New Zealand Law Society
Te Kāhui Ture o Aotearoa

Credit Contracts and Consumer Finance Amendment Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

23 June 2025

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Credit Contracts and Consumer Finance Amendment Bill (**Bill**), which seeks to make various changes to the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**).

1.2 This submission has been prepared with input from the Law Society's law reform committees.[1]

1.3 The submission focuses only on clause 15 of Schedule 1 of the Bill, which provides that sections 95A and 95B of the CCCFA will now apply retrospectively to consumer credit contracts entered into, and fees and interest charged on those consumer credit contracts, between 6 June 2015 and 20 December 2019.

1.4 The aim of this clause is to extend the courts' discretion under sections 95A and 95B of the CCCFA to extinguish or reduce the effects of section 99(1A) in circumstances where it is just and equitable to do so. If enacted, this clause will enable the courts to rely on sections 95A and 95B to remove or reduce lenders' liability to forfeit any interest and fees charged *before* sections 95A and 95B came into effect.

1.5 The Law Society is of the view that (as discussed in more detail below):

(a) While retrospective application of sections 95A and 95B *could* be justified here, it is not appropriate to extend their application to any proceedings which are already underway at the time this legislation is enacted (including the *Simons & Ors v ANZ Bank New Zealand Limited and ASB Bank Limited* proceeding (**the *Simons* proceeding**)).[2]

(b) For this reason, the Bill should not pass in its current form.

(c) The alternative approaches we have suggested in Part 3 of this submission are less objectionable, and will still enable the Government to meet the key policy objectives of the Bill without raising concerns about Parliamentary intervention in active proceedings.

1.6 The Law Society **wishes to be heard** in relation to this submission.

2 Is retrospective legislation appropriate here?

2.1 Retrospective legislation is generally undesirable because it can reduce the certainty and predictability of the law, and in doing so, weaken the rule of law.

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1 The following law reform committees assisted with the preparation of this submission: Civil Litigation & Tribunals, Commercial and Business Law Committee, and Public Law Committee. See the Law Society's website for more information about these committees: www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees.

2 *Simons & Ors v ANZ Bank New Zealand Limited and ASB Bank Limited* CIV 2021-404-1190.

2.2 Nevertheless, it is not unusual for Parliament to pass legislation that has retrospective effect. However, Parliament should only pass retrospective legislation in exceptional circumstances, and where it can demonstrate there are good reasons for doing so.[3]

2.3 If it were not for the impact on the *Simons* proceeding, retrospective application of sections 95A and 95B *could* be justified here for the following reasons:

(a) The retrospective application of sections 95A and 95B will not prevent borrowers from seeking redress under section 99(1A) of the CCCFA in relation to fees and interest charged in the period between 6 June 2015 and 20 December 2019.

(b) The retrospective provisions simply aim to prevent lenders from suffering consequences which are said to be "grossly disproportionate" to the nature and circumstances of the disclosure failure[4] (for example, where a lender incurs significant liability for a minor disclosure failure which did not cause any harm to the borrower).

(c) They seek to achieve this by giving the courts the discretion to extinguish or reduce the effect of section 99(1A) where that is just and equitable. The courts are already able to exercise this discretion in relation to fees and interest charged from 20 December 2019 onwards.

(d) In doing so, the amendments will:[5]

(i) "simplify and streamline" the consequences for lenders who fail to meet their disclosure obligations under the CCCFA; and

(ii) protect consumer interests by ensuring they can continue to access credit through a "well-functioning and competitive market".

2.4 However, the Law Society is of the view that it is not appropriate for the Bill to apply to the *Simons* proceeding. While the Regulatory Impact Statement (**RIS**) for the Bill suggests that giving the court the discretion to deliver a just and equitable outcome is not an objectionable kind of interference,[6] as a starting point any direct interference in proceedings in this way is objectionable and the Law Society is not persuaded there is sufficient evidence to conclude it is justified. Our reasons for this are discussed below.

Concerns about the interference with live proceedings

2.5 The amendments in the Bill would impact proceedings which are currently before the courts (and notably, the *Simons* proceeding: a representative proceeding that is explicitly

3 LDAC Guidelines, ch 12. Concerns about retrospective legislation will also be considered in detail in the Law Society's upcoming publication, *Strengthening the Rule of Law in Aotearoa New Zealand*.

4 Ministry of Business, Innovation and Employment *Regulatory Impact Statement: Whether to apply legislation retrospectively to give courts discretion when considering consequences for disclosure failures by lenders* (5 March 2025) (**2025 RIS**) at page 1.

5 2025 RIS at [34] and [36].

6 2025 RIS at page 2.

identified in clause 15(4)(b) of Schedule 1 of the Bill).[7] This gives rise to several concerns, as discussed below.

Rule of law concerns

2.6 There is a "strong convention" arising out of the constitutional principles of comity and the separation of powers that, except in very limited circumstances, Parliament should not pass legislation which:[8]

(a) interferes with the judicial process and in cases before the courts; or

(b) deprives individuals of their right to benefit from judgments obtained in proceedings brought under earlier law or (more relevantly) to continue proceedings asserting rights and duties under that law.

2.7 This is why legislation that could have such an effect usually and specifically preserves the position of proceedings that are currently before the courts. The Legislation Guidelines state that "even when there are good reasons for a law to apply with retrospective effect … it ought not to apply to the particular litigants so as to deprive them [of] the benefits of their victory [and in] such cases, a saving provision for the actual litigants is appropriate".[9]

2.8 In applying the retrospective amendments to both current *and* future proceedings, the RIS argues that the Bill favours a more streamlined and consistent application of section 99(1A) of the CCCFA, and concludes that this factor outweighs the alternative policy option of excluding live proceedings from the scope of the amendments.[10] However, the public interest in having the law "streamlined" in this way needs to be carefully weighed against the competing interests of upholding the rule of law, and allowing litigants to conclude their proceedings under the law as it was when they commenced their proceedings. Based on the information available to us, it is not clear why pure efficiency concerns, that is the need to streamline the application of section 99(1A) and to "put all disclosure failures on the same legal footing",[11] outweighs the constitutional principles of maintaining the separation of powers and comity between Parliament and the Judiciary.

Revisiting earlier legislative decisions made by Parliament

2.9 It is also worth noting that both Parliament and the Government have previously considered whether sections 95A and 95B ought to have retrospective effect:

(a) In 2016, officials undertook public consultation on the retrospective application of what are now sections 95A and 95B of the CCCFA,[12] and found that submitters

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7 As noted by the 2025 RIS at [14] to [22], a number of issues concerning the interpretation of the CCCFA and remedies for borrowers remain 'live' issues in the *Simons* proceeding. The Law Society takes no position on these live issues, and instead approaches the Bill on the same basis as the 2025 RIS, being the impacts of *potential* interpretations of the CCCFA the courts may adopt.

8 LDAC Guidelines at 58-59, [12.1]-[12.2]; Burrows and Carter, at ch 18.

9 LDAC Guidelines at 59.

10 2025 RIS at [61].

11 2025 RIS at [64].

12 Ministry of Business, Innovation and Employment *Discussion Paper: Section 99(1A) of the Credit Contracts and Consumer Finance Act 2003* (November 2016) (**MBIE Discussion Paper**).

were "evenly split on the issue of the retroactive application".[13] Having considered those submissions, officials ultimately concluded that only the prospective application of those provisions presented a solution that was "fair to all parties".[14]

(b) In 2019, the Finance and Expenditure Select Committee also invited public submissions on the Credit Contracts Legislation Amendment Bill 2019, which inserted sections 95A and 95B into the CCCFA.[15] At the time, the Committee did not identify any need for those sections to have retrospective effect.

2.10 Parliament then – on advice from officials, and following public consultation – made a deliberate decision to enact sections 95A and 95B with only prospective effect. While the *Simons* proceeding had not commenced at the time,[16] it was known to officials that the prospective application of these sections would mean lenders remained liable to forfeit interest and fees charged between 6 June 2015 and 20 December 2019.[17]

2.11 In the Law Society's view, it would not have been unreasonable for litigants and others involved in proceedings which are currently before the courts to then have relied on this decision in good faith (and, in doing so, make financially significant decisions, incur legal costs and become exposed to adverse costs).[18]

2.12 This raises questions about whether it is now appropriate for Parliament to revisit this decision in a way that will affect those proceedings, particularly in the absence of new evidence which justifies revisiting the earlier legislative changes (as discussed further below).

2.13 It is also worth noting that the amendments in the Bill are being progressed nearly four years after the commencement of the *Simons* proceeding, despite officials preparing advice about the potential impacts section 99(1A) could have on lenders well before the commencement of that proceeding. If it was ever necessary to pass retrospective legislation in a way that impacts proceedings currently before the courts, it would have been more appropriate to do so at an earlier point in time (for example, before interlocutory matters were considered by the Supreme Court, and before the parties and others involved in the proceeding incurred legal costs in progressing the matter).[19]

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13 Ministry of Business, Innovation and Employment *Regulatory impact statement: Consequences for lenders of non-compliant information disclosure: section 99(1A) of the Credit Contracts and Consumer Finance Act 2003* (May 2017) (**2017 RIS**) at [126].

14 2017 RIS at [116].

15 *Report of the Finance and Expenditure Committee on the Credit Contracts Legislation Amendment Bill 2019 131—2* (11 November 2019).

16 The *Simons* proceeding commenced in 2021.

17 2017 RIS at [116].

18 For example, the Law Society understands that the Supreme Court has already considered interlocutory matters relating to the *Simons* proceeding, and these matters will likely have resulted in legal costs for the parties involved – see: N Chamberlain "Proposed retrospective law interferes with live class actions for benefit of two Australian banks" [2025] NZLJ 127 at 127.

19 As above.

Impacts on accrued rights

2.14 As currently in force, the CCCFA arguably makes lenders liable to forfeit all interest and fees paid on a loan during a period of non-compliant disclosure during the relevant period.[20] This effectively gives affected borrowers *unconditional* rights to receive a full refund of interest and fees. While sections 95A and 95B do not prevent the courts from making lenders liable to fully forfeit these payments, it will make their liability *conditional* on whether the court considers that to be just and equitable in the circumstances (including against factors listed in section 95B).

2.15 The RIS suggests that it may be appropriate to give sections 95A and 95B retrospective effect because giving the court the discretion to deliver a just and equitable outcome is not an "objectionable kind of interference".[21] While this may be the case *generally*, we query whether this argument applies in circumstances where Parliamentary intervention has the potential to impact on accrued unconditional rights which are being tested in the courts.

2.16 More generally, the impacts on these rights which have accrued under the CCCFA may also conflict with the overriding consumer protection purposes of that Act.[22]

Insufficient evidence to justify retrospective changes

2.17 There appears to be little evidence to justify the retrospective application of sections 95A and 95B to forfeitable fees and interest charged prior to those sections coming into force. The RIS identifies a number of deficiencies and limitations in the evidence and data available to support this proposal – for example:

(a) It is not known whether there are other lenders who are liable to refund fees and interests charged under section 99(1A) in the period between 6 June 2015 and 20 December 2019, and the extent of that liability.[23]

(b) There is also uncertainty as to whether such breaches can affect the consumer credit supply and competition in the long term.[24] As a result, there is no evidence which demonstrates that these amendments are necessary to maintain the consumer credit supply and/or market competition (both of which are identified as underlying policy objectives of this Bill).[25]

(c) To date, the courts have not made any orders under sections 95A and 95B, and so the extent of relief available under those provisions is unknown. It is therefore unclear whether any relief retrospectively granted under these provisions will in

20 See 2025 RIS at [5]-[6].
21 2025 RIS at page 2.
22 CCCFA, s 3, and in particular s 3(2)(c).
23 Ministry of Business, Innovation and Employment *Regulatory Impact Statement: fit for purpose consumer credit law* (21 August 2024) (**2024 RIS**) at page 2, and [52].
24 2025 RIS at page 2. However, the RIS does note, at page 7, that potential impacts on the two lenders involved in the *Simons* proceeding are "significant but probably not existential".
25 2015 RIS at page 8.

fact address concerns about potential disproportionate consequences for lenders during the period from 6 June 2015 and 20 December 2019.[26]

Lack of evidence of the need to align the two statutory regimes

2.18 The RIS justifies the retrospective application of sections 95A and 95B to live proceedings on the basis that it is necessary to "put all disclosure failures on the same legal footing", and retrospective application enables a "straightforward and streamlined approach to consequences for lenders" and a "consistent basis" for the application of section 99(1A).[27] However the RIS offers no evidence which:

(a) illustrates any difficulties with applying different statutory regimes to interest and fees forfeitable in the period from 6 June 2015 to 20 December 2019, and thereafter; or

(b) suggests there is any real need for Parliament to streamline the two regimes in this way (i.e., by taking the drastic step of interfering in live proceedings before the courts).

2.19 It is not unusual to have different statutory regimes apply to similar events which occurred at different points in time, and it is not always necessary for those regimes to be aligned or consistent.[28] In the present circumstances, it would be a relatively straightforward task to identify when a consumer credit contract was entered into, and to determine which statutory regime applies to that contract.

2.20 There is unlikely to be any undue complexity in undertaking this exercise, and therefore it is unclear why this policy consideration outweighs other considerations.

Lack of new evidence to revisit earlier legislative changes

2.21 The RIS describes the financial impacts of the *Simons* proceeding on the two lenders involved as "significant but probably not existential".[29] Aside from that proceeding, the policy materials relating to the Bill do not disclose any new evidence that would suggest Parliament now needs to take a different approach to how sections 95A and 95B ought to apply.

2.22 It is also worth noting that the 2016 consultation undertaken by officials was sparked by arguments advanced by the New Zealand Bankers Association at the time that appear materially similar to those now advanced in support of the current Bill.[30]

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26 2024 RIS at [33].

27 2025 RIS at [61] and [64].

28 For example, the Limitation Act 1950 continues to apply to acts and omissions which occurred before 1 January 2011, despite that Act being repealed by the Limitation Act 2010 (see: Limitation Act 2019, ss 57 and 59).

29 2025 RIS at page 7, although the underlying text is redacted.

30 MBIE Discussion Paper at Annex A.

Lack of evidence about potential impacts on funded representative proceedings and access to justice

2.23 The *Simons* proceeding identified in Schedule 1 of the Bill is a representative proceeding funded by two litigation funders.[31] It has been suggested that the proposed amendment will:[32]

(a) "severely increase" the legal costs and time taken in this proceeding;

(b) cause the calculation of damages to be subject to a "substantial increase in evidence", which will be to the detriment of class members and funders;

(c) change the risk profile of the proceeding and the projected recovery; and

(d) potentially even impact the viability of litigation funding in the proceeding.

2.24 However, the materials relating to the Bill do not contain any information as to whether this is likely to be the case, nor offer any insights into what impacts the proposed retrospective amendments will have on the proceeding and its funders. The RIS also fails to consider whether it is appropriate to retrospectively apply the amendments in the Bill to ongoing funded representative actions, and the potential impacts this can have on access to justice in the long term.

2.25 The absence of such analysis further calls into doubt whether it is appropriate for the law applicable to a live funded proceeding to be changed "mid-stream" in this way,[33] and suggests that Parliament's powers should only be sparingly exercised to pre-empt the outcome of pending representative actions. This is especially the case where legislative adjustments can curtail accrued rights of consumers under consumer protection legislation, as discussed above.

3 Alternative approaches available

3.1 The Law Society proposes two alternative approaches which may be less objectionable than what is proposed in the Bill:

Introducing a longstop limitation

3.2 One way of addressing the concerns regarding grossly disproportionate outcomes for lenders would be to introduce a longstop limitation on claims made under section 99(1A),[34] (noting the current limitation period is three years from the date of discovery).[35] Such a provision could be modelled, for example, on section 11(3) of the Limitation Act 2010.

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31 More information about this proceeding is available at www.bankingclassaction.com.

32 N Chamberlain "Proposed retrospective law interferes with live class actions for benefit of two Australian banks" [2025] NZLJ 127 at 128.

33 As noted by the Supreme Court in *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [147].

34 We note this is also put forward as an alternative option in N Chamberlain "Proposed retrospective law interferes with live class actions for benefit of two Australian banks" [2025] NZLJ 127 at 128.

35 CCCFA, s 90(3).

3.3 With such a limitation in place, it could perhaps be possible to identify the potential liabilities of lenders as the limitation deadline passes, and to use that information and evidence to determine whether that liability is likely to threaten the ability to maintain consumer credit supply and market competition (and if so, whether retrospective intervention is warranted).

Excluding live proceedings from the scope of the amendments

3.4 Another alternative approach (which is also discussed in the RIS) would be to enable sections 95A and 95B to apply retrospectively to consumer credit contracts which were entered into since 6 June 2015, but to expressly exclude their application to any proceedings which will have commenced prior to this Bill being enacted (including the *Simons* proceeding).

3.5 The Law Society considers that this option is preferable to the proposal in the Bill to retrospectively apply the amendments to live proceedings. This change would address some of the concerns we have noted above – in particular, it would address the concerns about:

(a) undermining the rule of law by having Parliament interfere with proceedings that are currently before courts;

(b) the impacts on accrued rights which are being tested in the courts;

(c) revisiting earlier legislative decisions in a way that impacts live proceedings; and

(d) any potential impacts the proposed amendments can have on funded representative proceedings and access to justice.

3.6 Like the proposal in the Bill, this option would also help address concerns regarding grossly disproportionate outcomes for other lenders, and avoid unforeseen risks to the consumer credit supply and market competition.

3.7 The RIS identifies this alternative option as 'Option Two, and compares it to the option proposed in the Bill (which is identified in the RIS as 'Option Three'). Upon comparing the two options, the RIS notes:[36]

> *Interests of consumers* – Despite also applying to active litigation against ANZ and ASB, Option Three does not materially improve on Option Two in avoiding the consequences of concern under the counterfactual, given that concern is predominantly associated with how a finding in that litigation could disproportionately affect any other lenders/deposit-takers who had compliance issues before December 2019.
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> *Just outcomes* – By including active litigation, Option Three involves greater potential for a just and equitable outcome than Option Two, but would also appear to involve greater conflict with legal principles.

3.8 However, the RIS ultimately discounts Option Two on the basis that it would not streamline the legal consequences for lenders who fail to meet their disclosure obligations under the CCCFA (i.e., because under this alternative option, the current

[36] 2025 RIS at [61].

statutory regime would continue to apply to proceedings which were commenced prior to the retrospective amendments coming into effect).

3.9 However, we query whether the policy objective to simplify and streamline the legal framework should outweigh the need to address the concerns we have identified at [3.5] above, particularly in light of our comments above regarding the lack of evidence to show that it is necessary to align the different statutory frameworks.

3.10 We also note that, unlike our suggestion at [3.2 – 3.3] above, this approach will avoid opening up litigation 'floodgates' prior to the expiry of a potential limitation period (noting this could be a possibility if individuals who believe they are entitled to receive a refund of fees and interest under section 99(1A) were to file speculative proceedings before their claims become time-barred after the limitation period has passed).

3.11 We invite the Select Committee to consider adopting either of the alternative options suggested here in order to address some of the concerns regarding the retrospective application of sections 95A and 95B of the CCCFA.

Frazer Barton
President