>
> *(i) prejudice caused to any person by the contravention in question, and the degree of culpability for it; and*
>
> *(ii) the powers conferred on the Court by subsection (2) and sections 135 and 136.*
>
> *(2) If it appears to the Court just to do so, it may in an enforcement order reduce or discharge any sum payable by the debtor or hirer, or any surety, so as to compensate him for prejudice suffered as a result of the contravention in question.*

66. NZBA submits that retaining section 99(1A) means New Zealand's consumer credit laws are out of step with international best practice. Section 99(1A) creates an imbalance between the need to protect of consumers and the efficient and effective operation of the market for credit.

Section 99(1A) is inconsistent with the other CCCFA enforcement provisions

Inconsistent with the statutory right to cancel a contract

67. Section 99(1A) is inconsistent with section 30(2) of the CCCFA, which sets out what a debtor must pay if they cancel a contract.

68. Section 27(1) gives debtors the statutory right to cancel a contract where a creditor has not made initial disclosure.

69. If a debtor chooses to cancel, then under section 30(1)(c) the creditor must calculate the difference between the amounts due to the creditor and the amounts due to the debtor.

70. Under section 30(2), the amounts due to the creditor include interest on the unpaid balance for the period during which credit was provided. Section 30(2) also includes any reasonable expenses incurred by the creditor under the contract or in cancelling the contract.

71. So, section 30(2) allows a creditor to retain costs of borrowing where section 99(1A) does not. The provisions are completely inconsistent. NZBA submits section 30(2) correctly reflects Parliament's intent.

Inconsistent with the cap imposed on statutory damages

72. Section 99(1A) compels a creditor to refund all costs of borrowing, even where, in the absence of section 99(1A), the creditor could apply to Court to reduce statutory damages or defend against a claim for statutory damages.

73. The costs of borrowing are almost always likely to exceed the cap on statutory damages.

74. Section 89(1) of the CCCFA caps statutory damages for breaches of section 17 or 22 at the lesser of $6,000 or 5% of the credit limit on a revolving contract or all advances.

75. Sections 93 and 94 allow debtors or the Commission to apply to the Court to require a creditor to pay an amount that reflects the debtor's loss where statutory damages aren't enough to compensate the debtor. The Court has the discretion to consider the circumstances and whether compensation should be increased or exemplary damages awarded to express displeasure at the conduct of a creditor.

76. Section 91 also allows creditors to apply to the Court to reduce statutory damages. The creditor also has a defence of reasonable mistake for a claim for statutory damages under section 106.

77. Statutory damages are compensation for loss or damage. Parliament considered the amount of statutory damages appropriate to compensate borrowers for breaches of the CCCFA as being up to $6,000.

78. As noted above, the officials report to the Commerce Select Committee on the Amendment Bill is clear that if costs of borrowing must be refunded after disclosure has been made then this:

> *…would be inconsistent with the statutory damages cap, and the better way to deal with the situation is to increase the amount of the statutory damages cap*

79. NZBA also notes the cap on statutory damages was increased to specifically address concerns about whether the level of compensation to debtors for breaches was appropriate.

80. As stated above, section 99(1A) is therefore inconsistent with the cap on statutory damages given the amount refunded will almost always exceed the cap on statutory damages. We believe section 89(1) correctly reflects Parliament's intent.

Inconsistent with the cap on fines imposed for offences

81. Similarly, section 99(1A) is inconsistent with the cap on fines for any offences in section 104.

82. Under section 99(1A), the creditor must refund all costs of borrowing, to all borrowers affected, with no limit or defence.

83. Section 104 applies where a Court convicts a creditor of 2 or more offences for breaches of the same rules of the CCCFA, and those breaches are the same or similar. The fines a Court can impose must not exceed the maximum fine that can be imposed.

84. The effect is that, under section 103, the maximum fine is capped at $200,000 for an individual and $600,000 for a corporate, and under section 102A, the maximum fine is capped at $10,000 for an individual and $30,000 for a corporate.

85. As above with statutory damages, if the costs of borrowing must be refunded after disclosure has been made, then this would be inconsistent with the cap on fines.

86. The monetary penalty imposed would exceed the cap on fines for the underlying offence. We also note that the fines imposed in section 103 were significantly increased to act as a deterrent and reflect the seriousness of breaches. However, costs of borrowing refunded under section 99(1A) could significantly exceed those amounts and be excessively punitive.

Inconsistent with the defence that applies to criminal offences

87. Creditors have a defence of reasonable mistake under section 106 for offences under section 103.[5]

88. There is no defence provided to the monetary penalties imposed under section 99(1A). This would appear to lead to the result that a creditor may not be liable for an offence under section 103, but must still refund all costs of borrowing under section 99(1A). Again, NZBA submits this is punitive and unfair.

89. As noted by the Law Commission:[6]

> *Absolute liability pecuniary penalties should be used very rarely.*

90. NZBA sees no justification for imposing monetary penalties without defence, particularly where defences are available for the same conduct that gives rise to a criminal offence.

Inconsistent with the prohibition on enforcing guarantees

91. Section 99(1A) is inconsistent with section 100(3) of the CCCFA.

92. Section 99(1A) provides that 'neither the debtor nor any other person' is liable for costs of borrowing where there is non-compliance.

93. The only other person liable for costs of borrowing, other than the debtor, would be a guarantor.

94. However, section 100(3) is clear that failure to make disclosure to the debtor will not affect the ability of the creditor to enforce a guarantee. NZBA submits that overriding that position is inconsistent with the nature and effect of a guarantee at law.

95. It is right that a guarantor remains liable for costs of borrowing even where a creditor has failed to disclose to the debtor. The guarantee is a document which imposes liability on the guarantor for amounts owing as well as or instead of the debtor. Provided the creditor has correctly disclosed to the guarantor, including providing a copy of the credit contract, the creditor should be entitled to enforce the guarantee. The contracts the debtor and guarantor enter are separate and distinct.

96. A guarantor remains liable for costs of borrowing under section 100(3), but is not liable for costs of borrowing in the same circumstances under section 99(1A). Section 99(1A) is therefore also inconsistent with section 100(3).

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[5] We suspect the defence should also apply to section 102A and this may have been accidentally omitted as a consequential amendment to section 106 when section 102A was introduced.

[6] Guideline G8 at page 103 of the Law Commission Report 'Pecuniary Penalties: Guidance for Legislative Design'.

Inconsistent with the nature of agreed variations

97. NZBA believes it is inappropriate that section 22 is included in the ambit of section 99(1A).

98. Creditors will not know with any great certainty whether they have complied with section 22, creating significant risks as to when section 99(1A) applies.

99. Significant numbers of changes are made to consumer credit contracts over the contract's life, at the debtor's request and for their benefit. One of our members has reported that in recent reviews of their loan practices, they have several examples of customers making more than 30 loan changes within a year, and some customers making many changes on the same day.

100. Any errors, however minor or unintentional, in any of those variation disclosures will fundamentally change the creditor's position under section 99(1A).

101. Further, NZBA does not believe there is sufficient certainty as to the nature of conduct that will lead to the monetary penalty in section 99(1A). Section 22 requires the creditor to disclose 'full particulars of the change', which is undefined. Whether the 'full particulars of the change' have been disclosed will heavily depend on the individual circumstances of the transaction.

102. As such, including section 22 within the ambit of section 99(1A) increases the risk to creditors and creates added doubt, as it will be unclear what conduct is caught within section 99(1A).

103. The Court in *Sportzone* criticised criminalising conduct where an assessment of breach is subjective, depending on the individual circumstances. We consider the same issues arise with including section 22 within the ambit of section 99(1A).

104. Further, section 22 applies to changes *agreed to* by the debtor. It seems inappropriate to require a creditor to refund all costs of borrowing for a breach of disclosure about a change the debtor has agreed to and in most cases voluntarily asked the creditor for.

105. By its nature, section 22 requires the debtor to have agreed to the change, for that change to have been made. Section 9C(3)(c) also requires creditors to have helped the debtor reach an informed decision in all later dealings under the agreement, including variations.

106. If section 99(1A) is not repealed, non-compliance should not be included within section 99(1A) where the creditor can show they have complied with section 9C(3)(c).

107. NZBA is also concerned that by including section 22, section 99(1A) creates an inconsistency how breaches of variation disclosure are treated.

108. A breach of disclosure of a change agreed to by the debtor under section 22 falls within section 99(1A), but a breach of disclosure of a change due to an exercise of a creditor's power under section 23 does not. Some creditors may refuse to allow debtors to ask for changes to the contract to avoid the risk associated with variation disclosure under section 22 if it remains within the ambit of section 99(1A).

Inconsistent with section 102A

109. It would be inconsistent for a lender to refund all costs of borrowing in situations Parliament intended to be subject to a lower penalty for a criminal offence.

110. NZBA also questions whether section 99(1A) should only apply to complete failures to disclose, given the potential conflict with provisions creating that lower criminal offence.

111. In particular, the distinction between sections 102A and 103 of the CCCFA must influence section 99(1A)'s interpretation and section 99(1A) must only apply to complete failures to disclose. If not, section 99(1A) becomes inconsistent with section 102A.

112. Section 102A is a new, lesser, infringement offence for initial and continuing disclosure (among others). Section 102A carries a much lower fine on conviction of an offence. Section 102A also allows the Commission to issue infringement notices for an offence instead, with substantially lower infringement fines.

113. Section 102A applies to any of the paragraphs in Schedule 1 or section 19.[7] The section does not distinguish the paragraph's importance in disclosure or the impact of its absence on the debtor and their lending decision.

114. Importantly, section 102A(2) is clear that a complete failure to give or send initial or continuing disclosure is an offence under section 103, not section 102A. Section 103(5) is also clear that conduct that is an offence under section 102A is not an offence under section 103.

115. Given the express words in section 102A(2) and 103(5), it seems clear Parliament must have intended disclosure with errors about any material particular, to no longer lead to a complete failure to disclose. NZBA submits it would lead to absurd results if leaving out a paragraph from disclosure means a creditor only commits an infringement offence under section 102A, but including the paragraph with errors means the creditor commits an offence under section 103.

116. In this context, we believe section 99(1A), like section 103, should and can only apply where there is a complete failure to disclose.

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[7] It seems unusual that section 102A does not apply to section 22 or 23, despite the fact similar information may be given when disclosing 'full particulars' of a change. We believe this gap may also create unexpected and unfair results.

Creates 'double jeopardy'

117. As a general principle of law, a person should not be subjected to more than one penalty for the same conduct that breaches the law.

118. Section 99(1A) creates double jeopardy. A creditor who breaches section 17 or 22 will:

    a. Commit a criminal offence under section 102A or 103,

    b. be liable for civil statutory damages under section 88, and

    c. be liable for a civil monetary penalty under section 99(1A).

119. Further, if a creditor fails to comply with section 99(1A), then the creditor breaches section 48, which in turn leads to the creditor committing a further criminal offence under section 103.

120. A situation of 'triple jeopardy' could also occur, as the Responsible Lending Principles include a requirement that a creditor must meet all legal obligations to a debtor, including the obligations under the CCCFA.

121. The Law Commission has stated that the law should prevent a person being punished by the imposition of both a monetary penalty and a criminal penalty for the same conduct.[8] Section 99(1A) is inconsistent with this recommendation.

122. As discussed above, NZBA also finds the outcome punitive where the creditor would have a defence to the criminal penalty or would be subject to a lesser, infringement fine or penalty.

Alternative support for an amended form of Option D

123. Should Option E (repeal of section 99(1A)) not be acceptable to MBIE, in the alternative NZBA supports an amended form of Option D, with retrospective effect.

Placing the onus on the debtor is consistent with the CCCFA enforcement regime

124. Option D places the onus on debtors to seek enforcement. NZBA believes this is consistent with the wider enforcement regime in the CCCFA.

125. NZBA notes MBIE's concerns that imposing the onus on the debtor to seek enforcement may create a barrier to justice. NZBA disagrees this is the case. As outlined above, the debtor is adequately protected in the absence of section 99(1A). The debtor continues to have a cancellation right. The debtor and the Commission

[8] Guideline 7 in the Law Commission's report Pecuniary Penalties: Guidance for legislative design.

can seek statutory damages and a range of Court orders. The debtor also has access to the Disputes Tribunal.

Clear and objective test of what will and will not be materially adverse

126. In NZBA's view, Option D should clarify when non-compliance, objectively, will not be materially adverse. NZBA submits that section 99(1A) must set out clearly and objectively when creditors must refund costs of borrowing and minimise the need to seek guidance or orders from the Court.

127. NZBA submits a creditor should only refund costs of borrowing where, objectively, the non-compliance was materially adverse to a reasonable person. We also suggest providing more detailed guidance on what will or will not be materially adverse.

128. NZBA strongly believes there is some information that must be given under Schedule 1 that is unlikely to sway a debtor's decision to enter a credit contract. For example, a debtor is unlikely to choose not to enter a contract if the creditor has failed to tell them their financial services registration number, full legal name, or address, or the creditor failed to tell them when they would send continuing disclosure.

129. Furthermore, a debtor is unlikely to be adversely affected where the creditor can show that they have met other disclosure duties under the Act, including responsible lending duties. Alternatively where the creditor can show they gave the information they failed to provide, or provided incorrectly, in other ways. For example, information is readily available on the creditor's website or included in continuing or variation disclosures.

130. For example, it's unlikely a debtor will be materially adversely affected where a creditor failed to provide correct information about a repayment amount if the creditor included the correct amount in continuing disclosure or online or provides the debtor with required notice before a direct debit is taken.

131. While the information is provided in another way, the debtor is still adequately protected under the CCCFA from the underlying non-compliance. As discussed above, the debtor continues to have a right to cancel and can seek statutory damages or appropriate Court orders. The Commission can also bring proceedings for any offences under section 102A or 103.

Removal of section 22 from the ambit of section 99(1A)

132. As discussed at paragraphs 97-108 above, NZBA also suggest that if not repealed, officials remove section 22 from the ambit of section 99(1A). Section 22 requires disclosure for changes agreed by the debtor and creditor. By its nature, section 22 requires the debtor to have agreed to the change, for that change to have been made. Section 9C(3)(c) also requires creditors to have helped the debtor reach an informed decision in all later dealings under the agreement.

133. Including section 22 in the ambit of section 99(1A) also considerably increases the risks to creditors given the sheer volume of variations that happen to a contract over its life and the uncertainty for creditors as to whether they have or have not complied.

134. If section 22 is kept within the ambit of section 99(1A), then NZBA suggests non-compliance should not be materially adverse where the creditor can show it complied with section 9C(3)(c).

Section 99(1A) should only apply where the creditor has completely failed to make disclosure under section 17

135. NZBA submits that if not repealed, section 99(1A) should state it only applies where the creditor has completely failed to make disclosure under section 17. In other words, conduct that would constitute an offence under section 103. NZBA does not believe section 99(1A) should apply to conduct that would constitute an offence under section 102A. As discussed above, we believe Parliament intended some behaviour to be subject to a lesser offence with a lesser penalty, and section 99(1A) appears inconsistent with this.

136. NZBA also suggests providing a definition of 'complete failure'. We think this would assist interpretation of sections 102A and 103. We suggest:

> *Complete failure means failing to give or send a disclosure statement. A complete failure does not include where a disclosure statement is given or sent, but non-material information required to be contained in the disclosure statement isn't included or is misleading, deceptive, or confusing.*

Removal of the words 'nor any other person'

137. NZBA also suggest removing the words 'nor any other person' from section 99(1A). Section 99 applies to disclosure to the debtor. Section 100(3) states that a failure to make disclosure to a debtor in accordance with the Act does not affect the ability of a person to enforce the guarantee. As such, section 99(1A) is currently inconsistent with section 100(3).

Suggested re-drafting of Option D

138. We provide below our suggested re-drafting of Option D:

> *'(1A) A debtor is not liable for the costs of borrowing for any period that the creditor has made a complete failure to comply with section 17 and the non-compliance would:*
>
> *(a) constitute an offence under section 103, rather than section 102A; and*
>
> *(b) be materially adverse to a reasonable person in the same circumstances as the debtor.*
>
> *(1AA) Non-compliance under paragraph (1A) will not be materially adverse if the creditor made that information available:*
>
> *(a) on a website the debtor can access at all reasonable times; or*

(b) in a continuing disclosure statement under section 18, a variation disclosure statement under section 22 or 23, or on a website the debtor can access under section 21(1)(a).

(1AAA) A creditor can apply to the Court to make an order that, despite non-compliance that is materially adverse, the debtor remains fully liable for the costs of borrowing. The creditor must show that they have a defence of reasonable mistake under section 106 or that refunding the costs of borrowing would be disproportionate to the gravity of the non-compliance.

Retrospective effect

139. For the same reasons set out in paragraphs 41-55 above, an amendment to section 99(1A) to reflect an amended form of Option D should apply with retrospective effect.

NZBA does not support Option B

140. As noted in the Discussion Paper, Option B (relief for disproportionate consequences) is MBIE's preferred approach.

141. NZBA does not support Option B. In our view, Option B is inconsistent with the CCCFA's enforcement regime as it places the onus on creditors to seek relief. Creditors will incur unnecessary costs seeking relief where it is clear a breach is immaterial or has not caused harm.

142. Asking creditors to seek relief from the Courts will also lead to unnecessary and unwarranted reputational consequences, even where the breach is immaterial or has not caused harm. The impact on creditors will be disproportionate to the impact of the breach.