



FINANCIAL SERVICES FEDERATION

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30 September 2014

The Commerce Commission  
P O Box 2351  
**WELLINGTON 6140**

By email to: [uctconsult@comcom.govt.nz](mailto:uctconsult@comcom.govt.nz)

### **CONSULTATION ON DRAFT UNFAIR CONTRACT TERMS GUIDELINES**

We are writing to comment on the above document, which contains draft Guidelines on the unfair contract terms provisions in the Fair Trading Act 1986 (“Act”) which will come into force on 17 March 2015. In what follows, the consultation document is referred to as “the draft Guidelines”, and those statutory provisions are described the same way as in the draft Guidelines, namely as the “UCT provisions”.

**Background:** By way of background, the Financial Services Federation (“FSF”) is the industry body for the responsible and ethical finance and leasing providers of New Zealand. The FSF has over forty members and associates providing first-class financing, leasing, investment, banking and insurance products and services to over 1 million New Zealand consumers and businesses. The FSF’s affiliate members include internationally recognised legal and consulting partners. A list of our members is attached as Appendix A.

Many FSF members are consumer lenders, to whom the draft Guidelines will be of particular relevance, as some consumer loan documentation may contain provisions of some of the types set out in section 46M of the Act.

In that regard, the FSF was disappointed that the UCT provisions were added to what was then the Consumer Law Reform Bill after the Select Committee stage of that Bill, in such circumstances that the FSF had no opportunity to make submissions on the UCT provisions before they were enacted.

The FSF accordingly welcomes the opportunity now to express its views as part of this consultation, but at the same time this consultation does not provide the opportunity to address the wider points that might have been addressed in Select Committee – and the FSF accepts that this consultation may not be an appropriate place now to address such matters.

The FSF does however want to record one point clearly at the outset, namely that it does not accept that consumer loan documents containing provisions of types that are listed in section 46M of the Act are necessarily to be considered unfair as a result. That will be returned to where appropriate below.

The FSF’s submissions are mostly concerned with how particular UCT provisions may apply to consumer credit, and follow below in the same sequence as the relevant matters appear in the draft Guidelines.

**Purpose and scope:** The FSF notes that the draft guidelines record (in para 3) that they are intended –

*“...to facilitate parties’ thinking about how the UCT provisions will apply to them”*

but are –

*“.. not exhaustive and are not intended to be legally binding.”*

As regards that objective, the FSF welcomes the Commerce Commission taking the initiative in that way, and is sure that the Guidelines will be of value to affected parties, both initially and on an ongoing basis.

The FSF also accepts that the content of the draft Guidelines are not intended to be legally binding, but does want to record its hope that –

- (a) the adjective “draft” will be removed from the title to the document when it is revised following this consultation; and
- (b) where views are expressed by the Commission as to the manner in which the UCT provisions may apply, the Commission will not lightly depart from those views in future.

That comment reflects that many FSF members relied on the views expressed by the Commission in its “Draft Guidelines on Consumer Credit Fees” published in May 2010, and were both disappointed and disadvantaged when the Commission subsequently departed from those views.

**Paragraph 7.1 – Explanation of “Standard form contract”:** The FSF notes that the explanation of “standard form” in this paragraph reads as if it were a definition, but in fact it only mentions two of the 5 factors that section 46J of the Act says must be taken into account. It would be preferable if this text, or a footnote to it, noted that whether or not a contract is a “standard form contract” may depend on other factors too, and that the subject is addressed in more detail in paragraph 27.

**Paragraph 8 and Footnote 6 – “Finance” as an example of a Standard form contract:** The second example of a standard form contract given in paragraph 8 is “finance”. The FSF suggests that in this context most people would read that word as if it were referring to “consumer credit contracts”, but the term “finance” is instead footnoted in footnote 6 thus –

*“Financial services contracts also fall under the jurisdiction of the Financial Markets Authority”.*

That statement is too absolute and in this context is arguably also misleading: the FMA is not responsible for administering the laws applicable to consumer credit contracts, but rather the Commerce Commission itself is. The footnote needs to be corrected.

**Paragraph 24 – Businesses as “consumers”:** The second sentence in paragraph 24 reads –

*“This means that the law can treat a business as a “consumer” for the purposes of the UCT provisions”.*

That statement is also too absolute, and might be read as suggesting that business transactions generally are subject to the UCT provisions. It would be preferable if the statement were qualified to make clear that a business will only be a “consumer” for the purposes of the UCT provisions where consumer goods are involved.

**Paragraph 45 – What is “reasonably necessary to protect legitimate business interests”:** Paragraph 45.2 is to the effect that a party claiming a clause is “reasonably necessary to protect” their “legitimate business interests” will need to show that the interest –

*“..cannot reasonably be protected by fairer means.”*

The UCT provisions do not in fact say that, and paragraph 45.2 should accordingly be deleted.

**Paragraph 55 – What is an “average reasonable consumer”:** Paragraph 55 suggests the courts will likely adopt an “average reasonable consumer” standard. These are interesting words to use in light of the recent Court of Appeal case of Godfrey Hirst NZ Limited and Cavalier Bremworth Limited. In that case the Court expressly stated that the word “average” should be avoided because of its use in a “mathematical sense”. This could cause confusion. In describing a consumer, the Courts have preferred “reasonable consumer” in the class targeted except the outliers (ill equipped consumers, or those whose reactions are extreme or fanciful). The FSF would therefore suggest avoiding using the word “average”.

**Paragraph 67 – Terms permitting unilateral alterations:** Paragraph 67 reads -

*“In some cases, businesses may have a legitimate need to be able to vary their terms, such as where they want to accommodate market developments. However, we consider that businesses should give adequate notice of such changes and consumers should have the right to cancel the contract without penalty where the changes are materially detrimental. In these cases, the consumer should not be worse off as a result of the business choosing to vary the terms.”*

This situation is one that may be applicable to FSF members who are lenders, because interest review clauses in their loan documents may be considered examples of clauses that exist because lenders “have a legitimate need to be able to vary their terms ... to accommodate market developments”, the “market developments” being changes in the lender’s funding costs due to interest rate movements.

FSF members exercising interest review clauses do try to give reasonable notice of rate reviews. However, in respect of interest review clauses the FSF disagrees with the Commission’s statement that “consumers should have the right to cancel the contract without penalty” if a change was adverse to them. Termination of a credit contract can involve significant costs to lenders, which the Credit Contracts and Consumer Finance Act 2003 (“CCCFA”) permits lenders to recover.

Further, because the CCCFA thus permits cost recovery, it follows that under section 46K(1)(c) of the Act such clauses are accordingly beyond the scope of the UCT provisions.

As a result, the FSF suggests that paragraph 67 should make clear that the Commission does not have that expectation in respect of cancellations following interest reviews, for the reasons just given.

**Paragraph 81 – Interest as part of the “upfront price”:** The FSF agrees with the statement in paragraph 81 that interest is part of the “upfront price”, with the consequence that terms fixing contract interest rates cannot be considered unfair terms for the purposes of the UCT provisions.

**Paragraph 88 – Interest on default may be fair:** The FSF also agrees with the useful example given in paragraph 88, based on the English decision in *Director of Fair Trading v First National Bank* to the effect that a term requiring interest on default is part of the “essential bargain” between lender and borrower, a factor which weighs in favour of such a term not being held to be unfair.

The FSF considers the decision in *Director of Fair Trading v First National Bank* to be correct and would expect the New Zealand courts to follow it in applying the UCT provisions.

**Paragraphs 89 & 90 – Price terms must be transparent:** As noted at para 81 above, the FSF was pleased to see the Guidelines’ acceptance that interest is part of the “upfront price”. However it is concerned the statement in paragraph 90 that the Commission will be concerned about “price terms that have not been transparently disclosed” may give scope to apply the UCT provisions to subject terms about interest if they are not “transparent”.

While the FSF accepts that –

- a) under section 46K(2) of the Act a term can only be part of the “upfront price” (and thus not unfair terms for the purposes of the UCT provisions) if the term is “transparent”; and
- b) to be “transparent”, an element of clear expression is required;

it suggests that if a consumer credit contract meets the disclosure requirements of the CCCFA, then it cannot have been intended also to be subject to further scrutiny from the Commission on the basis that it is not “transparent” enough.

The FSF considers that terms in a consumer credit contract that are disclosed to the standards required by the CCCFA are protected from being “unfair” by section 46K(1)(c) of the Act. The FSF also suggests that it would be helpful to both lenders and consumers if the Guidelines recorded a credit contract that meets CCCFA disclosure requirements is consequently considered to be “transparent”.

**Paragraph 94 – Terms permitted by other Acts:** The FSF notes that the example given in paragraph 94 explicitly states that a fee that is permitted by the CCCFA “cannot be an unfair contract term”. The FSF agrees, and is pleased to see acceptance of that by the Commission.

Please do not hesitate to contact me if you require any clarification or further input of the above.

Yours sincerely



Lyn McMorran  
**EXECUTIVE DIRECTOR**

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**APPENDIX A**  
**Membership List as at 1 September 2014**

Debenture Issuers - (NBDT) Non-Bank Deposit Takers	Vehicle Lenders	Finance Company Diversified Lenders	Credit Reporting	Insurance	Affiliate Members
<p><b><u>Rated</u></b></p> <ul style="list-style-type: none"> <li>• Asset Finance (B)</li> <li>• Avanti Finance (BB)</li> <li>• Fisher &amp; Paykel Finance (BB+)</li> <li>• Medical Securities (A-)</li> </ul> <p><b><u>Non-Rated</u></b></p> <ul style="list-style-type: none"> <li>• Mutual Credit Finance</li> <li>• Prometheus Finance</li> </ul>	<ul style="list-style-type: none"> <li>• BMW Financial Services</li> <li>• Branded Financial Services</li> <li>• Community Financial Services Limited</li> <li>• European Financial Services</li> <li>• Fleet Partners NZ Ltd</li> <li>• Mercedes-Benz Financial Services</li> <li>• Motor Trade Finances</li> <li>• Nissan Financial Services NZ Pty Ltd</li> <li>• ORIX NZ</li> <li>• SG Fleet</li> <li>• Toyota Finance NZ</li> <li>• Yamaha Motor Finance</li> </ul>	<ul style="list-style-type: none"> <li>• Advaro Ltd</li> <li>• Centracorp Finance 2000</li> <li>• Dorchester Finance</li> <li>• Finance Now</li> <li>• Future Finance</li> <li>• GE Capital</li> <li>• Home Direct</li> <li>• Instant Finance</li> <li>• John Deere Financial</li> <li>• Oxford Finance Ltd</li> <li>• DTR Thorn Rentals</li> <li>• South Pacific Loans</li> <li>• The Warehouse Financial Services Group</li> </ul>	<ul style="list-style-type: none"> <li>• VEDA Advantage</li> </ul> <p><b><u>Debt Collection Agency</u></b></p> <ul style="list-style-type: none"> <li>• Baycorp (NZ)</li> </ul>	<ul style="list-style-type: none"> <li>• Autosure</li> <li>• Protecta Insurance</li> <li>• Provident Insurance Corporation Ltd</li> </ul> <p><b><u>Associate Members</u></b></p> <ul style="list-style-type: none"> <li>• Southsure Assurance</li> </ul>	<ul style="list-style-type: none"> <li>• American Express International (NZ) Ltd</li> <li>• Buddle Findlay</li> <li>• Chapman Tripp</li> <li>• Deloitte</li> <li>• Ernst &amp; Young</li> <li>• Finzsoft</li> <li>• KPMG</li> <li>• PriceWaterhouseCoopers</li> <li>• SimpsonWestern</li> </ul>