FINANCIAL SERVICES FEDERATION

Competition & Consumer Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
P O Box 1473
WELLINGTON 6140 By email to: consumer@mbie.govt.nz

Discussion Paper: Review of Consumer Credit Regulation June 2018

Firstly, thank you for the opportunity for the Financial Services Federation ("FSF") to submit on the Discussion Paper.

By way of background, the FSF is the industry body representing the responsible and ethical finance and leasing providers of New Zealand. We have nearly sixty members and associates providing financing, leasing, and credit-related insurance products to more than 2 million New Zealanders. Our affiliate members include internationally recognised legal and consulting partners. A list of our members is attached as Appendix A.

Introduction:

Because the Credit Contracts and Consumer Finance Act 2003 ("CCCFA") is the key piece of legislation which governs the way in which FSF members (and all other consumer credit providers in New Zealand) operate and run their businesses, this submission is necessarily long and detailed. For a summary of the key points of the submission please refer to the answer provided for question 28.

The FSF and its members have long been advocates for all consumer credit contracts and credit-related insurance providers behaving responsibly towards consumers. FSF's commitment to this is demonstrated by their development of Responsible Lending Guidelines to which all their members voluntarily signed up back in 2011 long before the introduction in the CCCFA review of 2014 of Lender Responsibility Principles which now apply to all lenders.

Indeed, the FSF's Responsible Lending Guidelines in large part informed the development of these Principles and the FSF was very pleased to see these extended to all credit providers. The FSF was also pleased to take a lead role with regard to putting responsible lending behaviour into focus and in the discussions that lead to the 2014 CCCFA review and the changes to credit contracts regulation that were introduced in mid-2015 including the Responsible Lending Code.

These changes were implemented to ensure that all lenders treat all consumers responsibly and ethically and their failure to do so is not in the FSF's view due to a lack of robustness in the law, but due to the fact that vulnerable consumers are still being subject to irresponsible and illegal predatory lending behaviour because of a lack of enforcement of the current law.

This is acknowledged within the Discussion Paper which states that there is insufficient enforcement of the law against these practices to stop this behaviour and/or put the lenders concerned out of business. Indeed the FSF believes that if enforcement of the law was considered to be one of the areas where the 2015 responsible lending changes were working, then the Discussion Paper would not be necessary. Therefore the FSF cannot agree with the assertion in the last point under "What's Working?" on page 8 of the Discussion Paper that the Commerce Commission has done good enforcement work because it has taken until 2018 for any such enforcement work to have become obvious to the community and this is still too limited to have a significant deterrent effect for the irresponsible sector of the market.

It is a fact from the point of view of FSF members that the law is followed by those who are willing to be law-abiding and there have been little to no consequences for those who have chosen not to be. The process appears to be too slow to get to a resolution against those who do not behave responsibly.

The FSF does however acknowledge the advocacy work of the Commission and the fact that they have done some limited enforcement work against some mobile traders and some further work is becoming evident against payday lenders. However after this initial flush of success and some contraction of the number of irresponsible truck shop operators, some of these have begun operating again using unmarked trucks so it is not obvious what they are doing and they have been driven underground.

The FSF strongly suggests that the Commerce Commission needs to target their enforcement efforts in the areas where the most harm is being done by underground, non-compliant, predatory lenders by becoming embedded in communities and continuing to work to put these operators out of business and keeping them that way.

The FSF also believes that the 2015 changes have had the unintended consequence of driving vulnerable consumers further towards irresponsible credit providers. This is because, in order to meet their responsible lending obligations, responsible lenders are less likely to be able to help borrowers whose circumstances do not fit strictly within their credit criteria. The ability for responsible lenders to make judgement calls based on their experience and borrowers' individual characteristics has been limited by the imperative to ensure that all lending they do meets their criteria and is not seen to be "outside the box" in any way and therefore potentially subject to the scrutiny of the regulator.

Indeed since the 2015 changes responsible lenders have moved out of some credit provision sectors such as providing short term loans to consumers and this has allowed the growth of

predatory lenders. The FSF believes this will only get worse if further compliance obligations are placed on responsible lenders.

The sad reality is that there are people in New Zealand for whom access to short term lending is vital in order for them to afford essentials such as housing, food, power, transport, clothing and educating their children, etc. They do not have access to emergency savings when they get a winter energy bill or their car needs repairing so they can get to work or school as examples.

The FSF believes that this is part of a long-term failure of Government to address issues such as housing affordability has forced some New Zealanders into making the difficult choice of either borrowing from a payday lender or going without essentials such as heat and light. An OECD Economic Survey on New Zealand from 2017 found that any wage growth in the previous 45 years had been eroded by rising housing costs, particularly in Auckland. Low income families were the hardest hit with housing costs averaging 54% of income for the bottom fifth of households by income in 2015, up from less than 30% in 1990. The report also found that a majority of the 351,000 recipients of the accommodation supplement now spend more than half their income on housing costs.

Putting further restrictions around how responsible payday lenders can lend to these people when they need help to meet essential commitments, will make these offerings uneconomic and drive such offerings further underground. Either that or vulnerable consumers will continue to have to make unpalatable choices such as whether they feed their families or pay their power bill.

The Responsible Lending Code requires lenders to take enhanced care when dealing with those who are described as being vulnerable consumers as per the definition in the Code and in the FSF's view it should be the Government's focus on ensuring that these obligations are being met rather than making regulatory changes that will be once again ignored by the predatory lending community.

It also needs to be remembered that access to responsibly provided credit for all consumers is vital to the country's economy and society as a whole but any change to the way in which it is expected to be provided will result in increased costs which will be passed on to borrowers.

A further point before this submission turns to answering the specific questions raised in the Discussion Document is that the vast majority of lending being done in New Zealand is already being done responsibly. There is only a very small percentage of the overall consumer credit provided to consumers that is done without consideration of its suitability or affordability or in any other way irresponsibly.

It is a sad fact that the consumer advocates and social agencies have to deal with clients and families who are carrying unaffordable debt (para 17 of the Discussion Paper) but the FSF submits that the providers of this debt do not represent the significant majority of responsible lenders. It's also a sad fact that once responsible lenders have exhausted the means at their

disposal to provide credit responsibly, consumers who are desperate will keep trying until they find a "lender of last resort" who will provide them with debt that they may not be able to afford and who will not take into account other debt they may already be servicing.

The law and its enforcement therefore needs to carefully target the very small minority who are not willing compliers already. It also needs to be considered whether examples such as those cited in para 17 are systemic issues rather than one-off examples.

Disputes resolution schemes report that complaints to them about credit contracts form a very small part of their caseload. The Insurance & Financial Services Ombudsman scheme's latest annual report showed that only 9 of the total 314 complaints they investigated in their 2016/17 financial year related to credit contracts and only 10 of 272 in the 2016/15 year.

Financial Services Complaints Limited reported 45 complaints investigated relating to consumer credit of the total 216 cases they investigated in the 2016/17 financial year. The Banking Ombudsman Scheme reported for their 2016/17 financial year that lending (which is a bank's core business) related to 30% of the total 3,499 enquiries, complaints and disputes they handled while the remaining 70% related to bank accounts, payments systems, investment, insurance etc.

When considered alongside the fact that hundreds of thousands of consumer credit contracts are entered into each year, there is only a very small minority of these that give rise to a complaint (and if they do only a small number of these that are upheld).

The FSF warns against any further prescription within the law as to the way in which responsible lenders should provide their products. When there is very little discretion for them in the way they set interest rates and none as to the way in which they set their fees, there remain very few levers for them to use to provide innovative products to differentiated markets and too much prescription will eliminate innovation and product development entirely.

However, the FSF does consider that there is insufficient guidance available to lenders as to how to meet their responsible lending obligations when transacting with consumers via digital means. The FSF acknowledges the recently-released Commerce Commission paper on this aspect of lending which is helpful but too high level to be sufficient to provide comfort to lenders that they are not inadvertently breaching their obligations. It is the FSF's long-held view that the Responsible Lending Code is the right place for more comprehensive (but non-prescriptive) guidance that better reflects current practice or future needs for consumers to access credit.

Finally, the FSF considers the way in which the Discussion Paper has been written to be very leading given the way in which it provides various options at various stages throughout but does not encourage submitters to discount these if they are not workable and provide their own options. It is likely therefore that many submitters might select the "least worst" of the options provided which does not necessarily equate to the best option. Where possible the FSF

has tried to provide their view on the best possible option in answer to the questions that follow.

1. **Do you agree that the problems identified with high-cost lending (even where it is compliant with the CCCFA) are significant? Do you have any information or data that sheds light on their frequency and severity?**

The FSF does not have any providers of what might be described as payday lenders offering short term high interest finance as members so is unable to comment to any significant degree regarding the problems they may cause. However the reality is that if the loan is provided over a short term (which needs to be defined) it is not so much the interest rate being charged that causes harm to borrowers but rather the continuing nature of the credit or roll-over of it if it is not repaid within the short term. The FSF notes that what exactly "high-cost lending" is, is also not defined in the Discussion Paper.

These loans do have a place in the credit market as there is a need for consumers to sometimes access such credit and the FSF recognises that there are issues for consumers when these are not able to be repaid within the agreed timeframe. This is a product of lenders not applying the Lender Responsibility Principles with respect to ensuring affordability of the loan without incurring substantial hardship and, if this is in fact the issue for consumers such as those described in paragraph 17 of the Discussion Paper, then this is a failure of the regulator in enforcing the existing law which is designed to protect these very people.

Looking at the interest rate on its own can be misleading and it is the total cost and affordability of the loan itself which needs to be considered. As an example if a consumer borrows $100 for two weeks in order to pay their power bill and is charged $25 in interest at the end of that time that is an effective interest rate of 600%. But this might be a better alternative to them than sitting in the cold and darkness. It would certainly be better for them than paying a disconnection and reconnection fee if their power is disconnected and then later reconnected when they can afford it.

The FSF submits that preventing roll-overs of such loans or limiting the number of these is a far more effective way of reducing the harm to consumers than introducing an interest rate or fees cap.

The harder it is made for legitimate lenders in this space to make such an offer, the more it will drive consumer demand towards the irresponsible providers. It may be possible to obtain some data from those who are legitimately trying to comply with their responsible lending obligations but it will certainly not be possible to get any data from those operating outside of the law.

In some ways the FSF believes that this makes this exercise a futile one and the resources being allocated to it could more sensibly be put to enforcing the current law against those who do not currently comply.

2. **Do you support any of the extensions of Cap Option A? What would be the impact of these extensions on borrowers, lenders and the credit markets? Do you have any information or data that would support an assessment of the impact of these extensions?**

The FSF submits that it is hard to consider Cap Option A or its extensions without a clear definition of what is considered to be a high- cost lender. For the reasons stated in answer to question 1 above (and bearing in mind the example provided in that answer of what might be considered to be a high cost loan), the FSF submits that a better option to Cap Option A would be to limit the number of times a short term loan could be rolled over or the offering of a new loan to borrowers in default.

The provision of short term loans such as the one described in the example under question 1 above is not economically viable for responsible lenders if they are unable to make a reasonable return on the money being lent. These types of loans are by their nature small, they are unsecured and very high risk and it is reasonable that responsible lenders should be able to make a viable living from providing them.

The FSF has some sympathy with the suggestion of a possible prohibition on offering a high-cost loan to a person who has defaulted on an existing high-cost loan or a loan that refinances that loan, and has not yet repaid it. The FSF also supports the proposal of a cooling-off period between repayment of a high-cost loan and obtaining a new high-cost loan and suggests that 30 days would be reasonable. This would only be able to be enforced however if the borrower sought a new loan from the same lender as there is no way for a second lender to know about a previous loan with another lender.

3. **Do you agree with our assessment of the costs and benefits of the options for capping interest and fees? Are any costs or benefits missing? Do you have any information or data that would help us to assess the degree or estimate the size of these costs and benefits?**

The FSF again notes that Cap Option B is intended to apply only to high-cost lenders who are yet to be defined so it is difficult to comment on whether or not it is a good option but considers that the costs for each of the options outweigh the benefits provided by them.

With regard to credit fees, the protections for borrowers are substantial already, and the Commerce Commission has the power it needs to enforce against non-compliant lenders. To illustrate, section 41 of the CCCFA states that neither credit fees nor default fees can be unreasonable. As a consequence of the Sportzone/MTF cases which addressed the "reasonableness of fees", lenders are well aware that credit fees have to be able to be justified and they can only recover the actual costs relative to a particular loan. They cannot be used by lenders to make a profit. They are also aware the Commerce Commission has the power to expect lenders to be able to justify the fees they charge on request and can prosecute any lender whose fees do not comply with the current provisions of the CCCFA.

Following this series of cases, the Commerce Commission released helpful guidance to lenders on setting credit fees and the fees section of the Responsible Lending Code was amended in accordance with the judgment and this guidance. Accordingly the FSF believes there is no need for further legislation around this issue. There is more than enough guidance and understanding in the industry. Rather, the Commerce Commission should use their resources to prosecute lenders who continue to choose to charge fees that are unreasonable despite all the guidance available to them.

The interest rate therefore must reflect the cost of credit to the lender, the risk inherent in providing that credit according to the risk profile of the borrower or borrowers, recovery of indirect costs associated with providing credit and whatever profit a lender may make as a business. The lending market in New Zealand is a very competitive one and consumers have many options as to which credit provider they wish to deal with so the interest rate is also driven by what the consumer will accept as being reasonable and they can shop around to find a provider with the best offering for them.

There is also no value to lenders in having high levels of loans in arrears and good lenders lose money when this happens. Responsible lenders will therefore come to arrangements with borrowers which may extend loan terms to a point where borrowers can meet their commitments but which might exceed any of the loan cap options provided in the Discussion Paper. The FSF submits that lenders should be able to continue to do so.

4. **Do you have any suggestions for the design of options for capping interest and fees? If so, what would be the impact of your proposed design on borrowers, lenders and the credit markets?**

Please refer to the answer provided to question 1 above where the FSF has provided an example that shows that it is not necessarily either the interest rate or fees that make lending unaffordable, but rather in the case of high-cost, short-term loans, the fact that they were unaffordable at the outset and as a result need to be rolled over. Provision of such loans which are more often than not unsecured, and the administration of them to ensure they are repaid, is a time-consuming and costly exercise. Limiting the amount of interest that can be charged under them will have the effect of making them uneconomic to provide and that will leave the market (because there clearly is one) open to those providers who operate underground and without meeting their responsible lending obligations.

As stated under question 3 above, all credit fees must already be cost-justified and cannot have any profit element included in them.

On this basis the FSF does not support any of Cap Options A, B or C but would give qualified support to the concept of limiting extensions and refinancing of high-cost short-term loans (subject to a reasonable definition of what these actually are). The FSF reiterates that the key to limiting harm to consumers using these kinds of lenders is however ensuring that the Lender

Responsibility Principles have been applied at the outset – particularly in regard to ensuring affordability without incurring significant hardship – and this can only come from enforcement.

5. Which interest rate cap options, if any, would you prefer? Which interest rate options would you not support? Please explain how you made your assessment.

The FSF does not support any of the three options A, B or C for the reasons stated in answer to questions 2-4 above.

The FSF points out that it has been the experience in overseas jurisdictions that interest rate caps can become a target for irresponsible lenders if set too high and if set too low could mean that high cost short term lenders are unable to cover the risk associated with that type of lending which would remove them from the market leaving only underground and even less responsible providers to fill the void.

The FSF notes however that Cap Option C of aggregating interest and fees into an equivalent interest rate (with or without a cap at a specific rate) is a return to the disclosure of a "finance rate" which was required prior to the CCCFA coming into force in 2003. There is some support within FSF's membership to a return to a requirement to disclose the finance rate on the basis that it makes consumer comparison between one lender's offering and another's easier and more transparent.

There is not however unanimous support for this view and the FSF suggests that the timeframe for developing a response to the Discussion Paper has not been sufficient to fully canvas and debate this option. The FSF submits therefore that more time should be allowed for consultation before any decision is made with regard to either an interest rate or fees cap or a return to an equivalent interest rate.

With regard to the equivalent interest or finance rate the FSF can see both advantages and disadvantages which would need to be considered before making any decision.

The advantages include transparency and ease of comparison as already mentioned. A further advantage is that if fees are included in the finance rate and the consumer comparison is made using this rate, there would no longer be any need for lenders to go through the extremely time-consuming and expensive process of regular review of their fees and being prepared to justify them if required. The cost of doing this is already being recovered by lenders in the total cost of credit to consumers.

Disadvantages include the fact that finance rates cannot be calculated for revolving credit offerings and that the difference between the headline interest rate and the finance rate was difficult for consumers to understand. Guidance as to how to help them to do so could however be included within the Responsible Lending Code.

In Australia a comparison rate which is similar to the finance or equivalent interest rate concept is required to be disclosed. FSF members who work across Australasia report that consumers find the concept very hard to understand – particularly those less sophisticated borrowers who are potentially the ones who typically most frequently access high-cost loans.

Issue 2: Continued irresponsible lending and other non-compliance

Before answering the specific questions raised in relation to Issue 2: Continued irresponsible lending and other non-compliance, FSF has a few comments to make about the commentary provided about these issues and in relation to the Registration, Enforcement and Responsibility Options proposed in this section (about which it seemed that specific questions were not asked in the Discussion Paper).

Firstly, the FSF questions how the assertion in para 39 that "It is common for some lenders to perform only superficial testing of loan affordability …" has been arrived at and what evidence has been provided to substantiate this. If this assertion results from input received into the preparation of the Discussion Paper from community advisers and social agencies providing valuable assistance to vulnerable consumers in situations of hardship, the FSF reiterates the point it made earlier in the introduction to this submission. That is that these agencies only see the instances where people are in difficult circumstances due to the irresponsible provision of credit. So their view would be that these practices are "common". The FSF believes however that these practices are not the norm and that the vast majority of credit is provided responsibly with appropriate testing of loan affordability and adherence to all other responsible lending obligations. Those consumers who have been provided with credit on this basis are not going to require the services of these agencies so they will never see the situations where lending is provided responsibly and repaid within the terms of the contract which the FSF points out once again is the significant majority of situations.

The FSF submits therefore that making law changes without substantiation of the actual harm being caused by not doing so, is a dangerous basis on which to legislate.

Once again the FSF also points out that it is already against the current law to provide consumers with credit which would put them into a situation of significant hardship and the key to ensuring that this practice is stamped out is not in writing more law but in enforcing the perfectly adequate law we already have.

Further, FSF members are aware of situations where they may well have fulfilled their responsible lending obligations to borrowers who subsequently seek further credit from other less scrupulous lenders which then puts the borrower into a hardship situation because of a lack of affordability assessment from the subsequent lender. Had these irresponsible lenders conducted appropriate affordability assessments and other checks such as a credit check on the borrower, they would have been aware that they already had other credit commitments to meet and therefore should not have extended any further credit. Sadly these situations do

happen because there is no incentive for such irresponsible lenders to cease their inappropriate practices because of the lack of enforcement of the current law.

On the same note, the FSF also takes issue with the assertion made in para 39 c with regard to borrowers "often" being unaware that they have purchased insurance with vehicle loans. Again when consumers deal with an FSF credit or credit-related insurance provider they will be provided with full and appropriate disclosure to make them fully aware that they have purchased insurance with vehicle or any other type of loans.

The key paragraph in the entire Discussion Paper in the FSF's view, is that of para 53 in the introduction to the enforcement section. This relates to the fact that the Commerce Commission issued no warnings, settlements or prosecutions for breaches of the lender responsibilities between the time the reforms came into force in June 2015 and February 2018.

The FSF submits that, given it is most unlikely that there were absolutely no breaches of the lender responsibilities during that time, this is totally unacceptable. The FSF understands that taking such action sometimes takes time to investigate in order to prepare a case and follow the process of natural justice, but almost three years and no action seems to be excessive. The FSF does however compliment the Commerce Commission on the action it has taken in the cases mentioned in para 53 in relation to Dealer Finance Limited and Ferratum New Zealand Limited as well as those against some of the irresponsible mobile traders during that time.

The FSF disputes the statement made at the beginning of para 54 that there are currently no penalties for breaches of the lender responsibilities. The current CCCFA enables the Court to make various orders if there are breaches of the Lender Responsibility Principles, including orders to refund money and/or to pay damages. It is also important to note that a breach of lender responsibilities may also result in prosecution under the Fair Trading Act 1986, and would have serious implications for a lender's brand and reputation. Therefore the incentive to comply with the lender responsibilities are not weak – even leaving aside the significant incentive for already responsible lenders to continue to behave in that way to protect their reputation and brand.

The statement at the end of para 54 that there is a lack of incentive for the Commerce Commission to take resource-intensive enforcement action is also nonsensical in FSF's view. This is their purpose as part of their consumer protection function.

With regard to the specific Registration, Enforcement and Responsibility Options suggested in the Discussion Paper, the FSF found that these overlapped in many areas and found the Discussion Paper somewhat confusing and hard to follow at this point. The FSF has provided its submission in regard to the three Registration Options in answer to question 6 below but could not see how any of the questions asked in the Discussion Paper related to the FSF's view of the 5 Enforcement Options proposed so will cover these off in this introduction.

With regard to these specific enforcement options proposed in this section, the FSF submits that Enforcement Option A already exists not only within the CCCFA but also the Fair Trading Act 1986.

The same applies to Enforcement Option B and duties of directors as there are already mechanisms to prevent individuals that are not fit and proper from working in this industry. Under section 108 of the CCCFA, the Court can make an order restricting or prohibiting "any person" from doing various matters listed in the section if, for example, they have been convicted of a crime involving dishonesty or they have been a director or principal officer of a body corporate that has failed to comply with provisions of the CCCFA. The matters which the person is restricted from doing include being in the employ of a creditor, or acting as a director in relation to managing and negotiating credit contracts. The Fair Trading Act 1986 also allows for prosecutions to be brought against individuals. It seems the mechanisms and powers are in place, it is about resourcing and prioritising enforcement.

FSF submits in respect to Enforcement Option C that if the current Lender Responsibility Principles contained in the CCCFA with regard to ensuring that borrowers can meet their repayment obligations without suffering substantial hardship were being enforced, there would be no need for lenders to substantiate their affordability and suitability assessments. Responsible lenders do not lend to borrowers who cannot demonstrably afford to meet their repayments – the first rule of responsible lending is to ensure that the loan can be repaid.

FSF members would not support a requirement to substantiate their affordability or suitability assessments. It is a commercial decision on behalf of the lender as to whether or not to lend to an individual and their assessment criteria is commercially sensitive information which they would not wish to make public so that it was available to their competitors.

The FSF also questions what expertise the Commerce Commission or anyone else to whom a lender would be required to substantiate their decisioning process has to assess the suitability of this. If they were to do so it would have to be with the assistance of those already deemed to be responsible lenders such as those who are members of the FSF.

Finally with regard to Option C, the FSF believes that if this was to become a requirement of lenders, it will stifle innovation and slow the development of technology alternative options for consumers as essentially all credit offerings would be expected to meet a standard set of criteria and would therefore all become the same or very similar.

With respect to Enforcement Option D to increase the industry levy on creditors to help fund advocacy, monitoring and enforcement of CCCFA, the FSF has the following to say.

When the Financial Advisers Act 2009 ("FAA") came into force, FSF members took the view that, due to the very broad definition in that legislation of what constitutes financial advice, they needed to comply with the FAA if they provided lending responsibly. Therefore FSF members took the option of becoming a Qualifying Financial Entity ("QFE") or of registering

their individual customer-facing staff as Registered Financial Advisers. As such they have been paying considerably more than the annual levy of $460 + GST to the Financial Markets Authority.

There are many other lenders outside of the membership of the FSF who took the opposite view with respect to the FAA and determined that they are not providing advice and therefore have not paid the annual levy or any other costs.

This anomaly is hopefully about to be put right once the Financial Services Legislation Amendment Bill is passed by Parliament and it is made clear that consumer credit contract and credit-related insurance providers are exempted from coverage of financial adviser legislation because the way in which they provide these products to consumers is legislated for in the CCCFA.

At that point the FSF submits that the FMA no longer has any jurisdiction over consumer credit contract providers and therefore such entities should no longer be required to pay a levy to help fund a regulator who does not regulate them. The FSF therefore strongly submits that, if a levy is to be paid by lenders to help fund the enforcement activity of the Commerce Commission it should apply to all registered lenders and should be no greater than the $460 + GST levy currently payable by them to the FMA.

Finally with respect to Enforcement Option E requiring creditors and their agents to work with consumer advocates if asked to do so, and in good faith, the FSF submits that it is in lenders' interests now to co-operate with such agencies and can see no difference between what is the current situation and what is being proposed. Responsible lenders such as FSF members already have a mutually beneficial relationship with consumer advocates such as the network covered by the National Building Financial Capability Charitable Trust. Lenders work with these agencies to resolve issues rather than to risk losing money when a loan cannot be repaid and these agencies are also aware that all lenders belong to independent disputes resolution services to which they can refer their clients in need.

It should also be noted with respect to Enforcement Option E that there are already three layers of support in place to protect all consumers. These are 1) effective regulation and enforcement of it; 2) support services such as financial mentors and budget advisory services; and 3) initiatives to improve consumer financial capability. The issues with all of these are consistency of enforcement application and quality and availability of financial mentors and financial capability training. Addressing these issues would provide more consumer benefit than the requirements of Enforcement Option E.

The FSF can therefore not see any point in this Enforcement Option being adopted.

The 3 Responsibility Options suggested in the Discussion Paper are covered off by the answers to questions 7 - 10 below.

6. **If directors have duties to take reasonable steps to ensure that the creditor complies with its CCCFA obligations, should any duties apply to senior managers?**

If there is a desire to expand registration and banning options, the FSF supports Registration Option A to empower the Commerce Commission to direct the Registrar to deregister a lender and the proposed new management banning order power in principle. More detail needs to be provided as to how that power would be invoked, in what circumstances and on what grounds, what right of appeal the lender might have before it happens, etc before the FSF could be more supportive of this suggestion.

The FSF notes that the FMA currently has similar powers and the FSF believes that, as the regulator for consumer credit providers and credit-related insurance providers, these should also be extended to the Commerce Commission provided the question raised in the previous paragraph can be satisfied.

With respect to Registration Option B to introduce fit and proper person tests in the registration of lenders, the FSF also supports this Option, even though there are enforcement options already available to the Commerce Commission. Criminal checks on directors of finance companies are already required when registering on the Financial Services Providers' Register ("FSPR") and they are also required for senior managers of these companies who are named on the FSPR so the FSF supports the extension of the requirement to name senior managers and conduct similar checks on them for all lenders. Furthermore, directors and senior managers have to be vetted under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 so such a test is already being carried out to a large degree.

The FSF does not believe that Option C to introduce a comprehensive creditor licensing system is necessary. The FSF takes this view because it cannot see what difference it would make to the behaviour of lenders who are currently non-compliant but it would create a further burden (and therefore increase cost) for already responsible lenders.

The proposed requirements to obtain such a licence by satisfying the regulator that the creditor's directors and senior managers are fit and proper persons as described in Option B is already covered by other legislative requirements as outlined above; the need to have adequate systems and procedures to be a responsible lender and comply with the CCCFA is already a legal requirement and this must be demonstrated to the Commerce Commission's satisfaction on request now; and creditors are expected now not to contravene any of their obligations under the CCCFA. The FSF therefore fails to see what would be gained by way of consumer protection by the introduction of such a comprehensive creditor licensing system. There would clearly be costs passed to the consumer however to recover the cost to the creditor of having to go through this process.

7. **If there are to be more prescriptive requirements for conducting affordability assessments, what types of lenders or loans should these apply to?**

The FSF does not support any more prescriptive requirements for conducting affordability assessments than already exist in the current CCCFA and under the Lender Responsibility Principles. The FSF does however support the enforcement of this law against those lenders who cause concern with regard to non-compliance.

The FSF also seriously questions the assertion in para 73 of the Discussion Paper with regard to there being non-compliance with requirements regarding affordability assessments in the provision of loans for motor vehicles. This seems to suggest that any lending that is not a housing loan is being deemed a high cost loan – which goes back to an earlier point made in this submission that a clear definition of what is considered to be a high cost loan needs to be provided.

Further, the FSF submits that the motor vehicle finance is a very competitive sector in New Zealand and the vast majority of these loans are made by responsible lenders most of whom are FSF members. It is dangerous to draw conclusions from a small sub set of these loans that would present to budget advisors and other support services.

8. Should there be any change to the requirement that lenders can rely on information provided by the borrower unless the lender has reasonable grounds to believe the information is not reliable? What would be the impact of such a change on borrowers, lenders and the credit markets?

The FSF absolutely does not support any change to current Section 9(c) 7 of the CCCFA that allows lenders to rely on information provided by the borrower unless they have reasonable grounds to believe the information is not reliable. To suggest that all borrowers must provide further evidence beyond what they are already providing to support their credit application, is to suggest that there is a belief that all consumers are misleading lenders which is far from the case. This would create major inconvenience to the majority of reliable and responsible borrowers and the principle of borrowers taking some responsibility for themselves in the contractual relationship with a lender should not be undermined. It would also have the effect of responsible borrowers bearing the cost of irresponsible borrowers which is not in the least bit fair and reasonable in the FSF's view.

Trust is a factor in any contractual relationship and the FSF does not support in any way the burden of proof being shifted entirely to the lender.

Once again, if there is an issue with lenders who are providing credit that is proving to be unaffordable or irresponsible, the solution is to enforce the current law not penalise every borrower and lender for the behaviour of a few.

The FSF developed a Responsible Borrowing Code in conjunction with what was then the Federation of Family Budgeting Services (now the National Building Financial Capability Charitable Trust) and this was launched at the same time the 2015 amendments of the CCCFA and the Responsible Lending Code came into force. This was designed to be provided to

consumers via FSF member premises and websites and through the budget advisory networks to advise them of their rights and obligations under a credit contract and to detail why it is important for them to disclose truthfully and completely to lenders. This Code is still in circulation and being provided to potential borrowers to ensure they understand what they are getting into when taking out a loan contract.

There are many other initiatives available to consumers to help them to understand financial matters but the FSF believes that the fact that consumers are still unaware of their rights and obligations with regard to consumer credit is an issue of lack of financial literacy so the FSF supports the extension of these initiatives as widely as possible.

9. Do you consider there should be any changes to the current advertising requirements in the Responsible Lending Code? If so, what would be the impact of those changes on borrowers, lenders and the credit markets?

If, as is asserted in para 78, the Code's guidance is being poorly adhered to by some lenders (and the FSF sees no evidence of such non-adherence), the key is once again to enforce the current law where it is being breached or warn such lenders that their advertising is not deemed to be responsible.

The FSF believes the requirements for advertising credit responsibly that currently exist in the Responsible Lending Code are generally sufficient but some further guidance about how they can meet all their lender responsibilities (and not just in respect to advertising) when they are transacting with consumers via digital means would be helpful. The FSF has prepared a discussion paper with some suggestions as to how this might be achieved for consideration by the Code Advisory Group which provides advice to the Ministry on how well the Code is working (or not). This has been under consideration but has now been parked until the outcome of this CCCFA review but the FSF is very keen to see it not be shelved indefinitely and for it to become part of the review of the Code that will necessarily arise out of the CCCFA review.

10. Do you agree with our assessment of the costs and benefits of the options to reduce irresponsible lending and other non-compliance? Are any costs or benefits missing? Do you have any information or data that would help us to assess the degree or estimate the size of these costs and benefits?

In answer to this question, please refer to the introductory comments to Issue 2 made earlier in this submission and also to the answer to questions 6-9 above.

With respect to Responsibility Option C to require disclosure to be in the same language as advertising, the FSF submits that para 7.15 of the Responsible Lending Code recommends that lenders who advertise their products in a language other than English should communicate the key features of the loan to the borrower in that language or refer the borrower to an interpreter who can translate English into that language, at the lender's cost.

The FSF notes however that no standard exists in relation to translators and how accurately they might translate from English into another language and therefore it would be difficult for lenders to determine whether they had inadvertently included any errors or made any important omissions in their translations.

Whilst the FSF acknowledges that the guidance provided to lenders in the Code is not binding, lenders are required to show how they comply if they do not follow the recommendations of the Code and therefore the FSF suggests that where harm is being caused to non-English speakers taking out credit contracts they do not understand after responding to advertising in another language, the current provisions of the CCCFA should be enforced against the lender concerned.

11. **Do you have any suggestions for the design of options for reducing irresponsible lending and other non-compliance? If so, what would be the impact of your proposed options on borrowers, lenders and the credit markets?**

The FSF does not have any further suggestions for reducing irresponsible lending and other non-compliance other than what has already been submitted above. The key to ensuring that consumers do not suffer harm lies in the enforcement of the law we already have as has been said frequently already.

12. **Which options for reducing irresponsible lending and other non-compliance would you support? Which would you not support? Please explain how you made your assessment.**

Please refer to the submissions already made as above.

13. **Do you agree with our assessment of the costs and benefits of the options for covering additional credit contracts under the CCCFA? Are any costs or benefits missing? Do you have any information or data that would help us to assess the degree or estimate the size of these costs and benefits?**

The FSF supports Option A to include credit contracts that charge default fees in the definition of a consumer credit contract to a limited extent. By this we mean that the basis on which the default fees are calculated should be by way of cost-recovery only (as is required for all default fees under the current CCCFA) so that providers of these alternative types of credit contracts would not be able to make a profit from charging default fees.

If however the full lender compliance obligations were applied to other businesses such as those described in footnote[8] on page 28, these sorts of deferred payment options would become non-viable as they are not charging interest on the deferred payment stream and an important consumer choice for payment of goods would therefore be removed.

The FSF does not support Scope Option B to prohibit the price of goods or services sold on credit from exceeding the cash price at all. The FSF believes this option to be unworkable because, whilst the cost for purchasing a good either by cash or with credit should be the same, the fair market value of a good cannot be determined by the credit provider. The actual cost of a good is determined by the seller's supply arrangements from their suppliers and consumers understand that they can sometimes obtain discounted prices for goods from larger sellers because of these supply arrangements.

Once again if the issue is that of irresponsible provision of credit for the purchase of these goods, the key to solving this lies in the enforcement of the existing provisions of the CCCFA.

14. Do you have any suggestions for the design of options for covering additional credit contracts under the CCCFA? If so, what would be the impact of your proposed options on borrowers, lenders and the credit markets?

Please refer to the answers provided to questions 4 and 13 above.

15. Which options for changes to cover additional credit contracts would you support? Which would you not support? Please explain how you made your assessment.

Please refer to answers provided to question 13 above.

16. If prescribed fee caps were introduced, who should they apply to, and what process and criteria should be used to set them?

The FSF is not in favour of the introduction of imposed specific fee caps in regulation. As stated in para 102 of the Discussion Paper, costs vary widely between lenders. This is because lenders' business models vary widely and therefore so does their cost structure. Any business model that allows for a "high touch" consumer experience or which operates in a more high risk environment, for example, will necessarily create higher costs to operate.

Imposing fee caps will, in the FSF's view, encourage lenders with lower costs to deliver to increase their fees to the cap which is hardly beneficial to consumers and those whose costs might exceed the cap will simply increase their interest rate to recover all costs associated with their credit offering (as pointed out under the "Cons" for this option in the Discussion Paper).

The three fees options – Fees Option A: require lenders to substantiate reasonableness of fees; Fees Option B – impose specific fee caps in regulation; Fees Option C: return to disclosure and advertising based on an "equivalent interest rate" have all been effectively explored under the Cap Options for capping interest and fees earlier in the Discussion Paper and the FSF has provided its opinion on these options in answer to questions 3, 4 and 5 earlier in this submission.

The key to ensuring that fees being charged are compliant with the law is once again in enforcing the law we currently have.

17. Do you agree with our assessment of the costs and benefits of the options for capping interest and fees? Are any costs or benefits missing? Do you have any information or data that would help us to assess the degree or estimate the size of these costs and benefits?

The FSF submits that in regard to Fees Option A to require lenders to substantiate reasonableness of fees, this is the requirement under the current CCCFA and confirmed by case law following the judgment in the Sportzone/MTF case and therefore the FSF does not believe that any further regulation beyond what is in place now is required. Please also refer to FSF's answers to questions 2-5 above.

As mentioned previously, since the Supreme Court's judgment in that case was released, the Commerce Commission has also released helpful guidance to lenders on setting credit fees and the fees section of the Responsible Lending Code has been amended in accordance with the judgment and this guidance.

Lenders are already required to calculate their fees by reference to the costs of the activities that are being recovered, and to keep records that show how their fees have been calculated. They are further required to review their fees on a regular basis and at any time when their costs may have changed which is a time-consuming, costly exercise and auditable exercise.

Further the Commerce Commission already has the information-gathering powers to obtain lenders' records of how their fees have been calculated and they do use these to some extent. If it is felt that there are still some lenders charging unreasonable fees, the FSF strongly suggests that the Commerce Commission be empowered (and resourced) to use their information-gathering powers more widely and to take action where lenders are unable to sufficiently justify their fees calculations.

The FSF also notes the High Court decision in May of this year that determined that the platform fee being charged by peer-to-peer lender is a credit fee and therefore subject to the CCCFA. In the FSF's view this judgment makes it clear that fees involved in all types of credit offering, regardless of the way in which the offer of credit is made, are subject to the CCCFA fees requirements and therefore also to the scrutiny of the Commerce Commission and the FSF believes this is as it should be.

18. Do you have any suggestions for the design of options for reducing unreasonable fees? If so, what would be the impact of your proposed options on borrowers, lenders and the credit markets?

The FSF refers to the answer provided for question 17 above that Fees Option A to require lenders to substantiate the reasonableness of their fees is the best option. It already applies

and responsible lenders have already calculated their fees on the basis of the recovery of costs that are closely relevant to the transactional activity they are being charged for. Responsible lenders that are FSF members are also able to justify the way in which their fees have been calculated if required to do so by the Commerce Commission.

If there are continued instances of lenders charging unreasonable credit fees, the Commerce Commission needs to investigate these cases using their information-gathering powers and prosecute where necessary and also seek consumer redress where borrowers have been overcharged.

19. Which options for changes to fees regulation would you support? Which would you not support? Please explain how you made your assessment.

Please refer to the answers to questions 2- 5 and 16-18 above.

20. Have you seen issues with excessive broker fees, or other unavoidable fees charged by third parties, being added to the loan? If so, are there any specific changes that should be made to the regulation of third party fees? What would be the impact of these changes on lenders, borrowers and third parties?

The FSF cannot report any particular issues with excessive broker fees or other unavoidable fees charged by third parties, whether these are added to the loan or not, as the FSF is unaware of any such issues. In the FSF's view all third party fees are avoidable simply by not dealing with the third party and dealing directly with the credit provider.

The FSF is aware however that it is not always clear to a consumer whether they are potentially dealing with a broker or a lender when looking at some broker websites. In the FSF's view this should therefore be made clear as there are obligations on lenders under the current CCCFA with regard to what must be displayed on their website that currently do not apply to brokers.

The FSF points out however that fees to third parties who are not related to the creditor are a fee for a service provided to the consumer in finding them the best possible credit option for their particular circumstances. These third parties make their income from receiving these fees (or commission from the credit provider) as they are not earning interest from the loan itself.

The FSF would therefore not support these fees being treated as "credit fees". However the FSF does believe that such brokers and third parties as described above should be treated as financial advisers under the appropriate legislation for providing financial advice in New Zealand and should therefore be subject to the Code for Financial Advisers (once that has been written subsequent to the passing of the Financial Services Legislation Amendment Bill currently before the House). This is to ensure appropriate consumer protections exist to put consumer interests ahead of any conflict of interest on behalf of the third party involved.

The issue with third parties related to the creditor is entirely different however. It's arguable in the FSF's view whether in fact if they are a related party they could even be called a "third party" and therefore it is entirely appropriate for any fees they charge to be deemed to be "credit fees" and therefore subject to the CCCFA requirements to be justifiable and charged on a cost-recovery basis only.

21. Is this an accurate picture of the problem for consumers experiencing debt collection? Do you have information that confirms or refutes these issues, or sheds light on how widespread or severe they are?

The FSF is not comfortable with many of the assertions made in the Discussion Paper in paragraphs 112-117 in relation to the problems for consumers experiencing debt collection. None of these assertions are quantified or substantiated as to how often these issues occur compared to those debt collection activities that are undertaken lawfully and responsibly, there is no definition of what is deemed to be "unaffordable" or "excessive" or what constitutes reasonable behaviour with regard to avoiding harassment.

The FSF is in no doubt that a small number of consumers have experienced one or more of these problems during the course of a debt collection relative to the very large number of debt collections that are taking place each day.

However, the FSF refers once again to comments made earlier about the fact that, if this is the sort of behaviour being reported by social agencies such as budget advisory services, community law centres and the like as being "common", this is because they only see the consequences for their consumers of a small minority of lenders or debt collectors who have behaved irresponsibly and in many cases illegally. They do not deal with the vast majority of New Zealand consumers who are granted credit, meet their repayments until the loan is repaid and have no reason for complaint. Nor do they deal with the vast majority of consumers who have experienced debt collection action in one form or another but this has been provided responsibly and in accordance with the law.

The FSF does not believe that responsible debt collectors should be bearing the regulatory and compliance burden for the small minority of irresponsible players in the market. Rather as has been said many times before in this submission, illegal and irresponsible behaviour should be being penalised to the extent of the current legislation.

The FSF also suggests that there is very probably a strong link between predatory lending practices and predatory debt collection practices in that those lenders who are not concerned about meeting their responsible lending obligations to consumers are unlikely to be concerned about whether their debt collection practices meet legal requirements either. Therefore the way to protect consumers in these instances is to enforce the law we currently have not to write further legislation that will only be complied with by those in the industry who are already compliant.

The FSF also takes issue with the point raised in paragraph 112 of the Discussion Document which says that complaints to the Commerce Commission about debt collection have been steadily rising from 23 in 2013 to 119 in 2017. This does not provide any detail about what these complaints were about and, more importantly whether or not they were upheld or were indicative of any systemic break-down in responsible debt collection practices. Further it is not surprising to FSF that numbers of complaints might have increased as this is probably related to the fact that so too has the amount of debt taken out by consumers.

A further point is that even at 119 complaints, this is a very miniscule percentage of the overall numbers of consumers who are dealing with debt collection agencies within an average year. And finally, there is no breakdown of this number as it relates to debt collection for a credit contract as opposed to debt collection carried out for other providers such as utilities providers for example.

22. What information should be provided to borrowers by debt collectors? When and how should this information be provided?

The Discussion Paper puts forward Debt Collection Option A to require key loan information to be shared with the debtor at commencement of debt collection and then goes on to detail what this information should consist of.

FSF Affiliate members include most of the responsible debt collection businesses which act as an agent of a creditor or those who buy debt from lenders before pursuing it. They report that they routinely provide borrowers with most of the information specified in Debt Collection Option A as standard practice at commencement of debt collection action. However it is sometimes difficult for them to be able to provide a copy of the original credit contract for example if this is not passed on to them by the creditor at the time of transfer of debt or debt collection action. They will make every effort to provide the loan contract on request but if the loan account has been in place for some years, as an example, this is not always possible and can also add to the overall costs to the consumer of the debt collection action.

Also, under the CCCFA borrowers will already have been provided with a copy of the loan contract at the commencement of the loan so the FSF submits that a further copy of the contract need only be provided on request if it is available from the credit provider and at the cost of the borrower.

If it is the case in some debt collection scenarios, that other key information is being withheld from borrowers, the FSF once again submits that the problem does not lie with the legislation but with the enforcement of it.

23. Do you agree with our assessment of the costs and benefits of the options for addressing irresponsible debt collection? Are any costs or benefits missing? Do you have any information or data that wold help us to assess the degree or estimate the size of these costs and benefits?

With respect to the further Debt Collection Options provided in the Discussion Paper, the FSF has this to say about each of them:

- Debt Collection Option B: require debt collectors to offer an affordable repayment plan. The FSF submits that it is not in anyone's interest – that of the borrower, the creditor or the debt collection agency – to offer anything other than an affordable repayment plan. If the borrower is already in such circumstances that the services of a debt collector are required, an unaffordable repayment plan is hardly likely to help them to get out of debt or to have the debt repaid to the benefit of the creditor.

  Responsible lenders and debt collectors will always work with borrowers in default to find a way to make repayments affordable with the ultimate aim of having the debt repaid to everyone's mutual satisfaction. However there are times when no amount of reworking of the repayment plan can help the borrower out of the situation they are in perhaps because of changes in circumstances or the taking on of further debt beyond the initial loan approved by a responsible lender. In these circumstances it is not possible or responsible to offer a repayment plan and it is better in these situations to determine that sooner rather than later to avoid fees and default interest etc from mounting any further than is necessary.

  The FSF further submits that what is actually "affordable" is often a very subjective assessment. For example, should the debt collector take into account only essential living costs such as rent, power, phone, food, transport, clothing etc when assessing what might be left to meet a repayment plan? Or is there a view that other costs should be taken into account? And what would be included within these costs? The FSF notes that in 2017 ASIC introduced a Debt Collection Guideline: for creditors and collectors in Australia which is considered to be helpful to those collectors who operate on a trans-Tasman basis. The FSF would support the development of such guidance for collectors based on the New Zealand context and is committed to developing something along these lines with FSF's debt collection agency members using the ASIC guideline as a basis to ensure a consistent approach to matters like affordability and acceptable conduct.

- FSF debt collection agency members have some sympathy with the idea of specifying appropriate limits regarding contact between the debt collector, borrower and other persons as suggested in Debt Collection Option C. Responsible creditors and debt collectors already go to some lengths to ensure that their treatment of defaulting borrowers does not amount to harassment.

  What constitutes reasonable or appropriate contact however needs to be more specifically defined for clarity to debt collectors. For example would it constitute harassment for a debt collector to make one phone call per day over, say, 5 days leaving a message but not getting a response? At what point is it deemed to be harassment if a borrower will not return the call of the debt collector? Once again FSF debt collection agency members would find

adoption of guidance to the sector along the lines of ASIC's Debt Collection Guideline: for creditors and collectors would be helpful here.

This guidance provides the recommendation that collectors do not contact a debtor more than three times per week, or 10 times per month at most (when contact is actually made, as distinct from attempted contact) and only when it is necessary to do so.

The FSF submits however that contact frequency needs to be appropriate and not too restrictive as this may have a detrimental impact on the consumer because, if thresholds are too low and reached, then this is likely to cause escalation of process and additional expense to the consumer.

FSF member organisations also have a constructive working relationship with the financial mentor networks of the National Building Financial Capability Charitable Trust ("the Trust"). This often involves working with the financial mentor as a representative of the borrower for the best possible outcome which FSF members are more than happy to do.

The FSF agrees that the potential cost of Option C has been correctly identified in the table on page 39 of the Discussion Paper.

- With respect to Option D: to make third-party debt collection agencies directly subject to the CCCFA, the FSF is not in agreement with this suggestion. As pointed out in paragraph 128 of the Discussion Document, debt collectors who have been assigned rights to the debt are creditors and therefore are, quite rightly, directly subject to the CCCFA. Debt collectors acting as agents of the creditor are not as the creditor takes responsibility for the actions of their agents. The creditor therefore has a vested interest in ensuring that the way in which their debt collector agent interacts with their customer is consistent with the provisions of the CCCFA. The FSF can therefore see no value in both the creditor and the agent having the same requirements placed on them.

  The FSF has however provided opinion on whether or not debt collectors acting as agents of the creditor should be required to belong to an approved financial disputes resolution scheme in answer to question 24 below.

- The FSF is not supportive of Option E to make external debt collection fees cost-based. The business model for debt collection agencies requires them not just to cover their costs but also to make a profit – which in the FSF's view is entirely appropriate for any business. FSF credit provider members who use third-party debt collectors to recover debt on their behalf have a range of responsible agents to choose to do business with. Normal market forces apply with regard to the cost of doing so and the FSF does not support any limit on this. Without the ability to charge a reasonable fee for their services, responsible debt collection agencies would go out of business and the FSF believes that either lenders would have to undertake their own debt collection activity (with associated costs passed on to all

borrowers through increased interest rates) or the less responsible credit providers would once again decide to use agents operating outside of the law.

One further point with regard to this Option is that debt collection activity is not just undertaken by lenders or debt collection agencies. Lawyers as an example often act for their clients to recover debt and the fees they charge for their services are often extremely high and are passed on to the consumer, but they appear to be outside of the scope of this review.

24. Do you have any suggestions for the design of options for addressing irresponsible debt collection? In particular, what is an appropriate frequency of contact with debtors before (and then after) a payment arrangement is entered into? Please state the likely impact of your proposed options on borrowers, lenders and the credit market.

Please refer to the answer to question 23 above.

Further, the FSF submits that those debt collection agents who buy debt from lenders before pursuing it, are required under the Financial Services Providers (Registration & Disputes Resolution) Act 2008 ("FSPRA") to meet all the requirements to register on the Financial Services Providers Register ("FSPR") and to belong to an approved disputes resolution scheme.

Those creditors who have an in-house debt collection team are also required under the FSPRA to be registered on the FSPR and to belong to an approved disputes resolution scheme.

However those debt collection businesses acting as an agent of a creditor do not have a similar requirement and the FSF submits that it would provide better consumer protection if these businesses were also required to be registered on the FSPR and to belong to a disputes resolution scheme. This could be achieved by a small change to the FSPRA to include such agents and would make it easier for the law to be enforced as all those acting in the debt collection sector would be visible to the regulator through the Register.

This would also provide access to all consumers dealing with a debt collector to independent disputes resolution and the redress they can provide if necessary. The one proviso with regard to this being that it should be made clear that the disputes resolution schemes can only investigate complaints arising out of a consumer credit contract as described in the CCCFA (to make it clear that customers of a debt collector acting on behalf of businesses other than lenders do not have the same access to financial disputes resolution.

25. Which options for changes to the regulation of debt collection would you support? Which would you not support? Please explain how you made your assessment.

Please refer to the answer to question 23 and 24 above.

26. Are you seeing harm from loans to small businesses, retail investors or family trusts as a result of them not being regulated under the CCCFA?

The FSF is not aware of any harm being caused to small businesses, retail investors or family trusts as a result of them not being regulated under the CCCFA. . As previously stated in this submission (in the introduction to the FSF's comments with regard to Issue 2 raised in the Discussion Paper), the first rule of responsible lending is to ensure that the loan can be repaid. It is therefore not in the interests of any responsible lender to cause harm to any borrower, regardless of their structure, by providing unaffordable credit that cannot be repaid without causing hardship.

The FSF also notes that "small" in the context of "small businesses" is not defined but it is the experience of many FSF members that a lot of small business lending is done in the personal names of the business owners or directors so is covered by the provisions of the CCCFA in any event.

27. Do you think small businesses, retail investors or family trusts should have the same or similar protections to consumers under the CCCFA? Please explain why/why not.

As stated in answer to question 26 above, FSF members apply responsible lending principles regardless of the type of customer to whom they are lending and the protections relating to oppressive contracts and repossessions of consumer goods already apply to these types of contracts in any event

Lending to a business is an entirely different process to that of consumer lending. The income of a business is not as easily determined as that of someone on wages or salary but is verified by financial statements most of which are prepared on behalf of the business by an accountant or other such adviser. This adviser will be assisting the business to determine their funding needs and how these might be structured for the greatest possible tax effectiveness. Likewise, most family trusts have an independent trustee advising them on their funding needs and, in fact most Trust deeds detail on what basis, if at all, the Trust can borrow.

The FSF believes that including these types of entities in the scope of the CCCFA will have the opposite effect of providing protection to them because it is likely that lenders will deem the requirements to meet CCCFA provisions for these entities to be too onerous and will cease to service this market. If irresponsible lending to this sector is deemed to be a problem the FSF would like to see the matter addressed more substantively and in another forum. A definition of what is deemed to be a "small business" would also be helpful in this context.

However this would also be an opportune time to expand the significance of the declaration under section 14 of the current CCCFA. Currently the declaration only provides evidence that the borrower intends using the "credit" wholly or predominantly for business or investment purposes. It would be useful if the declaration could also be used as evidence that the actual "goods" taken for security will also be "used" for business or investment purposes, and not for

consumer purposes. This would prevent borrowers later claiming goods taken as security under business loans were in fact used for consumer purposes. This is relevant because the lender must choose whether to enforce under the Personal Property Securities Act or the CCCFA depending on the use of the goods. Some borrows will make claims that the lender enforced under the wrong Act, thereby slowing down enforcement and leading to expensive court cases. This matter was more substantively detailed in our report prepared for the Ministry in March of 2016 (attached as Appendix B), and there have been recent cases that have addressed the confusion.

28. Are there any other issues with the CCCFA or its impact on vulnerable people that are not addressed in this discussion paper? If so, what options should MBIE consider to address these issues?

In answer to this question, the FSF provides a summary of the key points made in this submission:

- The vast majority of lending being conducted in New Zealand is provided responsibly and causes no harm to those consumers accessing it through the majority of lenders who take their responsible lending obligations seriously (such as FSF credit provider members). The FSF strongly objects to the assertions in the Discussion Paper that harmful lending practices are in any way common or widespread but totally agrees that where these practices are occurring they are causing significant concern to the consumers concerned;

- The FSF does not believe that there is a need to review or make wholesale changes to the current requirements of the CCCFA in order to prevent this harm happening to vulnerable consumers. Rather the key to doing this lies in the Commerce Commission being adequately resourced to do their job which is to enforce this law. This includes not just having the personnel available to investigate instances of irresponsible lending but also the legal measures to put predatory lenders out of business (permanently), being able to act much more quickly against these lenders than they currently do to provide the necessary deterrent to all others operating equally as irresponsibly and targeting their enforcement action towards those areas that cause the most harm to New Zealand's most vulnerable;

- The FSF believes that most of the issues raised in the Discussion Paper can be dealt with by the regulator enforcing the existing law on the basis described in the previous point;

- The FSF believes that an unintended consequence of the previous CCCFA reforms has been to drive vulnerable people further away from responsible lenders who are unable to help them and still remain responsible. The FSF does not believe that any outcomes from this further review will change that situation – in fact it is likely that further legislation will only exacerbate that problem;

- The FSF believes that there is a need for short-term lending to be provided to consumers from time to time to cover essential living costs because of the high cost of living in most areas of New Zealand. Unfortunately societal issues outside of responsible lending have led to the situation where people are forced to do so;

- The FSF believes that the choice to access these types of loans should be available to these consumers but there is a high cost involved to lenders in providing them and they should not be restricted in terms of the interest they charge to do so. The FSF does believe however that they should be provided responsibly (in that they must be demonstrably able to be repaid within the term of the loan) and must not be continually rolled over or re-written to avoid the harm this causes to consumers caught up in a never-ending debt spiral (and this needs to be rigorously enforced by the regulator);

- The FSF is not supportive of the introduction of interest rate caps or similar for this reason;

- The FSF is similarly not supportive of the suggestion to introduce a comprehensive creditor licensing system;

- The provision of credit responsibly is vital for New Zealand's economy but the FSF believes it needs to be remembered that any further compliance burden on lenders will ultimately be passed on to consumers;

- The FSF believes that the Enforcement Options described in the Discussion Paper already exist under current law and that where this is not being adhered to, effective action needs to be taken by the regulator;

- The FSF does have some sympathy for the option to apply an industry levy on creditors to help fund the advocacy, monitoring and enforcement of the CCCFA by the Commerce Commission. Those credit providers who have previously complied with the FAA (and who will hopefully be exempted from having to do so by the passing of the Financial Services Legislation Amendment Bill) already pay a levy to the FMA who is not their regulator. Provided they are not expected to pay any more than this and this levy can be re-directed to the Commerce Commission, this proposal would have the FSF's support;

- The FSF strongly opposes the suggestion of removing Section 9C(7) of the CCCFA which provides the ability for lenders to rely on information provided by the borrower as a loan agreement is a contract between two parties – the lender and the borrower – both of whom have obligations towards the other. Removing this ability would cause major inconvenience and cost to the majority of borrowers who behave responsibly act in good faith towards lenders;

- The FSF believes that the current law is very clear with regard to what lenders can charge by way of credit fees and case law arising out of the Sportzone/MTF case has provided further

clarity in this regard. On that basis the FSF does not support any change to the way in which the CCCFA is currently written in regard to the setting of credit fees or the introduction of a cap on fees;

- There is however some support among FSF members for a return to the disclosure of an "equivalent interest rate" or "finance rate" model. This needs to be further canvased and debated before making any changes to the way in which fees are required to be calculated;

- The FSF believes there is a strong link between predatory lending practices and predatory debt collection practices and believes that the current law provides adequate protection to consumers from predatory debt collectors (if it is properly enforced);

- The FSF supports and would be prepared to help develop guidance to debt collectors as to what is and is not acceptable behaviour (including what is an appropriate level of contact between collectors and borrowers) along the lines of the ASIC Debt Collection Guideline: for creditors and collectors introduced in Australia in 2017;

- The FSF does not support the inclusion of debt collectors acting as agents of the creditor being subject to the CCCFA because the creditor themselves take this responsibility. However the FSF does support all debt collectors being registered under the FSPRA and the need for them to belong to an approved disputes resolution scheme for referral of complaints relating to debt collection action taken to recover a debt under a consumer credit contract;

- The FSF does not support extending the provisions of the CCCFA to small business, retail investors or family trusts.

The FSF has no further comment to make on the Discussion Paper or the effectiveness of the CCCFA regime. The FSF is however grateful for the opportunity to make this submission and would be pleased to discuss further any points that may require clarification or amplification.

Lyn McMorran
EXECUTIVE DIRECTOR

Appendix A
FSF Membership List as at 1 April 2018

Debenture Issuers - (NBDT) Non-Bank Deposit Takers	Vehicle Lenders	Finance Company Diversified Lenders	Credit Reporting Other	Insurance	Affiliate Members
<u>Rated</u> Asset Finance (B) <u>Non-Rated</u> Mutual Credit Finance Gold Band Finance ➢ Loan Co	BMW Financial Services ➢ Mini ➢ Alphera Financial Services Branded 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 ORIX NZ SG Fleet Lease Plan	L & F Ltd ➢ Speirs Finance ➢ YooGo Avanti Finance Caterpillar Financial Services NZ Ltd CentraCorp Finance 2000 Finance Now ➢ The Warehouse Financial Services Flexi Cards Future Finance Geneva Finance Home Direct Instant Finance ➢ Fair City ➢ My Finance John Deere Financial Latitude Financial Pioneer Finance ➢ Personal Finance South Pacific Loans Thorn Group Financial Services Ltd Turners Automotive Group	Equifax (prev Veda) Centrix <u>Debt Collection Agencies</u> Baycorp (NZ) Illion (prev Dun & Bradstreet (NZ) Limited	Autosure Protecta Insurance Provident Insurance Corporation Ltd Southsure Assurance	American Express International (NZ) Ltd AML Solutions Buddle Findlay Chapman Tripp EY Finzsoft KPMG Paul Davies Law Ltd PWC Simpson Western FinTech NZ HPD Software Ltd Total : 56 members