NEW ZEALAND
BANKERS ASSOCIATION

Submission

to the

Finance and Expenditure Committee

on the

Credit Contracts Legislation Amendment Bill

18 June 2019

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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 seventeen 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
   - China Construction Bank
   - Citibank, N.A.
   - The Co-operative Bank Limited
   - Heartland Bank Limited
   - The Hongkong and Shanghai Banking Corporation Limited
   - Industrial and Commercial Bank of China (New Zealand) Limited
   - JPMorgan Chase Bank, N.A.
   - Kiwibank Limited
   - MUFG Bank, Ltd
   - Rabobank New Zealand Limited
   - SBS Bank
   - TSB Bank Limited
   - Westpac New Zealand Limited

Background

3. NZBA welcomes the opportunity to provide feedback to the Finance and Expenditure Committee (**Committee**) on the Credit Contracts Legislation Amendment Bill (**Bill**). NZBA commends the work that has gone into developing the Bill.

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

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Introduction

5. NZBA supports the policy goals underpinning the Bill, which focus primarily on amending the Credit Contracts and Consumer Finance Act 2003 (**Act** or **CCCFA**) to reduce the harm that problem debt can cause to vulnerable consumers.

6. We see many positive aspects to the Bill, including the proposed limit on the costs of borrowing for high-cost lending. We think that a limit on costs of borrowing will benefit consumers by targeting high-cost lending, which can cause significant harm to our communities.

7. In this submission, we do not comment on all proposals in the Bill. Instead, we focus on changes which we think will better deliver the Bill's policy goals, or where the Bill's proposals may lead to excessively conservative lending practices that have the unintended effect of limiting access to credit, causing financial exclusion.

8. Our submission is in two parts:

   (a) **Key themes:** We identify and comment on key themes emerging from the Bill, which are relevant to our detailed submissions.

   (b) **Detailed submissions:** We highlight enhancements to specific areas of the Bill to better reflect its policy goals.

   In particular, we are concerned to ensure the Bill encourages creditors to lend responsibly, while still allowing access to credit for those who need it. As drafted, we believe that some of the Bill's provisions may unintentionally exclude vulnerable borrowers from sources of safer credit, and we suggest changes to address those.

Key themes

9. The following section sets out NZBA's submissions on three key themes:

   (a) proportionality;

   (b) timing and reliance on Regulations; and

   (c) interaction with other regimes.

Proportionality

10. We have identified several areas in the Bill where it is useful to stand back and consider what the proposed change is trying to achieve, and whether that change is a measured and proportionate response.

11. One key to reducing harm from problem debt is supporting access to responsible, lower-cost borrowing. However, in our view, several of the proposed changes may unintentionally lead to conservative lending practices to the detriment of consumers.

12. We are especially concerned about the impact conservative lending practices may have on vulnerable consumers, including low-wage workers, immigrants, and refugees. Our members' experience is that these communities already find it difficult to access credit from mainstream creditors, making them particularly vulnerable to predatory lending practices. Conservative lending practices, which drive consumers to higher-cost and potentially irresponsible lending, run counter to the important policy objectives of promoting financial inclusion and access to safer credit.

13. The following are examples of changes that may unintentionally lead to conservative practices, which could affect access to credit. We discuss these further in our detailed submissions also:

(a) Penalties for breach of director and senior manager duties:

We support directors and senior managers having a due diligence duty. Those with the ability to influence a creditor's compliance with the Act should take all reasonable steps to do so. We also support some form of penalty if directors or senior managers fail in that duty. However, any consequences should be suitable and proportionate.

We consider that the proposed civil pecuniary penalties (with insurance and indemnities prohibited) and statutory damages are disproportionate and may drive excessively conservative lending practices to the detriment of consumers.

We also expect that people who are qualified and competent to perform director and senior manager roles will be reluctant to take on those roles, again affecting customer outcomes.

We propose options for more proportionate consequences for a breach of the due diligence duty at paragraphs 51-53.

(b) Advertising:

New disclosure duties on creditors that advertise in other languages may well lead many creditors to pull back from advertising. That would have the effect of decreasing the amount of information about the range of borrowing choices available, likely affecting vulnerable borrowers.

A lack of information about different credit products may encourage borrowers to seek credit from higher-cost creditors that are active in their communities. That may not lead to good customer outcomes.

In our detailed submissions we also question whether the real issue may be advertising by high-cost creditors targeting those with limited English (at paragraphs 131-137). If so, we consider that better customer outcomes could be achieved through targeted duties.

14. Additionally, we wish to reiterate the industry's concerns in respect of s 99(1A). In particular, the disproportionality of the remedies available under that section in the case of disclosure issues, even if the issues were minor, technical, or caused little or no consumer harm. Without retrospective change to that section, it poses significant risk to the lending industry. Our submissions on that are below at paragraphs 99-112.

Timing and reliance on Regulations

15. Several of the Bill's key provisions create a framework only, with Regulations to flesh out the detail. For example, suitability and affordability inquiries, record keeping, disclosure requirements before debt collection, and advertising standards. Those draft Regulations are not yet available and, we understand, are unlikely to be available until after the Select Committee reports back on the Bill. In our view, the lack of detail in the Bill impacts the ability of key stakeholders to assess and make informed, meaningful submissions on the Bill's potential impacts.

16. Achieving good customer outcomes depends on a creditor's ability to update technology systems, documents, and processes to comply with changed requirements. When inadequate time is provided, manual workarounds are often required, which increases the risk of errors occurring. In their report into the conduct and culture of New Zealand retail banks, the Financial Markets Authority (**FMA**) and the Reserve Bank of New Zealand (**RBNZ**) recognised that manual processes have led to issues affecting customers.

17. We are particularly concerned about this risk as significant technology and process changes are likely to be needed to implement the Regulations, which, we understand, will be prescriptive.

18. Accordingly, we recommend extending the commencement dates of some provisions in the Bill to better align with the delivery of the Regulations. We believe this will provide a better result for consumers as it will ensure that creditors have time to develop robust frameworks and systems to meet their obligations.

19. For example:

    (a) As proposed, the record keeping requirements in the Bill will come into force on 1 March 2020. To implement those requirements, creditors will need to review and update existing technology systems or processes within a very short period.

    In some cases, creditors may need to create new systems and processes entirely as there is currently no express record keeping obligation in the Act. The Responsible Lending Code also currently allows creditors to evidence compliance in many ways.

    Further changes to those systems and processes will be required to reflect the Regulations which address suitability and affordability.

    (b) Complying with Regulations which set the extent and nature of suitability and affordability assessments is likely to require reprogramming of affordability calculators, as well as other tools and processes. Changes to these calculators can be highly complex. However, that work cannot begin until the detailed requirements are known, and the Regulations are promulgated.

    The systems and processes involved are likely to be the same systems which must be updated to comply with new record keeping requirements.

    NZBA therefore recommends deferring commencement of the Bill's provisions on record keeping, affordability and suitability, currently scheduled for 1 March 2020, until after Regulations are promulgated. We also suggest aligning the timing of Regulations around record keeping and suitability and affordability. Otherwise, there will be duplication of effort as impacted systems and processes will need to be changed twice.

20. Finally, we also encourage extending commencement dates to align with the Financial Services Legislation Amendment Act (**FSLAA**). Again, because compliance with FSLAA will require changes to the same technology systems and processes as will be affected by the Bill (particularly changes to comply with record keeping and suitability requirements). Training of staff across both regimes, which create similar responsibilities and disclosure duties, is also needed. To avoid timing conflicts or unnecessary duplication of work, we recommend aligning these regimes and providing enough time for delivery.

Interaction with other regimes

21. NZBA is generally supportive of principle-based duties which focus on setting expected behaviours.

22. However, we are concerned that there is risk of overlap between regimes which use different language to describe principles-based duties that are similar in substance, and have different penalty frameworks. That may lead to unnecessary complexity, create confusion, and mean that regulators approach similar issues in different ways. For example:

(a) There may be overlap with the duties proposed in MBIE's Conduct of Financial Institutions Options Paper. Particularly, the overarching duties to promote good customer outcomes – for example, the proposed duty to act with due care, skill, and diligence. The Options Paper also proposes an executive accountability regime, which may overlap with due diligence duties in the Bill.

(b) The lender responsibility principles in the Act are also similar, but not identical, to duties in FSLAA and its associated Code of Practice.

23. We consider that duties which are simple, clear, and consistent encourage compliance, and avoid confusion and implementation issues. That will also encourage regulators to take a consistent approach to similar duties across different regimes. Ultimately, that will promote good customer outcomes.

24. We also consider that some aspects of the Bill appear to address concerns that are wider than the those traditionally regulated under this Act. We believe these matters are already well regulated via existing regimes, or may be more fittingly dealt with elsewhere:

(a) Provisions relating to debt collection:

The Bill introduces a duty to make disclosure when debt collection begins for all credit contracts with natural persons. We understand the intent is to address concerns with the conduct of debt collection agencies and is intended to apply beyond consumer credit contracts.

Rather than introduce a disclosure obligation, we suggest addressing debt collection agency conduct through a separate regulatory regime, or, alternatively, under the Fair Trading Act 1986 (**FTA**).

That is because we do not believe that disclosure will address conduct. Prescribed disclosure is also unlikely to fit the wide range of debts collected and may unintentionally conflict or overlap with other regimes, for example, the Property Law Act 2007, Receiverships Act 1993, and the proposed Farm Debt Mediation Bill.

Additionally, we are concerned that the relevant stakeholders may not have visibility over the Bill, and therefore will not have an opportunity to comment during the Bill's development.

(b) Advertising regulations:

We believe the lender responsibility principles in the Act, the Responsible Lending Code, the Advertising Standards Code, and the FTA together create an appropriate framework for the regulation of advertising.

Additionally, the Commerce Commission regularly enforces the FTA where advertising is misleading or deceptive and there is significant judicial precedent in this area.

We query whether there is a need for another layer of regulation over advertising, given the existing body of regulation. If there is concern around advertising of high-cost credit, then Regulations should target that part of the industry only.

Detailed Submissions

Cap on interest and fees on high cost lending

Costs of borrowing on high cost lending must not exceed the first loan advance if the contract's interest rate is 50% pa or more. (Clause 22)

25. NZBA supports introducing a cap on borrowing costs for high-cost lending coming into effect on 31 March 2020, as proposed in the Bill.

26. This is a key way in which the Bill targets and addresses predatory lending practices and harm to vulnerable borrowers.

27. The cap will effectively limit the debt that can amass under a high-cost loan, minimising harm for borrowers who may need credit, but may be unable to access other forms of lower-cost credit. Very high interest rates and fees can contribute to unmanageable debt and debt spirals, and we consider this clause will be likely to address this potential for harm quickly.

Duties on directors and senior managers

Proposed duty on directors and senior managers to exercise due diligence to ensure a creditor complies with its duties under the CCCFA. (Clause 23)

28. NZBA supports this proposal.

29. However, we suggest some changes below to enable creditors to:

    (a) Correctly calibrate due diligence programmes and training for directors and senior managers.

    (b) Update or set up suitable processes, systems, and compliance policies.

30. Clarifying the matters below would promote the policy of the legislation and ensure that training is targeted on the people, processes, and issues that are most important.

Scope of due diligence duty

31. We suggest expanding (either via the Act or in Regulations) on the relevance of the 'nature of the business…' and the 'position… and nature of responsibilities…' in determining reasonableness:

    (a) If the creditor is a high-cost creditor, we expect that should change what is reasonable and this should be clearer in the Bill. We suggest that it may be suitable to state that, in those circumstances, more extensive inquiries or care, diligence, and skill is required by the director or senior manager.

    (b) If the creditor is a large creditor, with directors and senior managers who will have little day-to-day involvement in providing credit to consumers, we query how that will affect what is reasonable. We would expect it is reasonable, in some circumstances, for directors and senior managers to delegate developing processes and systems to those with suitable expertise and skills as part of due diligence. Again, we request that this be clarified in the Bill.

    (c) We believe the above distinctions are what the 'nature of the business' relates to, but request greater certainty.

32. We also suggest defining 'due diligence' as 'means taking reasonable steps' rather than 'includes...' to provide greater certainty around the duty, particularly given the penalties proposed.

Scope of who is a 'senior manager'

33. We suggest including a bright-line test to describe who is a 'senior manager' – for example, 'any person undertaking the role of the CEO or CFO' with a more detailed definition in support. That will allow creditors to give their employees certainty about whether they are a 'senior manager'.

34. At a minimum, we suggest clarifying that FMA comments on the meaning of 'senior manager' (made in respect of the Financial Markets Conduct Act 2013 (**FMCA**)) also apply to the interpretation of the term in the CCCFA.

Civil pecuniary penalties ─ directors and senior managers

> The Bill introduces new civil pecuniary penalties for breaches of director and senior manager due diligence duties. Other people will also face liability for aiding, abetting, inducing, being a party to a contravention, etc. Maximum pecuniary penalties will be $200,000. (Clause 36)
>
> A corporate will be unable to indemnify a director, senior manager, employee or agent against civil pecuniary penalties. And no person may obtain insurance to indemnify that person against civil pecuniary penalties. (Clause 36)

35. As discussed at paragraph 13(a), NZBA supports imposing a due diligence duty on directors and senior managers. We also support some form of penalty if directors or senior managers fail in that duty. However, any consequences must be appropriate and proportionate.

36. We consider that the proposed consequences of civil pecuniary penalties (with insurance and indemnities prohibited) and statutory damages are disproportionate and may drive excessively conservative lending practices to the detriment of consumers (discussed at paragraphs 10-13).

37. Comparable regimes in New Zealand and overseas do not impose personal liability for statutory damages or forbid indemnities and insurance for civil pecuniary penalties to the extent proposed in the Bill. The CCCFA risks being significantly out of step. Such regimes limit indemnities or insurance only in criminal or quasi-criminal cases, which involve intentional or at least reckless acts, and not where liability could be connected to an uncertain, principles-based, underlying obligation.

38. As presently drafted, directors and senior managers may be liable, for example, for minor mistakes (such as disclosure failings) that may amount to breaches of a duty.

39. As discussed above, we are also concerned that qualified candidates will be reluctant to accept senior roles in banks, and our members are already receiving enquiries from current employees about their potential exposure under this regime.

40. A similar issue arises for other employees who may face liability for being party to a contravention.

There are strong incentives to comply, without civil pecuniary penalties

41. Imposing a due diligence duty on directors and senior managers will incentivise them to promote compliance.

42. However, disproportionate penalties for breach of that duty may risk undoing the benefits of introducing the duty.

43. The Bill will achieve the policy objective of improved compliance through imposing that duty, coupled with increased use of the other available tools in respect of the creditor itself.

Extent of personal liability ─ directors and senior managers

44. We hold real concern over applying civil pecuniary penalties for breaches of

principles-based obligations, particularly for personal liability for directors and senior managers.

45. Many of a creditor's duties under the CCCFA are principles-based, rather than prescribed. Given that, directors and senior managers may find it difficult to know whether they have done enough to satisfy their due diligence duty. Such matters are always assessed with the benefit of hindsight, and that doubt may drive conservative behaviours.

46. Additionally, penalties should be proportionate to the likely harm arising. We do not believe that breach of a due diligence duty would cause material harm to consumers, *independent of any underlying breach by the creditor*. The proposed maximum of $200,000 therefore appears disproportionate.

47. We acknowledge that proposed s 107A(2) provides factors the Court must consider when setting a suitable penalty. However, we are concerned this will not provide enough certainty for directors and senior managers to counter the issues identified.

Civil pecuniary penalties – indemnities and insurance

48. The proposed prohibition on indemnities is unduly and disproportionately punitive:

    (a) The prohibition is similar in nature to the cartel conduct provisions contained in the Commerce Act 1986. However, the cartel conduct provisions are not principles-based.

    (b) The prohibition is also much more extensive than the Companies Act 1993, which also applies for FMCA purposes. That regime allows indemnities for certain costs and liabilities, other than criminal liability and liability for breach of good faith or best interests duties.

49. Similarly, the prohibition on insurance for civil pecuniary penalties is unprecedented:

    (a) The Commerce Act 1986 does not prohibit insurance.

    (b) The proposed prohibition relates to civil liability. In contrast, the Companies Act 1993 allows insurance for non-criminal liability, related costs, and costs for successfully defended criminal matters.

    (c) The proposed prohibition applies to all people (including the director/senior manager themselves), not just the underlying company.

50. We consider that forbidding indemnities and insurance goes too far, and risks undermining the policy goals by driving unnecessarily conservative behaviour. Directors and senior managers who owe statutory duties will take those duties seriously, and will not treat them lightly because they have the benefit of indemnities or insurance.

Suggested changes

51. We consider that a proportionate consequence for breaching the due diligence duty would be to impose pecuniary penalties for intentional or reckless breaches. The amount must also reflect the harm caused by the breach, and any other penalties imposed.

52. Directors and senior managers must also have suitable defences available, and access to insurance and indemnities consistent with other regimes, including the Companies Act 1993.

53. We suggest amending the civil pecuniary penalties regime so:

    (a) liability is only imposed for intentional or reckless breaches of duties, with suitable defences available;

(b) penalties imposed on directors or senior managers for breaches of due diligence are below the proposed maximum of $200,000, to reflect the lack of likely harm *independent of any underlying breach by the creditor*; and

(c) it better aligns with the Companies Act 1993/FMCA, whereby insurance and indemnities are not restricted, unless behaviour is reckless or wilful.

Statutory damages – directors and senior managers

The Bill introduces liability for statutory damages/compensation for directors and senior managers where there is a breach of their duty. Liability is 'joint and several' with the creditor and any other director, senior manager and other liable person. (Clause 40)

54. The purpose of statutory damages is to deter conduct that could risk causing harm. Given that, statutory damages should be borne mainly by the creditor.

55. NZBA does not consider that directors or senior managers should be liable for statutory damages. Rather, the policy goal of providing suitable compensation for borrowers can be achieved through other remedies in the Act and by allowing insurance cover.

56. In the event that this liability remains, we provide specific suggestions below to counteract the potential for a move towards conservative lending.

Suggested changes

57. Director and senior manager liability for statutory damages should only arise where there is a direct connection between the breach of the due diligence duty and the creditor's breach of duties:

    (a) It is unclear the extent to which the director or senior manager's breach must be connected causally to the creditor's breach for statutory damages to be imposed.

    (b) Given the broad meaning of the words used in the proposed section, the regulator or borrowers could allege due diligence breaches 'in respect of' any breach by the creditor of its duties under the Act. We do not think that was intended.

    (c) We suggest replacing 'in respect of' with 'directly connected to'.

58. Similarly, statutory damages should only be ordered against a director or senior manager if there has already been an equivalent order made against the relevant creditor:

    (a) The objective of statutory damages is to deter behaviour that may create a risk of harm. Director or senior manager liability for statutory damages should only arise as a back-up, if the creditor does not meet its statutory damages obligations.

    (b) Equally, we do not think the concept of 'joint and several' liability is correct. There is not a single liability with more than one person owing the liability — there are separate liabilities on each person. If the reference to 'joint and several' liability remains, the provision should also clarify the director or senior manager's liability is extinguished on payment by the creditor of statutory damages or compensation.

59. Liability should only arise where the director/senior manager's contravention was wilful, deliberate, or reckless and the creditor has failed to pay. This reflects the fact that lender responsibility principles involve a degree of judgement and interpretation.

60. Any statutory damages imposed on directors and senior managers must also be

proportionate to the potential for harm. We discuss this in more detail below.

61. Finally, we consider that the s 106 defence should also be available to directors and senior managers themselves – they should not be deprived of a defence available to the creditor. Other suitable defences should also be available as we have concerns the reasonable mistake defence, which relies on an suitable compliance programme, risks not being available for a breach of due diligence.

Civil pecuniary penalties – creditor

The Bill introduces new civil pecuniary penalties for breaches of the lender responsibility principles, including failing to keep records. Maximum pecuniary penalties will be $200,000 per act/omission for individuals and $600,000 per act/omission for corporates. (Clause 36)

62. NZBA supports the policy goal behind this proposal which is to drive compliance with the responsible lending principles.

63. However, we consider that this goal can be achieved by incentivising creditors to comply with the responsible lending principles through using injunctions, the new compliance orders, and (finally) banning orders.

Civil pecuniary penalties are inappropriate for principles-based duties

64. Complying with lender responsibility principles inherently involves a high degree of judgement.

65. As an example, the principles require creditors to make ***reasonable inquiries*** to be satisfied that it ***is likely*** the lending will be suitable and not result in ***substantial*** hardship. We stress the subjective elements of this requirement, on which reasonable creditors could form different views.

66. A creditor's assessment may also be affected by the nature of the product involved, and the borrower's broader circumstances.

67. In meeting the subjective lender responsibility principles around suitability and affordability, the duty to act with care, diligence, and skill, and the duty to help a borrower make an informed decision, are also important. A responsible creditor would ensure the borrower is aware of, and accepts, potential risks where a creditor holds concerns over affordability or suitability, having made reasonable inquiries into those matters:

    (a) An example is lending to a borrower who urgently needs a loan to make repairs to their car. The creditor may hold concerns over affordability, but the borrower explains they need access to credit because if they don't have their car, they can't work, which would have a long-term negative financial impact. The creditor offers credit, on the best terms available in the circumstances, to meet the borrower's needs. The creditor also carefully discusses the risks with the borrower to help them make an informed decision.

    (b) Another example is lending to older borrowers who may have significant assets but their income is lower, or is expected to reduce on retirement. Creditors may reasonably satisfy themselves that lending is suitable and affordable where the borrower accepts they may need to draw on their significant savings or assets if they cannot repay the debt from income.

68. A wider view of the borrower's financial circumstances, and their (often immediate) need for funds, is important. There is a balance required when making those decisions. The Act and the Regulations should provide guidance on what is suitable and should seek to penalise a lack of inquiries, inadequate inquiries, or where

lending was objectively irresponsible.

69. We consider that it is inappropriate to impose personal liability for ensuring a creditor meets duties which may involve considerable judgement.

Concerns that penalties will lead to conservative lending practices

70. The purpose of any penalty should be to encourage creditors to make reasonable inquiries, within a culture of compliance, that minimises the risk of unsuitable or unaffordable loans to consumers.

71. We are concerned that introducing pecuniary penalties for breaches of responsible lending principles will drive excessively cautious behaviour from responsible creditors, which could drive borrowers to less responsible creditors. This is the opposite of the intended result, and would not be a good customer outcome.

72. There are other powerful, and suitable, remedies available to ensure creditors comply with the lender responsibility principles, including injunctions, compliance orders, and banning orders which adequately address non-compliance, phoenix companies, and under-capitalised creditors.

73. Imposing pecuniary penalties is also likely to be disproportionate to the harm caused, particularly for record keeping duties. For example, the lack of record keeping may not necessarily mean lending in a particular situation was unaffordable or unsuitable.

74. In this respect, we reiterate our submission at paragraph 47 – we are concerned that s 107A(2) will not provide enough certainty for directors and senior managers to counter the issues identified.

Suggested changes

75. If high-cost lending is the concern, then civil pecuniary penalties should apply only to creditors offering that lending and breach their duties.

76. Otherwise, if civil pecuniary penalties are retained, they must fairly and proportionately reflect:

    (a) the relevant harm;

    (b) the degree of intent or recklessness involved;

    (c) the actions the creditor took to respond to the breach; and

    (d) any other penalties or enforcement imposed.

Statutory damages – breach of responsible lending principles

> The Bill introduces new statutory damages for failing to comply with the lender responsibility principles. For a breach of the lender responsibility principles to assess suitability or affordability, the maximum statutory damages will be all interest charges, credit fees, and default fees that have become payable under the agreement. For other lender responsibility principle breaches, the maximum statutory damages will be $6,000 or 5% of the credit limit, whichever is lower. (Clause 24)

77. The maximum statutory damages set for breaches of the Act must be measured and suitable, and reflect the potential for harm caused to consumers by the nature of the breach.

78. While we expect courts to take a sensible approach when applying statutory damages, we are concerned that, on paper, the proposed levels of statutory damages are too high. We are particularly concerned the maximum levels will be excessive for breaches of the lender responsibility principles and record keeping

duties.

79. Statutory damages are not compensation for harm. Instead, compensation is dealt with elsewhere in the Act, including through the ability to award compensation and exemplary damages under s 94. As reflected in commentary on overseas regimes, statutory damages are set to deter behaviour that has the potential for harm. Statutory damages should be linked to the seriousness of the breach and proportionate to the actual or potential loss suffered.

80. Penalising a creditor with all costs of borrowing for failing to make reasonable inquiries also creates the same potential disproportionality that exists in s 99(1A) of the Act, which is being addressed by the Bill.

81. Costs of borrowing represent all the revenue earned by a creditor, not just their profit, and is critical for the solvency of many smaller creditors. Awards at the maximum of costs of borrowing could put smaller creditors out of business and expose banks to prudential risk. It also does not fairly reflect the benefit the borrower has had from using the funds lent, and creates a significant windfall. Additionally, issues with affordability or suitability may not be discovered for many years. This creates long-term systemic risks to the industry.

82. For breaches involving a few loans, the maximum statutory damages could be significant, and will multiply quickly if there are more than a few loans impacted. For example:

    (a) If 1,000 home loans were impacted by a disclosure breach, statutory damages would be $6,000,000.

    (b) If 100,000 home loans were impacted (which is not impossible given heavily automated systems and processes) statutory damages could reach $600,000,000.

    Where costs of borrowing are involved, those amounts could become even more significant, threatening the solvency of many creditors.

83. Those amounts bear little relationship to the likely need to deter conduct that could be at risk of causing harm; issues may not be due to poor or irresponsible lending practices. We therefore strongly urge that the level of statutory damages is set at a level that reflects the likely potential for harm.

84. As already discussed, compliance with the lender responsibility principles involves a degree of judgement and interpretation. Bright-line statutory damages for breaches of principles-based duties do not reflect or recognise that subjective part.

85. Other jurisdictions have not gone down this path and have instead restricted these types of damages to disclosure breaches only, and at far lower levels:

    (a) Australia has a civil penalty regime, rather than statutory damages, and caps penalties at a total of $500,000 for all borrowers affected by a single disclosure issue, if the creditor self-reports.

    (b) Equally, Canada only awards statutory damages where the creditor had *no* compliance programme, had an ineffective compliance programme, or did not correct the disclosure issue once discovered. Statutory damages in Canada are also capped at $500 per borrower, significantly lower than the maximums in the Act and the Bill.

86. The nature of breach is important in assessing the appropriateness of statutory damages.

87. The statutory damages are not to be awarded for a breach of a duty to ensure

lending is *not unaffordable or unsuitable*. Instead, the breach will be for *failing to make reasonable inquiries* to decide whether the lending was likely to be affordable or suitable. This is an important distinction. The lender responsibility principles focuses on the *nature of inquiries*, and we question whether statutory damages is suitable given the likelihood of harm caused by that type of breach.

88. Similarly, for the provisions covered in s 88, the breach will be a failure to provide disclosure. The failure of disclosure, particularly where minor or technical, may cause little or no harm to consumers. The maximum statutory damages in those situations would be inappropriate.

89. As stated above, the quantum of any statutory damages should be linked to the level of likely harm that could be caused by a breach. Our concern is that the existing and proposed levels of statutory damages are excessive in that context. For example, a creditor may have failed to make reasonable inquiries, but the lending may still be entirely suitable and affordable. In that case, statutory damages at the maximum of costs of borrowing would be wholly inappropriate.

90. The issue is even more obvious for record keeping duties. The lender responsibility will be to hold records of the inquiries a creditor has made into suitability and affordability. The corresponding breach will be a lack of records, or inadequate records. This will not necessarily mean underlying lending is unsuitable or unaffordable, merely that the creditor has failed to meet a procedural requirement to hold records. Statutory damages at a maximum of $6,000 or 5% of the credit limit appears excessive. We suggest that a breach of record keeping should instead be dealt with by compliance orders or infringement notices under s 102A of the Act.

91. The Act already provides mechanisms for addressing poor behaviour and irresponsible lending practices, which protect consumers without the need to award statutory damages at excessive levels. The severity of any breach or the creditor's behaviour is better addressed through the court's ability to award exemplary damages. Exemplary damages may be awarded if statutory damages (at a lower level) or compensation awarded under other provisions is inadequate to address harm.

92. Compliance with responsible lending principles can also be more effectively encouraged through using other tools, such as civil pecuniary penalties, criminal fines, injunctions, compliance orders, and ultimately banning orders.

93. We reiterate our concern that this proposal will drive excessively conservative lending practices, which will disproportionately affect access to credit and the financial inclusion of vulnerable consumers.

94. Incentives to comply can be achieved within the Act's existing framework, and by introducing new tools like compliance orders, without the need to introduce statutory damages.

Suggested changes

95. We strongly recommend that statutory damages should not be available for breaches of the lender responsibility principles or record keeping duties.

96. If retained for lender responsibilities, we consider that the maximum levels should be reduced to better reflect the likely harm that those statutory damages are intended to deter. Additionally, because relying on court guidance creates doubt and will drive conservative lending behaviours.

97. We urge that the default position for statutory damages is at the minimum level. The court should then have the ability to increase amounts, to a maximum, or reduce or extinguish amounts, to better reflect the level of harm caused, the creditor's

behaviour, and other relevant matters.

98. Finally, we suggest addressing breaches of record keeping through compliance orders or as an infringement offence under s 102A, given the lack of likely harm to consumers from a breach of a procedural requirement.

Relief in respect of s 99(1A)

The Bill provides that a creditor can apply to the Court for relief against ss 48 or 99(1A). However, relief can only be sought for costs of borrowing that arise after commencement. (Clause 29 and Schedule 1)

99. NZBA supports this change.

100. However, without retrospective change to s 99(1A), the section could continue to be interpreted in a way that poses significant risk to the lending industry.

101. The meaning of this section has not been clarified by the courts, but one interpretation is that consumers are not liable for interest and fees if there are disclosure issues, even if the issues were minor, technical, or caused little or no consumer harm.

102. If s 99(1A) continues to apply to loans entered after June 2015, and requires a refund of interest and fees paid, it could put smaller creditors out of business, lessening competition. It could also expose other creditors to significant risk.

103. The disproportionality recognised by the proposed changes to s 99(1A) is equally true for costs of borrowing arising between June 2015 and the commencement of the new provision.

104. Section 99(1A) will continue to apply, unmodified, to disclosure breaches involving any loans entered into after June 2015. The costs of borrowing amounts involved over the nearly four years since its introduction is large for many creditors.

105. If the changes are not retrospective, creditors will also have a long tail of unknown potential liability, as disclosure issues may go undiscovered for many years. Creditors will continue to be exposed to risk for accidental or technical disclosure issues long into the future.

106. Without retrospective change, there is a real risk that a minor error in disclosure, which has no borrower impact and does not reflect irresponsible or poor lending practices, will have serious consequences. Smaller creditors who have an unintended breach could end up going out of business.

107. The lending industry as a whole has sought retrospective change to s 99(1A) to avoid this doubt and risk.

108. We stress that retrospective change is needed to s 99(1A) to ensure creditors are not at risk of being disproportionately punished for immaterial issues or those that cause little or no harm to consumers. The lack of any proportionality in s 99(1A) in its current form, regardless of interpretation, is not fit for purpose and will continue to pose risk to the lending industry as a whole.

109. We accept that law changes are usually not retrospective. Given the disproportionate impact of s 99(1A) has now been recognised, we see this as a fitting case for retrospectivity.

110. The policy goal of correcting the disproportional impact of s 99(1A) can only be fully achieved by applying the proposed amendments for all costs of borrowing arising since the introduction of s 99(1A). Mitigating the disproportionate impact of s 99(1A) is an urgent and compelling concern.

111. Retrospective change will not undermine consumer protection. Consumers can cancel contracts in some cases, and can seek statutory damages. The Commerce Commission also has powers, including the ability to seek injunctions, compliance orders, other compensation orders, or ban creditors if there is egregious behaviour causing harm. Section 99(1A) itself would also continue to apply more proportionately.

Suggested changes

112. NZBA strongly supports the introduction of s 95A:

  (a) We consider that it should apply retrospectively in respect of costs of borrowing paid or payable since the introduction of s99(1A).

  (b) There is an argument raised (including in the current case of *Commerce Commission v Linsa Finance*) that s 99(1A) creates a duty to forfeit (and not just a block on enforcement) such that a duty to refund arises under s 48 for a breach of s 99(1A). NZBA does not agree that s 48 would apply and oblige creditors to refund amounts received during a period of non-compliance under s 99(1A) outside of an enforcement situation. NZBA wishes the Select Committee to note this difference of view and be cognisant that it is a live issue.

Reliance on information provided

Under the Act, creditors can rely on information a borrower/guarantor gives unless the creditor has reasonable grounds to believe the information is unreliable. The Bill would require creditors to verify information borrowers/guarantors give in a wide range of circumstances. (Clause 10(3))

113. We query whether the harm that this change is targeting is clear, and whether the change is a proportionate response.

114. Section 9C(7) currently requires creditors to make further enquiries if they have reasonable grounds to believe the information given to them by a borrower is not reliable. We believe this is a suitable standard and should drive correct inquiries by the creditor around whether the information is reliable.

115. If the issue with s 9C(7) is that some creditors are failing to make *any* inquiries, then this is clearly in breach of the lender responsibility principles. The proposed penalties and enforcement mechanisms should be used to incentivise compliance.

116. If the issue is, instead, that some creditors are failing to consider whether they have *reasonable grounds to believe the information is reliable*, then again, the proposed penalties and enforcement mechanisms will incentivise compliance.

117. Or, if the issue is that some creditors fail to consider *what* inquiries they should make or whether they *should* verify information when making *reasonable inquiries*, then we suggest changing, not repealing, s 9C(7). For example, s 9C(7) could be amended to state that, if a creditor intends to rely on information a borrower gives, the creditor must have reasonable grounds to believe the information provided is reliable. Further guidance could then be provided through the Responsible Lending Code on the types of inquiries that could be made, including how or when information should be verified. We note that the proposed Regulations will also provide added prescription.

118. Also, if this is seen as a particular issue for high-cost lending, then we suggest amending s 9C(7) to specify that creditors under high-cost credit contracts must verify or confirm information.

119. We are concerned that repealing s 9C(7) may have unintended consequences, particularly for vulnerable borrowers who may find it difficult to provide evidence of income and expenses in the usual ways. For example, immigrants and refugees may have difficulty providing evidence of previous account behaviour or income. The self-employed, contractors, and other borrowers may also have sporadic income evidence.

120. Additionally, a creditor must rely on information the borrower gives about what their objectives and requirements are when making reasonable inquiries into suitability. Those objectives and requirements will often be subjective and will not be independently verifiable.

121. Reliance on borrower information is also critical for variable, rather than fixed, expenses. Requiring a creditor to verify all expenses would not only be time consuming, but may be impossible. For example, gathering three months' worth of electricity bills will not give the creditor a view of the borrower's average bill over a year, given seasonal changes. We also know that borrowers taking on new debt are likely to change their spending behaviour, so use of living expense curves is more suitable than reviewing information on historic expenses.

122. While we agree some confirmation of income and fixed expenses is appropriate, there may be many ways that this is done. For example, using information already held about the borrower, or benchmarking.

123. Requiring independent confirmation of all information would also cause delays in processing and may increase the cost of processing lending applications. It may also mean borrowers are less willing to move their lending to other creditors, given their existing creditor will have an advantage in already holding their information. These are not likely to lead to good customer outcomes.

124. Extensive proof requirements will also make online or phone application processes difficult and add delays in the ability to access credit when needed.

125. Removing a creditor's ability to rely on information a borrower provides does not reflect the borrower's responsibility to be truthful and complete when applying for credit. As the Court of Appeal noted in *Fortes v Bank of New Zealand*[1]:

> *As a general proposition, to impose a duty on lenders to go behind what borrowers tell them and make inquiries in the borrower's interests would be both inefficient and potentially unfair to lenders.*

126. We are also concerned that even where a borrower commits fraud, causing the creditor loss, a creditor could be held to have breached the lender responsibility principles if they failed to verify the borrower's information. The borrower could then be entitled to all costs of borrowing, despite the fact they lied or omitted information. We think this would be unfair and that this moral hazard must be avoided. If a borrower does provide fraudulent/false information that appears genuine, that borrower should not be able to benefit if the creditor did not make further enquiries.

127. The removal of s 9C(7) and increased prescription through Regulations may require large changes to technology systems and processes to collect and verify supporting information given by a borrower. For example, banks would need to develop systems to identify what information is needed, and, based on the evidence provided, specify what confirmation must be completed across multiple systems and processes, and products. It is vital that lenders be allowed enough time to make these changes.

[1] [2014] NZCA 346.

Suggested changes

128. Changes in this area should target an identified harm. While we believe the current standard strikes a fitting balance, we suggest amending the provision so it requires creditors to consider if they have reasonable grounds to believe the information a borrower gives is reliable.

129. Alternatively, if high-cost lending is of concern, we suggest that s 9C(7) is amended, so creditors under high-cost consumer credit contracts must confirm information given by a borrower when making reasonable inquiries into affordability.

130. Again, we recommend the commencement of this provision is deferred until Regulations about suitability and affordability are promulgated, given creditors will need to make changes to the same systems and processes to meet increased prescription.

Advertising

Creditors must comply with Regulations around advertising of consumer credit. Regulations will specify how creditors advertise interest rates and what fee information must be included. (Clause 12)

131. We support responsible advertising, but cannot provide meaningful comment on this proposal until the draft Regulations are available. We do, however, query whether there is a strong need for further regulation of advertising, or if there is clear evidence of harm. We are concerned the new regulation will be out of step with identified harms.

132. As noted above at paragraph 24(b), advertising requirements are already clearly addressed through the existing legislative regime, and enforced by the Commerce Commission.

133. Added clarity could be provided through the Responsible Lending Code, rather than Regulations which risk being inflexible given the range of advertising and credit products in the market.

134. If the concern is with advertising of high-cost lending, then we suggest targeting any prescriptive regulation at that type of lending, rather than all lending.

Suggested changes

135. We are interested to understand the problems and harm that have been identified in respect of advertising so that we can engage on a suitable response to those issues.

136. We recommend careful consideration of how much prescription is actually needed in this area, given the FTA and other available tools that can be used to ensure advertising is at a suitable standard.

137. Given the wide range of advertising that creditors undertake, including online, it is important that creditors are provided sufficient time to make system changes – for example, a lead in time of at least 12 months, starting from when the Regulations are finalised.

Suitability and affordability

Regulations will set how creditors must assess suitability and affordability. They are likely to specify requirements to collect and verify income, expenses, and likelihood of repayment, and specify scenarios where lending may be ‘unsuitable’. (Clause 10)

138. NZBA supports greater clarity around how creditors make reasonable inquiries into suitability and affordability.

139. However, we cannot provide meaningful comment on this proposal until the draft Regulations are available.

140. We believe the focus for those Regulations should be on improving customer outcomes. The Regulations should provide for an overriding principle of the 'customer's best interests' to ensure they remain flexible and suitable for the wide range of consumers and credit types available. For example:

(a) When considering a customer's income and expenses alone, and not the customer's wider financial situation, a creditor may have concerns about the affordability of a debt consolidation loan. However, when looking at the customer's wider financial situation, it may be that a debt consolidation loan would be more affordable than the borrower's current debts. A creditor should not be in breach of the responsible lending principles if it makes that loan, provided they have acted with care, diligence, and skill and have helped the borrower to make an informed decision.

(b) Where there is a home loan to joint borrowers, and one borrowers dies, the surviving borrower may want to take over the loan so they can remain in their home. The creditor may have concerns about whether that loan is affordable for the surviving borrower. But on compassionate grounds, and to avoid upheaval at a difficult time, the creditor believes it is in the borrower's best interests to stay in their home. The creditor may then work with the borrower to consider their options in the longer term. Provided the creditor acts with care, diligence, and skill and helped the borrower to make an informed decision, the creditor should not be in breach of the responsible lending principles.

(c) A borrower may need emergency access to a small loan or overdraft, at a low interest rate. The borrower may be unable to provide all the income or expense information that may otherwise be needed in a normal application, given time pressure. But the creditor has information about the borrower based on their ongoing relationship with them and understands the need for credit and the borrower's general financial situation. While the creditor may have some concerns about affordability, the need for short term access to credit is pressing, and the creditor approves the loan. Provided the creditor acts with care, diligence, and skill and helps the borrower to make an informed decision, the creditor should not be in breach of the responsible lending principles.

141. We strongly recommend that the Regulations focus on the specific problems identified around compliance with suitability or affordability. This may be for specific types of credit, rather than all credit. Or, where the risk of consumer harm from more judgemental credit decisions may be higher.

142. The Regulations should also be flexible in how they apply to different product types and for lending of different amounts. For example, an emergency overdraft of $100 with relatively low interest and fees to allow a borrower to buy food should be permitted with fewer inquiries than an application for a home loan of $500,000.

143. As discussed above, the harsh penalties proposed for a breach of the responsible lending principles are disproportionate and may lead to excessively conservative lending decisions by responsible creditors. Vulnerable borrowers may be forced to borrow from high-cost lenders. The Regulations must support financial inclusion by remaining flexible and targeting irresponsible lending practices.

144. The changes in Regulations will mean creditors must review, change, or set up new compliance systems and processes – as discussed above. This work is likely to be

complex, particularly if creditors offer multiple products. Time is needed to develop robust systems and avoid the need for manual workarounds. For example, most affordability assessment processes are automated and will require technology changes if extra income or expense information must be collected and verified beyond what creditors currently do.

Suggested changes

145. We urge Officials to provide draft Regulations for public consultation as soon as possible. It is important that the industry has the opportunity to provide feedback so the Regulations promote sound and responsible lending practices, without driving conservative behaviour.

146. We see the overriding policy objective in this area as improving customer outcomes by guiding creditors on the base assessments needed for suitability and affordability. With that in mind, we recommend that Regulations:

    (a) prioritise customer outcomes and the best interests of the borrower based on their wider financial situation and goals;

    (b) recognise that differences in products and loan amounts may drive a need for different assessments and scope of inquiries; and

    (c) address specific harm arising.

147. We also recommend the Bill's provisions do not come into force until after the Regulations are promulgated, as discussed above at paragraph 19.

Record keeping – suitability and affordability

The Bill provides that creditors must keep records of inquiries made for 7 years, showing how the creditor satisfied itself of suitability and affordability. Records must be made available, on demand and for free, to the Commerce Commission, borrowers, guarantors, and dispute resolution schemes. (Clause 11)

148. NZBA supports a requirement to provide information about how a creditor satisfied itself as to suitability and affordability, but we are concerned that it is not appropriate to provide detailed credit assessment methodologies. That is because:

    (a) Methodologies are commercially sensitive and proprietary information.

    (b) Disclosure of methodologies could lead to increases in fraud.

149. We suggest clarifying that creditors are not obliged to disclose assessment methodologies or assessment information to borrowers or guarantors, other than the inputs they provided for the creditor to make the assessment.

150. Where appropriate, assessment methodologies or assessment information could be provided to the Commerce Commission or dispute resolution schemes instead, with suitable confidentiality and use of information arrangements. However, borrowers may be uncomfortable with their personal financial information being provided to the Commerce Commission. Appropriate confidentiality and use provisions should be included.

151. We consider that the provision should make it clear that it does not apply where a creditor has declined lending. The provision should not be used as a mechanism for borrowers to challenge declined applications, and instead should work as an incentive on creditors to make reasonable inquiries *where they do lend*.

152. We are also concerned about privacy issues that may arise for joint borrowers or borrowers and guarantors. To comply with the Privacy Act 1993, a borrower would be entitled to information about them, but not necessarily information about any joint

borrower. Similarly, where guarantors request information about the financial circumstances of a borrower, creditors will generally refer the guarantor to the borrower directly or require the borrower's express consent before providing that information.

153. We suggest the provision should be clarified so that any duty to provide information is limited to information about *that* borrower or guarantor alone. Otherwise, the provision should expressly address the Privacy Act 1993 to prevent conflicts.

154. This may require large changes to technology systems and processes for many creditors. For example, creditors may collect and record information a customer gives, and the outputs of any credit decision, but may not necessarily retain the underlying credit assessments in a readily producible format. Those changes may take some time to carry out well.

155. We suggest that the record keeping duties should come into force after the Regulations are promulgated, given the records must demonstrate matters that will not be known until the Regulations are finalised.

Record keeping – fee justification

The Bill creates a duty to keep records of how fees were assessed as reasonable and provide those records on demand to the Commerce Commission or disputes schemes, for up to 7 years. (Clause 21)

156. We note the Banking Ombudsman Scheme does not generally have jurisdiction to hear disputes about fees (see paragraph 3.7 of the Banking Ombudsman Scheme Terms of Reference).

157. We propose either that:

   (a) jurisdiction for assessing the appropriateness of fees rests solely with the Commerce Commission; or

   (b) the duty to provide records to a disputes scheme should only apply if the relevant disputes scheme has jurisdiction to hear disputes about fees. The duty to provide records should also be only for the fees that are the subject of a dispute.

158. Given the commercial sensitivity of the information that will be involved, we suggest providing suitable confidentiality and use of information provisions for any records provided.

Advertising in another language

The Bill provides that, if a creditor advertises a credit product or provides information in another language, and the creditor suspects a borrower has an inadequate understanding of English, the creditor must give disclosure in the language it advertised in. (Clause 14)

159. We accept the potential for borrower harm where a creditor knows or believes a borrower cannot understand English, but nevertheless contracts with them in English.

160. However, there must be a balance between protecting vulnerable borrowers from harm where they enter contracts they may find difficult to understand, and restricting information about the range of borrowing choices.

161. We believe the Act already addresses this issue through a creditor's responsibility to help the borrower to reach an informed decision and be reasonably aware of the full implications of a contract. The Responsible Lending Code also provides strong guidance for creditors, including recommendations around translation.

162. We believe creditors should be encouraged to provide foreign language material to fulfil this responsibility (which benefits the borrower), but creditors should not be forced to make full disclosure in that language given the severity of penalties imposed for disclosure breaches.

163. Requiring full initial disclosure in other languages would mean that creditors must develop customised disclosure documents, and would increase the risk of disclosure errors.

164. We are concerned that in its current form, this provision will drive many creditors to choose not to advertise their credit products in other languages. We believe this may have an unintended effect in that it could limit the information available to vulnerable borrowers about their rights and the range of credit available to them. We believe this could encourage those borrowers to seek credit from higher-cost, higher-risk sources which are visible in their communities.

165. The provision also appears to have an unintentionally wide scope, and we have concern with respect to its practicality:

(a) The provision applies regardless of whether a debtor has seen the creditor's advertising. For example, the advertising could be in publications with limited audience or that target a particular part of the public.

(b) The provision extends to *any information* provided to a debtor. We do not believe this was intended or is practical given the nature of duties imposed on creditors.

For example, a staff member may provide information to a specific borrower in another language during a conversation. The creditor may then be required to provide other borrowers with disclosure in that language if they believe they may have a better understanding of that language. The drafting in s 17A(1)(c) refers to 'a debtor' rather than the debtor to whom information was given in s 17A(1)(b).

(c) Creditors will need to accurately assess a borrower's English competence and form a judgement as to whether disclosure can be made in English.

(d) The provision also appears to be triggered if the creditor advertised in another language within 12 months of the contract being entered into. When the Bill is finalised and passed, we will be within 12 months of the proposed commencement date for this provision. This would mean that creditors will be required to make decisions about whether to continue advertising in different languages (before they know what the final obligations will be, if any). This could be addressed through amendments to the Bill's transitional provisions in Schedule 1AA.

166. We strongly suggest that this provision is limited to genuine advertising (rather than the provision of information), to ensure the requirements are targeted and practical.

167. We also believe a shorter window between advertising and disclosure is appropriate, for example, three months. We think it is very unlikely that a borrower would contact a creditor in response to an advertisement they had seen or heard a year earlier.

168. We encourage Officials to work with the industry to provide further guidance in the Responsible Lending Code on how creditors can best help vulnerable borrowers, including those for whom English is a second language. That guidance could cover the range of ways creditors will interact with borrowers, including digitally.

Debt collection disclosure

The Bill creates a duty to disclose certain information before commencing “debt collection” for any credit contract with a natural person. The details of information that must be disclosed will be in Regulations. (Clause 42)

169. We cannot provide meaningful comment on the disclosure information until the draft Regulations are available.

170. From information in the Regulatory Impact Statement, it appears the concern is over the behaviour of third party debt collection agencies.

171. We are unsure that added disclosure by the creditor will address the behaviour concerns raised and it may affect customer experience as creditors already give considerable written correspondence to consumers in default.

172. The proposed provision is also not limited to consumer credit contracts. We are concerned the scope is broad and applies to all credit contracts with natural persons – for example, sole traders, trustees, partnerships, individuals borrowing for business or investment purposes. Many farm loans fall in to this category.

173. Clarity is needed as to how this requirement will interact with other disclosure obligations and debt recovery processes, like mortgagee sales and receiverships. For example, we are concerned the content of any debt recovery disclosure may conflict with requirements for notices under the Property Law Act 2007.

174. The nature of disclosure required may also be unsuitable for the wide range of entities and debts the provision will capture. For example, we question whether disclosure of an overdraft sent to a collection agency could be the same as repossession of a car, appointment of a receiver, or mortgagee sale for a home loan.

175. We suggest that, if kept, the provision should only apply to the extent there are not existing duties to provide notices on debt recovery under other legislation. The provision should also only apply where the debtor is not a wholesale client, the credit has been acquired for personal, domestic, or household purposes, and the creditor carries on a business of providing credit.

Suggested changes

176. The harm being targeted should be carefully considered to ensure the regime is proportionate and effective from that perspective. For example, if the concern or harm is the behaviour of debt collection agencies, we would suggest direct regulation of those agencies.

177. Additionally, the regime should be limited so that it only applies to consumer credit contracts.

178. We also suggest clarifying that this process is not triggered by reaching an agreed payment arrangement whether for the debt or any arrears.

179. We also suggest clarifying who has the disclosure duty when collection has been outsourced (ie the creditor, the collector, or both).

Call in power

The Bill provides for Regulations to be made declaring an arrangement to be a consumer credit contract. (Clauses 13 and 43)

180. NZBA supports the power to declare certain contracts to be consumer credit contracts, subject to our comments below.

181. Although there are safeguards around when this power could be invoked, we would appreciate more clarity as to the boundaries for its use. For example, we think the power should only be available where:

(a) the debtor is a natural person (and not a trustee, etc);

(b) the credit is being acquired predominantly for personal, domestic, or household purposes; and

(c) the declaration is for a limited period before it must be reconfirmed through legislation or regulation – for example, 12 months with the ability to renew for a further 6 months.

182. We believe this certainty is important for all parties, including for securitisation programmes run by some creditors. In some programmes, loans are selected to be part of the programme because they are not consumer credit contracts. The status of all credit contracts, and many other arrangements, would be less certain when this power is in place.

183. We suggest that 'buy now, pay later' or deferred payment services are deemed to be consumer credit contracts. We are concerned these types of services may cause harm due to lack of affordability assessments and the potential for high default fees.

184. Our members' experience is that some customers may meet their payment obligations to these services by using credit cards, or by overdrawing their accounts. Customers also appear to use these services when their access to traditional credit has been restricted. Our understanding is the number of customers who miss payments is also high. We note also that there are reviews already underway on these types of services in Australia, and we recommend they are addressed quickly in New Zealand to prevent potential harm.

Additional observations

The Bill amends the definition of 'Relevant Guarantee' to include a carve-out for guarantees given by trustees of a family trust. (Clause 9)

185. NZBA supports this change as it will help create consistency in the way the Act treats individuals who are acting as trustees of a family trust.

186. However, there is need for further change here, as the concept addressed (individuals acting in a non-personal capacity) is wider than purely trustees of family trusts. We believe ensuring certainty in the scope of duties is vital given proposed prescription in Regulations around how creditors assess affordability for guarantors.

187. We suggest expanding the carve-out to s 9B so it also cover individuals acting as partners of partnerships or trustees of any trusts. An equivalent carve-out to s 15(1) would also be prudent meaning that, where a borrower is a trustee of a trust or a partner of a partnership, there is no need to consider whether the borrowing is to be used, or is intended to be used, wholly or predominantly for personal, domestic, or household purposes. We think this is the policy intent of the various provisions in the Act, including ss 11, 12, and 15.

Section 9K – Publication of costs of borrowing

188. If a creditor is asked to provide costs of borrowing information to a borrower under s 9K(4), there is no clear ability for the creditor to give that information electronically, with the borrower's consent.

189. Section 9K contrasts with ss 9J(4) and (5), about standard form contracts, which expressly allow the creditor to provide the information in an electronic

communication.

190. We suggest including an equivalent of s 9J(5) in s 9K to avoid any doubt about whether a creditor can provide a costs of borrowing information electronically.

Changes to disclosure provisions

191. NZBA supports the proposed changes to the disclosure rules in ss 32 and 35. They are a good step, however, we consider that they could be further enhanced.

192. We agree with the underlying policy that disclosure plays an important part in protecting consumers. However, to embrace a digital world we need flexibility ─ to provide faster, more efficient services to meet borrower expectations and improve the customer experience.

193. The Act must help provide flexibility by being technology neutral, or expressly enabling parties to use digital tools to meet their compliance duties. Creditors must be able to meet the rules and protections imposed by regulation regardless of how creditors and their borrowers interact. Substance must be more important than form. 'Digital' provides opportunities for timely, better quality disclosure to consumers in the electronic form they seek.

Consumers are demanding digitisation

194. New Zealand consumers have embraced digitisation, and now demand fast, easy, and flexible services. In particular, customers want more convenient and timely communications and the ability to 'self-serve' and make changes to their credit contract direct.

195. We understand that customers are also actively turning off paper statements and are instead accessing information about their credit contracts electronically.

196. Our members report that they complete hundreds of thousands of variations to consumer credit contracts that borrowers ask for each year. For example, since 2015, one member reports that it has completed over 2 million variations of home loans alone. Posting or handing borrowers paper disclosure statements in those volumes is inefficient for creditors and unwanted by consumers. The environmental costs of producing and sending paper statements is also inappropriate, and digital disclosure must be encouraged to reduce the industry's carbon footprint.

197. To meet customer demand and enable digital business growth, NZBA considers that it is important the Act allows creditors to make disclosure through online self-service channels. Essentially, the Act must become technology neutral.

198. The Act currently constrains the way creditors interact with borrowers in the context of consumer credit contracts. Creditors should be able to meet the rules and protections imposed by the Act, regardless of how creditors and consumers interact.

199. We recognise the demand for digital services creates challenges around how and when we protect consumers and manage the conduct of creditors. Keeping the right balance is important. Concerns that 'digital' presents greater risk for consumers must be tempered by the overwhelming use of digital services by those consumers. The risks noted with 'digital' around access often also arise with 'analogue' services.

200. In our view, digital services will improve consumer protection and access to information by providing timely, quality disclosure and increased transparency:

(a) With digital disclosure, consumers will receive information about their credit contract in a timely and effective way – far faster than post, given cuts in postal services.

(b) The constraints inherent in electronic forms, like mobile banking

applications, also means information must be targeted and concise. Good digital design conveys information clearly and simply and ‘at a glance’.

Separate notices are unnecessary where disclosure is provided electronically

201. It is important that changes to the disclosure provisions in the Act are comprehensive and create a law that embraces and enables digital technology.

202. We think that proposed subsections 35(1)(c) to (e) should be simplified. In particular, we do not think that sending a separate notice should be required for electronic disclosure. This treats digital disclosure differently to postal disclosure and would impose unnecessary processes. The rules for paper and digital should be the same.

203. Creditors have no duty to advise a borrower before posting disclosure – we struggle to see why creditors must give notice when making the same information available in electronic form.

204. Equally, borrowers will expect creditors to communicate with them in the channel they are interacting in. The current drafting may mean that if a borrower asks for changes while online, the creditor would need to send a separate notice that disclosure was available in the channel the borrower is already using. That would be an undesirable outcome.

Distinguishing ‘electronic form’, ‘electronic communication’, and ‘information system’ in proposed s 35(1) may cause confusion

205. We also note that proposed changes to subsection 35(1)(c) may create doubt over whether a creditor may include the disclosure statement within the content of an electronic communication.

206. We assume that deleting the reference to electronic communication in subsection (c) is intended to widen that subsection, confirming that other methods are available as well as sending electronic communications. However, we think that should be made clearer in the drafting.

Method of disclosure where there is more than one party

207. We support the proposed changes to s 35(2) as this will help clarify how disclosure must be made where there is more than one borrower. However, we suggest further amending s 35(2), to make it even clearer that where a disclosure statement must be given to two or more people:

    (a) if they ask for one copy only, or have or specify the same information system, then disclosure made to one of those people is treated as made to all those people; and

    (b) if those people have consented to the same electronic form, then disclosure made to one of those people in that electronic form is treated as made to all those people.

208. We think this will address where borrowers have the same email address or joint internet banking access.

209. We also suggest inserting a new subsection into s 35. We believe where disclosure must be made to one person as borrower and as guarantor, disclosure to them as borrower should meet any duties to disclose to them as guarantor. We think this would clarify that creditors do not need to send separate disclosure to a guarantor, where the borrower and guarantor are the same person, and the borrower will receive disclosure.

To address the issues above, we suggest the following drafting changes to s 35:

We suggest aligning the language in s 35(1) with s 32(4):

(1) Disclosure must be made by:

(a) giving the disclosure statement to the person to whom disclosure is to be made; or

(b) sending the disclosure statement by post to that person's place of residence last known to the person making disclosure or to an address specified by the person ~~for this purpose~~; or

(c) ~~in the case of an electronic communication, sending the disclosure statement to the information system specified by the person for that purpose; or~~ giving or making the disclosure statement available in electronic form, whether by electronic communication or otherwise.

Alternatively, we suggest amending s 35(1):

(1) Disclosure must be made by:

(a) giving the disclosure statement to the person to whom disclosure is to be made; or

(b) sending the disclosure statement by post to that person's place of residence last known to the person making disclosure or to an address specified by the person ~~for this purpose~~; or

(c) ~~in the case of an electronic communication, sending the disclosure statement to the information system specified by the person for that purpose; or~~ making the disclosure statement available in electronic form, including by:

(i) sending the disclosure statement in an electronic communication to the information system specified by the person;

(ii) sending an electronic communication to the information system specified by the person that allows the disclosure statement to be accessed in electronic form; or

(iii) making the disclosure statement available in electronic form by means of the Internet, a mobile application, or other electronic platform.

Remove proposed s 35(1A).

Change s 35(2):

(2) If a disclosure statement must be given, sent, or made available to more than one person, disclosure to all those people is treated as having been made if:

(a) the disclosure statement is given, sent, or made available to any of them; and

(b) all those people agreed to receive one copy or have the same the place of residence, have specified the same address, information system, or electronic form.

Change proposed subsection 35(4):

(4) For the purposes of sections 27 and 99 to 102, when disclosure is made by making the disclosure statement available in electronic form ~~sending the disclosure statement to a person by means of an electronic communication,~~

the disclosure is to be treated as having been made on the second working day after the day on which the statement is sent.

Change proposed subsection 35(5):

(5) For all other purposes, the disclosure is to be treated as having been made to a person:

(a) on the day on which the statement is posted to the person; or

(b) on the day and at the time on which the disclosure statement is sent to the person ~~to the information system specified by~~ or made available in electronic form ~~the person; or~~

(c) ~~if subsection (1)(d) or (e) applies, on the day on which the electronic communication referred to in that paragraph is sent to the person~~.

Add new s 35(6):

(6) Disclosure to a guarantor under sections 25(1)(b) or 26 is treated as made where the same or similar information is disclosed to that person as debtor under sections 17, 18, 21, 22, 23, or 24.

Issues with s 21(1)(b) – enable greater flexibility

210. Under s 21(1)(b), disclosure under s 18 is not required if the creditor maintains a website allowing the borrower to access the information in s 19, and the borrower consents to receiving disclosure through that website.

211. There are two key problems with this section as currently drafted:

(a) Using the term 'website' is too narrow. It may exclude other types of electronic platform commonly used by borrowers, like mobile banking apps. This restricts digital innovation and doesn't reflect customer demand. The Act must not become a barrier to that digital service – specifically where the same required information is or can be made available easily.

To clarify, we suggest providing that disclosure isn't required if the creditor maintains a website, mobile app, or other software or electronic platform allowing access to the information if the borrower agrees.

(b) The section refers to the continuing disclosure information listed in s 19. However, s 19 lists certain types of information which do not fit easily with how information is typically provided on internet banking and mobile banking applications.

For example, s 19 requires disclosure of the opening and closing dates of the period covered by a statement, and opening and closing unpaid balances. On electronic platforms, a 'running balance' with recent transaction information is displayed (usually a current month or up to 90 days), with the ability to search for older transaction information, by date or by transaction, as required.

To meet s 21(1)(b), as currently drafted, many creditors publish PDF copies of continuing disclosure statements, which we believe is unnecessary when modern online methods provide more flexible access to information.

Similar issues arise with the required information in s 19 if the creditor relies on ss 32 and 35 to provide the information in electronic form (despite amendments proposed). We also suggest more fundamental changes to ss 18 and 19 to better cater for continuing disclosure in electronic form, including in running balances.

212. We recommend changes to s 21(1)(b) and to ss 18 and 19, below to address these concerns.

To address the issues above around use of the word 'website' and better cater for running balance disclosure online, we suggest amending subsection 21(1)(b) and adding a new subsection 21(1A) as follows:

21 Continuing disclosure is not required

(1) Disclosure under section 18 is not required if:

(a) [repealed]

(b) in connection with the consumer credit contract:

(i) the creditor maintains (at all reasonable times) a website<u>, mobile application, or other electronic platform,</u> that allows the debtor to access the information set out in ~~section 19~~ <u>subsection (1A)</u> as is applicable to the contract for any reasonable ~~statement~~ period specified by the debtor; and

(ii) the debtor consents to the information set out in <u>subsection (1A)</u> being disclosed in the manner set out in subparagraph (i); or

(c) neither interest charges nor credit fees are payable under the consumer credit contract.

<u>(1A) Under subsection 21(1)(b), as much of the following information as is applicable to the consumer credit contract is disclosed for the reasonable period specified by the debtor under subsection 21(1)(b)(i):</u>

<u>(a) the date, amount, and a description of each advance during that period; and</u>

<u>(b) the date and amount of each interest charge debited to the debtor's account during that period; and</u>

<u>(c) the date and amount of each amount paid by the debtor to the creditor, or credited to the debtor during that time period; and</u>

<u>(d) the date, amount, and a description of each fee or charge debited to the debtor's account during that time period; and</u>

<u>(e) the unpaid balance after each of the transactions referred to in subsections (1)(a) to (d) above; and</u>

<u>(f) the current unpaid balance; and</u>

<u>(g) the amount and time for payment of the next payment that must be made by the debtor under the contract; and</u>

<u>(h) the annual interest rate or rates applying during that time period, and if that interest rate or rates changed during that time period, the date and a description of each change; and</u>

<u>(i) for a credit card, a prescribed minimum repayment warning and other prescribed information for payments under a credit card contract (as those terms are defined in section 19(2).'</u>

Alternatively, if our suggested expansion to s 35 is accepted (see above), we suggest repealing s 21(1)(b) and making the following drafting changes to ss 18 and 19:

18 Continuing disclosure

(1) Every creditor under a consumer credit contract must ensure that disclosure of as much of the information set out in section 19 as is applicable to the contract is made periodically to every debtor under the contract in continuing disclosure statements.

(2) ~~The maximum period for a continuing disclosure statement is:~~ Where disclosure under subsection (1) is made in electronic form by means of a website, mobile application, or other electronic platform the creditor must ensure the electronic form:

(a) ~~in the case of a revolving credit contract, 45 working days; or~~ is available to access at all reasonable times; and

(b) provides or allows the debtor to access up to seven years of information or if the contract has been in place for less than seven years, information from the start of the contract.

(3) ~~This section is subject to section 21.~~ In all other cases, disclosure under subsection (1) must be made at least every 45 working days for revolving contracts and every 6 months for any other consumer credit contract.

(4) This section is subject to section 21.

19 Content of continuing disclosure

(1) Every continuing disclosure statement must contain as much of the following information as applicable to the consumer credit contract~~.~~ for the periods set out in section 18(2) or 18(3):

(a) the date, amount, and a description of each advance during that period; and

(b) the date and amount of each interest charge debited to the debtor's account during that period; and

(c) the date and amount of each amount paid by the debtor to the creditor, or credited to the debtor during that time period; and

(d) the date, amount, and a description of each fee or charge debited to the debtor's account during that time period; and

(e) the unpaid balance after each of the transactions referred to in subsections (1)(a) to (d) above; and

(f) the current unpaid balance; and

(g) the amount and time for payment of the next payment that must be made by the debtor under the contract; and

(h) the annual interest rate or rates applying during that time period, and if that interest rate or rates changed during that time period, the date and a description of each change; and

(i) for a credit card, a prescribed minimum repayment warning and other prescribed information for payments under a credit card contract (as those terms are defined in section 19(2).

Address the interaction between ss 22, 23 and 21(1)(b)

213. We also ask that urgent changes are also made to ss 22(4) and 23(6).

214. Sections 22(4)(b) and 23(6)(b) provide that, for certain types of changes, disclosure may be made when the creditor provides the borrower with the next continuing disclosure statement. This construction is problematic for two reasons.

215. First, variation disclosure under those sections can only be provided with the next continuing disclosure statement *if the creditor is required to make continuing disclosure*:

(a) Where a creditor and borrower agree the borrower will access information on a website, that works as an exception to the duty to provide continuing disclosure (rather than as alternative means of making that disclosure). Section 21 states 'disclosure under section 18 is not required if…'. Therefore, the variation disclosure exceptions in s 22(4)(b) and s 23(6)(b) do not apply where s 21(1) is met. This forces the creditor to provide the disclosure in paper form or by an electronic communication, even though the borrower has expressly requested continuing disclosure information is given electronically.

(b) We do not believe this was the intent behind ss 22(4) and section 23(6). We believe variation disclosure should be able to be made in or with the next continuing disclosure statement under s 18, or online if continuing disclosure is not required under s 21(1)(b).

216. Second, ss 22(4)(b) and 23(6)(b) provide that variation disclosure may be made *'at the same time as'* the creditor provides continuing disclosure:

(a) The construction focuses on when variation disclosure may be given, but creates doubt about whether that variation disclosure can be included within the next continuing disclosure, or must be a separate document.

(b) Section 32(2) arguably allows variation disclosure to be provided within the next continuing disclosure statement, as that section allows disclosure to be included as part of 1 or more other documents. However, we think this should be clarified, particularly given the penalties imposed for a breach of the disclosure provisions.

217. In this context, we would propose retaining the requirement that variation disclosure for the purposes of hardship applications under s 55 should be made before the change takes effect.

We suggest amending section 22(4) as follows (with the same changes to be made to section 23(6)):

22 Disclosure of agreed changes

…

(4) The disclosure referred to in subsection (3) may be made, at the creditor's discretion, either:

(a) within 5 working days of the day on which the change takes effect; or

(b) if the creditor is required to make continuing disclosure under section 18, in or with the next continuing disclosure statement (as required under that section) after the change takes effect; or

(c) if the creditor is not required to make disclosure under section 18, in or with the information the creditor makes available in electronic form under section 21(1)(b) within 5 working days of the day on which the change takes effect.

Consent to disclosure in electronic form is unnecessary in a digital age

218. Sections 21 and 32 require that electronic disclosure is only permissible where a borrower consents to receiving information in electronic form.

219. The Act allows a borrower to consent by signing up to services on terms and conditions which provide generally for electronic disclosure.

220. However, we believe needing specific consent to disclosure in electronic form is unnecessary in today's digital age. After all, this is not required for postal disclosure (despite postal services being infrequent, and in some rural areas, non-existent). We think consumers demand, and are comfortable with, accessing information digitally.

221. Removing consent will not decrease consumer protection. The protections for consumers around disclosure are already strong, including the disclosure rules themselves and the lender responsibility principles.

222. Rather than needing consent, we suggest that a creditor should make it clear how disclosure will be made.

223. Electronic disclosure could be described in initial disclosure. Schedule One currently requires creditors to include a statement in their initial disclosure if the creditor consents to receive notices or other communications in electronic form from the borrower. We suggest this should be broadened. Creditors should include information in their initial disclosure about how *the borrower* will receive notices and other communications from *the creditor*, so this is drawn to the borrower's attention.

We suggest removing section 32(5) and changing section 32(4) as set out below:

(4) The requirement to make disclosure in writing may be met by giving or making available the required information in electronic form, whether by means of an electronic communication or otherwise. However, if information is given or made available in electronic form~~, if:~~ that information must be readily accessible so as to be useable for subsequent reference.

(a) ~~the information is readily accessible so as to be useable for subsequent reference; and~~

~~(b) the person to whom the disclosure is required to be made consents to the disclosure being made in electronic form and by means of an electronic communication, if applicable.~~

We suggest changing section 21 as set out below:

21 Continuing disclosure is not required

(1) Disclosure under section 18 is not required if:

(a) [repealed]

(b) in connection with the consumer credit contract~~:~~,

~~(i)~~ the creditor maintains (at all reasonable times) a website, mobile application, or other electronic platform, that allows the debtor to access the information set out in ~~section 19~~ subsection (1A) as is applicable to the contract ~~for any reasonable statement period specified by the debtor; and~~

~~(ii) the debtor consents to the information set out in section 19 being disclosed in the manner set out in subparagraph (i)~~; or

We also suggest some changes to paragraph (u) of Schedule One below:

~~Consent to~~ Disclosure in electronic form, including in an electronic communication

(u) if disclosure statements, notices, or other communications under the credit contract by either party may be made ~~the creditor consents to~~

	~~receive notices or other communications from the debtor~~ in electronic form, whether by means of an electronic communication or otherwise: (i) a statement to that effect~~.~~, and (ii) a description of the electronic form and how changes to that electronic form are to be notified.

Review and align variation disclosure under sections 22 and 23

224. Section 22(3) allows for disclosure of agreed variations to be made after a change, rather than before, if that change reduces the borrower's obligations, extends the time for payment, releases security, or changes the credit limit. (A similar provision applies at s 23(5) for unilateral variations).

225. Creditors may disclose after a change under one subsection under s 22(3), but this may conflict with another subsection under s 22(3).

226. For example, if a creditor and borrower agree to change the payment frequency from monthly to fortnightly, the borrower will pay off their loan sooner and pay less in interest – reducing their long-term debts. However, by changing the payment frequency from monthly to fortnightly, the borrower has more payments to make in a year, and those payments will be higher than previously ─ increasing the borrower's immediate duties. This change won't reduce the borrower's obligations in the short term, so it's questionable if s 22(3)(a) will apply.

227. These issues mean that where a change increases the borrower's obligations in any way (regardless of materiality), the creditor must disclose before that change takes effect. Practically, this means that to avoid risk of breach creditors must disclose before a change takes effect for the overwhelming majority of changes that consumers ask for.

228. The exceptions provided in s 22(3) and (4) are rendered meaningless. We strongly suggest aligning variation disclosure under ss 22 and 23 by allowing all variation disclosure to occur after the change is made.

229. This is more efficient and avoids uncertainty. We think there is strong consumer demand for this approach and it is simply sensible when the nature of changes under s 22 is considered.

230. Under s 22, where borrowers ask for a change, creditors can't action that change until they have disclosed information in writing, despite helping the borrower to make an informed decision under the lender responsibilities. This limit delays carrying out requested changes. For example, a borrower may ask for a change to their payment amount to take effect immediately. Banks cannot meet this request because they must make disclosure of the change the borrower has asked for before it takes effect. This unnecessary delay is particularly problematic where changes are requested by telephone or online.

231. Debtors are also unlikely to misunderstand changes they've asked for and agreed to. Any concerns could be further addressed through a cooling off period for changes (subject to exceptions where the change has resulted in the banks entering funding arrangements, for example, fixed interest rates). We also think enough protection is provided by the lender responsibility to help consumers to make an informed decision when there are changes to the contract.

232. In respect of our proposal for a new s 22, we note that is an alternative to our proposed amendments above at pg 32 and is our preferred approach. Additionally, the proposed new s 22(2) relies on the proposed amendment to Schedule 1 (u) also being adopted.

We suggest replacing both ss 22 and 23 with a new s 22:

22 Disclosure of changes

(1) Subject to subsection (3), every creditor under a consumer credit contract must ensure that disclosure of the following information is made to every debtor under the contract if ~~the parties to the contract agree to~~ there is a change to the contract:

(a) full particulars of the change; and

(b) any other information prescribed by regulations to be information that must be disclosed under this section.

(2) Disclosure under this section must be made ~~before the change takes effect.~~: within 5 working days of the day on which the change takes effect.

(3) ~~Despite subsection (2), disclosure may, instead of being made in accordance with that subsection, be made in accordance with subsection (4), but only if the change is one that:~~ Where a creditor exercises a contractual power to change the interest rate, a fee, or a charge, or how they are calculated, a creditor may, instead of complying with section 35, follow any publication requirements prescribed by regulations.

(4) Subsection (3) does not apply to a high-cost consumer credit contract within the meaning of section 45A.

(5) Disclosure under this section is not required in relation to a particular debtor if the creditor cannot reasonably locate the debtor.

~~(a) reduces the obligations that the debtor would otherwise have, unless the obligations are reduced following an application under section 55; or~~

~~(b) extends the time for payment of any payment to be made under the contract, unless the time for payment is extended following an application under section 55; or~~

~~(c) releases the whole or any part of a security interest relating to the contract; or~~

~~(d) increases any credit limit under the consumer credit contract.~~

~~(4) The disclosure referred to in subsection (3) may be made, at the creditor's discretion, either:~~

~~(a) within 5 working days of the day on which the change takes effect; or~~

~~(b) if the creditor is required to make continuing disclosure under section 18, at the same time as the creditor provides the debtor with the next continuing disclosure statement (as required under that section) after the change takes effect.~~

Proposals in relation to ss 23 and 26

233. To satisfy ss 23 and 26 of the Act, a creditor can take advantage of the alternative publication rules set out in the Regulations.

234. Under the Regulations, a creditor must disclose by public notice in several newspapers, display information at all their places of business, and, if the business has a website, on that website.

235. Debtors increasingly deal with banks online only. Disclosure in branches and in newspapers is increasingly ineffective to bring information to our borrowers'

attention. Disclosure in newspapers is also costly.

236. We suggest there is an opportunity to update the Regulations. Creditors should be allowed to disclose by public notice, displaying information on a website, or displaying information at their places of business if the creditor does not have a website.

237. Additionally, the Bill proposes changes to ss 23 and 26 excusing a lender from providing certain disclosure if the lender cannot reasonably locate the customer or guarantor (as is the case currently for continuing disclosure under s 21(2)(a)). We submit this change should make it clear that lenders should not be required to make the usual disclosure if the lender has attempted to make the disclosure and it is undelivered (eg because the email address is not incorrect). A comparable change should also be made to section 26A.

238. Our proposed amendments are subject to the proposal above at paragraph 209 that disclosure is not required when the guarantor and the borrower are the same person.

Amendment to ss 21(2)(a) and new sections 23(8) and 26(6), adding the following text to the end of each subsection:

… including where any disclosure sent by post or means of an electronic communication is returned undelivered.

A similar provision should be added to section 26A as follows:

(2A) Disclosure under this section is not required in relation to a particular debtor or guarantor if the creditor cannot reasonably locate the debtor or guarantor, including where any disclosure sent by post or means of an electronic communication is returned undelivered.

Schedule 1(o)

239. Paragraph (o)(i) of Schedule 1 should be amended to clarify that lenders may use both figures and methodology to describe payments:

We suggest amending paragraph (o)(i) of Schedule 1:

(o) if more than 1 payment is to be made

(i) the amount of the payments, or the method of calculating the amount, or both; and