



FINANCIAL SERVICES FEDERATION

27 March 2020

Committee Secretariat
Economic Development, Science and Innovation Committee
Parliament Buildings
WELLINGTON

By email to: edsi@parliament.govt.nz

Fair Trading Amendment Bill 2019

The Financial Services Federation (“FSF”) is grateful to the Ministry for the opportunity to provide this submission on the Fair Trading Amendment Bill 2019.

By way of background, the FSF is the industry body representing the responsible and ethical finance, leasing and credit-related insurance providers of New Zealand. We have sixty members and affiliates providing these products to more than 1.5 million New Zealand consumers and businesses. Our affiliate members include internationally recognised legal and consulting partners. A list of our members is attached as Appendix A. Data relating to the extent to which FSF members (excluding Affiliate members) contribute to New Zealand consumers, society and business is attached as Appendix B.

1. Introduction

The FSF agrees with the General Policy Statement accompanying the Bill that unfair commercial practices such as the use of pressure tactics, deception, one-sided contract terms, and practices that generally exploit a consumer’s or small business’s vulnerabilities are unacceptable. As the FSF is the industry body representing responsible non-bank financial institutions, to whom there is a great deal of regulation that applies in regard to the protection of consumers, it is good to see progress being made to better align the obligations that are already placed on the financial services sector with obligations on all of New Zealand’s sectors and industries to provide more holistic protections to consumers and small businesses.

However, the FSF wishes to express some general concern that while the premise of better protecting consumers and small businesses on which the Bill rests is admirable, there is potential for the amendments to result in over regulation within the financial services sector. There are already extensive provisions within the Fair Trading Act 1986 (“FTA”), the Commerce Act 1986, the Credit Contracts and Consumer Finance Act 2003 (“CCCFA”), the equitable doctrine of

unconscionability, the Consumer Guarantees Act 1993, and the Contract and Commercial Law Act 2017. Therefore, while the FSF supports the extension of some of the more prescriptive ways in which financial services businesses must operate to businesses more generally, the FSF is concerned further amendment to the FTA may run the risk of placing more prescriptive compliance obligations and costs on to the financial services sector which ought to be avoided as much as possible.

The FSF also wishes to express that while we generally support the prohibition of unconscionable conduct in trade, we do not support the extension of consumer protections from unfair contract terms to all New Zealand businesses. The FSF considers the transaction value cap that has been set in the Bill is a poor indicator of whether the contracting relationship comprises two businesses of disparate power and vulnerability. As it is currently drafted, the FSF expects that either businesses will be incentivised to negotiate all of their contracts rather than offer them in standard form, or the legislation will protect large and powerful businesses in contracts with smaller ones. Both of these potential outcomes would result in the imposition of significant costs on the contracting businesses, which is contrary to the purpose of the legislation, being that it ought to protect vulnerable consumers and businesses and strengthen the New Zealand economy.

2. Unconscionable conduct in trade

Despite the lack of case law on the matter, the FSF is pleased to see protections are offered for businesses against “unconscionable” conduct, as opposed to protections against “oppressive” conduct as was suggested in the previously released Discussion Paper on the matter. This is because the higher threshold prohibits contracts that are more clearly inappropriate and unacceptable which provides affected businesses with sufficient certainty as to whether or not the conduct they are experiencing falls within the scope of the legislation.

Owing to the lack of New Zealand case law however, and given that proposed section 7(3) sets out that the provision would not be limited by any rule of law or equity relating to unconscionable conduct, the FSF seeks a more extensive definition of what falls within the remit of unconscionable conduct in trade. This is particularly so because, where a court makes a finding that there has been unconscionable conduct, the assessment appears to be highly discretionary and therefore is also likely to be difficult to appeal. The assessment also appears to focus on the circumstances of the trading relationship, rather than on the outcome of the conduct itself. While the FSF agrees that it is appropriate that in making an assessment a court has regard to these contextual matters, the FSF considers that having an objective yardstick with which to assess the unconscionability of any given conduct is essential.

3. Unfair contract terms in standard form small trade contracts

The FSF is concerned about the proposed definition of a small trade contract as it is outlined in clause 7 of the Bill. While sole traders are a clear example of a small business that warrants protections comparable to those enjoyed by consumers, the FSF is concerned that the current regime will protect large, powerful and sophisticated businesses.

The FSF considers that this is largely due to the transaction value cap that has been set which does not present a good criterion by which to assess whether a business should be protected. As it is currently drafted, the threshold is too simplistic, such that there is potential for large businesses to be unduly protected when they are contracting for a value that falls under the cap in the first transaction that initiates their contracting relationship; and means that any subsequent contract, which may exceed the cap significantly, will also not be permitted to contain terms which a large business might consider to be unfair.

The value of the contract is understood by the FSF to be a poor indicator of the size of a business, and therefore reinforces the notion that the transaction value cap will not effectively serve the purpose of the legislation. Rather, by treating all businesses in the same way as consumers the FSF anticipates the legislation would result in a fundamental shift in New Zealand's commercial environment, similar to that of Australia. The FSF is therefore extremely cautious of such changes being implemented in which businesses are treated as consumers.

Whilst recognising that when small businesses encounter unfair contract terms this can result in adverse effects on the New Zealand economy, the FSF would prefer legislative drafting that specifically targeted those vulnerable businesses that have been identified as needing protection. It is also important to recognise that even small businesses, as limited liability companies, have various other legislative protections in place already that do not extend to consumers. Therefore, the FSF suggests that consideration be given to an alternative mechanism for determining what is a small business, rather than what is a small trade contract. This could possibly involve a more flexible threshold, or a combination of transaction value and business size, which in turn could be determined by annual turnover, for example. This would ensure that large and sophisticated businesses are not unduly protected.

However, the FSF is pleased that clause 21 provides that the protections from unfair contract terms in standard form small trade contracts only apply after sections 26B to 26E come into force, rather than being retrospectively applied.

The FSF supports the extension of the "grey list" of unfair contract terms set out in section 46M of the FTA to protect both consumers and businesses engaging in a small trade contract as this provides some clarity and commercial certainty to businesses about what terms may or may not be regarded as unfair.

Due to the inherently subjective nature of the interpretation of what is "unfair", FSF members have reported that in spite of assessing their contract terms and making full disclosure to customers, they have experienced both consumer and business customers accusing them of imposing unfair contract terms during the course of the contract. The FSF therefore is very conscious of the fact that a term that a customer may dispute and consider to be unfair, may not always be unfair under the legislation.

The FSF is also concerned about the potential unintended consequences that might arise, such as terms which are common and reasonable in the business context being regarded as unfair, which may disincentivise trade with small businesses. The FSF submits that, for example, there are

commercially necessary terms, such as those which outline fees for early repayment of credit, that are frequently complained about or disputed. Credit contracts often contain terms that provide for recovery of reasonable loss to the credit contract provider in the event of early repayment of a fixed interest rate loan. This is perfectly legal practice, provided that the credit contract provider recovers their reasonable loss and does not impose a further penalty on the borrower.

Similarly, early termination fees are also often calculated with reference to the Rule of 78, which, despite being the subject of some consumer complaints, is still acceptable in the context of consumer lending under the CCCFA and FTA. The FSF anticipates that the status quo regarding terms such as these will remain, despite being the subject of some consumer complaint due to a subjective interpretation of the term being unfair. Similarly, it is often the case, in the experience of FSF credit provider members, that what might have been considered fair by the customer at the time of entering into the contract, might be construed by them as being unfair if it is invoked and they are asked to compensate the credit contract provider for their loss in the event of early repayment of the loan. Therefore, the FSF seeks clarity that these terms will continue to be regarded as commercially reasonable and will not be regarded as an unfair contract term in the context of small trade contracts.

One further point the FSF makes in relation to unfair contract terms, whether in a business or consumer context, is that New Zealand has very effective competition law in place that prohibits large businesses using their influence and greater bargaining power unfairly. The FSF therefore submits that the key to protecting these smaller businesses may not necessarily require more legislation, but rather that it may lie in enforcing the existing law.

4. Uninvited direct sale agreements

The FSF supports the proposed extension of better protections to individuals in order to empower and enable them to direct a person with the intention of negotiating an uninvited direct sale agreement to leave or not enter the premises.

Thank you again for the opportunity to provide the FSF's views on the Fair Trading Amendment Bill 2019. Please do not hesitate to contact me if you require anything further.



Lyn McMorran
EXECUTIVE DIRECTOR

FSF Membership List as at 1 February 2020

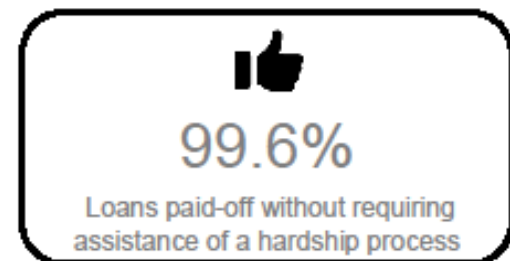
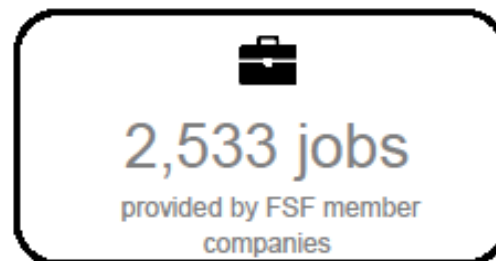
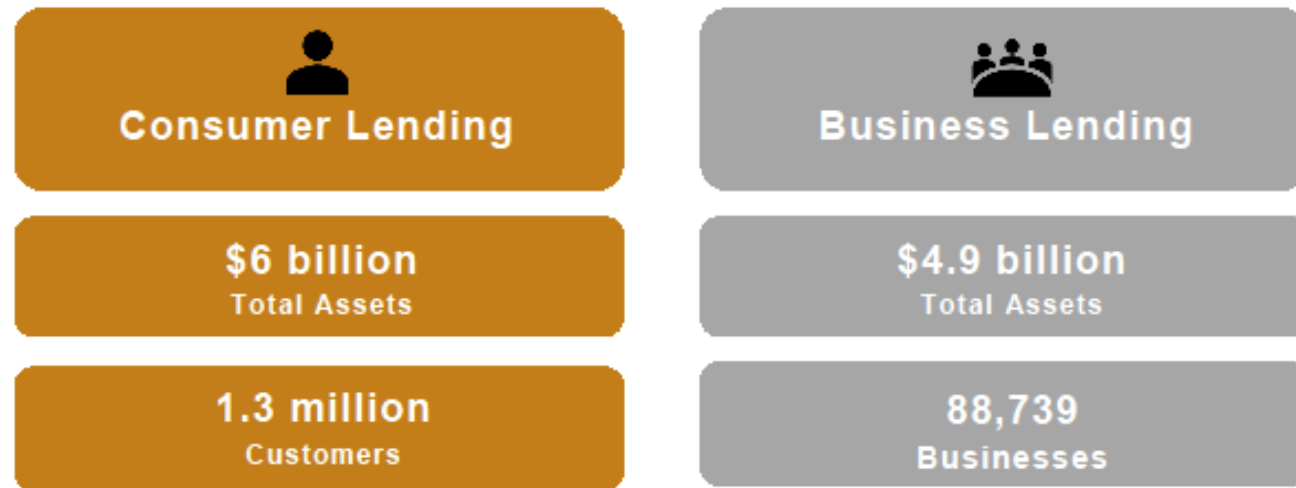
Appendix A

Non-Bank Deposit Takers (NBDTs)	Vehicle Lenders	Finance Company Diversified Lenders	Finance Company Diversified Lenders	Credit-Related Insurance	Affiliate Members
<p><u>Rated</u></p> <p>Asset Finance (B)</p> <p><u>Non-Rated</u></p> <p>Gold Band Finance</p> <p>➤ Loan Co</p> <p>Mutual Credit Finance</p>	<p>AA Finance Limited</p> <p>BMW Financial Services</p> <p>➤ Mini</p> <p>➤ Alphera Financial Services</p> <p>Community Financial Services</p> <p>European Financial Services</p> <p>Go Car Finance Ltd</p> <p>Honda Financial Services</p> <p>Mercedes-Benz Financial</p> <p>Motor Trade Finance</p> <p>Nissan Financial Services NZ Ltd</p> <p>➤ Mitsubishi Motors Financial Services</p> <p>➤ Skyline Car Finance</p> <p>Onyx Finance Limited</p> <p>Toyota Finance NZ</p> <p>Yamaha Motor Finance</p> <p><u>Leasing Providers</u></p> <p>Custom Fleet</p> <p>Fleet Partners NZ Ltd</p> <p>Lease Plan</p> <p>ORIX NZ</p> <p>SG Fleet</p>	<p>L & F Ltd</p> <p>➤ Speirs Finance</p> <p>➤ YooGo</p> <p>Avanti Finance</p> <p>➤ Branded Financial</p> <p>Caterpillar Financial Services NZ Ltd</p> <p>CentraCorp Finance 2000</p> <p>Finance Now</p> <p>➤ The Warehouse Financial Services</p> <p>FlexiGroup (NZ) Limited</p> <p>Future Finance</p> <p>Geneva Finance</p> <p>Home Direct</p> <p>Instant Finance</p> <p>➤ Fair City</p> <p>➤ My Finance</p> <p>John Deere Financial</p> <p>Latitude Financial</p> <p>Metro Finance</p> <p>Pepper NZ Limited</p> <p>Personal Loan Corporation</p> <p>Pioneer Finance</p>	<p>Prosopa NZ Ltd</p> <p>South Pacific Loans</p> <p>Thorn Group Financial Services Ltd</p> <p>Turners Automotive Group</p> <p><u>Credit Reporting and Debt Collection Agencies</u></p> <p>Baycorp (NZ)</p> <p>Centrix</p> <p>Equifax (prev. Veda)</p> <p>Illion (prev. Dun & Bradstreet (NZ) Limited</p> <p>Intercoll</p> <p>Receivables Management</p>	<p>Autosure</p> <p>Protecta Insurance</p> <p>Provident Insurance Corporation Ltd</p> <p>Southsure Assurance</p>	<p>Buddle Findlay</p> <p>Chapman Tripp</p> <p>Experian</p> <p>EY</p> <p>FinTech NZ</p> <p>Happy Prime Consultancy Limited</p> <p>HPD Software Ltd</p> <p>KPMG</p> <p>PWC</p> <p>Simpson Western</p> <p>Total : 60 members</p>



FINANCIAL SERVICES FEDERATION

The Financial Services Federation (FSF) is the association for responsible finance and leasing companies operating in New Zealand. This infographic is a snapshot of our 61 members, the membership list can be found at our website: www.fsf.org.nz



FSF lending members data survey period as at 31 July 2019 . Data collected and aggregated by KPMG