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Credit Fees Submissions
Commerce Commission
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Consumer credit fees draft guidelines

Introduction

1. The New Zealand Law Society welcomes the opportunity to comment on the *Consumer credit fees draft guidelines* (Guidelines) released by the Commerce Commission in September 2016.

2. The Guidelines update the Commerce Commission's previous draft guidelines in light of the Supreme Court judgment in *Sportzone Motorcycles Limited (in liquidation) and Motor Trade Finances Limited v Commerce Commission*[1] (*Sportzone*) and amendments to the Credit Contracts and Consumer Finance Act 2003 (CCCFA) that came into force in June 2015.

3. The Law Society recognises the significant work that has been applied in updating the Guidelines and makes the following general comments:

    a. The CCCFA, *Sportzone* and the Guidelines provide a complex framework for credit fees. Fees must be disclosed in a way that assists a consumer to make an informed decision. It will be challenging for market participants and their advisers to achieve this.

    b. The complexity of the framework has considerable implications for consumers. Market participants will incur ongoing costs interpreting *Sportzone* and the Guidelines, and significant costs are involved in allocating costs to particular profit lines. All of these costs will eventually be passed on to consumers. In addition, consumers do not always read or understand disclosure documentation. Consideration should be given to simplifying the current regulatory regime to increase benefits to consumers for less cost. A simpler regime could enable product comparisons and better understanding by the consumer of the risks and rewards of each transaction.

    c. The Guidelines do not adequately describe what should happen if a fee is estimated but the actual costs are less than the amount estimated. It is not clear if the over-estimate should be repaid to the customer.

    d. The previous draft guidelines have remained in draft form for six years. The Law Society supports the Guidelines being issued in final form as soon as possible to provide certainty to the market.

4. The Law Society identifies the following issues for further consideration:

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1 [2016] NZSC 53.

Not all actual costs are reasonable (paragraphs 41—43)

5. It would be helpful to provide further guidance as to the types of actual costs that would be unreasonable.

Fees should be regularly reviewed (paragraphs 50—52)

6. This guidance appears to go further than the requirements of the Responsible Lending Code.[2] The Law Society recommends providing an example of how this will work in practice for a particular transaction.

Recovering fixed and variable costs (paragraphs 64—72)

7. This section is opaque. As noted at paragraph 64, the Supreme Court did not find the distinction between fixed and variable costs to be of great assistance. The Law Society questions why this section is included in the Guidelines.

8. Paragraph 71 refers to the Supreme Court judgment at [114], quoting:

> *.... a fee based on the variable costs incurred in taking the steps for which the fee is charged is likely to be at, or below, the level that would be considered "reasonable" for the purposes of s 41 of the 2003 Act, assuming the costs themselves are reasonable.*

9. It is not clear how this quote assists with the question of what level of fee would be considered reasonable. The Law Society considers that paragraph 70 is sufficiently clear of itself and recommends deleting paragraph 71.

Lender may average its establishment costs for appropriate classes of contract (paragraphs 85 and 86)

10. As indicated in paragraphs 83 and 84, section 42(b) of the Act allows a lender to average establishment costs for appropriate classes of contracts.

11. Where lenders average establishment costs, *Sportzone* implies that "reasonableness" must be based on a representative sample of the specific type of transaction. At [73] of the judgment:

> *where averaging is permitted, this should be done for a representative sample of transactions so that the average cost per transaction can be assessed.*

12. Lenders will therefore need to consider costs in relation to a particular type of transaction and set fees accordingly. The example box is correct in this, but the language used in paragraphs 85 and 86 suggest that it may be optional for lenders to treat similar types of transactions as a class and then average across that class.

13. Paragraphs 83 to 86 should be redrafted to clarify the requirement that lenders treat similar types of transactions as a class and to better reflect the *Sportzone* judgment.

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[2] Responsible Lending Code, pp 39—42
https://www.consumerprotection.govt.nz/assets/Uploads/Documents/responsible-lending-code.pdf

Prepayment fees

Paragraph 112

14. This paragraph states that "A lender cannot charge a prepayment fee for any amount where a variable interest rate applies to the lending". This wording may have been oversimplified as section 43(2)(b) of the CCCFA allows prepayment fees on the fixed portion of a loan that has fixed and variable components, providing that a prepayment fee relates only to "the portion of the unpaid balance for which the interest rate is fixed for an agreed period".

Tables 1—3 (establishment fees pp16—17, other credit fees pp20—21 and default fees p25)

15. The Law Society recommends that types of costs should be consistent across all three tables to assist readers to understand how costs are treated. For example, Table 1 contains "Staff costs" but Tables 2 and 3 do not. It would also be helpful if the types of costs were listed in the same order in each of the tables (e.g. alphabetically).

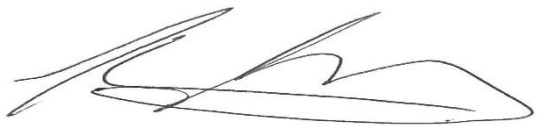
16. In Table 1 – 'Staff costs', the table states that "an appropriate apportionment of the wages, salaries, performance schemes and ancillary costs of staff may be charged for those staff involved in establishing a particular loan or class of loans." The Law Society considers that this is too broad. The Supreme Court considered costs of training staff to assess applications (at [96] to [98] of the judgment) and found that this cannot be included in an establishment fee. This cost could arguably be considered an "ancillary cost of staff" for the purposes of the Guidelines. The table should emphasise that it is only those staff costs that are transaction-specific, i.e. staff time that is attributable to the assessment of a particular loan, that can be counted. Training to assess applications, or costs of hiring / managing cannot be included in a fee as they are not transaction-specific.

17. The Law Society considers that some of the categories stated in Table 3 as unrecoverable would be recoverable. Section 44A of the CCCFA (relating to default fees) allows the lender to recover a reasonable estimate of the loss incurred as a result of the debtor's acts or omissions. Therefore, some of the categories that are specified to be unrecoverable because they are not a cost of a borrower's default would be recoverable because they fall within a reasonable estimate of the loss incurred. In particular, 'loss of profit' / 'loss of capital' is a loss that could be directly linked to the actions of the debtor in defaulting.

Conclusion

18. If further discussion would assist, please contact Rebecca Sellers, the convenor of the Law Society's Commercial and Business Law Committee, via the committee secretary Karen Yates (04 463 2962, karen.yates@lawsociety.org.nz).

Yours faithfully



Kathryn Beck
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