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FINANCIAL SERVICES FEDERATION

Introduction:

By way of background, the Financial Services Federation ("FSF") is the industry body for the responsible non-bank financial services sector. We have forty members and associates providing financing, investment, banking and insurance services to over 1 million New Zealanders and our eight affiliate members include internationally recognised legal and consulting partners. A list of our members is attached as Appendix A.

As advocates for responsible and ethical behaviour in the provision of financial services to New Zealand consumers, FSF members take their compliance obligations extremely seriously. As such, FSF members abhor irresponsible behaviour in the financial services sector to which they all too frequently bear witness.

The FSF believes strongly that enforcement of legislation or regulation is the key to ensuring that those firms who do not adhere to high standards of responsible financial services behaviour are prevented from preying on the vulnerable. In the opinion of FSF members, enforcement action to stop unethical behaviour from lenders who do not subscribe to similar standards as they do is currently sadly lacking and will need to be stepped up considerably upon enactment of the Credit Contracts and Financial Services Law Reform Bill (the "Bill").

The FSF also believes strongly that enforcement of legislation or regulation is the key to ensuring that those firms who do not adhere to high standards of responsible financial services behaviour are prevented from preying on the vulnerable. In the opinion of FSF members, enforcement action to stop unethical behaviour from lenders who do not subscribe to similar standards as they do is currently sadly lacking and will need to be stepped up considerably upon enactment of the Credit Contracts and Financial Services Law Reform Bill (the "Bill").

The FSF and some of its member organisations were represented at the recent Consumer Credit Forum called by Minister of Commerce, the Hon Craig Foss. This was the fourth of such forums to have been held over the last decade. Some examples of horrendously irresponsible behaviour including unjustifiably high interest rates and egregious fees being charged by credit providers were recounted at that this forum by budget and consumer advisers – much as they have provided similar such stories at the previous three forums.

If, following the enactment of this Bill, a similar such forum is held and these people who work in the community with our most vulnerable members of society are still providing such examples of horrific lending practices, this will be a very sad indictment not on lenders in general but on the regulators and enforcers whose role will not have been fulfilled.

While the FSF feels strongly about some of the issues raised by this Bill, it is of course also grateful for the opportunity to make a submission on the contents of the Bill.. This submission will not cover every aspect of the Bill but will confine itself to those aspects of it that are of interest or concern to FSF members.

However the FSF does still have a considerable number of submissions on the Bill. They are set out below in the same sequence as the clauses of the Bill to which they relate. However in terms of those submissions that are of major concern to the FSF, they are –

a) Responsible lending (addressed at pages - below);

b) Preparation of the Responsible Lending Code which states that the Code must be published not less than 2 years after the Bill is enacted (addressed at pages - below);

c) The Bill's requirement to publicise rates and terms (addressed at pages - below);

d) The implications of the amendment of section 21 by clause 14 of the bill (addressed at pages - below);

e) Transfers of credit contracts (addressed at pages - below);

f) The subject of credit fees generally and specific amendments in respect of prepayment fees (addressed at pages - below);

g) The Bill's requirement that commission on any insurances may not be charged if the borrower is required to obtain that insurance from a particular insurer (addressed at pages - below).

h) Hardship applications (addressed at pages - below).

The FSF's submissions on the Bill now follow, in the same sequence as the Bill's clauses.

<u>Clause 8 of Bill –Credit contract may provide for security interest</u>: Although broadly comfortable with much of the thrust of the proposed section 7A that is provided for by clause 8, the FSF nevertheless has a number of serious concerns with aspects of it:

a) **<u>Credit contracts to which proposed section 7A applies</u>**: Proposed section 7A will apply to "credit contracts" generally, not just to "consumer credit contracts" as defined in the Credit Contracts and Consumer Finance Act 2003 ("CCCFA"). That is offset to some degree by the fact that much of the section will apply only to "consumer goods", but despite that, the fact that the section as drafted will apply to "credit contracts" generally may have peculiar consequences. For example, a General Security Agreement over a large manufacturing plant may be ineffective in respective of the refrigerator in the factory kitchen, due to proposed section 7A(2)(vi), and a receiver of such a business could sell the entire business - but *not* that refrigerator.

   In addition, the FSF's membership includes financiers of medical equipment for business purposes, e.g. doctors and dentists. It needs to be made clear that security for such transactions is still possible.

   The FSF submits that such peculiar outcomes are neither necessary nor desirable, and that the section should apply only to "consumer credit contracts";

b) **<u>Proposed section 7A(1)</u>**: In addition to the point at a) above, the FSF is concerned that when proposed section 7A(1) states that a credit contract can "provide for a security interest over consumer goods that are specifically identified in the contract", the section is too narrowly drafted. In order to align properly with section 44 of the Personal Property Securities Act ("PPSA") the section needs to be redrafted so that the goods are "specifically identified in the credit contract *or in an agreed variation to it*".

   (The same point also applies to proposed section 83B(2) – see below);

c) **<u>Proposed section 7A(2)</u>**: Some FSF members do take purchase money security interest securities ("PMSIs") over collateral of the types listed in paragraph (a), and the FSF is pleased to see that is intended to remain possible.

   The FSF submits that repossession of any goods is an absolute last resort for responsible lenders. In all cases the aim is to assist a borrower to meet their commitment and repay their debt and it is the norm for a lender to have had several interactions with a defaulting borrower before invoking their right to repossess. Holding and storing household goods and then on-selling them almost always results in a cost to the lender that is ultimately passed on to the borrower and is therefore undesirable for all concerned.

FSF members have no issue at all with the taking of security not being possible over personal medical equipment, travel and identity cards, and bankcards. However FSF believes that preventing borrowers from being able to provide a lender with security over assets such as their refrigerator or washing machine is discriminating against those people for whom such items are their only assets. Prevention of the taking of security over these assets increases the risk profile of loans, as they would then be unsecured and therefore inevitably those who can least afford it may well be faced with increased borrowing costs as a result. Further, mandating that a lender is unable to take security over such assets may impact on lenders' funding costs if a larger proportion of their lending book became unsecured as a result. A situation that will result in increased cost of credit for all borrowers.

Some FSF members do on occasion take non-PMSI securities over collateral of the types listed in paragraph (a), and need that to remain possible. Being prevented from doing so will ultimately make access to credit harder or more expensive for people in lower socio-economic circumstances, and could potentially drive these people to dealing with those lenders who do not comply with current regulation and legislation.

The point that needs to be emphasised here is that there is nothing per se wrong with taking security, over refrigerators, washing machines or other chattels – the problem is when loans are made on that or any other security that cannot be repaid by the borrower. That is a responsible lending issue, not one relating to the type of security offered and is adequately dealt with elsewhere in the Bill, so in a real sense proposed section 7A(2) is not necessary.

It is also relevant to note that the Law Commission did not suggest that such security should not be possible, but rather only that repossession of such items should not be possible. The difference may not always be purely semantic;

d) **Proposed section 7A(3)**: The FSF submits there is nothing in principle wrong with a lender holding a duplicate set of keys from day one of a loan: doing so may well facilitate subsequent repossession, to the benefit of all concerned in terms of cost savings etc. It is *use* of the keys that should be regulated, not custody of them.

   The point has particular emphasis in the case of motor vehicle financing – motor vehicle manufacturers typically hold duplicate keys for vehicles manufactured by them, and many of them own outlets that provide point of sale finance for those new vehicles. Is the section intended to prevent them from holding duplicate keys in future? FSF members would seek clarity on this particular point and would submit that the cost to replace modern motor vehicle keys in particular is significant. This is a cost that would ultimately be passed on to the consumer, and which will often need to be incurred by lenders if this clause is enacted without change.

   (The same point also applies to proposed section 83I – see below);

Clause 9A of Bill - Definition of "Lender" for purposes of Lenders Responsibility Provisions: Clause 9A of the Bill defines a number of terms for the purposes of Part 1A, including "lender" which is defined as including "a creditor". A principal consequence of this definition is that "creditors" are thus "lenders" for the purposes of the lenders responsibility provisions of the Bill.

The word "creditor" is not defined in the Bill, but is defined in the CCCFA as being "a person who provides, or may provide, credit under a credit contract; and, if the rights of that person are transferred by assignment or by operation of law, includes the person for the time being entitled to those rights". Under that definition, a dealer or retailer who sells goods on hire purchase before assigning the agreement to a financier would be a "creditor" and therefore would be subject to the Lender Responsibility Principles.

The FSF submits that this creates some inconsistencies with other legislation such as the Financial Advisers Act 2008, where point of sale retailers are exempt from the Act's requirements regardless of whether they are assigned hire purchase providers or document loans as agents for the credit provider. It seems broadly inconsistent for New Zealand law to exempt point of sale retailers from financial adviser legislation but at the same time to expect them to observe lender responsibility provisions that in places are similar in nature to advice.

Further, the Bill in its current form captures dealers or retailers who offer credit to consumers on an assigned hire purchase basis and makes them subject to the Lender Responsibility Principles, but does not capture those dealers or retailers who offer credit options to consumers as agents for a credit provider and do not themselves sign the credit agreement as creditor. However in economic substance there is no difference between the two types of dealers or retailers.

Where retailers or dealers provide credit to consumers as agents for a lender, the lender takes responsibility for what retailers or dealers do or say to ensure their products are fairly represented to the consumer.

The FSF submits that, in the interests of consistency between both types of dealer/retailer arrangements and with other legislation, and because it is the real credit provider on whose behalf dealers or retailers act that will be ensuring that Lender Responsibility Principles are adhered to in any case, the term "lender" should be defined so as not to apply to any point of sale dealers or retailers, and in effect to exempt them from the Lender Responsibility Principles.

Clause 9B of Bill – Lender Responsibility Principles: The introduction of Responsible Lending Principles is not something that causes concern to FSF members. Indeed the FSF proactively produced its own set of Responsible Lending Guidelines for members some time ago as a means of providing clarity around what responsible behaviour towards consumers entails. All FSF members agree to adhere to the FSF's Responsible Lending Guidelines.

The Responsible Lending Principles in the Bill largely correspond to the requirements of the FSF Responsible Lending Guidelines, and therefore do not provide any material concerns for FSF members in adhering to them.

There is one point that the FSF would like to make with regard to the substance of the Lender Responsibility Principles contained in the Bill, and that is with regard to Clause 9B (3) (b) and (d) where the lender is required to assist the borrower or guarantor to be aware of the "full" implications of entering into the agreement or guarantor. The FSF would submit that the requirement for the lender to assist a borrower or guarantor to be aware of the "full" implications is very broad and overly onerous for the lender and would therefore submit that the word "full" be deleted in both instances.

The FSF would hope that the Code would provide clarity around the more imprecise concepts contained in the Principles such as the use of "care, diligence and skill"; the requirement to make "reasonable inquiries"; assisting the borrower to reach an "informed decision"; not to be "misleading, deceptive, or confusing"; expressing terms in a "clear, concise and intelligible manner"; treating borrowers and their property "reasonably and with respect" and ensuring that that the terms of loan agreements should not be "oppressive to the borrower".

If such clarity was to be provided to lenders in a Responsible Lending Code, this could be relied upon to become a "safe harbour" but when Clause 9E provides that the Code is to be published not later than 2 years after the Bill is enacted, FSF members feel that this a long time for lenders to have to wait to achieve that clarity. The FSF therefore submits that the period for development of the Code following enactment of the Bill should be one year not two.

On this basis, the FSF and representatives of its members would be very keen to assist officials in development of the Code, in order to define for the industry what is expected of them under these principles and what is and is not responsible lending behaviour.

Clause 9H –Publication of Standard Terms, Clause 9I – Publication of Costs of Borrowing and Clause 9J – Application of sections 9H and 9I to Repayment Waiver or Extended Warranty: The requirement for lenders prominently to display standard terms and information about all the costs of borrowing in relation to every type of agreement offered by that lender to a borrower on their internet sites and at all business premises is hugely problematic for FSF members.

FSF members are absolutely committed to full and clear disclosure of all relevant terms to their customers before the customer signs the loan agreement, and to there being no surprises on either side.

The FSF would submit however that, by its very nature, consumer lending including motor vehicle and other consumer financing, is not a standardised product susceptible to this type of regulation. Each individual customer situation is unique and the risks involved in each lending scenario are unique to that situation. Prudent lenders relate the cost of credit to the risk involved in providing that credit, therefore the level of risk is assessed for each individual borrower and the pricing is struck accordingly, and factors that responsible lenders would consider in assessing the risk of a particular lending proposal include but are not limited to type and value of security being offered (or not in the case of unsecured lending) and the individual's income situation, employment history and credit history.

The range of interest rates charged varies not only by borrower in such ways, but also varies by type of credit product being offered, and the range of consumer credit products on offer is very wide, especially in respect of non-mortgage credit.

The point is essentially that the only way that these provisions could be complied with by lenders would be for a significant range of rates and terms to be disclosed in branch and on line, and that –

a) Is not likely to assist prospective borrowers, who for the most part will still not be able to tell which rates and terms will apply to them;

b) Means that rate and other competition by encouraging "shopping around" is in fact unlikely to be promoted by these provisions;

c) The volume of rates and terms required to be displayed would add costs to lenders, but for no perceivable benefits to borrowers.

d) Providing consumers with a potential range of rates that could apply to their loan may be misleading as it lets people think they might be eligible for the lower end of the range – and indeed could have adverse consequences for borrowers in that lenders could opt to condense the interest rate range, erring towards the higher end to avoid such confusion.

e) Whenever rate changes occur these would require updating and republishing, so the cost to the lender is not just the one-off cost of publishing their entire range of rates and terms for their entire product suite but also the ongoing cost of keeping these updated as required. These are all costs that will be ultimately passed on to the borrower increasing the cost of credit to consumers.

The FSF's above submission is given emphasis by the fact that the FSF understands that in Australia the requirement for average rates to be displayed on the front counters of lenders' premises was removed, because it was seen to be unworkable.

A further point the FSF would like to make with regard to these clauses relates to their potential impact on debt collection agencies. As debt assignees, these agencies are captured within the definition of "creditor" and are thus a lender for the purposes of the Bill. In this case they would be required to comply with these clauses to display the costs of borrowing. Clearly this would be impractical as they are typically assigned a number of different types of credit contracts from various different lenders and therefore for them to obtain and then publish the fees, charges and interest rates for each and every debt category and product type within those categories at their premises and on their websites would be unworkable, and – more importantly – is simply unnecessary if such "creditors" only collect and do not also lend.

On this basis, the FSF submits that the requirement for publication of standard terms and disclosure of costs of borrowing in proposed sections 9H, 9I and 9J should not be proceeded with – not because FSF members wish these matters to be hidden from borrowers, but because the sheer amount of information that would have to be provided to cover every conceivable lending scenario and every available lending product would not serve to provide potential borrowers with any useful information.

The FSF believes instead that the requirement should be for credit providers to fully disclose all fees, interest rates and terms associated with the loan to the borrower prior to, or at the time of, them signing a loan agreement – which is effectively the law already.

If this submission is not accepted, the FSF submits that debt assignees should be exempted from compliance with Clauses 9H and 9I.

Clause 10 of Bill – Secondhand Dealers and Pawnbrokers: Clause 10 of the Bill makes clear that the CCCFA is not intended to apply to pawnbroking transactions where the pawnbroker's only recourse is to the goods pawned. The FSF questions that policy, for two reasons:

a) Why should customers of a pawnbroker not be as fully informed about the costs of borrowing as they would be if disclosure had been made to them in the same way as the CCCFA requires of other forms of consumer finance?

b) It is not obvious why the law should give pawnbrokers a competitive advantage over other forms of consumer finance, when those other types of finance may in fact be more customer-friendly, since they leave the customer in possession of the collateral.

Clause 11 of Bill – Meaning of "Consumer Credit Contract": Clause 11 of the Bill will amend the CCCFA's present definition of "consumer credit contract" in a way that the Explanatory Notes to the Bill say is intended to "emphasise the creditor's reasons for providing the credit, rather than …the debtor's reasons...". In respect of that the FSF notes –

a) It is not obvious exactly what is intended to be effected by this change: the FSF suggests that in most cases the intentions of the creditor and the debtor will in fact be the same;

b) In any case the FSF doubts if the drafting achieves what the Explanatory Notes to the Bill say is intended: the word "intended" is not linked by the drafting to the creditor in any way at present, but is simply left objective;

The FSF suggests this should be made more clear.

Clause 13 of Bill – Initial Disclosure: Clause 13 of the Bill will amend section 17 of the CCCFA so that initial disclosure must be made before a contract is entered into. Having regard to what has already been said regarding Clauses 9H and 9I above, the FSF supports this change, because –

a) The loan document is effectively the disclosure of all terms, conditions, costs and rates and obligations on both the borrower and the lender once issues like the interest rate to be charged has been struck and the most appropriate product for the borrower's need has been determined – having regard again to the need to price appropriately for the risk involved in the lending scenario as is prudent lending practice.

b) As such responsible lending practice would require disclosure to be made prior to the contract being entered into. In reality, the contract will be entered into mere seconds following disclosure.

However, while supporting this practice the FSF has reservations about the potential for this to be misused in future by defaulting borrowers claiming that disclosure was not made to them until after the contract was made. The FSF suggests that to help pre-empt that, text is added making clear that minor non-compliance has no adverse consequences.

Clause 14 of Bill – Section 21 amended (continuing disclosure not required): The FSF considers that when clause 14 provides for the repeal of section 21(1)(a) of the CCCFA, this will be a significant change because:-

(a) Section 18 of the CCCFA requires "continuing disclosure" for all consumer credit contracts (which for non-revolving credit, involves sending statements 6 monthly); but –

(b) Section 21(1)(a) of the CCCFA presently says that is not necessary for what are in essence fixed rate loans with fixed payments.

By repealing Section 21(1)(a) of the CCCFA, the Bill will consequently require statements to be sent at least 6 monthly to borrowers under fixed payment contracts in future. Any lenders who do not presently send customers statements in respect of fixed payment contracts will have to change their practices to do so in future, if this is enacted.

The FSF believes that this is a retrograde step. The posting of statements is now seen to be old-fashioned as customers can see their loans on-line and in other forms. Most lenders actively encourage customers to elect not to receive statements. It is a matter of giving customers appropriate choices.

Even more importantly, there is no customer benefit in receiving statements 6 monthly in respect of a fixed rate loan where nothing has changed since the loan was initially taken out. Further the option for the borrower to request disclosure at any time remains.

The FSF therefore submits that clause 14 of the Bill should not proceed, and that Section 21(1)(a) of the CCCFA should remain unchanged, so that 6 monthly statements will continue not to be required for fixed rate loans where nothing has changed since the loan was established. .

Clause 15 of Bill – Disclosure: of Agreed Changes: The most important feature of clause 15 is that it will change section 22 of the CCCFA so that disclosure will in future be required in respect of a number of agreed changes in respect of which the CCCFA does not presently require disclosure to be made at all. All of those changes relate to matters that are in the interests of the borrower, which is no doubt why the CCFA has not previously required such disclosure in respect of them.

While the Bill may only require these disclosures sometime after they are made, the FSF strongly opposes this proposed change: it can see no benefit in requiring lenders to incur cost by sending paper to borrowers, potentially many weeks later, when the borrower has already voluntarily agreed to the change and most likely been given a copy at the time of signing too.

The FSF also submits that as debt assignees, debt collection agencies are assigned the debt after a borrower is in default. By this point, the acceleration clause in the credit contract has been triggered and the full amount of the debt becomes due, owing and payable immediately. Post assignment it is usual for the debt collection agency to enter into payment arrangements with the borrower. More often than not, those payment arrangements will provide for an extension of time for the borrower to make payments and will often reduce the borrower's obligations. The experience of FSF's debt collection agency members is that a majority of those arrangements will break and new ones will be entered into, often many times before the full amount of the debt is ultimately repaid. For a debt collection agency to be obligated to send out written disclosure of such changes, where the borrower has already agreed, or where the change reduces the borrower's obligations is impractical and administratively burdensome.

Clause 16 of Bill – Disclosure of Changes following exercise of power: Clause 16 of the Bill is similar, and will change section 23 of the CCCFA so that disclosure will in future be required in respect of a number of changes made by lenders pursuant to powers in the contract, but in respect of which the CCCFA does not presently require disclosure to be made.

The FSF also strongly opposes this proposed change, for essentially the same reasons as already given in respect of clause 15 above.

Clause 17 of Bill – Request Disclosure: Clause 17 of the Bill will change section 24 of the CCCFA so as to add to the information that must be provided to a borrower on request:

a) certain continuing disclosure information; and also -

b) "any disclosure statement … provided … before the date on which the request is made."

The FSF regards this too as imposing an unnecessary extra cost on lenders, as most if not all of this information will already have been provided to borrowers under other provisions in the Bill, by way of initial or continuing disclosure – or even in response to a previous request for the same material.

If this provision is to be enacted, the FSF suggests that the section is first further amended to make clear that a lender can charge a fee to recover the cost of providing information that is requested after it has already been provided to the borrower on a prior occasion.

The FSF further suggests that a debtor or guarantor should be restricted to the number of times they can request disclosure throughout the term of a loan contract – perhaps to only once per annum, and/or perhaps a debtor or guarantor should not be permitted to request disclosure of something disclosed to them in the previous 12 months.

In the case of the FSF's debt collection agency members, we would also point out that the further obligations on the request disclosure provision will cause them significant administrative challenges in obtaining this information from the original credit provider.

Clause 18 of Bill – Disclosure of Guarantee: Clause 18 of the Bill will change section 25 of the CCCFA so as to require disclosure to be made to guarantors before the contract is made, rather than after as is presently possible. The FSF supports this proposed change, for essentially the same reasons as already given in respect of the similar change envisaged by clause 13, above.

Clause 19 of Bill – Disclosure of Transfers of credit contracts: Impact on Securitisations etc: Clause 19 of the Bill will add a proposed new section 26A to the CCCFA, requiring that when a consumer credit contract is transferred from one creditor to another, details of the transferee must be disclosed to the borrower within 5 working days. This section can be expected principally to impact on FSF members in 3 distinct ways –

a) Assignments of point of sale finance agreements;

b) Collection companies purchasing blocks of (typically delinquent) consumer credit contracts;

c) Securitisation funding structures.

All are addressed below, but as will become apparent it is necessary to address securitisation funding structures separately.

Assignments of point of sale finance agreements, and collection companies' purchases: Much point of sale finance is provided by way of finance agreements that are initially entered into by the dealer or retailer, and then assigned almost immediately by them to a finance company, which thereafter conducts all material dealing with the borrower. These transactions are commonplace, and will be subject to the proposed new section 26A of the CCCFA.

In addition, the FSF's members include collection companies whose business includes purchasing blocks of delinquent consumer credit contracts, before proceeding to collect the receivables from the relevant borrowers. These transactions are also commonplace, and will also be subject to the proposed new section 26A of the CCCFA.

In respect of both of those types of transaction, for obvious reasons the transfer is invariably disclosed to the borrower soon after it happens, and consequently the FSF members involved have no issue with proposed new section 26A requiring disclosure of the transfer.

However the timing of that disclosure may differ. With assigned point of sale finance agreements disclosure of the transaction generally occurs at or even before the very time that the finance is provided or, if not, very soon after it. However with collection company purchases, disclosure of the sale generally occurs more slowly. The reason for this is principally that often large numbers of loans are purchased, and if letters to the borrowers under all of them went out at the same time, collection companies have found that their lines may be tied up for several days, which is not in their interests, nor in the borrowers' interests. Consequently customer mail outs are often staggered, for up to 3-4 weeks.

Also, when a debt is assigned to a collection company, it may be sent to them in a format that is not readily loadable into their databases. They need to work through the data, which can take up to 10 working days, and only when loaded are they able to send out letters of assignment. The sending out of these letters is an automated process which is reliant on the accounts being loaded into their systems.

A further issue that has some potential to delay disclosure of transfer of a loan to a collection company will be the implications of New Zealand Post's announcement of its intention to move from 6-day per week mail deliveries to only 3 per week by 2015.

Reflecting the above, the FSF submits –

a) Proposed new section 26A seems to place the onus of making disclosure of the transfer on the transferor. That should either –

    i. be reversed so that the obligation to make disclosure is on the transferee, because that is what actually happens in practice; or

    ii. the section should permit disclosure to be made by either the transferor or the transferee;

b) As will be apparent, the 5 working days within which proposed new section 26A requires disclosure to be made is too short, and should be extended to at least 20 working days.

<u>Securitisation funding structures</u>: It is common for consumer lenders to use consumer loan receivables (often mortgage receivables) as a means of raising funding for their operations. This is typically done by establishing a new entity, sometimes a trust, and transferring a bundle of consumer loan receivables to it before that entity then issues bonds to investors on the security of those transferred receivables. Such funding structures are known as "securitisations". They are more commonly used by banks than by non-bank lenders, but FSF members have used securitisation funding in the past, and in some cases still are.

A range of different securitisation funding structures exist, but common to all of them is that the borrowers under the transferred loans typically never know that their loan has been transferred to the securitisation structures, and when the funding raised by the structure is repaid, the transferred loans are typically transferred back to where they were originated, again without the borrowers being aware of that transfer.

The FSF has discussed the issues that new section 26A would cause for securitisations with the New Zealand Bankers Association ("NZBA") and the FSF and NZBA agree that compliance by securitisations with new section 26A would neither be possible nor desirable, and that securitisations accordingly need to be carved out of the scope of the new section 26A. Attached as a schedule to this submission is the text of a draft amendment to new section 26A that would achieve that and which has been developed by FSF and NZBA. As will be apparent, it is complicated and quite technical in places, reflecting the varied types of securitisation funding structures that exist, as mentioned above.

An alternative, and simpler, approach would be to amend proposed section 26A so that the obligation to make disclosure only arises when the transferee actually wants to contact the borrower, because that seldom happens with securitisations. The FSF would support that way of dealing with this issue, and would also support an amendment to the section in the form attached to this submission as Appendix B.

Clause 20 of Bill - Cancellation Rights: Clause 20 of the Bill will change section 27 of the CCCFA so as to extend the period within which a borrower may cancel the contract, from 3 working days of disclosure being made to within 5 working days of disclosure.

In practice, the experience of FSF members has been that relatively few borrowers exercise this cancellation right, and those that do typically do so quickly. The FSF is not aware of any empirical data showing that this change is actually required, however has no argument against it.

Clause 21 of Bill - Effect of Cancellation: Clause 21 of the Bill will replace section 30 of the CCCFA with a new section redefining the consequences of borrowers exercising their cancellation rights. The FSF is mostly comfortable with the proposed new text, but notes –

a) Proposed new section 30(c)(i) refers to interest but does not clearly state that borrowers are liable for interest accruing prior to cancellation, in the same way that section 30(1)(d) presently does;
b) When proposed new section 30(c)(ii) refers to "… amounts due to the debtor, including any advance paid by the debtor to the creditor", that seems backwards: advances are paid by the creditor to the debtor, and are due to the creditor not to the debtor. The FSF does not understand what is intended by this part of Clause 21.

Clause 22 of Bill – Disclosure Standards: Clause 22 of the Bill will change section 32 of the CCCFA so that disclosures must be made in any form prescribed by regulations. There are no such mandatory forms of disclosure prescribed by regulations at present, and never have been. The FSF strongly opposes this change. It notes that –

a) Although "safe harbour" disclosure forms are prescribed by regulations under the CCCFA at present, their use is voluntary not mandatory, which regulations under this proposed change would be;

b) If in fact the intention really is to prescribe mandatory disclosure forms by regulations, then Schedule 1 of the CCCFA would become unnecessary – and yet clause 68 of the Bill actually adds to Schedule 1;

c) The existing "safe harbour" forms would presumably also become redundant, despite the fact that section 34 of CCCFA (which provides for them) is not otherwise affected by the Bill. If the safe harbour forms are to become redundant, that will result in many lenders incurring major documentation costs, as those "safe harbour" forms are widely used;

d) The belief that in respect of disclosures "one size may fit all" is likely to be misplaced in any case – the range and nature of consumer credit products differs widely as we have already pointed out under our response to Clauses 9H and 9I in this submission, and if a mandatory prescribed form could be devised which was suited to all of them (which the FSF doubts) then it will be a very complex form indeed, complexity which seems likely to be counter-productive in terms of the objective of clear and helpful disclosure;

e) It is also worth noting that the disclosure section typically comprises a large part of a consumer loan document (in fact the loan document is typically the disclosure), so that prescribing mandatory forms of disclosure is essentially having the effect of prescribing the form of consumer loan documents generally, a prospect which the FSF sees as abhorrent - in a free economy lenders must be at liberty to create their own documents, and that applies to the disclosure section as well as to the balance of the document. The penalties for failure to make compliant disclosures already give lenders strong incentives to ensure that their disclosure are adequate, and heavy handed regulation such as this envisages is simply not necessary.

f) Many FSF members have already incurred significant cost in developing plain English loan documentation in order to ensure that their customers receive disclosure that is as transparent as possible. A prescribed form of disclosure may not necessarily provide the same level of clarity.

The FSF repeats that it is strongly opposed to the change envisaged by clause 22. If however this change was proceeded with, the FSF suggests that it be restricted to prescribing that the loan document should include a section where all costs associated with the loan are contained in the one place.

Clause 23 of Bill – Default interest: Clause 23 of the Bill will change section 40 of the CCCFA so as to make clear that default interest –

a) Can only be charged while a default continues, and

b) Can only be charged on the amount in default, rather than on the entire loan balance or principal sum.

As regards the first of those things, the FSF supports that change, which coincides with the existing practices of most FSF members.

As regards the second above point, most FSF members also support that change. However some FSF members do presently calculate default interest on the loan principal. For them, this change will reduce their ability to recover the costs a lender incurs due to borrower defaults, and may force them to increase default rates as a result.

Unreasonable Credit or Default Fees – Generally: The Bill contains a number of provisions that propose amendments to the CCCFA provisions relating to credit or default fees. The FSF would categorise many of them as in the nature of "fine tuning", often with no apparent clear concept of what the changes are seeking to implement, at least not one that is evident to a reader. This continuing lack of a clear approach able to be understood and applied is of concern to the FSF and its lender members. Over the last decade -

a) The CCCFA was enacted in 2003, with a fee regime quite different from previous law, and expressed in terms that did not make for clear application;

b) As a result of matters such as industry concerns about the lack of clarity, in 2009 the Commerce Commission produced "Draft Guidelines" about credit and default fees that were very helpful to FSF members;

c) However, the Commerce Commission since appears to have followed a slightly different approach, and in the recent High Court decision in *Commerce Commission v Sportzone*

Motorcycles [2013] NZHC 2531, argued for an approach to credit and default fees that seems quite different from its 2009 Draft Guidelines;

d) The High Court's decision in *Commerce Commission v Sportzone Motorcycles* was delivered on 27 September, well after the Bill was introduced to Parliament. As a result, the relevant parts of the Bill take no account of what the High Court considers the law now to be;

e) It is also worth noting that the High Court's decision –

   i. Appears to introduce into the law in this area fine distinctions based on accounting concepts such as direct and indirect costs, and fixed and variable costs, none of which are reflected in the Bill (which uses terms like 'administration costs' in clause 25);

   ii. Took 10 months to be delivered, which may reflect the complications and uncertainties in this area at present.

The FSF and its members regret the manner in which the law in this area has developed over the last decade, and also regret the continuing lack of clarity in this area at present. Nor does any greater clarity seem likely now to flow from the relevant provisions of the Bill, especially given the High Court's recent decision in the *Sportzone Motorcycles* case. In fact FSF members would go so far as to say that they are very disappointed that they were given guidelines by the Commerce Commission on which they felt they could rely, and then within a relatively short period it now seems that lenders are being penalised for using them.

Given that recent decision and its relationship to the Bill clearly needs study by all interested parties, the FSF submits that none of the Bill's provisions about credit or default fees should proceed, but that the subject should instead be referred back to the Ministry for extensive consultation on the subject with all stakeholders, including industry groups like the FSF, with a view to evolving the clear and principled direction that is needed in this area but which the Bill presently seems unlikely to achieve.

As has been stated previously in this submission, FSF members work hard to comply with all their legal and regulatory obligations. In the case of the charging of fees the lack of clarity makes this very difficult and this is an area where the industry is therefore seeking a more prescriptive approach.

In case that submission is not accepted, in its submissions on clauses 24 - 28 below the FSF will nevertheless address the Bill's existing provisions about credit or default fees.

<u>Clause 25 of Bill – Prepayment Fees in respect of fixed rate contracts</u>: Clause 25 of the Bill will address prepayment fees in respect of fixed rate contracts in a proposed new section 43. The FSF's issues with the proposed new section 43 all relate to its proposed subsection (1), as follows:

a) For both full and part prepayments, section 43 of the CCCFA presently states that a prepayment "is unreasonable if, and only if, it exceeds a reasonable estimate of the creditor's loss arising from the ... prepayment." The Bill proposes to change that, so that whether a prepayment is a reasonable estimate of the creditor's loss arising from the prepayment would in future only be a matter that a court must "have regard to";

b) The FSF strongly opposes that change, and the thinking implicit in it, which seems to involve an assumption that lenders may still be acting unreasonably even if they recover no more than – or maybe even less than – the losses that prepayments undoubtedly cause them;

c) The philosophy behind Clause 25 also seems to involve a view that factors other than interest rates may cause a prepayment fee to be unreasonable. However what these other factors may be is not addressed by the clause at all;

d) Further, a key plank of the CCCFA since it was enacted has been the "safe harbour" calculation for prepayment fees contained in regulation 9 of the Credit Contracts and Consumer Finance Regulations 2004. Use of that formula presently means that under section 54 a lender is taken to be charging a fee that is a reasonable estimate of their loss, and which under section 43 is thus presently "safe" from challenge. That will cease to be the case if section 43 is changed as proposed by clause 25 of the Bill;

e) Instead, since the Bill does not propose changes to either section 54 or those regulations, the Bill will make possible a situation in which lenders may charge fee calculated in accordance with a formula prescribed by law, and still be held to be acting unreasonably.

The FSF is strongly opposed to the changes clause 25 would make. It submits that clause 25 should be deleted from the Bill altogether, section 43 of the CCCFA should be left unchanged as it is, so that the "safe harbour" formula prescribed by regulations can continue to be used "safely". Retaining the status quo in that way is in the interests of both borrowers and lenders, as each of them know exactly where they stand under that formula. By contrast if clause 25 of the Bill were to be enacted, both of them would be left guessing.

Clause 26 of Bill – Other Credit and Default Fees: Clause 26 of the Bill will address credit and default fees in proposed new sections 44 and 44A, effectively bisecting the present section 44 and splitting it into 2. Were it not for the *Sportzone Motorcycles* case, the FSF would have considered that Clause 26 made little real change to the existing law. Following the *Sportzone Motorcycles* case, as above the FSF now considers that it is essential that the entire subject of credit and default fees is revisited, and that the Bill should proceed without these provisions in it until the situation can be properly assessed. On this basis, the FSF would be keen to work with the Commerce Commission and organisations such as the New Zealand Bankers Association and other market participants to take the lead and suggest a sustainable and reasonable path forward. It should be understood that the current uncertainty creates a very significant business risk for lenders.

One further point with regard to default fees that the FSF submits does not appear to be clearly understood is that these are typically only charged by most reputable lenders after a lender has had several interactions with a borrower who is in default. First and foremost in every case is the desire for the borrower to get their loan back into order and all responsible lenders will typically have done considerable work to help them to achieve this long before default fees are applied.

Clause 27 of Bill_– Section 45 amended (fees or charges passed on by creditor, and commissions): Clause 27 of the Bill will amend section 45 of CCCFA by extending the scope of present section 45(5) to extended warranty, and by adding a new section 45(6) to the effect that lenders may not charge commission on any insurances if the borrower is required to obtain insurance from a particular insurer. The FSF is comfortable with the first of those changes, but not with the second.

To explain, as a preliminary point FSF members strongly believe in the value of insurance as a means of protecting borrowers should anything go wrong for them, allowing them to continue to meet their obligations under the loan contract and thus avoid the potential alternatives of default, arrears, repossession and a poor credit history. FSF believes that providing suitable protection to a borrower is entirely consistent with responsible lending principles.

Whether or not a creditor is paid commission as a result of a borrower taking out credit-related insurance or extended warranty is therefore, in FSF's view, largely irrelevant when compared to the benefit a borrower receives from the insurance or warranty if it happens that they need to claim on it.

The FSF is not uncomfortable with the requirement that credit providers should not compel borrowers to take such credit-related insurance or extended warranties from a particular provider. However most credit providers have a relationship with only one provider of such products, having completed due diligence with regard to the products and providers available in that market to determine which in their view is the most likely to provide the best protection to the borrower.

FSF does believe however that the requirement for the lender to provide the consumer with a range of products or providers is one which could prove counter-productive as it creates barriers to the consumer taking out desirable insurance or extended warranty, and is therefore not in keeping with responsible lending behaviour.

It should also be remembered that consumers have a choice as to where they go to seek credit finance – they are not compelled to take it from a particular lender. Therefore if they are unhappy with the insurance being offered by a lender, they are free to go elsewhere.

The FSF also believes it is worth considering whether the references to "credit related insurance" or "extended warranty" in Clause 27 should be expanded to cover any similar products. The experience with payment waivers suggests that they should be treated in the same manner as other insurance products but they would not be included in Clause 27 at present even though they have essentially the same purpose.

Clause 28 of Bill – Full Prepayment: Clause 28 of the Bill will change section 51 of the CCCFA which also addresses the amounts that can be required on a full payment. Apart from changes as a result of extending the prepayment credit insurance premium rebating regime to repayment waivers, the principal change made by clause 28 seems to be to delete the ability of a lender to recover its average administrative costs on a prepayment. The FSF questions why that should be deleted from section 51 in that way, when clause 25 explicitly assumes that a lender should continue to be able to recover its average administrative costs on a prepayment. The FSF submits that ability must be added back into section 51 before it is otherwise amended as envisaged by clause 28.

Clause 31 of Bill: Unforeseen Hardship – Section 55 amended (changes on grounds of unforeseen hardship) and Clause 32 – Section 57 amended (application may not be made in certain circumstances) and Clause 33 of Bill (Obligations of creditor in respect of application): At present section 57 of the CCCFA does not allow a borrower to make a hardship application if the borrower is in default. Clause 32 of the Bill will change that so that a hardship application cannot be made –

(i) If the borrower is still in default 2 weeks after receiving a repossession warning notice; or

(ii) If a repossession warning notice has not been served, if the borrower has missed 4 consecutive payments

Firstly, the FSF submits that in point (ii) above, the term should not be 4 consecutive missed payments but a number of days in arrears such as 30. The reasoning behind this is that payment terms vary considerably from weekly to fortnightly to monthly and, in the case of some structured payment terms even quarterly. To miss 4 such payments could mean the debtor being in arrears for as long as one year. Extensive terms for arrears has a significant negative effect for lenders in terms of their capital adequacy provisions – the longer their average arrears term, the more they need to provision for the possibility that a loan could default entirely. This would add a further layer of cost to all borrowers and on this basis the FSF believes the term under (ii) above should more reasonably be 30 days.

The FSF believes that New Zealand needs to be careful not to replicate the Australian experience with regard to hardship, which is open to abuse by consumers and is causing an expansion in arrears as a result. In Australia if a borrower claims they are in a hardship situation then the lender must suspend their arrears or repossession action. This is effectively providing bad customers with the ability to have the loan without paying for it. This disadvantages all consumers, because good consumers are paying for those who abuse the system.

The FSF wishes regulators to understand that it is in the financier's interest to help customers through short term hardship in order that their loan is repaid. The credit provider secures future payments by dealing with hardship situations effectively for both parties.

Credit providers take action such as repossession as an absolute last resort. Repossession is both time-consuming and costly for the lender and more often than not results in them recovering less than the debt owed, leaving the borrower with a residual obligation to the lender which then leads to poor credit history or at worst bankruptcy.

Responsible lenders will always work with borrowers to find a way to repay the loan. FSF has entered into a Memorandum of Understanding with the New Zealand Federation of Family Budgeting Services ("NZFFBS") which requires FSF members to:

- Refer customers to the NZFFBS as soon as they recognise that the customer may be under financial stress and heading towards a hardship situation whether they be in default or at risk of default of their borrowing obligations to the FSF member; and
- Engage with the NZFFBS to assist such customers in managing their debt.

The purpose of this Memorandum of Understanding is to proactively provide customers of FSF members who are displaying signs of financial stress or hardship with the professional help they need to get back on track and avoid the adverse consequences of arrears, default, repossession and poor credit history or bankruptcy.

Sadly, FSF members know that often when they decline a loan to a potential customer because in their opinion the repayment obligations if they approved the loan proposal could put the customer into a situation of financial hardship, there are other less responsible lenders who will approve the loan even if hardship may be the result.

FSF members also often assist borrowers with debt consolidation loans which put the customer into a better financial position by reducing overall repayment commitments and assisting them to repair adverse credit history. It is therefore frustrating for FSF members to discover that customers have been able to re-draw credit facilities with other lenders which should have been cleared and closed and to find that the borrower is now in a hardship situation which requires extra time on their part to manage.

The FSF believes it is essential that genuine cases of hardship are managed with empathy and understanding but that hardship provisions should not provide unscrupulous borrowers with a loophole to avoid their repayment commitments. If that was to become the situation, both consumers and credit providers alike would be severely disadvantaged.

Reflecting the above, the FSF also makes the following further specific submissions:

a) In respect of clause 31, the FSF agrees with the approach in proposed new section 55(1b)(a) to the effect that a debtor who makes a hardship application cannot make another hardship application for 4 months, but submits –

    i. 4 months is not long enough: 6 months might be more realistic;

    ii. Regardless of that, a second or subsequent hardship application should *never* be possible if it relates to events that occurred before the date on which a previous hardship application was made;

b) In respect of clause 32, the FSF can accept some of proposed new section 57(1)(a), to the effect that a debtor should be able to make a hardship application even if slightly in default, but when proposed new section 57(1)(a)(ii) would permit a debtor to make a hardship application until the time they have "failed to make 4 or more consecutive periodic payments" in the FSF's view that is unacceptable: if a borrower's defaults are due to hardship, that should be evident to any reasonable borrower well before they have missed "4 or more consecutive periodic payments", which might often equate to 4 months or even more from the time the first payment was missed. As mentioned previously this should be limited to a period of 30 days at most;

c) In respect of clause 33 and the obligations of a creditor to respond to a hardship application, the FSF can accept much of what clause 33 will insert as a proposed new section 57A, but the obligation in proposed new section 57A(2)(b) to respond to a hardship application within 20 working days, even if the lender has not received the further information that it has requested under proposed section 57A(1)(b), is unacceptable: it is not reasonable for any lender to be required to respond to such a claim when it has requested details necessary to allow it to process the claim, but has not been given the details requested. A more appropriate response to such a situation would be to disadvantage the party that has failed to respond to a request for information, not to penalise the party that asked for it.

The FSF notes also that the subject of hardship is further addressed below in the FSF's submissions on various of the provisions about proposed new Part 3A of the CCCFA, about repossessions.

Clause 36 of Bill - Request Disclosure for Consumer leases: The FSF does not believe any of its members presently enter into "consumer leases" as defined in the CCCFA, but in principle much of what has been said regarding clauses 9H - 9J above also applies here.

Clause 38 of Bill – Disclosure for credit insurances etc: Clause 38 of the Bill will change section 70 of the CCCFA so as to require disclosure of credit insurances, repayment waivers and extended warranty before they are entered into, rather than within 15 working days afterwards as is presently permitted. Despite what the FSF has said above in respect of Clauses 13 and 18, the FSF submits that with credit insurance disclosure should be possible after the loan is made as presently. The change proposed by the Fill would pose major problems for credit insurers as:

(a) They do not make clear what needs to be disclosed;

(b) There would be a strong reliance on the retailer doing the disclosing on behalf of the insurer which is not ideal;

(c) Currently disclosure within 15 working days afterwards allows the insurer/financier to send disclosures directly to the insured. This is usually done in conjunction with other documentation.

Clause 43 of Bill – New Part 3A about Repossession

New Part 3A Generally: Clause 43 of the Bill will insert a new Part 3A about repossessions into the CCCFA. That relocation of repossession law into the CCCFA is as recommended by the Law Commission in 2012, and the FSF supports that change.

Much of the content of the proposed new Part 3A into the CCCFA will either re-enact the corresponding provisions of the present Credit (Repossession) Act 1997 unchanged, or without much material change. This applies in particular to Subparts 4 and 5 of the proposed new Part 3A on pages 40 – 53 of the Bill, and the FSF is largely comfortable with that approach.

However the FSF does have some specific submissions on parts of the proposed new Part 3A, as set out below.

Proposed section 83B – Application of Part:

a. **Proposed section 83B(1):** The way that proposed new section 83B(1) begins, new Part 3A about repossessions will apply not just to consumer credit contracts but to *all* "credit contracts", to the extent they relate to consumer goods. While accepting that is already true of the Credit (Repossession) Act 1997, the FSF submits that proposed new section 83B(1) should be reworded so that new Part 3A would apply only to consumer credit contracts, because that would be consistent with the approach of the CCCFA in other respects, as almost all of the CCCFA presently applies only to consumer credit contracts;

b. **Proposed section 83B(2**): The intention of proposed new section 83B(2) seems to be that consumer goods cannot be repossessed unless they are adequately described in the security document. Subject to what is said at c) below, the FSF is comfortable with that. However the section does not say that at present, and needs to be redrafted or it will simply be ineffective;

c. Further, while the intention may have been to align repossession law with section 44 of the PPSA – which the FSF is again comfortable with – in fact the drafting is narrower than section 44 of the PPSA, and somewhat internally inconsistent: paragraph (B) requires lender and borrower to have agreed to "change the contract" and at the same time paragraph (A) requires the goods to "have been specifically identified *in* the credit contract." If the goods were "specifically identified in the credit contract" then there would be no need to agree to "change the contract" subsequently. In order to make sense (and to properly align to section 44 of PPSA), the section needs to be redrafted so that the goods are "specifically identified in the credit contract or in an agreed variation to it".

Proposed section 83D(3) and Proposed Schedule 3A: The content of a repossession warning notice as envisaged by proposed section 83D(3) and proposed Schedule 3A would differ markedly from present law, and Schedule 3A features a number of items that seem neither necessary nor in some cases desirable, an example of the latter being the text requiring defaulting borrowers to be informed that repossession cannot proceed if they make a complaint to the lender's dispute resolution scheme.

That will inevitably result in numerous unsubstantiated complaints being made simply to prevent repossessions, and is also undesirable in so far as it may consequently give less reputable lenders incentives to ignore the repossession warning notice requirement altogether, by following a liberal interpretation of the goods being "at risk".

Moreover, the content requirements in proposed Schedule 3A do not seem necessary at all if, as proposed section 83D(3)(d) envisages, there is to be a prescribed form of repossession warning notice.

The FSF submits –

a) There should continue to be a prescribed form of repossession warning notice, as there is presently under the Credit (Repossession) Act;

b) Proposed Schedule 3A is consequently unnecessary;

c) It is not desirable for the prescribed form of repossession warning notice to inform defaulting borrowers that repossession cannot proceed if they make a complaint to the lender's dispute resolution scheme.

With respect to the point made at (c) above, it should also be remembered that repossession is the absolute last resort for responsible lenders. The ultimate aim in all cases is for the debt to be repaid in full so that the borrower's credit history remains unimpaired and so that the lender can continue to lend to other borrowers. As such a responsible lender will have had many interactions with a borrower before getting to the point of serving a repossession warning notice in order to assist them to get back into order.

One further point with regard to the repossession warning notice is that there does not appear to be provision in the Bill for this to be done electronically. The FSF would submit that it is more and more common for the main point of contact a lender will have with a borrower will be via their e-mail address. It should therefore be possible for a repossession warning notice to be served electronically.

Proposed section 83D(4) - Expiry of Repossession Warning Notice: The FSF disagrees with proposed section 83D(4) stating that a repossession warning notice will expire after 28 days. It is quite common for repossessions not to be effected within 4 weeks of a notice being served, for example because the car (or other goods to which the notice relates) has been hidden by the defaulting borrower. Having to re-serve an expired notice in those circumstances will just add delay and cost to the security enforcement process, and –

a) Will result in lenders charging higher default fees to recover those higher costs; and

b) Will incentivise defaulting borrowers to hide financed goods to an even greater extent than already occurs.

The FSF submits that proposed section 83D(4) is undesirable, and should be deleted from the Bill and not replaced.

<u>Proposed section 83E(2) – Voluntary Return of Goods</u>: The FSF appreciates why proposed section 83E(2) makes a voluntary return of goods impossible where the goods include accessions. However the FSF submits that voluntary return of goods should be possible where all persons with an interest in the goods or in the accessions agree to that. In other words, proposed section 83E(2) should cross refer to section 129(1) of PPSA, in the same way that proposed section 83D(1) does.

<u>Proposed section 83F - Application of PPSA</u>: As worded in the Bill, this proposed section presently begins by referring to "Every creditor intending to repossess an accession …" under section 109 of the PPSA. Since the proposed new Part 3A of the CCCFA is intended to relate only to consumer goods, and as section 109 of the PPSA also relates to things other than consumer goods, proposed section 83F should begin "Every creditor intending to repossess an accession to consumer goods …".

<u>Proposed section 83G- Effect of Debtors' complaints, hardship applications etc:</u> In broad terms the FSF is sympathetic to the idea that lenders who have received bona fide and justified complaints from a borrower ought not to be able to take retaliatory enforcement action against that borrower. However the FSF is concerned that proposed section 83G may go well beyond that, and may have the potential to become a rogues' charter, able to be abused by some borrowers. Specifically, the FSF submits –

a) Presently the proposed text does not distinguish between complaints made before enforcement action has been commenced and those made after it. If the objective is to prevent retaliatory action against justified complaints by vindictive lenders, the section should only apply to complaints made *before* enforcement action is begun, and subsection (2) should be deleted fully. That would prevent abuse of the section by undeserving borrowers who have not thought to make a complaint until enforcement action is taken against them;

b) There is nothing in proposed section 83G that prevents a borrower who has unsuccessfully made a complaint from immediately making another complaint on learning that their earlier complaint has been unsuccessful, seeking to frustrate the rights of a secured lender to enforce their security by making a sequence of serial complaints. The section should state that a borrower cannot make a second complaint unless it relates to events occurring after the first complaint was made;

c) The Australian experience with abuses of complaints and hardship provisions shows that the average number of days in arrears has increased substantially across all lenders' loan books as a result – in some cases they report loan arrears of up to 400 days with enforcement action still not being able to be commenced. This has significant implications for the capital adequacy and debt provisioning of lenders if the same were to be allowed to happen here.

d) As a minor drafting matter, the FSF notes that in proposed subsection (3) it states that "the debtor may repossess the goods ...". This should read "the creditor may repossess the goods ...".

e) With regard to this subsection it should also be noted that Clause 83P (1) states that "A creditor must serve a post-repossession notice on the debtor and every other person referred to in section 83D(1) within 7 days of the repossession." This arguably contradicts the requirement in 83G(3) that the creditor must not take any further enforcement action following repossession if the goods are at risk. To address this, subsection (1) should be amended so that the 7days period begins after –

> "*the later of the repossession or any later date on which the creditor becomes entitled to take enforcement action under section 83G, where that section applies*";

f) The FSF notes, and supports, the fact that proposed subsection (4) only gives a borrower 14 days to refer the complaint to the lender's dispute resolution scheme, however despite that a complaint might still take a very long time to be resolved, and the remainder of the section gives borrowers no incentives to co-operate with the lender's dispute resolution scheme. To the contrary, borrowers have every incentive not to do so. If proposed section 83G is to proceed, it should place a clear obligation on borrowers to co-operate with the lender's dispute resolution scheme and not delay matters;

g) As a further minor drafting matter, the FSF notes that in proposed subsection (6)(b) the term "repossession notice" should read "repossession warning notice", as it does elsewhere in Part 3A.

h) In most cases, FSF members have their own internal complaints process where they work with the borrower in an effort to resolve the complaint and if it reached deadlock or the borrower was dissatisfied with the result of that process, it would be escalated to the creditor's disputes resolution scheme – the borrower also has the right to complain directly to the disputes resolution scheme directly if they choose. The Bill appears to state that a complaint can only be resolved by escalation to the complaints body. In all cases, that incurs costs to a creditor (which will ultimately be passed on to all other borrowers). These costs are not insignificant with FSF members reporting fees in the region of $250 to open a complaint and with fees increasing from then on depending on the action required including over $1,000 for a complaint going to mediation. In addition to actual cost to the creditor there is also the cost of their time to investigate and respond to a complaint. These costs are all incurred by the lender not the creditor therefore the FSF strongly submits that the opportunity for vexatious complaints by borrowers or abuse of the complaints and hardship process be minimised in the Bill to the greatest possible degree.

Proposed section 83H – Use of Disabling Devices: The FSF is sympathetic to regulation of disabling devices as proposed by proposed section 83H, but has a number of submissions about that proposed section:

a) First, proposed subsection (1) states that the section will only apply where a loan contract expressly states certain things. It will be a very easy matter to avoid the section altogether by *not* stating those things. The drafting plainly needs attention;

b) It seems somewhat odd that the regime for disabling devices envisaged by proposed subsection (2) is quite different from that applicable to repossessions generally;

c) In the definition of "disabling device" in proposed subsection (4), the warnings to debtors described in paragraph (a) of that definition seem benign and more deserving of praise than of regulation. The FSF suggests that paragraph (a) of that definition is deleted;

Proposed section 83I – Use of Keys etc: Proposed section 83I states that a lender must not "hold" keys or similar access devices until after a repossession of the goods to which the keys relate. Further to the submission already made under Clause 7A(3) with regard to the holding of duplicate keys particularly by motor vehicle financiers, that seems undesirable, as –

a) It would prevent a debtor voluntarily giving the lender to the keys at the beginning of the repossession process, which may well be a sensible thing for the debtor to do;

b) There is nothing in principle wrong with a lender holding duplicate set of keys from day one of a loan in any case: doing so may well facilitate repossession to the benefit of all concerned in terms of cost savings etc. It is use of the keys that should be regulated, not custody of them.

The FSF suggests that the word "hold" in line 1 of proposed section 83I(2) is deleted and replaced with the word "use".

Proposed section 83J – Documents to be produced by repossession agent on entry: Proposed section 83J will treble the number of documents that a repossession agent must give a defaulting borrower, increasing what section 17 of the Credit (Repossession) Act requires from 3 items to 9. The FSF submits that the list of such required items is unnecessarily long, and should be revisited and abbreviated. In particular –

a) It seems pointless for paragraph (b) of the list to require a borrower to be given another copy of the credit contract: they will already have had at least one copy given to them previously, are quite entitled to request another copy any time they wish independently of this section, and even if given it by the repossession agent they are still hardly likely to commence reading it before repossession occurs anyway;

b) It also seems pointless for paragraph (f) of the list to require an inventory of the "goods to be taken". That will be of no use to either the lender or the borrower if in fact items on the list are not there or are not taken. It may even be misleading as a result. Further, the debtor will already have received the same information in the repossession warning notice as a result of section 83D and Schedule 3A. It would be more useful to all parties if the agent was required by this section to leave an inventory of what *has* been taken, not of what might have been taken, but wasn't.

c) The FSF would strongly object to the requirement in 83J(1)(g) that the borrower be provided with a written statement setting out where the goods will be stored, for security reasons.

Proposed section 83L – No entry where unresolved complaints, hardship applications etc: Proposed section 83L provides in effect that repossessions cannot occur if the debtor has made a complaint that has not been "resolved" in terms of proposed section 83G. The FSF submits that for consistency with other provisions (like proposed section 83C(1)) it is essential that proposed section 83L is amended to make clear that repossession is still possible where the goods are "at risk", even if the debtor has made a complaint that has not been "resolved".

Proposed section 83M – Creditor must not enter residential premises at certain times: The FSF submits that proposed section 83M(2) should be deleted so that this cannot be used by a borrower to delay repossession. If the creditor or their agent has to return to effect repossession another day because it has not been completed before 9 pm once commenced, this will add cost to the borrower and also provide the borrower with the opportunity to hide the goods required to be repossessed.

Proposed section 83N – No repossession if not registered etc: Proposed section 83N provides for essentially 2 things:

a) No repossession action can be taken by a lender who is not registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008; and

b) Lenders must not use repossession agents unless they are either licensed or hold a certificate of approval under the Private Security Personnel and Private Investigators Act 2010.

The FSF supports both of those aspects.

The FSF does however also wish to submit that there is quite a high level of unnecessary overlap between this provision and proposed section 99B (as set out in clause 55 of the Bill) and that those two provisions should be combined.

Proposed section 83P - Notice to Debtor and others after repossession: Proposed section 83P(1) addresses the need for notices to the debtor and others after repossession, and is similar to what is presently contained in sections 20 – 22 of the Credit (Repossession) Act. The FSF has three submissions on proposed section 83P:

a) The present law requires this notice to be given within 21 days after repossession. Proposed section 83P(1) will abbreviate that to 7 days. The FSF submits that is too short a time, and there may be good reasons why a lender cannot always react that quickly following repossession – it must first receive a report from its repossession agent for example, and that could well take most of – or even more than - that 7 days. The status quo should therefore be maintained at 21 days.

b) There is a cross referencing error in proposed section 83P(2)(b): the reference to Schedule 3A should be to Schedule 3B;

c) Also regarding proposed section 83P(2)(b) and the information that Schedule 3B requires to be contained in this notice, for essentially similar reasons to those noted above regarding proposed section 83D(3) and Schedule 3A, there should continue to be a prescribed form for this notice as there is at present under the Credit (Repossession) Act. If there were a prescribed form, Schedule 3B would not then be necessary.

Proposed section 83ZH Service of Notices: This section does not allow for electronic service of notices. The FSF submits that increasingly e-mail is the main form of contact between lenders and borrowers and therefore service of notice via e-mail should be allowed for in the Bill. It should also be noted that New Zealand Post announced on 23 October that they are intending to reduce mail deliveries from 6 days per week to 3 in 2015 so posting of notices will cause delays in borrowers receiving them therefore other forms of service should be allowed for now to future-proof the Bill.

Clause 46 – 48 of Bill – Proposed sections 88 – 90: Statutory Damages and Repossessions: Proposed sections 88 – 90 will extend the existing CCCFA statutory damages regime to repossessions. The FSF did not support the existing statutory damages regime when first it was enacted in the CCCFA, and has not changed its views since: the FSF considers that a damages regime based on actual loss and operating in tandem with the criminal law is to be preferred.

Clause 55 of Bill - Proposed section 99B - No enforcement if not registered: First, see the FSF's submission on proposed section 83N, above.

In addition, the FSF submits that the lender's dispute resolution scheme should be added to the notice requirements in proposed section 99B(4).

Clause 56 of Bill - Proposed section 101- No enforcement of consumer lease if not registered: In two places proposed section 101 refers to "the costs of the lease". That expression is not defined, and needs to be.

The same point also applies to the term "the costs of the buy-back transaction" as used in proposed section 102.

Clause 68 of Bill – Amendments to Schedule 1 Regarding Disclosure: Clause 68 of the Bill will amend several paragraphs of the Disclosure Requirements presently listed in Schedule 1 of the CCCFA. The FSF is comfortable with all of these proposed changes, except that proposed paragraph (q)(iv) lacks clarity. When it refers to –

> *"what the consequences would be if the debtor were to give a security interest..."*

is that intended to mean –

> *"what the consequences would be if the debtor were to give a security interest to a third party over the same goods..."?*

If that is what is intended, it would be better worded as above. If that is not what is intended, the FSF does not know what is, and proposed paragraph (q)(iv) should be clarified accordingly.

Part 2 of Bill – Amendments to Financial Service Providers (Registration and Dispute Resolution) Act 2008

The FSF is generally supportive of the provisions in this part of the Bill, including in particular -

a) Supporting the proposals to give the FMA wider powers in respect of offshore financiers seeking registration in New Zealand under the Financial Service Providers (Registration and Dispute Resolution) Act 2008; and

b) Supporting the proposal in clause 78 / in proposed new section 14, to the effect that offshore offences should disqualify a party from registration in New Zealand if they are comparable to New Zealand offences that already disqualify a person from registration.

There are no other specific submissions that the FSF wishes to make on this part of the Bill.

There are no other specific submissions that the FSF wishes to make on any other part of the Bill. Once again, the FSF is grateful for the opportunity to make these submissions and would be available to discuss these further at Select Committee or with Ministry officials.

APPENDIX A

FSF Membership List as at 1st November 2013

Debenture Issuers - (NBDT) Non-Bank Deposit Takers	Vehicle Lenders	Finance Company Diversified Lenders	Credit Reporting	Insurance	Affiliate Members
Rated • Asset Finance (B) • Avanti Finance (BB) • Fisher & Paykel Finance (BB+) • Medical Securities (A-) **Non-Rated** • Mutual Credit Finance • Prometheus Finance	• BMW Financial Services • Branded Financial Services • European Financial Services • Mercedes-Benz Financial Services • Motor Trade Finances • Nissan Financial Services NZ Pty Ltd • ORIX NZ • SG Fleet • Toyota Finance NZ • Yamaha Motor Finance	• Centracorp Finance 2000 • Dorchester Finance • Equico Limited • Finance Now • Future Finance • GE Capital • Instant Finance • John Deere Financial • Oxford Finance Ltd • Rent Plus • DTR Thorn Rentals	• VEDA Advantage **Debt Collection Agency** • Baycorp (NZ)	• Protecta Insurance **Associate Members** • Southsure Assurance	• Buddle Findlay • Chapman Tripp • Deloitte • Ernst & Young • PriceWaterhouseCoopers • Russell McVeagh • SimpsonWestern • Visa Worldwide(NZ) Ltd

APPENDIX B

DRAFT CARVE OUT OF SECURITISATIONS FROM CLAUSE 19 OF THE CC&FSLR BILL / FROM PROPOSED SECTION 26A OF CCCFA

"(3) Nothing in this section applies to a transfer of a consumer credit contract which is -

(a) a transfer to a securitisation SPV;

(b) a transfer to a person which is made on serviced terms (the **transferee**); or

(c) a transfer by a securitisation SPV or a transfereee to the creditor from whom the consumer credit contract was acquired (the **original creditor**), the sponsor or a related entity of the original creditor or sponsor.

(4) For the purposes of this section -

"related entity" includes-

a) any entity that forms part of a group for the purposes of the Financial Reporting Act 1993 or would do so if that Act applied to any group of which that entity is a member, and

b) a company that is a related company as defined in the Companies Act 1993.

"securities" has the same meaning as in the Securities Act 1978;

"**securitisation SPV**" means an SPV -

(a) to which a consumer credit contract is, or will be, transferred by a creditor;

(b) which has granted, or will grant, a security interest in that consumer credit contract for the benefit of its secured creditors;

(c) which carries on a business of acquiring, holding or originating consumer credit contracts (including any business incidental to that purpose, such as issuing securities in connection with acquiring, holding or originating consumer credit contracts); and

(d) does not carry on any other business,

and includes a "covered bond SPV" as defined in the [Reserve Bank of New Zealand (Covered Bonds) Amendment Act 2013].

"**serviced terms**" means that as part of the arrangements in connection with the transfer of the consumer credit contract but subject to the terms of any servicing agreement with the acquiring creditor, either the original creditor, the transferring creditor or any other person provides management and administrative services in relation to the consumer credit contract.

"**sponsor**" means the person principally responsible for establishing the programme pursuant to which consumer credit contracts were or are transferred to the securitisation SPV or the transferee.

"**SPV**" means a special purpose vehicle. [***Drafting Note****: This definition is as per the* Reserve Bank of New Zealand (Covered Bonds) Amendment Bill noted above*]

"transfer" includes an assignment, sale, or other form of disposal. [***Drafting Note****: Due to this definition, the bracketed words that appear in the first line of proposed section 26A can now be deleted*]

Supplementary Point to Financial Services Federation Submission on the Credit Contracts and Financial Services Law Reform Bill:

The Financial Services Federation ("FSF") would be grateful if the following point could be considered alongside their submission on the Credit Contracts and Financial Services Law Reform Bill "the Bill".

Under our submission on Clause 8 of Bill – Credit contract may provide for security interest we make the point in (c) about proposed section 7A(2) that some FSF members do take purchase money security interest securities ("PMSIs") over collateral of the types listed in paragraph 7A (2) (a) of the Bill, and that the FSF is pleased to see that is intended to remain possible.

In addition to the points made in the submission under (c), the FSF would also submit that this creates a contradiction where some of the goods of the type listed in paragraph (a) are not considered essential if a PMSI is taken over them but would be considered as such if another form of security arrangement is entered into.

A National Federation of Financial Institutions

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