FINANCIAL SERVICES FEDERATION

13 October 2016

Ms Melissa Lee
Chairperson
Commerce Select Committee
New Zealand Parliament

Submitted on-line to: www.parliament.nz

Dear Ms Lee

Consumer Guarantees (Removal of Unrelated Party Lender Responsibility) Amendment Bill

The Financial Services Federation ("FSF") is responding to your letter of 23 September 2016 which invited the FSF to make a submission on the above Bill. The FSF is very grateful for the opportunity to do so on behalf of its members.

By way of background, the FSF is the industry body representing responsible and ethical finance and leasing providers in New Zealand. The FSF has over fifty members and affiliates providing first-class financing, leasing, and credit-related 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 the current membership is attached to this submission as Appendix "A".

Submission:

Section 2(1)(b)(ii) of the Consumer Guarantees Act 1993 ("the Act") will presently include a lender within the Act's definition of "supplier", if the lender makes a loan on the security of the goods sold and that loan was "arranged" by the actual supplier of the goods.

The Bill proposes to amend that part of the Act's definition of "supplier" by adding a requirement that the lender and the supplier of the goods must also be "related parties" as defined in accounting standard NZ IAS 24 (which would effectively mean that they must be under common control before the lender may be a "supplier").

The FSF supports the Bill's proposal to amend the Act's definition of "supplier" in that way, and submits the amendment proposed by the Bill is desirable, for three reasons:

1. Submission 1: The FSF believes this part of the definition was intended to ensure that lenders who were in effect an extension of the real supplier should be treated by the Act as also being "suppliers". However as presently worded this part of the definition may not achieve that, since it focusses on whether the supplier "arranged" the loan, not on whether it and the lender are under common control, and the uncertainties about what "arranged" means may presently be facilitating avoidance.

   The Bill will rectify that and will help to prevent avoidance, by requiring that those parties be "related";

2. Submission 2: The present text of the definition and in particular the use of the word "arranged" lacks clarity, and the resulting uncertainty may mean that lenders who are wholly

independent of the supplier of the goods may nevertheless be caught by it, becoming "suppliers" who are responsible for the statutory guarantees of quality etc.

The Bill is right to seek to remove that uncertainty and to seek clarity for the position of lenders who are not related to the true supplier;

3. Submission 3: In principle, there is no good reason why lenders who are not related to the real supplier and who do not themselves "supply" goods at all should be liable under the Act. Thus, the Bill also adopts a principled approach to statutory liability.

The FSF will elaborate on each submission below.

Submission 1 – Lenders under common control with the true supplier may presently be able to avoid liability: As this part of the Act's definition of "supplier" is presently worded, the key part of the definition is that a –

"... loan was arranged by a person who in trade supplied the goods."

In effect, that is anti-avoidance text, aimed at preventing suppliers who sell on credit terms from avoiding the Act simply by "arranging" for credit to be provided by another entity, and then ceasing to trade when problems arise, leaving the consumer without a remedy but still liable to a lender who may be closely related to the now-failed supplier.

Prior to the Act, a similar approach was taken by the Hire Purchase Act 1971 (section 2(2)) and by the Credit Contracts Act 1981 (section 4(3)). In all cases the FSF believes the intention was to prevent avoidance of consumer protection legislation by sellers involving a related third party to provide the credit.

However, the definition in the Act does not require the lender and the supplier to be "related" entities, but asks instead if the credit was "arranged" by the supplier. As that word has been interpreted by the courts, there is considerable scope for unscrupulous suppliers to seek to avoid responsibility by involving a related entity that is a lender.

Thus in *Sudveldt v UDC Finance Ltd* (1987) 1 PRNZ 205 the Court of Appeal held that a loan was not to be considered "arranged" by a supplier of goods just because the supplier introduced the lender to the borrower. That actually facilitates unscrupulous suppliers seeking to avoid responsibility under the Act by introducing a lender that is related to them.

The FSF submits that should not be possible, and that the Bill is correct to seek to prevent that by inserting into the definition the very thing that is presently missing from it, namely a focus on the relationship between the supplier and the lender, in order to make it less likely that the Act can be avoided where there is such a relationship.

The FSF also submits that if a relationship between the supplier and the lender were required as the Bill proposes, there might then be no need to retain the existing requirement that the credit be "arranged" by the supplier, and indeed retaining that word might be undesirable as it would continue to invite arguments over whether the loan was "arranged" by the supplier or not.
The FSF therefore submits that that what is presently subparagraph (B) on page 2 of the Bill could usefully be deleted from the Bill before the Bill is enacted, with some relatively minor consequent other changes to text.

Submission 2 – The position of arms-length lenders who are independent of the true supplier nevertheless lacks clarity: As noted above, this part of the Act's definition of "supplier" does not presently require any relationship between the supplier of goods and the lender financing them. As a result lenders who are unrelated to the actual supplier of the goods presently risk liability if the process by which the customer comes to them might be considered "arranged" by the supplier in some way, even though in such cases the supplier has no influence in the lending process.

This is of concern to a number of the FSF's members, who frequently have dealings with customers sourced from retailers who are wholly unrelated to them. For example, with a typical vehicle purchase transaction or a finance agreement in respect of a whiteware purchase, the retailer and the financier are typically unrelated, but despite that the uncertainties around what is and is not "arranged" for the purposes of the Act's definition mean that it is difficult for a lender to know whether the Act will apply to them or not.

That lack of certainty is clearly undesirable, and the FSF supports the amendment proposed by the Bill as it would remove that uncertainty.

Submission 3 – In principle, arms-length lenders who are independent of the true supplier should not be liable under the Act as if they were "suppliers": The FSF also submits that there is in any event no reason why arms-length lenders who are independent of the true supplier should be liable under the Act as if they were "suppliers". It says that because –

a) Such lenders are in fact not the supplier of the goods in question, and are unrelated to the supplier;

b) As such, they –
   - Are not realistically able to be familiar with the quality of the relevant goods;
   - Consequently have not been involved in negotiations between the supplier and the consumer buyer, and have no way of assessing whether the goods are likely to meet the consumer's needs or not;

c) The consumer buying the relevant goods consequently does not in fact rely on the lender in respect of product quality and fitness for purpose, for those above reasons;

d) The lender is also not in any position to exercise any quality control over the supplier, and it would be wrong in principle for the Act to make lenders responsible for matters beyond their control, as the Act may presently do.

It is worth noting that the FSF believes that those points are already widely accepted throughout society in many similar contexts. For example, few would suggest that when a consumer maker a retail purchase using their credit card, the financier issuing the card should be responsible for the statutory guarantees of quality etc in the Act, even if the retailer suggested that they use their credit card.

That is however in substance no different from say a car dealer suggesting that a purchase is financed by an unrelated finance company, which is the type of situation in which it might be argued that the car dealer has arranged the loan, which if correct might at present make the unrelated finance company liable under the Act.

The FSF would also note that Parliament has relatively recently considered what should fairly be required of responsible lenders, in the responsible lender principles that were added to the Credit

Contracts and Consumer Finance Act in 2014. Those principles certainly require consumer lenders to –

> "…make reasonable inquiries to be satisfied that …. the credit or finance provided under the agreement will meet the borrower's requirements.."

but they do not require responsible lenders also to be similarly satisfied about the quality of the goods financed. The FSF submits that also implicitly accepts that it would be wrong in principle to expect to expect lenders to do so, and for that reason too the FSF strongly supports the Bill and the amendments it seeks to make to the Act.

The FSF trusts that its above responses are helpful, and would be pleased to discuss further, if that would be of assistance.

Lyn McMorran
EXECUTIVE DIRECTOR

Membership List as at 30 June 2016 Appendix A

Debenture Issuers - (NBDT) Non-Bank Deposit Takers	Vehicle Lenders	Finance Company Diversified Lenders	Credit Reporting Other	Insurance	Affiliate Members
Rated • Asset Finance (B) • Fisher & Paykel Finance (BB+) **Non-Rated** • Mutual Credit Finance • Gold Band Finance Limited	• BMW Financial Services • Branded Financial Services • Community Financial Services • Go Cars Finance Ltd • European Financial Services • Mercedes-Benz Financial Services • Motor Trade Finance • Nissan Financial Services NZ Ltd • Onyx Finance Limited • Toyota Finance NZ • Yamaha Motor Finance **Leasing Providers** • Custom Fleet • Fleet Partners NZ Ltd • LeasePlan NZ Ltd • ORIX NZ • SG Fleet	• Advaro Limited • Avanti Finance • Caterpillar Financial Services NZ Ltd • Centracorp Finance 2000 • Finance Now • Future Finance • Geneva Finance • Home Direct • Instant Finance • John Deere Financial • Latitude Financial • Personal Finance Ltd • South Pacific Loans • The Warehouse Financial Services Group • Thorn Group Financial Services Ltd • Turners Finance Limited	• VEDA Advantage **Debt Collection Agencies** • Baycorp (NZ) • Consumer Credit Management Limited • Dun & Bradstreet (NZ) Limited **52 Members**	• Autosure • Protecta Insurance • Provident Insurance Corporation Ltd **Associate Members** • Southsure Assurance	• American Express International (NZ) Ltd • AML Solutions • Buddle Findlay • Chapman Tripp • EY • Finzsoft • KPMG • PWC • SimpsonWestern