FINANCIAL SERVICES FEDERATION

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Consumer Policy
Ministry of Consumer Affairs
PO Box 1473
WELLINGTON

By e-mail to: CCCFA@mca.govt.nz

Dear Sir/Madam

FINANCIAL SERVICES FEDERATION RESPONSE TO CREDIT CONTRACTS AND CONSUMER FINANCE AMENDMENT BILL EXPOSURE DRAFT

Thank you for the opportunity to respond to the questions raised in your Consultation Document on the above Amendment Bill.

Our responses are contained in the document attached.

By way of background, the Financial Services Federation ("FSF") is New Zealand's largest member based industry organisation for financial institutions. The FSF has thirty six members and associates providing financing, investment, banking and insurance services to over 750,000 New Zealanders. Our four affiliate members are internationally recognised legal and consulting partners. A list of our members is attached at Appendix A.

We would also like to add that FSF is grateful for the Ministry's acknowledgement of FSF members' commitment to responsible lending practices which lead to the development of Responsible Lending Guidelines. All of our members have signed up to the guidelines.

Given the commitment shown by our members, the FSF believes that the proposed Responsible Lending Principles contained in the Amendment Bill should apply to those lenders not currently adhering to any principles of responsible lending rather than to those who already subscribe voluntarily to such principles.

In our view, responsible lending such as is carried out by our members, means ensuring borrowers can comfortably repay finance obtained, disclosing information in a fair and adequate manner, not acting in a manner that is misleading or deceptive and giving customers excellent customer service and that it is in their own interests to do so. The decision to obtain finance and the reasons for doing so are the domain of the customer.

FSF also submits that the principles and the code should be introduced at the same time. Adoption of the principles alone without the guidelines that will be contained in the code would create significant uncertainty that the industry would need to manage until the code was introduced up to two years later. In that time, practices will have evolved to reflect the principles which may diverge from the final position put forward by the code. To avoid the industry needing to potentially change practices twice, it would be fair that the principles and the code are introduced contemporaneously. This would also allow the principles to be developed in a thoughtful manner with input from stakeholders alongside the code. If the two were developed in tandem it would undoubtedly produce a better result and hopefully lead to more certain principles than those currently drafted.

FSF also refers to the Law Commission's recently released review of the Credit (Repossession) Act 1997, the first recommendation of which states that the provisions of this Act that are discussed in their Report should be redrafted and included in the Credit Contracts and Consumer Finance Act 2003. As this appears to be in line with the Minister of Consumer Affairs' and the Ministry's thinking on this matter, FSF requests that a further round of consultation is undertaken in respect of what this would actually mean to its members.

Please do not hesitate to contact me if you require any further clarification or input from us.

Yours sincerely

Lyn McMorran
EXECUTIVE DIRECTOR

FSF RESPONSES TO CONSULTATION QUESTIONS ON CREDIT CONTRACTS AND CONSUMER FINANCE AMENDMENT BILL EXPOSURE DRAFT

Responsible Lending

1. **How well do you think the responsible lending principles in the Bill (new section 9B) reflect the principles which should apply?**

The FSF's views on the responsible lending principles in proposed new section 9B of the Bill fall into 2 categories:

a) Principles with which the FSF is essentially comfortable;

b) Principles which the FSF considers need further attention

Principles with which the FSF is essentially comfortable: Into this category fall the principles listed as paragraphs (d) – (h) of proposed new section 9B(2). In respect of them the FSF notes -

(i) Paragraph (d): This principle essentially restates obligations to which lenders are already subject under the Fair Trading Act (FTA), and the FSF has no issues with this, except for the use of the term "confusing" which does not appear in the FTA and which would be subjective in terms of determining what is "confusing" ;

(ii) Paragraphs (e) and (f): These principles reflect actions that lenders already have every incentive to take, in their own interests as well as those of their borrowers, and responsible lenders already do so. The FSF has no issues with these proposed principles accordingly, except to say that in some contexts it is not necessary to make such enquiries as the borrower's objectives in entering into the agreement will be obvious. This is because it can be presumed why the finance is being sought based on the product that is being applied for;

(iii) Paragraph (g): This effectively reflects the existing requirements of the Credit Contracts and Consumer Finance Act ("CCCFA") in respect of unreasonable credit fees, and the FSF has no issue with that.

(iv) Paragraph (h): This principle also essentially restates obligations to which lenders are already subject under the FTA, and the FSF has no issues with this, except for the reference to "class of borrowers" as there are no separate or defined classes of persons within New Zealand and a lender's obligations should apply evenly to all New Zealanders.

Principles which the FSF considers need further attention: Into this category fall the principles listed as paragraphs (a) – (c) of proposed new section 9B(2). In respect of them the FSF notes –

(i) Paragraph (a) - "Exercise reasonable care and skill": As drafted this is too broad and lacks clear meaning, essentially because the verb has no object. As it stands, if para (a) has any effect it is probably to impose a duty of care on consumer lenders across the range of their activities. The FSF can think of no other sector of the economy where such a broad duty has been imposed by statute, and opposes para (a) as presently drafted.

If the intention of para (a) was to reflect the guarantee of reasonable care and skill under section 28 of the Consumer Guarantees Act, that duty exist in respect of "services" which, as defined in the Consumer Guarantees Act, in this context

means “lending money or providing credit to a borrower”. To better reflect that in the draft Bill, the FSF suggests that para (a) should therefore read -

> “exercise reasonable care and skill in lending money or providing credit to a borrower”.

Thus redrafted, para (a) would then reflect the existing requirements of the Consumer Guarantees Act, and the FSF would have no issue with that.

(ii) Paragraph (b):- “Provide information to enable the borrower to make informed decisions”: The FSF has three issues with the proposed text of proposed para (b):

a. It may not be achievable in all cases: some borrowers may lack the capacity to make what others would objectively consider to be an “informed decision”, and that is not a matter that lenders can reasonably be expected to be answerable for. Given that lenders would have an obligation to exercise reasonable care and skill under proposed para (a), the FSF considers these additional words are both unrealistic and unnecessary. They should either be deleted or made objective by replacing “the borrower” with “a reasonable borrower”;

b. Except as outlined at d. below in respect of point of sale (“POS”) finance, the FSF does not have any issues in principle with the requirement to provide sufficient information so far as it relates to non-POS lenders, but a lender can only provide information that it actually has: not all relevant information may be known to it – for example, because the borrower has not disclosed it. This needs to be reflected in the text;

c. The proposed text of proposed para (b) would oblige lenders to provide such information not only at the time the loan is made, but thereafter on a continuing basis “during all subsequent dealings” with the borrower. Again, that is an impossible objective that will be beyond the ability of lenders to perform. These words should be deleted;

d. The FSF is also concerned that there are tensions between the content of para (b) and the Financial Advisers Act, in particular in the area of POS finance such as sales on finance terms offered by retailers and car dealers.

Such POS sellers will be “lenders” as defined in proposed section 9A, and will accordingly be subject to the responsible lending principles. However in requiring them to place borrowers in a position to make “informed decisions”, proposed para (b) is arguably requiring them to provide “financial advice”, whereas POS sellers are exempted from the financial advisers regime (by section 13 of the Financial Advisers Act). Further, the point noted at b. above has particular force in respect of POS sellers – they will not be in a position to “provide information” about any but their own products.

The FSF considers there is accordingly a real need to make clear that proposed para (b) –

(i) Does not require a lender to give “advice”, but applies only to factual information (the provision of which is not “advice” under the Financial Advisers Act); and

(ii) Relates only to products that are available from the lender or POS seller in question.

If changes were made to reflect those 3 points, proposed para (b) might then read –

> "to the extent reasonably possible, provide the borrower with sufficient facts to enable a reasonable borrower to make informed decisions for themselves about the products available from the lender at the time of entering into an agreement"

The FSF would consider that to be significantly preferable to the presently proposed para (b).

(iii) Paragraph (c) – Terms of agreement to be "not unduly onerous": The expression "not unduly onerous" is very subjective and too general. It will mean many things to different people, and lacks the certainty of meaning that is in the interests of borrowers and lenders alike. Some might consider that even a market interest rate was "onerous", for example. The FSF suggests the words are not necessary in view of the requirements of the other proposed principles and of the CCCFA generally, and thus suggests they are deleted, so that para (c) would simply read -

> "ensure that the terms of the agreement are expressed in a clear, concise and intelligible manner".

The FSF would support para (c) if it were thus amended.

2. Should any additional principles be included in (or removed from) the principles of responsible lending?

There are no additional principles which the FSF considers should be added to the proposed responsible lending principles.

3. Should a responsible lending code be developed by the Minister of Consumer Affairs in consultation with affected people, or by a code committee as with the Code of Professional Conduct for financial advisors?

The FSF would support the establishment of a "code committee" to assist in development of a responsible lending code. It considers that to be appropriate, because if the responsible lending code is to be successful, it is essential that industry representatives with experience of what can realistically be achieved as workable responses to the problems should be closely involved in the development of a code. Constituting a working committee is likely to be the best way to achieve that.

The FSF would also hope that its members would be represented on such a committee, given that they comprise the largest part of the non-bank consumer finance market and already have experience in operating under such a code – namely the FSF's own Responsible Lending Guidelines. The FSF would be pleased to discuss further the establishment of such a committee with the MCA.

4. Is it appropriate for the code to elaborate and provide guidance on the responsible lending principles in the Bill, or should it be more prescriptive?

The FSF considers the code should provide guidance only, rather than being prescriptive. It is of that view because the Code will apply across a wide range of consumer lending, ranging from residential mortgages involving legal advice, to motor vehicle finance, and to small domestic loans. What are appropriate or desirable behaviours in one of those areas might not be appropriate in others. The FSF considers it is unrealistic to expect that prescriptive rules could apply sensibly across the entire range of consumer lending activity, and a Code that provides for guidance rather than prescription will be better able to provide the flexibility necessary for a Code of such wide application.

New Purpose Clause

5. **Do you agree with the new CCCFA purpose clause emphasising consumer protection and the market behaviours stated in new section 3(2)(a) and (b)?**

   The FSF is comfortable with the new CCCFA purpose clause as set out in proposed new section 3 of the CCCFA.

6. **Should any additional purposes to those in new sections 3(1) and 3(2) be included (or be removed) in order to ensure that the CCCFA is interpreted in a way that meets its objectives?**

   There are no additional purposes which the FSF considers should be added to proposed new section 3.

Disclosure

7. **Looking at amended sections 17, 22 and 23, is there any justification for consumer credit contract disclosure being made after the contract is made?**

   By providing for disclosure to be possible before or after the contract is made, section 17 presently reflects that what is important is that disclosure is properly made, and whether that occurs before or after the contract is made is of lesser importance. The FSF considers that approach to the timing of disclosure to be sensible, and preferable to the approach of the draft Bill in requiring disclosure to be made before the contract is entered into. In that regard the FSF notes -

   a) Very likely in many, or possibly even most, cases disclosure is presently already being made before the contract is entered into (thus many consumer credit contracts contain an acknowledgment by the borrower that disclosure has already been made to them), albeit the period of time between the disclosure and the contract being entered into may sometimes be condensed, possibly even a matter of minutes. There is nothing in section 17 as proposed by the draft Bill that would require there to be any minimum period of time "before the contract is made", so that would seem still to be permissible under the draft Bill;

   b) If that is what is occurring now, and if it will continue to be possible following the draft Bill, it is doubtful if this proposed change is likely to achieve anything;

   c) It is illusory to think that making disclosure only a brief period before the contract is made is likely to add meaningfully to the borrower's cancellation rights, or make it more likely that cancellation rights will be exercised. The borrower will seldom have time to read the disclosures before signing, and quite

likely is not motivated to do so at that stage – their motivation is to complete the loan transaction;

d) Past experience with New Zealand credit legislation also suggests that making disclosure mandatory before the loan contract is completed is likely to prove unsatisfactory: the Moneylenders Act 1908 featured a similar such requirement. In practice that achieved little by way of enhanced borrower protection – essentially for reasons similar to a) and c) above – and the complexity that requirement added was amongst the reasons why the Moneylenders Act was replaced by the Credit Contracts Act in 1981.

The FSF considers that the real question here is not if there is "any justification for consumer credit contract disclosure being made after the contract is made", but rather if there is any justification for requiring disclosure to be made before the contract is entered into. The FSF considers there is none, and is accordingly opposed to the change to section 17 that is proposed by the draft Bill.

These points also apply to clause 27 of the draft Bill, which would require disclosure of credit related insurances, repayment waivers and extended warranties before they are arranged, rather than within a further 15 working days as presently.

Also with regard to that change, the FSF notes that if it were to proceed, significant changes to the present practices of credit insurers in particular could be required in terms of the timing of such disclosures. The FSF is not satisfied that the costs related to such a change would be justified by any resulting benefits.

Finally, the heading to this question also refers to sections 22 and 23, in a manner that suggests that those sections are subject to the same considerations as addressed above. However the FSF considers that the proposed amendments to sections 22 and 23 raise quite different considerations. These are addressed under "*FSF Comments on other changes To The CCCFA contained In the draft Bill but which are not directly the subject of MCA questions*", below.

8. Looking at amended section 27, do you envisage any unintended consequences from extending the cooling off period from 3 working days to 5 working days?

Except as noted at c) below, the FSF does not foresee unintended consequences arising from extending the cooling off period from 3 working days to 5 working days, and doubts if there will be any material increase in the numbers of borrowers exercising cancellation rights as a result of that change.

The FSF does however question if this change is necessary. In that regard it notes that –

a) If the MCA's Explanatory Information paper is correct when it says at page 3 that "the cooling off period is of limited use when the consumer has probably spent the borrowed money", then it would seem to follow that this change is itself likely to be "of limited use";

b) It is not compelling to suggest, as the Explanatory Information paper does at page 3, that "The longer cooling off period is consistent with the cooling off periods for uninvited direct sales and extended warranties being provided in sections 36M and 36U of the Fair Trading Act through the Consumer Law Reform Bill". Those provisions are not yet law, and it is at least as logical to suggest that

the 5 working day periods that they feature ought to be abbreviated to make them consistent with the existing provisions of the CCCFA;

c) There may be some lenders that presently make a practice of not advancing the credit until the cooling off period has expired, in case the borrower does exercise cancellation rights. For example, it is common with mortgage loans for a lender to require executed documentation to be returned to it several days prior to the intended drawdown date. In such cases it is quite possible that extending the cooling off period to 5 working days may result in access to credit being delayed, which will often not be a desirable outcome from the borrower's point of view.

Publication of Standard Terms and Costs of Borrowing

9. Looking at new sections 9H and 9I:

a) Will making standard terms and costs of borrowing available at creditors' premises and on their websites be sufficient to improve transparency and improve competition?

b) To what extent will these provisions promote shopping around by borrowers and effective competition among lenders?

In relation to both parts of this question, the FSF accepts that these proposals may, to some degree encourage transparency, rate competition and "shopping around", objectives with which the FSF is comfortable. However those objectives need to be tempered with some realism –

1. In respect of residential mortgage lending, rates in particular are already widely publicised in these ways by mainstream mortgage lenders, and "shopping around" by borrowers is common, so the effect of this proposal in that part of the market is likely to be small at best;
2. In respect of smaller "household" or vehicle-related consumer loans, the experience of those FSF members that are active in that part of the market is that a very high proportion of new loans are to repeat customers, to whom brand loyalty and relationships with a lender's staff are likely to be major considerations that outweigh the likelihood of such borrowers wanting to "shop around";
3. In respect of such borrowers, many are not well equipped to digest "standard terms", nor to appreciate what may be subtle difference between the fees charged by different lenders. In those cases the proposed changes are unlikely to increase "shopping around". For that sector of the market, provisions of this kind are no substitute for taking steps to improve borrower comprehension of such information, an objective which the draft Bill does not address but of which the FSF is supportive;
4. Complying with these provisions will involve costs to FSF members, and in view of the above the FSF questions if sufficient benefits will flow from these provisions to warrant such costs.

Despite those points so far as these provisions relate to in-branch or website disclosure of standard terms, the FSF does not strongly object to these provisions, albeit that it doubts their likely effectiveness.

However, the FSF is firmly of the view that proposed section 9I should not proceed at least not in respect of in-branch or website disclosure of interest rates. It is of that view because of the following:

1. Proposed section 9I – and indeed the concept of "shopping around" itself - makes an assumption that for each lender there is one "annual rate of interest … for every type of agreement". That assumption is incorrect – even for a particular "type of agreement" the typical consumer lender will have a range of rates, which vary from customer to customer depending on factors such as their assessed credit standing, loan size and the security offered, etc;

2. Two points flow from that –

    a. The first is that if all such rates were required to be disclosed, prospective borrowers will be confronted with a number of rates, and will have no way of knowing from in-branch or website disclosures which rate is likely to apply to them. That means they will in reality be in no position to "shop around", and the apparent objectives of proposed section 9I will not be achievable;

    b. Second, compliance by lenders becomes incrementally more difficult – and costly - as the number of rates required to be displayed increases. Lenders should not be asked to bear such costs in an endeavour to achieve objectives that appear incapable of being realised in any case;

3. Further, if lenders were forced to disclose rates on a "type of agreement" basis, quite likely some may respond to the challenges of doing so by condensing the range of rates charged, so as to publicise the higher end of the range only. The effect may be to increase consumer finance rates, which does not seem to be in the interests of consumer borrowers;

4. One response to the above points might be to permit a range of rates to be disclosed, for example "15% - 20%". However in terms of objectives such as "shopping around", such a requirement is unlikely to achieve anything: again, consumers will be in no position to shop around meaningfully, as they will not know where in the range they may fall. FSF believes that risk-based interest rate pricing presents difficulties in publication of a range of rates and is likely to cause consumer confusion.

5. The above points are not confined to "lenders" in the literal sense either – as drafted proposed sections 9H and 9I would also apply to providers of point of sale ("POS") finance such as retailers and car dealers who write retail finance agreements with their customers before assigning them to a finance company. In respect of such POS finance –

    a. In the context of POS finance, any "shopping around" is in any case more likely to relate to the product the customer is seeking to buy than to the subsidiary issue of finance for it;

    b. If these proposals do ultimately proceed despite the FSF's opposition to them, the FSF further suggests that in respect of POS finance a realistic approach is needed, and that a similar approach should be taken by the draft Bill to that taken by section 13 of the Financial Advisers Act to POS finance, namely that POS financiers in respect of whom finance is but an

"incidental" part of their sales business should be exempt from requirements such as are proposed by proposed sections 9H and 9I.

For such reasons, the FSF is strongly opposed to proposed section 9I: it is very likely to be unworkable in practice, and equally unlikely to achieve the stated objectives of encouraging transparency, rate competition and "shopping around".

For completeness, the FSF also notes that proposed section 9I appears also to assume that the "prescribed information" that must be publicised may include information other than interest rates and fees. It is not clear from the draft Bill what that information might be. If proposed section 9I is to proceed despite the FSF's very real doubts about it, the FSF would welcome clarification of what this other information may be, and would request that it is consulted about any such regulations that may ultimately be made under this section.

A further reason why the FSF would want to be consulted about any regulations under proposed Section 9I is that Section 9J makes clear that Sections 9H & 9I are to apply to extended warranties. In that regard the FSF's members include an insurer involved with extended warranties, and it and a number of FSF members have expressed concerns about how proposed Sections 9H & 9I might apply to extended warranties.

It is important to note that there are two offerings of extended warranty in New Zealand; one fully underwritten by a licensed insurer and another self-insured by a distributor or dealer (motor dealer or retail appliance retailer). While lenders may finance the cost of extended warranties, in neither case does a lender have any control on the terms of these warranties, and typically when (say) a vehicle is sold the warranty continues with the vehicle for the benefit of the new owner, and is not repaid in the same way as the vehicle finance is.

Two points arise from that –

1. Since lenders have no control over the terms of these warranties, the FSF questions if it is appropriate for Sections 9H & 9I to require lenders to display terms they have no control over;

2. It would be wrong for any "prescribed information" under section 9I(3)(a) to include information about matters such as rebating of extended warranties on early settlements. What information is to be "prescribed" under section 9I(3)(a) in respect of extended warranties, if any, thus needs to be very carefully considered and as above the FSF requests it is consulted about such matters in due course.

Fees

10. Looking at the amendments to sections 40, 41, 43, 44, 45, 51, 52 and new sections 44A and 52A:

a) To what extent do the amendments and additions adequately describe the process by which an unreasonable fee may be altered?

The FSF is not certain that it appreciates the point of this question – both before and after the draft Bill the "process" is the same: application to a court by the Commerce Commission, a debtor or a guarantor. If the question is concerned more with the factors that the court may take into account, then yes those matters are adequately described, in

particular by the changes to proposed sections 41 and 44A, but overall the FSF's impression is that those changes are not likely to make material changes to the present law.

b) Do these provisions meet the objective of making the law clearer about what an unreasonable fee might be?

There are many changes made by the amendments to sections 40, 41, 43, 44, 45, 51, 52 and new sections 44A and 52A. Some seem to the FSF to add clarity, but others may detract from it. It is easiest to illustrate that comment by addressing the changed or new sections individually:

i) Section 40: The FSF welcomes this change, which does make more clear the period during which a default fee can be charged (albeit the result is to confirm what the FSF believes section 40 is generally already understood to mean);

ii) Section 41: The principal change is the additional specificity in section 41(3). The FSF doubts if it adds substantively to, or materially clarifies, a court's powers under section 41 at present;

iii) Section 43: The principal change is the deletion of the words that presently make clear that a fee to recover the lender's loss on a full or part-prepayment may include "the creditor's average reasonable administration costs." It is not clear why those words have been deleted, but if the intention is that a lender's recoverable costs on a prepayment should be actual costs, not averaged costs, that degree of precision is unlikely to be achievable, and it is unrealistic to expect lenders to calculate their exact administration costs in respect of each loan pre-paid. This change does not add clarity, and should not proceed;

iv) Section 44: The principal changes are:

   a. Replacing the present reference to "any cost incurred by the creditor" in respect of the subject of the fee with "creditor's reasonable costs in performing and documenting the credit contract". The proposed new wording is wider, and consequently less clear in meaning;

   b. The new text added to the end of proposed new section 44(2)(c) [which incidentally should be correctly numbered as section 44(2)(b)], to make clear that a fee to recover administrative costs on a prepayment is subject to that section. The FSF considers this makes no substantive change, and the cross reference back to section 43, which itself then cross-refers to section 54, makes comprehension challenging. The FSF suggests the intended effect would be clearer if these words were deleted, and the following added to section 43 instead:

      > "(3) A fee relating to administrative costs on a part or full prepayment is subject to section 44."

v) New section 44A: The FSF is comfortable with proposed new section 44A. Dealing with default fees separately from credit fees does assist clarity, although the FSF doubts if any substantive change will result from doing so in the terms used in the draft Bill;

vi) Section 45: The FSF welcomes this change, deleting the "difficult" present section 45(5). This too adds clarity, albeit the FSF again doubts if substantive change will result from it;

vii) Sections 51 and 52: The FSF has no issues with these minor changes, which do add clarity to a small degree;

viii) New section 52A: This extends the rebating of credit insurance on early settlements so as also to apply to repayment waiver charges. This is substantive and new, and issues of adding clarity to existing law thus do not arise.

Overall, while it is supportive of many of these proposed changes, the FSF considers that the various changes to these sections proposed by the draft Bill will not significantly clarify what is and is not an unreasonable fee: the substantive effect of most of most of the changes is not great, and "unreasonable" remains a concept that is subjective and sometimes uncertain.

c) Do the provisions leave open any avenue to charge a fee which is unreasonable?

No they do not. Both in its present form and as proposed by the draft Bill, the prohibition on unreasonable fees applies to all credit fees and default fees. The remaining sections relating to fees do not generally detract from that, or narrow the scope of that prohibition.

Hardship

11. Looking at the amendments to sections 57 and 58:

a) Will the new unforeseen hardship provisions improve access to hardship protections for those in genuine need?

If the amendments to sections 57 and 58 were enacted as set out in the draft Bill, that will certainly result in improved access to hardship protections for those in genuine need, because –

1. Borrowers in default cannot presently make hardship applications, but will be able to do so under the proposed changes;
2. The "timetable" for lender responses to hardship applications in proposed new section 57A is also likely to facilitate the progress of such applications.

In principle, the FSF is comfortable with each of those proposed changes, but does have issues with some of the suggested changes relating to hardship applications, as set out under c) of this question, below.

b) **Are additional changes necessary to protect consumers?**

The FSF does not think any further changes are necessary to protect consumers.

c**) Are additional changes necessary to protect lenders from abuse of the provisions?**

The FSF considers that the following should be changed, because at present they have the potential to operate in a manner that would be unfair to lenders:

1. The reference in proposed new section 57(1)(a) to a debtor not being able to make a hardship application if they have "been in default for 2 months or less" appears to be drafted back to front, and should presumably read "have been in default for 2 months or more" (so that hardship applications must be made within 2 months of a default, but cannot be made after that);

2. The FSF considers that 2 months after a default is too long in any case: a borrower should be able to make an application within one month of a default, if in fact the default is due to "hardship";

3. Proposed section 57A(2) appears intended to prevent lenders from charging default fees or default interest "in relation to an application". The drafting lacks clarity since such charges relate not to "an application", but rather to a default. If this is intended to mean that a lender cannot charge default fees or default interest once a hardship application has been made, that is unreasonable - defaults certainly do involve a cost to lenders, even if the default is subsequently remedied.

   Further, as presently drafted the proposed section could incentivise borrowers to make hardship applications each time they default in order to avoid default fees and interest, regardless of whether they are in fact suffering "hardship";

4. Proposed section 57A(4) is confusing: subsection (3) states that a lender may charge a fee to recover the costs of documenting changes following a successful hardship application, but subsection (4) appears to state the opposite. Subsection (4) is not necessary and subsection (3) is clearer without it. Subsection (4) should be deleted.

Unregistered Lenders

12. Looking at the new section 99A, are additional provisions needed to ensure unregistered lenders are not operating in the marketplace or to protect consumers from unregistered lenders?

Except as mentioned in the next paragraph, the FSF has no issues in principle with the content and effect of proposed section 99A, and does not think any additional provisions would be needed to ensure unregistered lenders are not operating in the marketplace, or to protect consumers from unregistered lenders.

The FSF does however question if proposed section 99A is the best solution – it is already an offence for unregistered lenders to be carrying on business. What is really needed here, as in other areas of consumer credit law, is for better enforcement of adequate existing provisions by those responsible for enforcing them. Section 99A seems premised on the idea that the Financial Service Providers (Registration and Disputes Resolution) Act may be better policed by consumer borrowers than by the authorities. The FSF does not agree with such an approach.

Oppressive or Unjust Contracts

13. Do you think the amended Guidelines for reopening credit contracts, consumer leases and buy-back transactions will improve the protection of consumers from oppressive credit contracts (amended section 124)?

The changes proposed by the draft Bill to section 124 would certainly make for a larger list of factors to which a court may have regard in reopening an oppressive contract, by including a number of matters not expressly referred to in the present section 124.

However, the FSF doubts whether the more expansive drafting is likely to improve consumer protection, or to add anything material to the present scope of section 124: all of the specific items that the draft Bill would add are surely covered already by present section 124 (a) ("all of the circumstances relating to … the contract") or by present section 124 (c) ("any other matters that the court thinks fit").

The FSF notes that proposed new section 124 (e) requires consideration to be given by the court to whether the borrower had legal advice. Except in respect of residential mortgage lending – which is unlikely to involve the "unscrupulous lenders" whose practices the Explanatory Notes state are a key driver of the Bill – lawyers will seldom be involved in consumer credit transactions. This factor is thus somewhat unrealistic. Unless the draft Bill intends to encourage the involvement of lawyers in smaller consumer credit transactions , this factor would be better deleted.

Overall, the FSF considers that proposed new section 124 is unlikely materially to improve the position of consumers in view of which FSF believes it should not proceed.

14. As an alternative, should we follow the approach to the re-opening jurisdiction in the Australian National Consumer Credit Protection Act 2009, and refer to "unjust" credit contracts rather than "oppressive" credit contracts?

The FSF would not support such a change. The definition of "unjust" in section 76(8) of the National Consumer Credit Code made under the Australian legislation is that "unjust" includes "unconscionable, harsh or oppressive". Each of those words is already used in the definition of "oppressive" in section 118 of the CCCFA, so such a change would have no substantive effect.

Disclosure of Statement of Rights

15. Do you think the amendments to the CCCFA Schedule 1 - Key information concerning consumer credit contract - will sufficiently improve disclosure or should additional information be provided in disclosure documents?

The FSF doubts if the amendments to Schedule 1 of the CCCFA will improve disclosure at all. Addressing separately the 3 changes that the draft Bill proposes to make to Schedule 1: -

a) Replacement of existing para (s) about Statement of Rights under section 27: The existing text prescribes wording that is universally used in consumer credit contracts, and which appears in practice to have worked well. There is no need to replace it, and to do so in a manner that appears to permit all lenders to interpret and summarise section 27 in a potentially wide number of ways does not seem desirable. It would be better if either –

    a. the present prescribed text continued to be required; or

    b. prescribed text continued to be required, but with the present text being abbreviated and made clearer.

    Furthermore, it is hard to reconcile the movement away from prescribed disclosure text in this provision with Clause 13 of the draft Bill, which would add a new para (ba) to section 32 of the CCCFA, the effect of which would seem to be to make mandatory use of any prescribed disclosure form: the two approaches seem broadly inconsistent.

b) New para (sa) about a Debtor's right to apply for relief due to hardship under section 55: Similar considerations apply here: The FSF has no objection to disclosure documents being required to draw borrowers' attention to their rights under section 55, but sees prescribed text as preferable to the more permissive approach presently taken by the draft Bill. The FSF would however hope that the

prescribed text could be succinct – as otherwise it will only add length to disclosure documents, which seems broadly at odds with the objective of borrower comprehension. The FSF would be happy to assist in developing suitable such text;

c) New para (ua) about ADR membership: This will achieve nothing. The same information is already required of QFE and registered adviser disclosure documents by the Financial Advisers Act and the Financial Advisers (Disclosure) Regulations 2010. Borrowers should already by receiving this information in either of those ways, and there is no point in the Bill requiring borrowers to be given the same information twice.

Transitional Provisions

16. Are all the situations where the new law should have an effect on existing contracts covered in the Bill?

The FSF is mostly comfortable with the approach to transitional issues taken by proposed clause 36 of the draft Bill, which takes as its starting point the principle that existing contracts should not be subject to the Bill, except as listed in clause 36. There are no further exceptions to that principle that the FSF would suggest.

However, in one respect the FSF disagrees with the approach taken in proposed clause 36. That is proposed clause 36 (2) (e), which would apply the amended provisions about credit and default fees to fees charged under existing contracts after the Bill becomes law.

That is not appropriate and indeed may be unworkable. The principal section of the CCCFA relating to unreasonable fees as it would be amended by the draft Bill begins –

> "A consumer credit contract must not provide for a credit fee or a default fee that is unreasonable."

Compliance with that section can only be assessed at the time that the credit contract is entered into, and that is the time at which the prohibition on unreasonable fees applies. To avoid the new provisions having retrospective effect on existing contracts which lenders are not able to alter, it follows that clause 36 ought not to provide for the fee-related provisions of the Bill to apply to fees "incurred" under existing contracts. Paragraph (e) of sub-clause (2) of clause 36 should be deleted accordingly.

After Acquired Consumer Property

17. In your experience, will the amendment of section 44 of the Personal Property Securities Act 1999 prevent the practise of "drag-net" securities over all personal property?

The proposed amendment to section 44 of the Personal Property Securities Act seems intended to prevent the use by lenders of powers of attorney or similar to sign on the borrower's behalf the "appropriations" of after-acquired property that are required by that section before a security can be effective in respect of after-acquired consumer goods.

The FSF is not aware of the extent to which powers of attorney or similar clauses are used for that purpose by other consumer lenders. However the FSF has no issues with the proposed amendment: in principle such appropriations ought to be signed only by the borrower in person.

However, the FSF doubts if the amendment will materially restrict the practice of using such "drag-net" clauses to obtain security over after-acquired consumer goods. The FSF is anecdotally aware of the use of such clauses by some consumer lenders (not FSF members) in circumstances where no such appropriation is signed by the borrower, and suspects that practice may well continue despite the proposed amendment.

The FSF is opposed to that practice, and considers that a stronger legislative response to it is required than what is proposed by clause 37 of the draft Bill. The FSF would have no issue in principle with legislation making it an offence to repossess after-acquired consumer goods where the lender does not hold the required appropriation signed personally by the borrower. Such an offence ought however to be located in the CCCFA or the Credit (Repossession) Act (assuming the latter continues to exist as a separate staute), rather than in the Personal Property Securities Act.

FSF COMMENTS ON OTHER CHANGES TO THE CCCFA CONTAINED IN THE DRAFT BILL BUT WHICH ARE NOT DIRECTLY THE SUBJECT OF MCA QUESTIONS

There are five matters arising from the amendments proposed by the draft Bill on which the FSF also wishes to comment, but which do not arise directly from the MCA's questions. They are -

1. **Clauses 9 and 10 – repeal of Sections 22(3) and 23(5):** The effect of these proposed changes is to repeal the provisions of CCCFA to the effect that disclosure is not required in respect of –

    a. An agreed variation of a loan; or

    b. the result of a lender exercising a power (such as an interest rate review);

    where the resulting change to the contract is one of several types typically favourable to the borrower.

    Although these provisions are mentioned in the heading to the MCA's question 7, these proposals raise quite different issues from that question – the issue here is not whether disclosure should be required before or after a loan contract is signed, but rather whether disclosure should be required at all (which it presently is not).

    There is no discussion of these proposals in the Consultation Document, which is unfortunate given that these provisions are important to lenders and, in relation to section 23(5) in particular, often quite complex systems relating to interest rate reviews have been designed around them and could not readily be changed without significant cost.

    While the FSF accepts that in many cases lenders may presently make disclosure of variations or of the result of a lender exercising a power even if they are not required to do so, that is not universally true.

    The FSF considers that these proposals should not be advanced without, at minimum, further consultation as to the Ministry's objectives in repealing these sections of the CCCFA. As matters stand, the FSF is opposed to these provisions of the draft Bill: it is harsh to expect lenders to incur the costs of changing existing systems and to expose lenders to penalties in respect of actions that may in fact be

favourable to borrowers, as was recognised when first these sections were enacted in the CCCFA.

(At a conceptual level, similar points might apply to clause 28, which would delete section 78 so that even favourable variations to buy-back agreements would need to be disclosed. However, that provision is not one that impacts on FSF members, as they do not enter into buy-back agreements).

2. **Proposed new Section 9J:** The FSF understands the reasoning for proposed section 9J making clear that publication of terms of repayment waivers and extended warranties is required in a similar manner to the requirements of proposed sections 9H and 9I. However –

    a. The FSF doubts if section 9J is necessary at all so far as it relates to proposed section 9H: where a repayment waiver and extended warranty is to be taken with a loan, it will form part of the 'standard terms' as defined in the Bill, so that proposed section 9H will already apply;

    b. More thought needs to be given to the drafting of proposed section 9J: simply stating that proposed sections 9H and 9I apply to repayment waivers and extended warranties does not work well when, for example, proposed section 9I refers to interest charges, but repayment waivers and extended warranties do not involve interest charges.

3. **Clause 13 – Amendment to section 32 CCCFA about disclosure standards:** Clause 13 will add a new para (ba) to section 32 of the CCCFA, the effect of which would seem to be to make mandatory use of a prescribed disclosure form. There already is a prescribed "safe harbour" disclosure form prescribed by regulations, but its use is not presently mandatory.

    The FSF strongly opposes changing section 32 of the CCCFA to make mandatory the use of a prescribed disclosure form. Although the presently-prescribed "safe harbour" disclosure form is widely used, it does not fit every circumstance and its content is often varied by FSF members, or not used at all. That should continue to be possible.

4. **Clause 41 – Removal of 12 Month Limitation period on applications to cancel fees:** When clause 15 of the draft Bill replaces the present section 41 of the CCCFA with a new section, one feature of the existing provision that is not brought forward into the proposed new text is present section 41(4), to the effect that a challenge to a fee must be made within 12 months of the fee being charged.

    The FSF's impression is that it has not been necessary for present section 41(4) to be widely relied on by lenders. Despite that, the assumption on which it is based – namely that if a borrower is unhappy with a fee it is reasonable to expect that they should complain about it within 12 months of being charged - seems to the FSF to remain as valid today as it was in 2003 when it was enacted. No reason is given by the MCA for the proposed deletion of that requirement, apart from an assertion that it is "unreasonable".

5. **Proposed new Section 52A:** The FSF understands the policy reasons for repayment waivers being subject to rebates on an early repayment of a loan, in a similar manner to what the CCCFA presently requires for loan prepayment charges. However the Consultation Document does not address the formula proposed for the rebating. It

would need to be different from that applicable to loan prepayment fees, because repayment waivers do not feature interest. It is difficult usefully to comment on this proposal without further information as to the proposed basis of rebating.

FSF COMMENTS ON MCA's "OTHER MATTERS" DOCUMENT

No comment is necessary in respect of the MCA's comments under the heading "CCCFA Regulator".

In respect of the other two matters raised by the MCA in this document –

1. **Credit (Repossession) Act**: The Law Commission's report has now been published, but the FSF and its members have as yet had insufficient time fully to consider the extensive changes that the Commission proposes. The FSF requests that a further round of consultation is undertaken in respect of the Law Commission's report, which is of major importance to FSF members.
2. **Cost of finance caps**: The FSF does not favour "cost of finance caps", and agrees that if the changes to the CCCFA which the draft Bill envisages meet their objectives, introducing such caps should be unnecessary.

APPENDIX A

Membership List as at 1st May 2012

Full Members

Chattel Lender	Credit Reporting	Finance Company	Debt Collection Agency	Vehicle Lender	Non-Bank Deposit Taking (NBDT)	Insurance
• Asset Finance Ltd • Equico Limited • GE Money • John Deere Credit • RentPlus • Thorn Rentals NZ Ltd	• VEDA Advantage	• Avanti Finance Ltd • Centracorp Finance 2000 Ltd • Dorchester • Finance Now Ltd • Instant Finance NZ Ltd • Mutual Credit Finance Ltd • ORIX NZ Ltd • Oxford Finance Corporation Ltd	• Baycorp (NZ) Ltd • EC Credit Control • Receivables Management (NZ) Ltd	• BMW Finance Ltd • European Financial Services Ltd • Mercedes-Benz Financial Services NZ Ltd • Motor Trade Finances • Toyota Finance Ltd • Yamaha Motor Finance NZ Ltd	• Fisher & Paykel Holdings Ltd • Heartland • Heretaunga Building Society • Medical Assurance Society Ltd • Napier Building Society • Nelson Building Society • NZ Association of Credit Unions • Prometheus Finance Ltd • Wairarapa Building Society	• Protecta Insurance NZ Ltd • QBE Lenders Mortgage Insurance Ltd

Associate Members

- Southsure Assurance Ltd

Affiliate Members

- Buddle Findlay
- Deloitte
- Ernst & Young
- Price Waterhouse Coopers
- Russell McVeagh