Regulatory Impact Statement

Credit Contracts and Consumer Finance (Infringement Offences) Regulations 2015

Agency Disclosure Statement

1 This Regulatory Impact Statement has been prepared by the Ministry of Business, Innovation and Employment. It concerns the infringement scheme that is due to come into force in the *Credit Contracts and Consumer Finance Act 2003* by 6 June 2015, as provided for in the *Credit Contracts and Consumer Finance Amendment Act 2014*.

2 Before that scheme can be fully implemented, regulations must be promulgated to set the amount of the infringement fee(s) in respect of infringement offences and to prescribe infringement and reminder notices that may be issued by the New Zealand Commerce Commission. (In the absence of these implementation requirements, the Commerce Commission will still be able to take penalty enforcement action in respect of infringement offences by commencing criminal proceedings.)

3 This Regulatory Impact Statement only considers options for setting the quantum of the infringement fees in respect of infringement offences. Given the infringement scheme was provided for by Parliament, the rationale and justification for the decision to establish the scheme is not addressed here.

4 The selection and assessment of options for infringement fee levels are informed and/or bounded by:

- the Legislation Advisory Committee's *Guidelines on Process and Content of Legislation*;
- the Ministry of Justice's *Guidelines for New Infringement Schemes*, which reflect Cabinet's expectations for new infringement schemes generally;
- the statutory maximum amount for an infringement fee of $2,000;
- the legislative requirement that infringement fees be identical for individuals and body corporates;
- an assessment that the various infringement offences are similar in nature and scale to each other;
- an identical infringement notice regime implemented in 2014 in the *Fair Trading Act 1986*.

5 Information about the efficacy and enforcement of comparable infringement schemes does not exist at this time to allow us to determine the likely effect of infringement fees on increasing compliance with the *Credit Contracts and Consumer Finance Act 2003*. We expect, however, that the operation of the infringement scheme will be monitored as part of the overall monitoring and evaluation of the package of reforms to consumer credit legislation. This is addressed by the Regulatory Impact Statement prepared for the overarching changes to the consumer credit regime.

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Status Quo

6 A significant outcome of the recent major reform of New Zealand's credit contracts and financial services law is the *Credit Contracts and Consumer Finance Amendment Act 2014* (the **Amendment Act**). This updates the *Credit Contracts and Consumer Finance Act 2003* (the **CCCFA**). The CCCFA is the primary law that regulates the provision of consumer credit and sets out ongoing obligations of those who provide credit. Nearly all the provisions of the Amendment Act will come into effect by 6 June 2015. The changes:

- better protect borrowers by promoting responsible lending practices without placing unnecessary compliance costs on lenders who already have good systems in place;
- ensure consumers are given the information they need to make informed decisions; and
- strengthen enforcement powers and penalties to crackdown on those lenders who breach the law.

7 The New Zealand Commerce Commission (the **Commission**) is responsible for enforcement of the CCCFA.

8 Among the new changes provided in the Amendment Act is the provision for an infringement scheme for certain minor offences under the CCCFA (so-called "infringement offences"). The infringement scheme, which was recommended by the Commerce Select Committee, is intended to add to the Commission's current enforcement toolkit by enabling the Commission to issue infringement notices relating to infringement offences, including the imposition of infringement fees in respect of such offences.

9 Infringement offences are distinguishable from other breaches of the CCCFA and are recognised as relatively minor breaches: the offences do not require proof of mens rea (intent) and are not punishable by imprisonment. The new infringement offences scheme will apply to a limited number of offences. In summary, the prohibited conduct generally relates to the failure by creditors, lessors or transferees to disclose certain prescribed information or supply certain mandatory documents under the CCCFA concerning consumer credit contracts, consumer leases or buy-back transactions of land, or to do so within the specified time (see **Appendix 1**).

10 Before the infringement notice regime can be implemented, regulations are necessary to prescribe the amount of the infringement fee(s).[1]

11 If the infringement scheme is not fully implemented by putting in place the infringement notice regime, the Commission will nonetheless be able to prosecute infringement offences after 6 June 2015. That is, instead of serving infringement notices (and imposing the infringement fee(s)), the Commission will be able to take proceedings against infringement offences in appropriate circumstances under the *Criminal Procedure Act 2011*.[2] A person accordingly found guilty of an infringement offence will be liable to a fine not exceeding $10,000 for an individual and not exceeding $30,000 for a body corporate.

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[1] Regulations are also required to prescribe the form of the infringement notices and reminder notices, and any matters that must be included in those notices.

[2] In addition, instead of commencing a penalty enforcement action (that is, criminal proceedings or issuing an infringement notice), the Commission may choose to pursue an internal administrative (non-penalty) enforcement action, where it considers this to be the most appropriate response to an infringement offence. This comprises the issuing of a compliance advice letter or a warning letter to a business or person to remind them of their obligations.

Problem Definition

12 Unless the necessary regulations are promulgated, the new infringement notice regime cannot be brought into effect, as intended by Parliament. Without the regime, minor breaches of the CCCFA will be difficult to enforce, as they will require remedies to be sought by the Commission through the Courts. But in many cases prosecution is disproportionate to the harm caused by the offence, will be delayed in its effect, and will incur fiscal costs on the taxpayer that significantly outweigh the benefits of prosecution. In short, in the absence of an infringement notice regime, compliance with the relevant information disclosure requirements under the CCCFA may be more difficult to enforce, potentially leading to poorer outcomes for consumers.

13 It is difficult to reliably estimate the extent to which infringement notices might have been issued in the past (assuming the infringement notice regime had existed then), or will be issued in the future.[3] Based on data supplied by the Commission for the financial years from 2005/2006 to 2012/2013, the Commission took enforcement action on average nine times per year in respect of information disclosure offences under the CCCFA that are equivalent to infringement offences as defined under the new infringement scheme in the Amendment Act. In the vast majority of cases, administrative (non-penalty) enforcement actions were taken resulting in the issuance of warning letters. During the eight-year period reviewed, there was on average only one criminal prosecution per year.

14 However, the data should be regarded cautiously here as it is only indicative of the possible extent of infringement notices in the future. This is because in the significant majority of cases there were also other, more serious, (non-infringement) offences alleged, under both the CCCFA and the *Fair Trading Act 1986*. In particular, instances where criminal prosecutions were taken appear to have involved relatively serious offences resulting in a high level of harm, including due to misleading representations proscribed by the *Fair Trading Act*. Furthermore, it is impossible to predict the nature and extent of future enforcement actions in relation to any breaches of the new information disclosure requirements introduced in the Amendment Act that are defined as infringement offences.

Objectives

15 This Regulatory Impact Statement concerns setting the amount of the infringement fee for infringement offences under the CCCFA through the proposed *Credit Contracts and Consumer Finance (Infringement Offences) Regulations 2015* (the **proposed Regulations**).[4]

16 The desired outcome of a proposed infringement notice regime is to increase compliance with the relevant information disclosure requirements to which infringement offences pertain by penalising and deterring non-compliance. Increasing compliance will contribute to ensuring consumers are given the information necessary for them to make informed and confident decisions relating to credit contracts and consumer finance.

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[3] The substantial majority of offences deemed to be infringement offences under the Amendment Act were already offences under the CCCFA. However, penalty remedies could only be imposed by the Courts following proceedings under the *Criminal Procedure Act 2011*. There are only a small number of infringement offences under the Amendment Act that were not already offences under the CCCFA. These primarily relate to repossessions of consumer goods under credit contracts.

[4] While included in the proposed Regulations, this Regulatory Impact Statement does not address the issue of prescribing the form of infringement notices and reminder notices, or the content of those notices. These are fundamentally matters of form rather than of substantive policy, as the Amendment Act prescribes the information that the notices *must* contain.

Assessment criteria

17 We consider the infringement fee for each infringement offence in the Amendment Act should be consistent with the criteria for setting infringement fees contained in the Ministry of Justice's *Guidelines for New Infringement Schemes*, which set out Cabinet's expectation for the design and operation of new infringement schemes. The Ministry's *Guidelines* state that:

> In setting infringement fees consideration must be given to the level of harm involved in the offending, the affordability and appropriateness of the penalty for the target group, and the proportionality of the proposed fee with the infringement fees for other comparable infringement offences.

18 We consider that infringement fees should therefore be set at levels that align with the following criteria:

a. *Level of harm involved in the offending* – that is, the infringement fee reflects the seriousness of the offending (and, hence, potential levels of harm caused).

b. *Affordability and appropriateness of the fee* – that is, the infringement fee is set at a level which is fair, takes into account the ability to pay of the target group, and renders an appropriate deterrence effect to incentivise compliance.

c. *Proportionality* – that is, the infringement fee is consistent with other fees for offences of comparable degrees of seriousness.

19 These criteria will be used below to assess the options for prescribing the level of infringement fees.

Regulatory Impact Analysis

20 This section is organised in four parts:

- First, it outlines several matters informing and/or constraining the selection or assessment of options for setting infringement fees in respect of infringement offences in the Amendment Act.
- Second, it sets out the options for infringement fee levels.
- Third, the analysis of the options is provided.
- Fourth, the selection and discussion of the preferred option.

Matters informing the selection of options

<u>Legislation Advisory Committee's guidelines</u>

21 The Legislation Advisory Committee's *Guidelines on Process and Content of Legislation* state that standard fees payable for an infringement offence should be set at a low level, generally not exceeding $500. The reason for this is that a fixed infringement fee provides no ability for the means or the overall culpability of an offender to be taken into account.

<u>Ministry of Justice's guidelines</u>

22 The Ministry of Justice's *Guidelines for New Infringement Schemes* (reflecting Cabinet's expectations for the design and operation of new infringement schemes) state with respect to penalties:

> As a general rule, every offence which is subject to an infringement notice should not normally exceed a fee of $1,000, unless in the particular circumstances of the case a high level of deterrence is required. The fee should generally be considerably less than the statutory maximum available to the court following a successful summary prosecution.

Statutory constraints

23 The options for prescribing the level of infringement fees in respect of infringement offences must fit within the following two statutory constraints:

a. the Amendment Act provides that the maximum amount that an infringement fee payable in respect of an infringement offence may be set at is $2,000; and

b. the Amendment Act does not permit an infringement fee to be set differently for individuals and body corporates (it is, however, possible to prescribe different infringement fees for different infringement offences).

Different infringement fees for different infringement offences?

24 We have considered, in consultation with staff of the Commission, the issue of whether there are any grounds at this time for setting different infringement fees for different infringement offences. There are 15 different types of infringement offences, which are summarised in **Appendix 1**.

25 We concluded that the various infringement offences are similar to each other in their nature and scale, that is, there are no significant reasons for differentiating between the offences for the purpose of considering the amount of infringement fees.

26 Moreover, given it is yet to be implemented, there is not sufficient information at this time to allow us to determine the effect of the infringement regime on deterring breaches of, or increasing compliance with, the relevant information disclosure requirements. This should become clear once the infringement regime has had time to bed in and a review of its operation has taken place (see the *Monitoring, Evaluation and Review* section below).

27 Accordingly, at this point, we conclude that different infringement fees for different infringement offences are unnecessary, that is, a flat infringement fee for all offences is considered most appropriate.

Is the infringement scheme in the *Fair Trading Act 1986* a useful comparator?

28 The *Fair Trading Amendment Act* of 2013 introduced into the *Fair Trading Act 1986* an infringement scheme that is identical in design to the infringement scheme provided in the *Credit Contracts and Consumer Finance Amendment Act 2014*, and which is also enforced by the Commission.

29 Thus, the *Fair Trading Act* includes a provision for prescribing in regulations infringement fees not exceeding $2,000 in respect of infringement offences under that Act. These offences also largely concern breaches of certain mandatory information disclosure requirements provided in the *Fair Trading Act* (see **Appendix 2**).

30 The *Fair Trading (Infringement Offences) Regulations 2014* implements the infringement notice regime. It provides for an infringement fee of $1,000 in respect of any infringement offence against the disclosure requirements, and which is applicable to both individuals and body corporates.[5] If proceedings are taken under the *Criminal Procedure Act 2011*, they can result in a maximum fine of $10,000 for an individual and $30,000 for a body corporate, the same as under the *Credit Contracts and Consumer Finance Amendment Act 2014*.[6]

31 We conclude that the infringement scheme in the *Fair Trading Act* provides a useful comparator for the infringement scheme in the *Credit Contracts and Consumer Finance Amendment Act*, because of the similarity in the types of infringement offences (both relate to breaches of information disclosure requirements), and the design of the scheme more generally.

Options for infringement fee levels

32 In addition to the status quo, we identify three alternative options for infringement fee levels, as follows.

Status quo

33 No infringement fees would be set in regulations, and the infringement notice regime could not be implemented.

Option 1 – flat infringement fee of $500 for all offences

34 Option 1 is based on the Legislation Advisory Committee's *Guidelines on Process and Content of Legislation*, which state that the maximum fee should generally not exceed $500 (paragraph 21).

Option 2 – flat infringement fee of $1,000 for all offences

35 Option 2 is based on the Ministry of Justice's *Guidelines for New Infringement Schemes*, which state that as a general rule the maximum fee should ordinarily not exceed $1,000 – the exception being if for a given case a high level of deterrence is desirable (paragraph 22).

Option 3 – flat infringement fee of $1,500 for all offences

36 Option 3 recognises that Parliament has legislated for a maximum infringement fee of $2,000 and that at least some infringement offences potentially may merit a higher level of deterrence.

Analysis of the options

37 Each of the options was analysed against the three criteria identified above for setting the infringement fee in regulations (paragraph 18). The table on the next page summarises our findings.

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[5] A Regulatory Impact Statement was not prepared in relation to the *Fair Trading (Infringement Offences) Regulations 2014*.

[6] One *Fair Trading Act* infringement offence is unrelated to information disclosure requirements. It concerns a failure to comply with a suspension of supply notice issued under section 33D of the *Fair Trading Act*. The notice may be issued by a product safety officer in respect of goods considered to be implicated in serious injury or death or where there is good reason to suspect the goods may be unsafe, and the supply of which may lead to a person suffering serious harm. Failure to comply with a suspension of supply notice is considered to be a significantly more serious offence than an information disclosure breach. Consequently, the infringement fee was set at $1,500. (Breach of a suspension of supply notice can result in a maximum fine of $200,000 for an individual and $600,000 for a body corporate, which is substantially higher than for an information disclosure breach.)

Infringement fee criteria	Status quo	Option 1 ($500 fee)	Option 2 ($1,000 fee)	Option 3 ($1,500 fee)
Level of harm involved in the offending – that is, the infringement fee reflects the seriousness of the offending (and, hence, potential levels of harm caused)	N/A. If the infringement fee is not prescribed in regulations, the infringement scheme cannot be fully implemented as intended by Parliament. The courts will assess culpability of the offender and the level of harm and determine the sentence.	No. The fee is a relatively small proportion (25%) of the maximum possible fee ($2,000) determined by Parliament and is therefore unlikely to reflect the seriousness of the offences. Option is not identical with the Fair Trading Act, which is a reasonable comparator.	Yes. Recognises much better than Option 1 consumers' vulnerability when entering complex credit transactions and lenders' ability to exploit their superior knowledge and resources. Option is identical with the Fair Trading Act, which is a reasonable comparator.	No. There is no evidence at this time that the gravity of any infringement offences amounts to an exceptional circumstance warranting a higher level of deterrence.
Affordability and appropriateness of the fee – that is, the infringement fee is set at a level which is fair, takes into account the ability to pay of the target group, and renders an appropriate deterrence effect to incentivise compliance	N/A. The courts would likely consider ability to pay and deterrence effect as part of sentencing.	Possibly. But while complying with the Legislation Advisory Committee's guidelines and the Ministry of Justices guidelines, the fee is a relatively small proportion (25%) of the maximum possible fee ($2,000) determined by Parliament and may therefore not provide an effective deterrent.	Probably. Fee would be 50% of the allowable maximum fee and complies with the Ministry of Justice's guidelines.	No. A fee of $1,500 would be well above the Ministry of Justice's guidelines.
Proportionality – that is, the infringement fee is consistent with other fees for offences of comparable degrees of seriousness	N/A.	No. The *Fair Trading Act* infringement scheme is a reasonable comparator.	Yes. This option would make the infringement scheme identical in design and operation to the *Fair Trading Act* infringement scheme, which is a reasonable comparator.	No. A fee of $1,500 would be disproportionate relative to the $1,000 fee for similar infringement offences under the *Fair Trading Act*, which is a reasonable comparator. Furthermore, a fee of $1,500 would inappropriately align with the most egregious infringement offence under the *Fair Trading Act*, relating to a failure to comply with the suspension of a supply notice concerning unsafe goods.

Preferred option

38 Our preferred option is Option 2. The most convincing arguments for this option are its good comparability with the existing identical infringement scheme in the Fair Trading Act (the proportionality criterion) and its adherence more generally to the Ministry of Justice's *Guidelines for New Infringement Schemes* regarding the design and operation of new infringement schemes. We have no evidence at this time to indicate that the Ministry of Justice's *Guidelines* do not provide an appropriate benchmark for the design and operation of the CCCFA infringement scheme.

39 We note that it is difficult to judge at this time which option will have the best deterrence effect to incentivise compliance (and, hence, our reason for placing a higher reliance on the proportionality criterion). We will monitor the infringement notice regime over time and gather empirical evidence to assess the operation and effectiveness of the regime with respect to promoting compliance with the information disclosure requirements (see the *Monitoring, Evaluation and Review* section below).

40 While there will be administration costs incurred by the Commission and compliance costs associated with the operation of the infringement notice regime, these are not expected to differ among the three options discussed for implementing the regime.

Consultation

41 We have consulted the Ministry of Justice and the staff of the Commission on the contents of this Regulatory Impact Statement. This included initially holding a workshop involving all parties to discuss aspects of the proposed infringement notice regime.

42 Commission staff have advised us that they are satisfied that the infringement notice regime should be aligned with the identical regime provided in the *Fair Trading Act*. They also agreed that the efficacy of the regime will need to be monitored to ensure there is an effective deterrence outcome.

43 Given their interest in infringement systems, the Ministry of Justice has provided helpful comments on iterations of this Regulatory Impact Statement to ensure that the final analysis is cogent and in accordance with appropriate assessment criteria.

Conclusions and Recommendations

44 Parliament has determined that an infringement scheme in the CCCFA that includes providing for the Commission to serve infringement notices is necessary for offences relating to breaches of certain information disclosure requirements prescribed under the CCCFA. The infringement notice regime should encourage compliance with the disclosure requirements and thereby facilitate better-informed and confident decisions by consumers relating to credit contracts and consumer finance. The analysis in this Regulatory Impact Statement supports implementing an infringement fee of $1,000 for all infringement offences (Option 2).

Implementation

45 The regulations necessary to implement the infringement notice regime are expected to be made in time for the regime to commence on 6 June 2015.

Monitoring, Evaluation and Review

46 There is a potential risk that the preferred option for setting the amount of the infringement fee will prove not to be an effective deterrent. Other potential risks include a large number of offenders challenging their infringement notices in court (consequently using up the Commission's time and resources) and low rates of payment of infringement fees.

47 Infringement offences and the operation of the infringement scheme, including the *Credit Contracts and Consumer Finance (Infringement Offences) Regulations 2015*, will be monitored as part of overall monitoring and evaluation of the package of reforms to consumer credit legislation. This is covered by the Regulatory Impact Statement for overarching changes to the consumer credit regime.

Appendix 1: Summary of infringement offences in the *Credit Contracts and Consumer Finance Amendment Act 2014*

Infringement offence	Nature of the offence (section and schedule references are to relevant information disclosure requirements in the CCCFA, as amended)
Section 102A(1)(a)	• Failure by creditor (s 17(1)), lessor (s 64(1)) or transferee (s 72(1)) to disclose any of the information as is applicable – concerning a consumer credit contract, a consumer lease or a buy-back transaction of land – in Schedules 1, 2 or 3, respectively. • Failure by creditor who takes a guarantee of a consumer credit contract to disclose to the guarantor any of the information as is applicable concerning a consumer credit contract in Schedule 1 (s 25(1)(b)). • Failure by a creditor under a credit consumer contract to disclose to a debtor any of the information in s 19(1) required by way of a continuing disclosure statement (s 18(1) and s (19(1)). (Note that the *complete* failure to provide a disclosure statement containing the applicable information required per any of the above is not an infringement offence but a more serious offence under s 103.)
Section 102A(1)(b)	• Failure by a creditor to provide to a debtor a copy of all terms of a consumer credit contract not covered above (in Schedule 1) within the stipulated time (s 17(2)). • Failure by a creditor who takes a guarantee of a consumer credit contract to provide the guarantor under a guarantee a copy of all of the terms of the guarantee within the stipulated time (s 25(1)(a)). • Failure by a lessor to provide to a lessee a copy of all the terms of the consumer lease not covered above (in Schedule 2) within the stipulated time (s 64(2)). • Failure by a creditor or a lessor to supply an insured person with a copy of the terms of credit-related insurance within the stipulated time, where the insurance was arranged by the creditor or the lessor (s 70(1)). • Failure by a creditor or a lessor to supply, respectively, a debtor or a lessor with a copy of the terms of a repayment waiver or extended warranty within the stipulated time (s 70(2)). • Failure by a transferee under a buy-back transaction to provide to an occupier a copy of all the terms of the buy-back transaction not covered above (in Schedule 3) within the stipulated time (s 72(2)).
Section 102A(3)	• Failure by a creditor under a consumer credit contract to disclose requested information in accordance with s 24 to a debtor or guarantor and/or within the stipulated time (s 24). • Failure by a lessor under a consumer lease to disclose requested information in accordance with s 67 to a lessee and/or within the stipulated time (s 67). • Failure by a transferee under a buy-back transaction to disclose requested information in accordance with s 79 to an occupier and/or within the stipulated time (s 79).

Infringement offence	Nature of the offence (section and schedule references are to relevant information disclosure requirements in the CCCFA, as amended)
Section 102A(4)	• Failure by a lender, who in relation to an agreement uses standard form contract terms, to supply a copy of its standard form contract terms to a person immediately after receiving a request from that person, free of charge (s 9J(4)).
Section 102A(5)	• Failure by a creditor who is subject to Part 3A (*Repossession of consumer goods under credit contract*) to include any information delineated in Schedule 3A that is required to be contained in a repossession warning notice served before taking possession of consumer goods pursuant to s 83G (s 83G(3)(b)). (Note that the *complete* failure to serve a repossession warning notice on a debtor in accordance with s 83G is not an infringement offence but a more serious offence under s 103 (s 102A(7).)
Section 102A(6)	• Failure by a creditor or creditor's agent who is subject to Part 3A to produce a document or information referred to in a paragraph of s 83O(1), which relates to a creditor or creditor's agent exercising a right of entry of premises for the purpose of repossessing consumer goods. (Note that the *complete* failure to comply with s 83O(1) is not an infringement offence but a more serious offence under s 103 (s 102A(7).)

Appendix 2: Summary of infringement offences in the *Fair Trading Act 1986*

Nature of the offence (section references are to relevant information disclosure requirements in the *Fair Trading Act*)
• Failure to comply with information disclosure requirements with respect to goods or services in accordance with prescribed consumer information standards (s 28). • Failure to make or ensure disclosure to potential purchasers of the fact that the vendor of goods or services offered for sale to consumers on the Internet, and when the offer is able to be accepted via the Internet, is in trade (s 28B(2) and (3)). • Failure by a supplier to comply with any of the prescribed disclosure requirements relating to a layby sale agreement and/or at the time the agreement is entered into (s 36C). • Failure by a supplier to provide the consumer with a written statement and/or within the time stipulated and/or free of charge that clearly sets out prescribed information relating to a layby sale agreement, if the statement is requested by the consumer (s 36D). • Failure by a supplier to comply with any of the prescribed disclosure requirements relating to an uninvited direct sale agreement and/or within the time stipulated (s 36L). • Failure by a warrantor to comply with any of the prescribed disclosure requirements relating to an extended warranty agreement and/or within the time stipulated (s 36U).