FINANCIAL SERVICES FEDERATION

18 March 2020

Commerce Commission By email: fitandpropersubmissions@comcom.govt.nz

Thank you for the opportunity for the Financial Services Federation ("FSF") to submit on the recently released Consultation Document: Criteria for Certification under the Credit Contracts and Consumer Finance Act 2003.

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.

Introduction:
Before providing answers to the questions raised in the Consultation Document, the FSF reiterates some of the comments made on behalf of members in response to MBIE's Discussion Paper: Consumer credit review: Fees for certification and registration requirements for non-financial services businesses in early February this year (a copy of this submission is provided for your information as Appendix C to this submission).

The FSF has always held the strong belief that irresponsible and predatory lending resulting in consumer harm is the minor exception in New Zealand rather than the norm (whilst acknowledging the harm that such practices cause where it does take place). The majority of lending in New Zealand is provided by responsible lenders to borrowers who understand the commitment they are making when taking on debt and that debt is repaid without hardship.

The FSF provided evidence of this assertion in the submission on the MBIE Discussion Paper from the survey of FSF members conducted as at 31 July 2019 by KPMG which showed that 99.6% of loans provided by FSF members in the previous 12 months had been repaid or were being repaid without the borrower requiring hardship assistance (please refer to Appendix B attached to this submission).

Further, KPMG's 2019 Financial Institutions Performance Survey of the Non-Bank Lending Sector released in December last year, and which reviewed the performance of 26 large non-bank lenders, revealed that a mere 0.87% of the total loans of the entities surveyed are considered to be "impaired assets" and that provision for impairments over the gross loans held by these entities is at an historically low level of 1.92%.

The FSF therefore believes that the certification requirements being applied to all lenders is a significant overreaction to the harmful behaviour of a few and that the key to preventing harm being caused to consumers particularly those in situations of vulnerability or hardship, lies in the enforcement of the law against those lenders whose behaviour continues to be irresponsible.

In the submission on the MBIE Discussion Paper, FSF also made the point that there is an absence of a definition as to who falls within the remit of a "director or senior manager" of a lender. This is particularly so for determining what constitutes a "senior manager" assuming that a "director" is a person who sits on the controlling Board of the business.

The FSF also submitted in response to the Discussion Paper that it is not uncommon amongst FSF members that a director or senior manager will be a director on the Board or a senior manager of a number of different companies all of which may be requiring their certification in order to register on the Financial Service Provider Register (FSPR). As an example, a lender might operate several different brands as separate companies but with common directorships and/or senior management so the FSF made the point that it is obviously desirable for each director and senior manager to have to obtain certification only once rather than for each company for which they are a director or senior manager.

Unfortunately the Consultation Document does not provide the clarity the FSF was seeking as to whether directors and senior managers of more than one lender or mobile trader will be required to seek certification for each of the entities for which certification would be required or only once at an individual level. The FSF submits that such clarity should be provided as soon as possible so that affected entities can plan their process for gathering all the required information and verifications in order that they can begin submitting their applications for certification as soon as possible to be ready for 1 September.

The FSF also took issue with the Discussion Paper's estimates of the costs to certify directors and senior managers and suggested that these were significantly understated. Tables 2, 5 and 8 of the Discussion Paper based their fees examples on entities having 4 senior managers and 3 directors requiring certification. The FSF disagreed with this estimate saying that it is most unlikely that a Board would be made up of only 3 directors and quoted the Institute of Directors of New Zealand's publication the Four Pillars of Governance Best Practice as saying that a Board numbering six to eight members is usually found to be the most appropriate.

The FSF is therefore concerned that the numbers of individuals seeking certification will exceed the Commission's expectations and therefore their ability to turn around certification

applications in a suitably timely manner within the window of 1 September 2020 to 1 April 2021 by which the lender or mobile trader will be required to hold certifications for all their directors and senior managers.

Further exacerbating this very real concern, the FSF notes with some alarm that the MBIE Discussion Paper raised the issue of the exemption in Regulation 10 of the Financial Service Providers (Exemptions) Regulations 2010 for non-financial service businesses from being required to register on the FSPR and the possibility that the requirement to certify all consumer creditors to obtain certification for their directors and senior managers as fit and proper might now require the revocation of that exemption.

In the consumer credit provider context, the exemption applies to non-financial businesses if both of the following apply:

a. The credit is provided in order to facilitate the provision of goods or services to their customers; and
b. The non-financial service business, in the ordinary course of its business, **assigns the credit contracts to another person within one working day of providing the credit**.

The Discussion Paper went on to say that it is MBIE's understanding that this primarily exempts retailers and motor vehicle dealers who enter into credit contracts in their own name, and then assign those to a finance company or other lender. The Discussion Paper also points out quite rightly that the alternative model used by some lenders is to have the retailer acting as an agent of the lender, in which case the lender (rather than the dealer or retailer) is the creditor under the credit contract and responsible for compliance with the CCCFA.

In the FSF's response to the Discussion Paper, the FSF strongly submitted against removing the exemption and went further to submit that the treatment of dealers and retailers under either the assignment or agency models as described above under the CCCFA should also be the same. The FSF made the point in support of this submission that it needs to be clearly understood that the dealer or retailer under the assignment model does not approve the credit contract themselves. They merely collect information from the potential borrower for sending to the finance company concerned for them to make the decision as to whether or not the credit application meets their criteria and whether or not credit should be extended to that individual.

The dealer or retailer has no discretion to circumvent the lender's policies and in fact is highly disincentivised not to do so as they would not wish to lose sales due to the credit provider having withdrawn their ability to offer credit to purchase their goods.

The FSF therefore believes that the credit provider is the lender to whom the credit is assigned and that the lender is ultimately responsible for ensuring that the requirements of the CCCFA are being fulfilled in exactly the same way as the lender is responsible for meeting the CCCFA requirements when their credit is provided by a dealer or retailer under the agency model.

The withdrawal of the exemption for non-financial businesses will have the effect of forcing dealers and retailers who offer credit for the purchase of their goods and services under the assignment model to incur the cost of registering on the FSPR when they are not in fact a financial services business.

Further, they will also be required to obtain certification as fit and proper persons for all their directors and senior managers while those directors and senior managers of dealers or retailers whose finance provider operates the arrangement with them under the agency model will not be required to do so.

Apart from the very real anomaly the FSF can see here between two models which essentially achieve the same thing, it appears to the FSF that neither MBIE nor the Commerce Commission have considered the considerably increased workload the Commission will have to deal with to be able to provide such certifications to directors and senior managers of a great many dealers and retailers which they are most likely not expecting and which will create further issues for the Commission in ensuring that all applications are processed in time for the 1 April 2021 deadline.

As the FSF submitted in response to the Discussion Paper, the FSF strongly believes that not only should the FSPR exemption remain in place for non-financial business who provide credit as an incidental and temporary part of their operation, but it should also be clarified that they are exempted from any requirement to certify their directors and senior managers under the CCCFA regardless of which model they use to do so.

However, given that discussions with MBIE Policy staff in recent times have made it clear that there is no appetite to provide for any such exemption, the only way in which FSF members who operate their finance arrangements with their dealer networks via the assignment model can avoid the expense and administrative burden of being required to certify the directors and senior managers of every individual dealership with which they interact, is to re-negotiate every single contractual arrangement they have with these dealers so they can operate under the agency model and avoid this unnecessary expense. Whilst the FSF accepts that this is a fait accompli, the FSF does reiterate its concerns about the unintended and basically unfair consequences that have arisen as a result of this anomaly.

With respect to the Consultation Document itself the FSF has the following points to make.

Purpose:
Returning to the point made above with regard to the fact that certifications are required of individual directors and senior managers of lenders and mobile traders, the point number 4 under the section headed “Purpose” in the Consultation Document does not make it clear that this is the case. It is the FSF’s understanding that it is not the lender or mobile trader as an entity in itself that is required to be certified as being “fit and proper”, rather it is the individual directors and senior managers of the lending or mobile trading entity that must be so certified in order that the entity can be registered on the FSPR.

This being the case, the FSF then questions how the Registrar of the FSPR or the Commerce Commission or any other regulator is intending to monitor that all such senior managers and directors have received the appropriate certification before registering. How, for example, will the regulator ensure that a lender or mobile trader has obtained certification for all the relevant senior managers and directors of their entity?

Further, point 5 of the "Purpose" statement goes on to say that "*If lenders or mobile traders provide consumer credit or mobile trading services without certification, they could be liable for penalties ($200,000 for an individual and in any other case $600,000).*" The FSF is interested to know how these penalties might be applied. For example, would the $200,000 fine apply to each of those relevant senior managers or directors of a lender or mobile trader who have **not** obtained certification but should have done so, or would the individual fine amount be applied to all those relevant senior managers or directors who have obtained certification as well as those from the entity who have not but who should have done so?

Further, would the entity itself be liable for the $600,000 penalty for failing to obtain certification for all its relevant senior managers and directors? And then would the individual senior managers and directors who have not obtained the certification also receive the $200,000 penalty?

The FSF submits that some clarification around these points would be helpful.

"Fit and Proper" assessment criteria:

The FSF notes from the Consultation Document that the Commission intends to publish guidance in mid-2020 which will outline the application process and the way the Commission intends to apply the criteria. Whilst the FSF is certain that such guidance will be very useful to entities having to obtain the certification for their directors and senior managers, the FSF would hope that the guidance is disseminated as soon as possible given that applications will open from 1 September and those more responsible lenders such as FSF members will be keen to understand the process and start getting relevant information together in order to get their applications in closer to that date than to 1 April 2021 when the certifications must have been obtained.

The FSF suggests that the guidance might also helpfully contain a template or checklist that applicants can follow to ensure that they have provided relevant information in relation to each of the criteria. The FSF believes that not only would this save time from the point of view of those administering certification applications within lenders' and mobile traders' organisations but it would also assist the Commission by ensuring that the vast majority of applications are received with the complete set of information attached.

The FSF also requests that the guidance should include the Commission's requirements with regard to the verification that will need to be provided by directors and senior managers in order for them to meet the probity, reputation and financial integrity criteria and the competency and capability criteria. Certainty as to how directors and managers must verify

that they meet these criteria is required sooner rather than later so that these people can gather the appropriate verification to accompany their certification applications and get these submitted in a timely manner in order to meet the 1 April 2021 deadline. This is particularly imperative where a director or senior manager might have to apply to an overseas jurisdiction to provide this verification.

With particular reference to those directors or senior managers requiring certification who either reside or who have resided in overseas jurisdictions, the FSF urges some flexibility and a common-sense approach be taken to the application of the criteria and the way in which it is expected to be verified. A number of FSF member organisations have overseas parent companies and therefore it is likely that a number of their directors in particular will be based in countries other than New Zealand and some of whom may not be able to provide verifications as readily as they might if they were based in New Zealand. For example, there are overseas jurisdictions that do not supply police checking information on individuals.

A director should not be disqualified from being certified and the entity for which they are a director therefore be unable to operate from 1 April 2021 because they have been unable to provide a particular document or verification due to their own country's laws and regulations. The FSF understands that the FMA has found this to be an issue for some people requiring to be certified as fit and proper under some of the licensing regimes they supervise. They have taken a pragmatic approach that, if all else leads them to believe that the person concerned is reputable, where some information just cannot be provided, they have waived that requirement.

A rigid adherence to the criteria in the face of other evidence that the person concerned is in every other way fit and proper to be a director of a lender, is counter-productive to providing consumers with access to responsible credit options in the FSF's view.

With respect to the questions posed in the Consultation Document, the FSF has the following points to make.

1. **What do you think of the proposed "fit and proper" criteria in Table 1 and Table 2 of this consultation document and why?**

With regard to the criteria in Tables 1 and 2 of the consultation document, the FSF is concerned that no time period since a liquidation (as described in criterion 3 of Table 1) or punishment by a regulator (as described in criteria 5 and 6 of Table 1) or restriction as to a degree of reasonableness that should be applied by the Commission is mentioned with regard to the way in which the Commission is to make their fit and proper assessment.

The FSF submits that criterion 3 of Table 1 is too wide-ranging as currently drafted. It is not uncommon for a director, senior manager or controlling owner to have operated in that capacity for an entity that has been placed into liquidation, receivership or voluntary administration in New Zealand or equivalent insolvency procedures overseas. The fact of an

entity being placed into liquidation, receivership or voluntary administration does not automatically indicate the entity is either insolvent or that it has been badly administered.

In fact it is not at all uncommon for the liquidation process to be used to wind up an entity that has sold its assets in a merger and acquisition process as an example and this is entirely reasonable and certainly not an indication of insolvency or poor administration on the part of any directors, senior managers or controlling owners.

The FSF therefore submits that this criterion should be amended to read that it applies only in situations where the entity became insolvent and not where the liquidation process occurred as a result of a group re-structure, amalgamation, merger, asset sale or other form of solvent winding-up. Even then this criterion could be seen to be unfair to a director who, recognising that the entity they were involved with some time in the past had become or could become insolvent, took the entirely reasonable step to call in the liquidators to protect the entity's creditors or to place the entity into voluntary administration. This would be more suggestive of prudent governance rather than financial mismanagement and therefore the FSF once again urges the Commission to take a common-sense and pragmatic approach to considering applications from directors or senior managers who have ever been involved in such action.

With respect to criteria 5 and 6 of Table 1, the FSF is concerned that it is possible for this to constitute a form of double punishment for directors or senior managers who have in the past received a conviction, judgment award, penalty or other enforcement action including receiving a warning or caution from the Commerce Commission, or other equivalent New Zealand or overseas regulator either as an individual or as a director or senior manager of a corporate entity. If this matter is now in the past, the director or senior manager has received their punishment for the matter and has since behaved in a way commensurate with good character, the FSF questions whether the director or senior manager would still be seen as being uncertifiable and thus not in a position to continue as a director or senior manager.

Further, the FSF submits that a warning or caution could well have resulted from the fact that consumer credit providers are subject to a considerable amount of complex legislation and regulation that a director or senior manager did not intentionally breach and therefore the warning or caution is not evidence of that person being unfit. The possibility that a certification could be declined due to the fact that a warning or a caution had been issued because of an unintended breach of a particular piece of legislation or regulation some time in the past would be extremely unfair in the FSF's view and the FSF once again urges the Commission to take a common-sense and pragmatic approach to consideration of any application where the individual might have been a director or senior manager of an entity that had previously received a warning.

Indeed, the FSF is aware of cases where in the interests of being responsible and following best practice, entities have self-reported to a regulator because they have identified an issue that has inadvertently put them in breach of a piece of legislation or regulation and have received a

warning as a result. It would be extremely unfortunate if the certification process became seen by responsible entities as a deterrent to behaving in this way.

It should also be noted that just because a settlement has been arranged between a regulator and an entity or individual, this is not necessarily an admission on behalf of that entity or individual that they are in the wrong, or indeed an indication that they are in the wrong. Often it is easier and more cost-effective to accept a settlement than to take a matter through the Court process.

The FSF is also concerned that the Commission currently has the power to issue warning letters or arrange a settlement with individuals or entities without any overview from a third party such as the Court or that there is no appeal mechanism on behalf of the individual or entity and that the issue of such a letter or arrangement of a settlement could be used to deem a director or senior manager unfit to be certified.

Finally, with respect to criteria 5 and 6, a warning letter could be addressed to a representative of an entity who is not necessarily the person responsible for the action that has created the need for the warning. It would be unfair in the FSF's view if the person acting as an entity's point of contact was unable to be appropriately certified just because they were acting in that capacity.

The FSF has a particularly strong objection to the open ended nature of criterion 12 of Table 1 and suggests that this should be deleted and that the 11 preceding criteria are sufficient to ensure that a person is fit and proper to be a director or senior manager of a credit provider. The same applies to criterion 22 of Table 2 which should also be deleted for the same reason.

Finally with respect to the assessment of whether a person is sufficiently fit and proper to be a director or senior manager of a credit provider, the FSF is concerned that the Consultation Document does not mention any right of appeal a director or senior manager may have if the Commission deems that person to be unfit. The FSF believes that this is unacceptable and that, for the purposes of ensuring the natural justice of the process, an appeal mechanism is essential.

2. What sorts of change in circumstances do you think could affect the Commission's assessment of whether directors and senior managers of a lender or mobile trader are "fit and proper"?

The FSF is comfortable that the changes referred to in the Consultation Document under 18.1-18.3 are appropriate to meet the requirement that the lender or mobile trader that has received certification for its directors and senior managers must notify the Commission about any prescribed change in circumstances. Once again, however, the FSF emphasises that the certification attaches to the individual senior managers and directors and not to the entity itself.

The FSF suggests however that guidance as to what is required to meet certification requirements for each change described in 18.1-18.3 would be helpful. For instance, where a new director or senior manager is appointed and they have not previously received certification, they would be expected to undergo the full process to meet the criteria in Tables 1 and 2 (unless they already held certification by way of their role with another entity then the certification would apply to their role in their new entity).

Where however the director or senior manager already holds the fit and proper certification due to their role with one entity and they take up a new role with another entity that requires them to also be certified the FSF believes that, if the certification attaches to the individual not the entity, then having to reapply and go through the entire certification process from scratch would be unreasonable. So, for example, they could be required to provide just the verification to demonstrate that they have the relevant knowledge, experience and ability to understand the technical requirements of the business and the awareness of the inherent risks of the management processes required to effectively perform a controlled function.

The same would apply where a director or senior manager had a change in role, for example being promoted from being the CFO of an entity to the CEO or moving from being a director on the board of an entity to being Chair of the board.

Thank you once again for the opportunity for the FSF to make this submission on the Consultation Document. Please do not hesitate to contact me if you wish to discuss this further.

Lyn McMorran
EXECUTIVE DIRECTOR

FSF Membership List as at 1 February 2020
Appendix A

Debenture Issuers - (NBDT) Non-Bank Deposit Takers	Vehicle Lenders	Finance Company Diversified Lenders	Finance Company Diversified Lenders	Insurance	Affiliate Members
<u>Rated</u> Asset Finance (B) <u>Non-Rated</u> Mutual Credit Finance Gold Band Finance ➢ Loan Co	AA Finance Limited BMW Financial Services ➢ Mini ➢ Alphera Financial Services Community Financial Services European Financial Services Go Car Finance Ltd Honda Financial Services Mercedes-Benz Financial Motor Trade Finance Nissan Financial Services NZ Ltd ➢ Mitsubishi Motors Financial Services ➢ Skyline Car Finance Onyx Finance Limited Toyota Finance NZ Yamaha Motor Finance <u>Leasing Providers</u> Custom Fleet Fleet Partners NZ Ltd Lease Plan ORIX NZ SG Fleet	Avanti Finance ➢ Branded Financial Caterpillar Financial Services NZ Ltd CentraCorp Finance 2000 Finance Now ➢ The Warehouse Financial Services Flexi Group (NZ) Limited Future Finance Geneva Finance Home Direct Instant Finance ➢ Fair City ➢ My Finance John Deere Financial L & F Ltd ➢ Speirs Finance ➢ YooGo Latitude Financial Metro Finance Pepper NZ Limited Personal Loan Corporation Pioneer Finance Prospa NZ Ltd	South Pacific Loans Thorn Group Financial Services Ltd Turners Automotive Group ➢ Autosure <u>Credit Reporting & Debt Collection Agencies</u> Baycorp (NZ) ➢ Credit Corp Centrix Collection House Equifax (prev Veda) Illion (prev Dun & Bradstreet (NZ) Limited Intercoll	Protecta Insurance Provident Insurance Corporation Ltd Southsure Assurance	Buddle Findlay Chapman Tripp Experian EY FinTech NZ Happy Prime Consultancy Limited HPD Software Ltd KPMG PWC Simpson Western Total: 59 members

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

Consumer Lending

$6 billion
Total Assets

1.3 million
Customers

Business Lending

$4.9 billion
Total Assets

88,739
Businesses

88,793
Businesses helped to achieve their goals

2,533 jobs
provided by FSF member companies

99.6%
Loans paid-off without requiring assistance of a hardship process

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

Appendix C

FINANCIAL SERVICES FEDERATION

5 February 2020

Competition and Consumer Policy
Ministry of Business, Innovation and Employment
PO Box 1437
Wellington 6140

By email to: consumer@mbie.govt.nz

Discussion Paper: Consumer credit review: Fees for certification and registration requirements for non-financial services businesses

The Financial Services Federation ("FSF") is grateful to the Ministry for the opportunity to provide this submission on the issues raised in the Discussion Paper: Consumer credit review: Fees for certification and registration requirements for non-financial services businesses.

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 nearly 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.

Introduction:
Before providing answers to the questions raised in the Discussion paper, the FSF would like to congratulate the Ministry of Business, Innovation and Employment, and all of the officials involved, for their foresight and the steps being taken to address the potential implications of the prospective methods of imposing fees upon creditors to recover the costs that will be incurred by the Commerce Commission in certifying directors and senior managers as fit and proper persons under what will be an amended version of the Credit Contacts and Consumer Finance Act 2003 (CCCFA).

The FSF would also like to offer its support for the questioning nature of the Document, which displays recognition of the fact that industry bodies like the FSF can aid in raising concerns or

providing suggestions that ultimately allow for the implementation of a more effective and efficient certification regime.
Having said that, however, the FSF believes that the reforms arising out of the recently-passed Credit Contracts Legislation Amendment Bill (the Bill) which amends the existing CCCFA and the regulations currently being formulated would have been largely unnecessary had the Commerce Commission had the capacity to adequately and rigorously enforce the CCCFA following its previous update effective in 2015.

The FSF believes that irresponsible and predatory lending resulting in consumer harm is the minor exception in the New Zealand credit market rather than the norm (whilst acknowledging the harm that such practices cause where it does take place). The majority of lending in New Zealand is provided by responsible lenders to borrowers who understand the commitment they are making when taking on debt and the debt is repaid without hardship.

As evidence of this point the FSF references the survey of members conducted as at 31 July 2019 by KPMG which showed that 99.6% of loans provided by FSF members in the previous 12 months had been repaid or were being repaid without the borrower requiring hardship assistance (see Appendix B). Further, KPMG's 2019 Financial Institutions Performance Survey of the Non-Bank Lending Sector released in December last year, and which reviewed the performance of 26 large non-bank lenders, revealed that a mere 0.87% of the total loans of the entities surveyed are considered to be "impaired assets". Further, provisioning for impairments over the gross loans held by these entities is at an historically low level of 1.92%.

The FSF therefore believes that the certification requirements being applied to all lenders is a significant overreaction to the harmful behaviour of a few and will necessarily result in considerable extra cost to the vast majority of lenders who behave responsibly which will unfortunately have to be passed on to New Zealand consumers of credit thereby increasing the cost of access to credit for all New Zealanders.

In any event, without sufficient enforcement against those irresponsible lenders who continue to cause harm to consumers particularly those in situations of vulnerability or hardship, the certification process will serve no purpose in protecting those consumers.

In response to the matters identified in the paper for which feedback is sought, the FSF has the following to say:

1. Setting fees for certification

1.1 The proposed certification process:

Owing to the inherently multi-cultural and diverse nature of New Zealand's workforce, the FSF firstly comments on the potential issues that may arise from the method of certification proposed in the discussion paper which appears to display an assumption that directors and senior managers will all be New Zealand residents or citizens with easily ascertainable information.

A significant number of New Zealand businesses have a multijurisdictional presence or recruit staff from overseas (and this is also true for lenders). For these directors or senior managers, a New Zealand based background check would bring up very little valuable information.

With regard to the proposed second step of the certification process, as displayed in Figure 1 of the discussion paper, the FSF considers that the extent of the required information to be submitted to the Commerce Commission by the applicant is currently unclear. More clarity is therefore sought as to what exactly the required information expected to be provided will actually be.

What is also unclear to the FSF and therefore of considerable concern to FSF members is the lack of clarity or any clear definition as to what will be considered to be a "simple application" versus a "complex application". The FSF therefore strongly submits that such clarification be provided as soon as practicable and certainly before the process for certification (and any associated fees) is finalised.

The FSF hopes that the Commerce Commission will use a process, comparable to that used in the Reserve Bank of New Zealand's (RBNZ) certification process. For directors or senior managers who currently or previously resided in countries where criminal record searches are only provided to the individual concerned, the process employed by the RBNZ offers a number of benefits that would likely translate well to the CCCFA certification regime.

Furthermore, the FSF hopes that with the information required to be put forward by the applicant in their application, there is a means of self-declaring content which the applicant is aware may be likely to cause their application to be regarded as more "complex". If the individual concerned has something in their past which may initially appear to be concerning, but which has since been mitigated, it is desirable that the applicant may be able to declare that without triggering the secondary "complex" fee.

Added to the FSF's concerns surrounding the lack of clarity as to the information required to be submitted, and the grounds on which an application is likely to regarded as "complex", is that in such circumstances the applicant only has ten days to provide any additional information required by the Commerce Commission. Where information is required from foreign jurisdictions, or documents are required to be sent as a hardcopy by post, or there are documents that may require translation, for example, the FSF considers that the time allowed for the provision of this additional information needs to be reasonable. To refuse an entire entity's application on the ground that an additional piece of information takes longer than ten days to ascertain is, in the FSF's view, an arbitrary and problematic outcome.

Further, with regard to the way in which the Commission will consider the character of each proposed director and senior manager, the FSF seeks clarity as to what is meant by "enforcement action" where the Discussion Paper (para 14.d) says the criteria for the character assessment will include whether the individual has previously "*been subject to enforcement*

action by a regulator personally, or previously been a director or senior manager of a business subject to enforcement action."

The FSF submits that there are levels of seriousness of the enforcement action taken in relation to the harm to consumers caused by the breach that caused the action; the outcome of the enforcement action in terms of whether the consumers affected by the breach that caused the action have been adequately compensated for that breach; how long ago the breach occurred that caused the enforcement action, etc; that could make this criterion unnecessarily punitive without further clarification as to the seriousness of the breach that caused the enforcement action, how long ago it occurred as to still be relevant, etc.

Finally, the FSF is very supportive of the proposal in the Discussion Paper that the Commerce Commission will only seek to recover from lenders the costs of their conducting the fit and proper person assessments for certification. In the FSF's view, this is entirely in line with the fact that lenders are prevented from making a profit out of the fees they charge to consumers and are only able to impose fees for the recovery of certain direct costs. So, the certification process should not become a source of extra revenue for the Commerce Commission as this would likely deflect them from their considerably more important role of enforcing the law against irresponsible lenders.

Further, the FSF submits that lenders are already being expected to bear the considerable cost that will arise out of the necessary changes to their processes that they will have to make in order to comply with proposed regulations for the assessment of product suitability and assessment and verification of affordability. As it is likely that all or most of both these costs and the costs of certification will be passed on to the consumer, it is clearly desirable to both lenders and consumers to minimise these costs wherever possible. It would be a very poor outcome for consumers of the whole process of the amendments to the CCCFA if it became unviable for smaller but still responsible lenders to continue doing business due to the significantly increased costs of compliance.

1.2 The proposed objectives for fee setting:

As the industry body representing responsible and ethical finance, leasing and credit-related insurance providers of New Zealand, the FSF firstly supports the objective of the Credit Contracts Legislation Amendment Bill (CCLAB), of strengthening protections for borrowers against irresponsible and high-cost lending, and against predatory behaviour by mobile traders.

The FSF also supports the identified objectives for the setting of fees for the certification process, those being that: certification fees do not act as a barrier to the operation of creditors or mobile traders; that fees are set at a level that fully recovers, but does not over recover, the costs to the Commission of assessing applications; and that any cross subsidy between different groups (particularly those with simple and complex applications) is minimised.

It is entirely appropriate in the FSF's view to keep these fees as low as possible, as entities are already exposed to a great range of costs including those previously mentioned that will arise

out of the necessary changes to lenders' processes out of the new regulations to accompany the amended CCCFA, and it is also desirable that responsible entities are not made to bear the added costs incurred by irresponsible entities.

It is also desirable of course to minimise the cost to consumers of any further protections against predatory lenders particularly when the vast majority of credit consumers in New Zealand have not been affected by predatory or problematic lending practices.

The FSF accepts that setting fees is the most appropriate mechanism for funding this regime, because as has already been stated, it would be completely undesirable for the Commerce Commission to reduce their enforcement activities in order to be able to afford to provide the requisite certification.

In addition, the FSF supports the deferred date on which creditors already registered on the FSPR are to be certified. Permitting these creditors to apply for certification on the date after 1 April 2021 when they would be required to supply their annual confirmation details to the Registrar of the FSPR, rather than requiring all creditors to be certified under the new regime by 1 April 2021, will ensure the Commerce Commission is not overrun by a mass of applications that might result in difficulty assessing the merits or issues contained in each individual application due to time constraints.

However, the FSF notes that within the CCLAB, the draft CCCFA Regulations, and the fees for certification discussion paper, there is an absence of a definition as to who falls within the remit of a "director or senior manager". In order to better inform applicants of their responsibilities and how they stand to be impacted, the FSF submits that there is significant value in providing a clearer and more tailored definition of particularly as to what constitutes a "senior manager" within the fit and proper certification framework (assuming that a "director" is a person who sits on the controlling Board of the business).

In assessing the character and capability of directors and senior managers, the FSF submits that certification at an entity level would not necessarily align with the objectives proposed in the document for setting fees under the CCCFA. It is not uncommon in the experience of FSF members that a director will be a director on the Boards of a number of different companies all of which may be requiring their certification. For example, a lender might operate several different brands as separate companies but with common directorships so it is obviously desirable (and clearly more cost-effective) for each director to have to obtain certification only once rather than for each company for which they are a director.

The FSF therefore submits that clarity is required as to the extent of the assessment of a director or senior manager's capability assessment, and whether it is in fact necessary to conduct this assessment for each of the comparable roles held by that director or senior manager. It would be anticipated by the FSF that the large part of a person's certification assessment will be at an individual level and therefore it would be in line with the objectives in

the document for there to be a degree of recognition placed on the fact that a director may already be certified as fit and proper in relation to their position within a different entity.

The relevant objectives that this would support are namely: the objective that certification fees do not act as a barrier to the operation of creditors or mobile traders; that fees are set at a level that recovers, but does not over-recover, the costs to the Commission of assessing applications; and that the charging of fees is able to be undertaken in an administratively efficient manner. By recognising that a director or manager is already certified under the CCCFA regime this would likely stand to ensure an excessive cost burden is not placed on creditors and mobile traders.

Although it is unclear on what grounds the determination was made, the FSF appreciates that an estimation has been provided for the time required for the Commerce Commission to certify each director or senior manager. However, also relevant is the time required for the entity itself to put together and submit an application and receive their certification and the costs that will be incurred by the entity as a result. It is unclear within the discussion document whether the duration of the application process could be days or even weeks.

An already costly process will be made even more expensive by requiring the entity to devote significant time and resources to preparing an application and therefore once it has been submitted it is important that they be promptly notified as to the outcome of their application. Not only would it impose additional financial burden on the entity itself, but it may impact their ability to hire new directors or senior managers if there are significant delays involved before they are able to commence their role, or it could it lead to valuable people being incentivised to undertake work within a different sector.

The FSF also seeks clarity as to the discretion granted to the Commerce Commission in determining whether to certify an applicant, who although they may have been convicted in the past of a serious offence, otherwise displays good character and capability. If a past conviction of a serious offence is indicative of poor character, then it is quite right that a director or senior manager is not certified as fit and proper. However, for a director or senior manager who has received a conviction for which they were properly punished, and who has since enjoyed employment and behaved in a way commensurate with good character, will regarding them as uncertifiable, and thus not in a position to continue as director or senior manager, constitute a form of double punishment?

Similarly, the FSF also inquires as to the kind of conditions that may be imposed on certifications where the Commission has concerns about one or more of an entity's directors or senior managers, and how such conditions may operate in practice. As already stated, the discussion document is also not wholly clear on when an application may be regarded as either simple or complex. As there will be a significant variation in the cost of the process to the entity depending on whether or not their application is considered "complex" it is right that the process be made more transparent between the Commerce Commission and the applicant.

1.3 Preferred options for the way in which fees ought to be imposed:
Owing to overall support of the proposed objectives for fee setting, FSF submits that we are particularly pleased to see that there has been consideration of a range of options as to how this might be achieved. As FSF members already have responsible directors and senior managers who are concerned with best practice in place, the FSF considers Option 1 for fee setting to be most appropriate.

This is because it provides certainty to lenders as to the costs that they will incur for certifying their directors and senior managers and avoids the potential for increased cost. It would also further facilitate the aim of the certification regime, which is to encourage those who are of good character and appropriate capability to engage as the directors and senior managers of financial businesses.

The FSF believes that by setting one fixed fee per person's certification, regardless of the complexity of the application, this will encourage the Commerce Commission to be more efficient and that they will be expected to operate within the proposed structure. That is that the Commission would be expected to manage its processes within a budget and that they would not be able to change the cost structure without further consultation so that lenders are not faced with further uncertainty as to the costs they will incur for certification.

However, the FSF does disagree with the Discussion Paper's estimates of the costs to certify directors and senior managers provided in Tables 2, 5 and 8 and suggests that these are significantly understated. It is most unlikely that any entity, regardless of size, would have a Board made up of only 3 directors and this is certainly not commensurate with best practice.

The Institute of Directors of New Zealand's publication the Four Pillars of Governance Best Practice says that a Board that is too large may not give its members the opportunity of participating in discussions and decisions to the best of their abilities. But, on the other hand, it goes on to say that a Board that is too small will limit the breadth of knowledge, experience and viewpoints that would otherwise be available to it and from which it could usefully benefit.

The publication goes on to say that as a general rule, a Board numbering six to eight members is usually found to be the most appropriate, taking into account the relatively small size of New Zealand companies in international terms.

It is therefore far more likely that an entity would be certifying an average of 4 senior managers and an average of 7 directors meaning a total of 11 people to put through the process which, under Option 1 would cost $12,441 not the $7,917 suggested in table 2. This is an extremely large amount of money, particularly for small entities, and it is therefore a bitter pill to swallow for those entities who have always operated responsibly.

The FSF also supports the proposition that those entities with boards of directors and management teams who are currently licenced by one or both of the Financial Markets Authority or the Reserve Bank, may be exempt from the need to seek further certification

under the CCCFA. It is difficult to see how being certified by two different agencies, both to declare they are an entity comprising of fit and proper persons, can further any additional purpose that would warrant the additional costs.

With respect to the other processes associated with certification as detailed in the Discussion Paper, the FSF submits that, as previously stated, appropriate definitions of terms such as "senior manager" and "simple" and "complex" applications need to be determined before the fees for certification and other processes are finally set.

The FSF would also expect that, even though certification renewals are not likely to take place until 2026 or later, the cost of processing certification renewals should be considerably less than the cost to certify directors and senior managers. This process should be a very simple and quick one (provided that no changes to directors or senior managers' circumstances have occurred since first certification) and should therefore be quick and inexpensive.

Other than that, the FSF supports the view that minor changes in circumstances should not attract any cost as there will be no reassessment of whether the person is fit and proper whilst accepting that a major change such as the replacement of a director or senior manager would require a full fit and proper assessment (unless that person was already certified due to their association with another entity), and that the charges would be applied accordingly.

2 Removing or narrowing an exemption from the Financial Services Provider Register (FSPR) registration requirements for non-financial services businesses

With regard to the proposed removal of the exemption provided in Regulation 10 of the Financial Services Providers (Exemption) Regulations 2010 (the FSPR) currently applying to non-financial businesses, which largely includes retailers and motor vehicle dealers, the FSF strongly opposes any proposition that the benefits of such removal would outweigh the costs that will ultimately fall to the same consumer that the CCCFA is designed to protect.

The FSF questions what exactly the problem is that this suggestion is trying to solve. If it is that there are some retailers and motor vehicle dealers misusing Regulation 10 and who are providing finance to their customers in an irresponsible way and then assigning the credit contract to another person (presumably the lender who has allowed the dealer or retailer to provide their credit irresponsibly) within one working day of providing the credit, the answer lies in the Commerce Commission enforcing the law against both the retailer or dealer and the credit provider rather than once again putting in place punitive regulation that treats responsible providers the same as those who are not.

The FSF notes that paragraph 49 of the Discussion Document states that when the exemption was granted in 2010, the benefits of requiring registration on the FSPR and membership of a dispute resolution scheme were considered to be outweighed by the compliance costs. The FSF would therefore be very interested to learn what has changed between then and now that now

suggests that there would be any benefit in dealers and retailers incurring these compliance costs.

The FSF also believes that removing this exemption is potentially discriminatory against the responsible businesses that operate in this way as it will not apply to those retailers and dealers who operate as agents of the credit provider. It will impose costs on the dealers and agents who operate under the assignment model that will not be imposed on those who act as agents of the credit provider and for no apparent reason in the FSF's view – other than that it might make it easier for the administration of the certification process using the FSPR as the entry portal for certification.

The FSF submits that the use of the assignment model for retailers and dealers to provide credit which ultimately comes from a credit provider who is subject to all the requirements of the CCCFA including the new requirement to certify their directors and senior managers, is not uncommon within the FSF's membership.

It needs to be clearly understood that the dealer or retailer under this model does not approve the credit contract. The dealer or retailer merely collects information for sending to the finance company for decision. The model works on the basis that the finance company concerned provides their dealer or retailer networks with access to their credit policies, processes and procedures with appropriate staff training and support as required to ensure that the lender's responsibility obligations are met but the credit appears to the borrower as having been provided by the dealer or retailer who assigns the credit to the credit provider within the 24 hour window.

The dealer or retailer has no discretion to circumvent the lender's policies and in fact is highly disincentivised not to do so as they would not wish to lose sales due to the credit provider having withdrawn their ability to offer credit to purchase their goods.

The FSF therefore believes that the credit provider is the lender to whom the credit is assigned and that, even under this model, the lender is ultimately responsible for ensuring that the requirements of the CCCFA including the 2015 reforms and those of the 2019 CCCLAB, are being fulfilled. As stated previously, if this is not the case with a minority of rogue dealers or retailers, the Commerce Commission should be enforcing the already robust law against both the dealer and the finance provider.

The only difference between this model and the way in which the alternative model (that where the retailer is acting as an agent of the lender and in which case the lender is the creditor under the credit contract and responsible for compliance with the CCCFA) is that the dealer or retailer assigns the credit from their name into that of the finance company within that 24 hour window.

The FSF therefore considers that the FSPR exemption remains appropriate and, further, supports the extension of the exemption such that all non-financial businesses who provide

credit as an incidental and temporary part of their operation are also exempt from any requirement to be certified under the CCCFA regardless of which model they use to do so.

Further, if there is any lack of clarity from differing perspectives on whether financial dispute resolution schemes that an assignee belongs to can consider breaches of the CCCFA by the non-financial service business (and FSF members who operate under the assignment model with their dealers and retailers do not believe that there is – they believe that any dispute with regard to the provision of credit relates to them and their processes and therefore falls within the jurisdiction of their disputes resolution scheme), then this lack of clarity should be cleared up under the regulations to make it clear that the credit provider's dispute resolution scheme does have the appropriate jurisdiction.

The FSF also strongly disputes the assertion in para 62 of the Discussion Paper that the options for removing the exemption for credit provided by non-financial services businesses could affect around 300 businesses and asserts that this number will be significantly higher. The Motor Trade Association has approximately 1,200 motor vehicle dealer members alone most of whom offer finance for their vehicles using the assignment model without counting retailers offering goods on credit who might also do so.

What will happen however if the exemption in Regulation 10 is removed and it is decided that the certification process does apply to non-financial businesses who are dealers or agents of credit providers operating under the assignment model, is that these businesses will then incur the cost to have each of their senior managers and directors certified, plus being required to register themselves on the FSPR to ease this process, plus being required to pay the annual FMA levy plus the cost of membership of a dispute resolution scheme. For an average-sized business this would amount to an extra cost of $13,701-$14,101 that is not going to be required to be paid by dealers and retailers operating under the agency model. This is totally prohibitive for a small dealer or retailer as well as being excessive and unnecessary in the FSF's view.

The FSF also strongly questions for what purpose any credit provider (whether they are the finance company themselves or the dealer or retailer) is expected to pay $460 per annum to the Financial Markets Authority when they have nothing to do with regulating the behaviour of credit providers who are not also deposit-takers.

Subjecting those credit providers whose dealers and retailers operate under the assignment model to the FSPR and certification fees will certainly incentivise them to change their business model entirely so that their dealers and retailers work under the agency model. This will incur one-off costs for the credit provider to do so but it is a far more palatable option than the massive disadvantage at which their dealers and retailers would be left by comparison if they did not do so.

In summary therefore the FSF strongly opposes the suggestion that Regulation 10 be removed or that the requirements of the CCCFA for dealers and retailers operating under the assignment model to certify their directors and senior managers.

Thank you again for the opportunity for FSF to comment on this matter. Please do not hesitate to contact me again if there is anything further you wish to discuss.

Lyn McMorran
EXECUTIVE DIRECTOR