

28 November 2016

Section 99(1A) CCCF Act Review
Competition and Consumer Policy
Ministry of Business, Innovation and Employment
PO Box 1473
Wellington

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Section 99(1A), Credit Contracts and Consumer Finance Act 2003 – consultation

The New Zealand Law Society welcomes the opportunity to respond to the Ministry's discussion paper, *Section 99(1A) of the Credit Contracts and Consumer Finance Act 2003*, November 2016 (discussion paper).

The Minister of Commerce and Consumer Affairs is considering amendments to section 99(1A) of the Credit Contracts and Consumer Finance Act 2003 (the CCCF Act). Under section 99(1A), a lender will forfeit the right to any interest or charges for the period during which it failed to make proper disclosure.¹ Concerns have been raised that the operation of section 99(1A) may lead to unfair outcomes, particularly where the information a lender fails to disclose is inconsequential to the loan or where the borrower suffers no harm.² The discussion paper seeks feedback on different options for the amendment of section 99(1A).

The Law Society has no comment on the options for remedial amendment of section 99(1A). Its comments relate only to the discussion set out at paragraphs 55 – 59 of the paper as to whether any amendment should be prospective or retrospective.

For the reasons set out below, the Law Society sees no justification for departing from the normal expectation that legislation should apply prospectively, and endorses the Ministry's (preliminary) preference for prospective application as set out at paragraph 59(c).

Section 99(1A) was inserted in the principal Act in June 2015. It relieves any borrower of the obligation to pay interest on a loan where the lender fails to make proper disclosure as required under the Act. It is thought that that might lead to unfair outcomes, as noted above, and the amendment proposes to ameliorate the situation where the outcome (zero interest) might be thought unfair to the lender. The New Zealand Bankers Association seeks to make the amendment retrospective, to take effect from the time section 99(1A) was introduced in June 2015.

The justification given is that making the amendment prospective may lead to "some complexity" for both creditors and debtors. It is suggested that prospective amendment might lead to

¹ Section 99(1A): "Neither the debtor nor any other person is liable for the costs of borrowing in relation to any period during which the creditor has failed to comply with section 17 or 22".

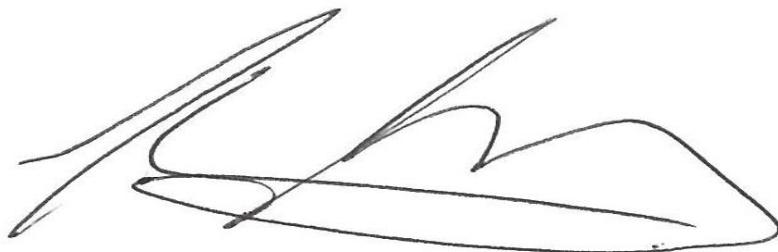
² Media release 2.11.16, Hon Paul Goldsmith <https://www.beehive.govt.nz/release/consultation-borrowers%20rights-released>

misunderstanding as to “which loans remain captured by section 99(1A) and which do not” (paragraph 56 of the discussion paper). This is unfounded. Under a prospective amendment, one merely has to look at the date the loan was entered into to ascertain whether or not it would be subject to the relaxation that is now proposed. Loans entered into following the coming into force of the amendment would be covered by it. All other existing loans concluded before that date would be subject to section 99(1A) as originally enacted. There is no undue complexity.

As the discussion paper notes at paragraph 56, retrospective legislation is justified only in exceptional circumstances. The Law Society agrees with the Ministry that this is not an exceptional case. The proposed amendment to section 99(1A) involves only a minor reform of an existing statutory provision. It raises no considerations of the public interest sufficient to justify retrospective application.

If you have any questions or would like to discuss this further, please do not hesitate to contact the convenor of the Law Society’s Rule of Law Committee, Austin Forbes QC, via the committee secretary Vicky Stanbridge (vicky.stanbridge@lawsociety.org.nz / 04 463 2912).

Yours faithfully

A handwritten signature in black ink, appearing to read "Kathryn Beck". The signature is fluid and cursive, with a large, stylized 'K' at the beginning.

Kathryn Beck
President