chapman tripp

To: Finance and Expenditure Committee

On: Credit Contracts and Consumer Finance Amendment Bill

23/06/2025

chapman tripp

Introduction

This submission is from full service law firm Chapman Tripp, PO Box 993, Wellington 6140. We have offices in Auckland, Wellington and Christchurch.

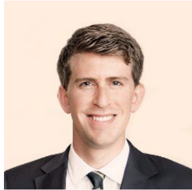
We wish to be heard. Our contacts for the purposes of this submission are:

Emma Sutcliffe
Partner
MOB : +64 27 294 9114
DDI : +64 4 498 6323
Email : Emma.Sutcliffe@chapmantripp.com

Luke Ford
Partner
MOB : +64 27 242 8143
DDI : +64 9 357 9298
Email : Luke.Ford@chapmantripp.com

Sarah Jackson
Special Counsel
MOB : +64 27 487 9506
DDI : +64 4 498 2403
Email : Sarah.Jackson@chapmantripp.com

Emma Peart
Senior Associate
MOB : +64 27 541 1950
DDI : +64 4 498 4986
Email : Emma.Peart@chapmantripp.com



Janko Marcetic
Senior Associate
MOB : +64 27 342 7429
DDI : +64 9 357 9696
Email : Janko.Marcetic@chapmantripp.com

chapman tripp

Background

1 Chapman Tripp welcomes the opportunity to submit on the Credit Contracts and Consumer Finance Amendment Bill (*CCCF Amendment Bill*), as the issues are highly relevant to many of our clients.

2 We focus on those proposals that we think could be materially improved, particularly where we consider that they do not (as drafted) meet the policy intent of the legislation. We also suggest some technical drafting changes.

3 Our submission does not purport to represent the views of any of our clients. We have no objection to our submission being published.

Summary of submissions on the CCCF Amendment Bill

Proportionate consequences for disclosure failures – clauses 32 to 34

4 We support the proposed repeal of sections 99(1A), 101(2) and 102(2) of the Credit Contracts and Consumer Finance Act 2003 (the *CCCFA*).

5 We also support the retrospective application of sections 95A and 95B of the CCCFA to credit contracts subject to section 99(1A) (i.e., consumer credit contracts entered into between 6 June 2015 and 20 December 2019). We consider that retrospective legislation is appropriate in this situation because:

5.1 no consumers have 'fruits' of a court victory that will be undermined;

5.2 section 99(1A) of the CCCFA has the potential to create vastly disproportionate results; and

5.3 the amendment will not undermine consumer protection, as the court will have discretion to determine what is just and equitable in a particular case.

Disclosure improvements needed

Continuing disclosure via website – clause 12

6 While we support allowing continuing disclosure information to be provided via a website where a running balance is made available instead of an opening and closing unpaid balance, we suggest two improvements to clause 12 in paragraph 31 to cover the use of apps and to avoid the unnecessary provision of paper statements.

Debt collection disclosure – clause 43

7 We recommend reconsidering the proposed definition and role of "credit limit notices" in the context of debt collection disclosure, as we believe the current drafting is likely to cause unintended issues. In particular, it should be permitted for a lender to request both overlimit and overdue amounts in a single notice during the concessionary period, without triggering a need to make debt collection disclosure. Requiring separate notices would be confusing for consumers. It should also be clear how the concession periods apply to amounts that are both overdue and overlimit. Our suggested clarifications are set out below in paragraph 34, but we consider that this area requires further consultation with lenders.

Other disclosure amendments

8 We recommend that the CCCF Amendment Bill also deals with other known issues with the disclosure regime, in particular:

8.1 Removing the requirement to provide "full particulars of the change" (in addition to the change itself and information required in the regulations) from sections 22, 23, 24 and 26 of the CCCFA – this would remove significant uncertainty introduced into the legislative requirements by the Commerce Commission's various (and differing) interpretations of that term.

8.2 Consent to receiving disclosure electronically should be able to be implied by conduct, as is the case under the Contract and Commercial Law Act 2017 (*CCLA*).

Express trusts and partners of a partnership – clauses 8, 11, 14 and 21

9 We support the replacement of "family trust" with "express trust" in relation to setting the boundaries of 'consumer credit contracts' and 'relevant guarantees'. The concept of an express trust better accords with the policy position that the protections of the consumer credit regime do not apply to trustees of trusts.

10 We also support the proposed changes to restrict disclosures to guarantors that are not acting as trustees of an express trust or partners of a partnership, as this will address an inconsistency with the current law.

Director and senior manager duty and pecuniary penalties – clause 20

11 We support the repeal of the director and senior manager duty, as the liability settings for directors and senior managers of lenders are too onerous and have caused considerable concern among lenders.

12 The complete prohibition on insurance and indemnities for pecuniary penalties is inconsistent with other relevant pecuniary penalty regimes and should be repealed.

Overly broad definition of "relevant CCCFA services" – clause 24

13 The definition of "relevant CCCFA services" extends beyond the extent to which any given activity is regulated by the CCCFA. This is because it incorporates other defined terms without the context in which they are used in or regulated by the CCCFA. Instead, those parts of the defined term that are too broad should be narrowed as set out in paragraph 44.

Regulatory duplication – clauses 51 and 24

14 We do not support the level of overlap in the proposed regulations caused by various legislative provisions regulating the same conduct. In particular, we note that the CCCF Amendment Bill:

14.1 Applies the Financial Markets Conduct Act 2013 (*FMCA*)'s fair dealing regime *as well as* the Fair Trading Act 1986 (*FTA*), rather than *instead of* as the Cabinet Economic Policy Committee agreed. In the case of consumer credit contracts for example, this results in three regimes prohibiting misleading and deceptive information, as the responsible lending provisions of the CCCFA also contain such a prohibition.

14.2 Provides for stop orders under both the FMCA and the CCCFA for restricted communications in respect of the possible supply of relevant CCCFA services, for example where the restricted communication is false or misleading, or likely to mislead or confuse in a material particular.

The FTA should be disapplied to "relevant CCCFA services", consistent with the decision of the Cabinet Economic Policy Committee.

Detailed submissions on the CCCF Amendment Bill

Proportionate consequences for disclosure failures – clauses 32 to 34

15 We support the retrospective application of sections 95A and 95B to credit contracts subject to section 99(1A) (i.e., consumer credit contracts entered into between 6 June 2015 and 20 December 2019), and the repeal of sections 99(1A), 101(2), and 102(2) of the CCCFA going forward. We commend the analysis in the Regulatory Impact Statement (*RIS*),[1] and make limited additional comments on this point.

16 It is well-recognised that, as a starting point, legislation should not have retrospective effect.[2] However, it is also well-recognised that retrospective legislation may be appropriate and justifiable in certain circumstances – including the retrospectivity applying to litigants of completed or pending litigation before the courts.

17 We consider that retrospective legislation is appropriate in this situation because:

17.1 no consumers have 'fruits' of a court victory that will be undermined;

17.2 section 99(1A) has the potential to create vastly disproportionate results; and

17.3 the amendment will not undermine consumer protection.

We expand on each of these points below.

18 The retrospective application of sections 95A and 95B will ensure that throughout the period that section 99(1A) applies, the courts will have the express discretion to reduce or extinguish the effect of s 99(1A) where it is just and equitable to do so. Under the current law, the Court does not have this *express* discretion for the period 6 June 2015 and 20 December 2019.

19 **No consumers have 'fruits' of a court victory that will be undermined:** The Legislative Design and Advisory Committee Legislative Guidelines (the *Guidelines*) recognise that retrospective legislation may be appropriate to provide certainty as a result of litigation, including to amend the law in light of the anticipated outcome of a court proceeding that is still in progress.

20 The Guidelines confirm that there is strong convention that Parliamentary legislation should not generally interfere with the judicial process in particular cases before the courts, but that there may nonetheless be good reasons why a law ought to be retrospective *and* to apply even to parties in a completed or pending court case.

21 We note the RIS considered whether the CCCF Amendment Bill should apply to litigation currently underway in respect of section 99(1A). We agree that "*[p]roviding the court with explicit discretion to deliver a just and equitable outcome is not, in our*

[1] Regulatory Impact Statement: Whether to apply legislation retrospectively to give courts discretion when considering consequences for disclosure failures by lenders (5 March 2025).

[2] Legislation Act 2019, section 12; Legislation Design and Advisory Committee "Legislation Guidelines" (2021 edition), Chapter 12, Parts 1 and 2.

view, an objectionable kind of interference with proceedings already before a court."[3] In particular:

21.1 as the authors of *Burrows and Carter Statute Law in New Zealand* note, depriving a person of the "*fruits of a victory in the courts*" is controversial (although nonetheless justified in certain cases).[4] However, the CCCF Amendment Bill does not deprive a consumer of the fruits of a victory, because the meaning and effect of section 99(1A) has not yet been determined by the courts;[5]

21.2 as noted in the RIS, the meaning of section 99(1A) is not yet settled. It is possible that a court would find it already has a discretion to reduce or extinguish the effects of section 99(1A) (irrespective of section 95A);[6] and

21.3 the CCCF Amendment Bill does not retrospectively repeal section 99(1A), it merely ensures that Courts have the *express* power to apply discretion to reduce its effects where it is just and equitable to do so. Accordingly, if the full forfeiture scenario is the correct interpretation, as a necessary implication the CCCF Amendment Bill will only negatively impact those consumers where a full forfeiture would be unjust and inequitable.

22 **Section 99(1A) could create disproportionate results:** One potential interpretation of section 99(1A) is the 'full forfeiture scenario', namely a finding that section 99(1A) requires lenders to forfeit the full costs of borrowing (i.e., interest and fees), no matter how inconsequential the disclosure failure, without any discretion by the court. Under any measure, full forfeiture of the costs of borrowing would be a severe remedy. However, section 99(1A) has the potential to create vastly disproportionate and draconian results when it is paired with the strict and technical requirements of section 17 (initial disclosure) and section 22 (variation disclosure).

23 The CCCFA is an important piece of consumer protection legislation. However, it is also highly prescriptive and technical, which increases the likelihood of minor breaches and/or breaches which do not result in any consumer harm. For example, the CCCFA requires that initial disclosure includes the creditor's registration number under the register of financial service providers.[7] This is a register of all financial service providers hosted by the Companies Office that records the different types of financial services provided by a creditor and the relevant dispute resolution scheme (which must also be separately disclosed). A creditor's registration number is publicly available and accessible through other means. It is difficult to envisage a situation in which a creditor's failure to include its registration number could cause a consumer harm.

24 If a court were to find that the full forfeiture scenario interpretation of section 99(1A) is correct, then consumers could find themselves able to claim years of interest rates

[3] RIS, Executive Summary. See also [63]-[64].

[4] RI Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, online ed, 2021) at 815.

[5] RIS, [18].

[6] RIS, [18(f)].

[7] Schedule 1, paragraph ub.

and fees, for breaches which have not caused them any harm. This would be a windfall for those consumers, which – as the RIS recognised – could come at the cost of other consumers.[8]

25 **The amendment will not undermine consumer protection:** Creditors are still subject to section 91(1A). The amendment will only have the effect of allowing the courts to consider whether allows the court to extinguish or reduce the effect of section 99(1A) where it is just and equitable to do so. For agreements entered into before these amendments come into force, the starting point will remain that section 99(1A) applies.

26 In considering whether it is just and equitable to reduce the effect of section 99(1A), the Court is required to consider:[9]

26.1 the role that section 99(1A) has in providing incentives for compliance with the CCCFA;

26.2 whether the creditor had an appropriate compliance programme;

26.3 the extent of, and the reasons for, the breach(es);

26.4 the extent to which any person has been prejudiced by the breach(es);

26.5 whether the breach was due to a reasonable mistake or due to events outside the creditor's control;

26.6 whether the breach was remedied (to the extent that it could be remedied) as soon as practicable after the breach was discovered;

26.7 the extent to which the creditor has compensated or offered to compensate any person who has suffered loss or damage by the breach; and

26.8 any other matters as the court thinks fit.

27 We consider that the amendment is the minimum possible intervention. It will not undermine consumer protection, but it will instead allow the courts to ameliorate the potentially draconian and disproportionate effects of section 99(1A) where it is just and equitable to do so.

28 In addition to section 99(1A), creditors will also be held to account for compliance under other mechanisms in the CCCFA including (as relevant) through criminal offences, statutory damages, compensation orders (to the extent statutory damages do not adequately compensate the loss or damage), exemplary damages to punish outrageous conduct, and injunctions and compliance orders.

---

[8] RIS at [31] and [47].

[9] Section 95B.

Disclosures

Continuing disclosure changes – clause 12

29 While we support allowing continuing disclosure information to be made on a website where a running balance is made available instead of an opening and closing unpaid balance, section 21(1)(b) should be extended to allow for disclosure by app to reflect modern technology and customer preferences.

30 In addition, a lender who has provided continuing disclosure information by internet banking using the concession in section 21(1)(b) of the CCCFA, should not be required to provide copies of all continuing disclosure statements if the borrower subsequently decides to elect a different disclosure method (currently required by section 21(3) of the CCCFA). Practically, if a customer changes their mind about internet banking currently, many years' worth of statements may need to be posted to the customer if an email consent is not held. Instead, section 21(3) should be limited to the situation where continuing disclosure is not made due to one of the events in section 21(2) (which relate to no continuing disclosure information being provided to the borrower for a period).

31 To achieve these changes, the CCCF Amendment Bill should:

31.1 amend section 21(1)(b)(ii) by replacing "website" with "website or software application"; and

31.2 amend section 21(3) by replacing "this section" with "subsection (2)".

Debt collection disclosure – clause 43

32 The proposed definition and role of a "credit limit notice" is confused and does not deal with the possibility that an amount owed by a customer may be both overlimit and overdue, or that accounts may have separate (or only partially overlapping) overdue and overlimit amounts. For example, in respect of credit cards, an account can be overdue (as a minimum payment has not been paid) and have a separate overlimit amount, if that amount is not overdue until it has been demanded and remains unpaid.

33 Issues arising from the proposed changes in clauses 43(2) to 43(4) of the CCCF Amendment Bill include:

33.1 A lender cannot request the payment of both an overlimit amount and an overdue amount in a single notice without triggering a need to make debt collection disclosure. Both the current definition of "payment reminder" and the proposed definition of "credit limit notice" are restricted to documents *only* requesting a payment that is overdue or a payment so that the credit limit is no longer exceeded respectively. In our view it would be confusing for consumers to receive separate notices in relation to the same amount, or multiple amounts owing under one consumer credit contract.

33.2 It is not clear how or if the concessions apply where an amount is both overdue and overlimit (particularly where the request for payment is within the 6 month concession for a "payment reminder", but after the expiry of the 1 month concession for a "credit limit notice").

34 We strongly recommend reviewing the proposed intention and drafting of these concessions with lenders to ensure that they are fit for purpose, and that changes to these proposals do not have other unintended consequences. Our suggested changes to improve the workability of the concessions are:

34.1 to provide that a document is not disqualified from being a payment reminder or a credit limit notice by virtue of covering both overlimit and overdue amounts by amending:

(a) clause 43(4) of the CCCFA Amendment Bill, to insert the words "subject to subsection (6A)," at the start of paragraph (b) of the definition of credit limit notice; and

(b) section 132A of the CCCFA to:

(i) in subsection (6), insert the words "subject to subsection (6A)," at the start of paragraph (a)(ii) of the definition of payment reminder; and

(ii) insert a new subsection (6A) as follows:

(6A) A communication that requests both a payment that is overdue and a payment so that the credit limit is no longer exceeded (regardless of whether some or all of the amount is both overdue and overlimit) is:

(a) both a payment reminder and a credit limit notice if it is made within 1 month of a debtor causing a credit limit under the contract to be exceeded; and

(b) a payment reminder but not a credit limit notice if it is made within 6 months of a default in payment but after 1 month of a debtor causing a credit limit under the contract to be exceeded.

34.2 providing that an amount that is both overdue and overlimit can still be subject to a concession by deleting the existing clauses 43(2) and 43(3) of the Bill and amending section 132A(5)(a) of the CCCFA as follows:

(a) if the act to recover (or attempt to recover) money is ~~either~~ 1 or more of the following:

(i) a payment reminder provided by the creditor who made the advance under the credit contract:

(ii) a credit limit notice provided by the creditor who made the advance under the credit contract:

(iii) a payment reminder provided by a person to whom the rights of a creditor have been transferred by assignment or operation of law (the assignee), if the assignment did not occur for the purpose of the assignee undertaking debt collection:

(iv) a credit limit notice provided by a person to whom the rights of a creditor have been transferred by assignment or operation of law (the assignee), if the assignment did not occur for the purpose of the assignee undertaking debt collection:

Other disclosure issues

35 We recommend that the CCCF Amendment Bill also deals with other known issues with the disclosure regime. In particular:

Disclosure of variations to borrowers and guarantors

35.1 We recommend limiting the disclosure of variations to borrowers and guarantors to the specific change and the information required by regulation 4F, 4G or 4H of the Credit Contracts and Consumer Finance Regulations 2004 (the *CCCF Regulations*), as applicable. This is consistent with the general understanding of the intent and purpose of those regulations at the time they were introduced.

35.2 The assorted Commerce Commission guidance on the variation disclosure obligations provided after those regulations were promulgated (containing several different interpretations as to what was required), have introduced significant uncertainty into the area. Some of that guidance cut across the express requirements of regulation 4F (e.g. required updated total interest and total payment figures for the life of the contract to be produced, in addition to the total of future interest and total of future payments).

35.3 As such, we recommend making it very clear that no such alternative interpretations are possible by removing the words "full particulars of" in sections 22(1)(a), 23(2)(a) and 26(2)(a) of the CCCFA, and removing the words "full particulars concerning" from section 24(2)(b) of the CCCFA.

Electronic disclosure

35.4 We note that the existing pre-consent requirement for electronic disclosure causes ongoing issues for lenders, particularly at the initial disclosure stage. Such a consent needs to be obtained as part of the loan application stage, as initial disclosure needs to be made before the loan contract is entered into. This results in lenders adopting awkward work-arounds to obtain consents from customers.

35.5 We recommend updating the electronic disclosure consent requirements for consistency with the equivalent provisions of the CCLA by providing that consent to electronic disclosure can be inferred from a person's conduct (section 220(2)(b) of the CCLA). This would allow email disclosure where a customer has provided their lender an email address, ensuring that the borrower can receive timely disclosure without needing the formality of providing a specific consent to disclosure being provided by that method and to that address, as is currently required by the CCCFA.

35.6 This change would involve inserting a new section 32(6) into the CCCFA as follows:

> (6) *For the purposes of this subpart, consent and the specification of an information system for a purpose may be inferred from a person's conduct.*

Express trusts and partners of a partnership – clauses 8, 11, 14 and 21

36 We support the replacement of 'family trust' with 'express trust' in relation to setting the boundaries of 'consumer credit contracts' and 'relevant guarantees'. This change deals with the current technical difficulties with the previous definition, and the concept of an express trust better accords with the premise that the protections of the consumer credit regime do not apply to trustees of trusts.

37 We also support the proposed changes to restrict disclosures to guarantors that are not acting as trustees of an express trust or partners of a partnership, as this will remove an inconsistency with the current law. Currently, responsible lending obligations do not apply to these guarantors, but lenders are still required to provide them with certain disclosures.

Director and senior manager duty and pecuniary penalties – clause 20

38 We support the repeal of the director and senior manager duty as the liability settings for directors and senior managers of lenders are too onerous and have caused considerable concern among lenders. Anecdotally, we have heard of people ceasing to hold director/senior manager roles within lenders (or not being interested in taking them on) due to the potential for personal liability and a lack of certainty about the circumstances in which such penalties would be levied.

39 In our view, insurance and indemnities should be allowed in respect of the remaining pecuniary penalties, without any limitations. The CCCFA's complete prohibition on insurance and indemnities for pecuniary penalties is inconsistent with other relevant pecuniary penalty regimes. For example, the Deposit Takers Act 2023 does not contain any such restrictions. Similarly, the FMCA contains no restrictions on insurance and its restrictions on indemnification do not apply to pecuniary penalties unless the employee or director has failed to act in good faith. The CCCFA should not be an outlier in this respect.

40 To remove this inconsistency, sections 107D and 107E of the CCCFA should be repealed.

Breadth of definition of "relevant CCCFA services" – clause 24

41 The definition of "relevant CCCFA services" extends beyond the extent to which these services are regulated by the CCCFA. This is because the definition of relevant CCCFA services incorporates other defined terms without the context in which they are used. Those parts of the defined term that are too broad and should be narrowed as set out in paragraph 44.

42 While some components of the definition, such as "mobile trader" include the critical elements that make the service captured by the CCCFA (being that they carry on a business of offering or agreeing to supply, in person and outside of fixed premises, consumer goods to a natural person either under a credit sale or where some or all of the supply of consumer goods is financed under consumer credit contract by an associate), other components of the definition do not.

43 One component of the definition where the context is significantly narrower than the defined term as currently drafted is the definition of "paid adviser". This is defined as, among other things, a person who acts for consideration as an adviser to one or more of the parties (excluding an employee of a party). Examples of this include lawyers advising borrowers and lenders (whether the arrangement is a consumer credit contract or not and whether the lawyer introduced the parties or not). The parties referred to in the definition are not even explicitly limited to being parties to credit contracts. We presume this breadth is unintended, as paid advisors (and brokers) are currently only relevant in the CCCFA in determining whether a contract is a consumer credit contract or not when the lender is not in the business or practice of entering credit contracts (this contrasts with other ancillary CCCFA services such as debt collectors and creditor's agents who have obligations under the CCCFA in specific circumstances[10]).

44 To avoid inadvertently capturing services that are not relevant to (or regulated by) the CCCFA, the proposed definition of "relevant CCCFA service" to be included as part of the new section 92A should be amended as follows:

> ***relevant CCCFA service*** *means any of the following:*
>
> *(a) acting as a creditor under a consumer credit contract or other credit contract:*
>
> *(b) acting as a creditor's agent under **Part 3A**:*
>
> *(c) acting as a lessor under a consumer lease:*
>
> *(d) acting as a transferee under a buy-back transaction or buy-back promoter:*
>
> *(e) acting as a paid adviser ~~advisor~~ or broker, where a consumer credit contract results from the introduction of one party to another party by the paid adviser or broker:*
>
> *(f) acting as a debt collector (as defined in **section 132A(4)**) that is required to make disclosure **under section 132A**:*
>
> *(g) acting as a mobile trader.*

Regulatory duplication – clauses 51 and 24

45 We do not support the level of overlap in the proposed regulation caused by the different legislative regimes regulating the same actions. As indicated by the table below, there will be significant overlap between the various legislative regimes governing credit.

Examples of duplication once the CCCF Amendment Bill is enacted

	CCCFA	FTA	FMCA
	Being a creditor under a consumer credit contract		
Misleading and deceptive	√ *	√	√

---

[10] In the case of debt collectors, to provide debt collection disclosure in specific circumstances and, in the case of creditor's agents, to do or not do various things under Part 3A of the CCCFA when repossessing consumer goods covered by that regime.

chapman tripp

	CCCFA	FTA	FMCA
Confusing	√ *	X	√ **
Unsubstantiated representations	X but must comply with the FTA	√	√
Stop orders for restricted communications	√	X	√

	Relevant CCCFA services, other than being a creditor under a consumer credit contract		
Misleading and deceptive	X	√	√
Confusing	X	X	√ **
Unsubstantiated representations	X	√	√
Stop orders for restricted communications	√	X	√

* advertising must not be or likely to be, and information provided to borrowers and guarantors must not be presented in a manner that is or is likely to be, misleading, deceptive or confusing.

** via the Financial Markets Authority's (*FMA*) power to issue stop orders.

46 Only one fine or pecuniary penalty can be imposed across the FTA, CCCFA and FMCA false and misleading conduct regimes for the same conduct.[11] In addition, the Commerce Commission will only be able to bring proceedings with the consent of the FMA (section 48P of the FTA). However, this will not prevent lenders (and other CCCFA related service providers) being expected to self-report breaches of the FTA to the Commerce Commission and meet the Commission's stringent self-reporting information obligations.

47 The FTA should be disapplied to "relevant CCCFA services", consistent with the decision of the Cabinet Economic Policy Committee at [3.3] of its Minute of Decision ECO-24-MIN-0178.

[11] Section 48Q of the FTA (in relation to breaches of the FTA and FMCA) and, more generally, sections 506 and 507 of the FMCA.

www.chapmantripp.com