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“Regulatory Responses to Unreasonable Consumer Lending Practices”.

BANKING AND FINANCIAL SERVICES LAW ASSOCIATION
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The Regulatory Environment – Pre April 2005

1. Prior to the introduction of the Credit Contracts and Consumer Finance Act in 2003, consumer lending in New Zealand had been governed by either the Credit Contracts Act 1981 or the Hire Purchase Act 1971. Consumer lending that fell outside these Acts, for example home loans that exceeded the \$250,000 threshold within the Credit Contracts Act, were largely unregulated except in relation to rules for registering security and establishing processes for enforcement of the loan transactions⁹².
2. While consumers received some protections under these Acts and further protection under the Consumer Guarantees Act, which contains provisions requiring services to be fit for their purpose and undertaken with reasonable care and skill, for the average consumer trying to understand which laws applied to their situations and their corresponding statutory rights and accessing statutory consumer protections was difficult, to say the least.

The Introduction of the Credit Contracts and Consumer Finance Act

3. In 2003, the Credit Contracts and Consumer Finance Act (“the Act”) repealed the Hire Purchase Act and Credit Contracts Act. The statutory protections relating to the realisation of loan securities and those under the Consumer Guarantees Act remained in force.
4. The Act removed the \$250,000 threshold and moved instead to a “primary purpose” test⁹³, with transactions being considered in light of whether they were primarily for personal, domestic or household purposes. While providing consumers with improved statutory protections this also had the effect of largely deregulating business to business lending⁹⁴. The purpose

⁹² Personal Property Securities Act, Land Transfer Act and the Credit (Repossession) Act.

⁹³ Section 11 (1)(b)

⁹⁴ With the exception of retaining the ability for business borrowers to access the “oppression” and re-opening provisions of the Act⁹⁴.

provisions of the Act⁹⁵ quite clearly established the move to a more consumer focussed approach.

5. The Act also introduced a new range of consumer protection provisions including:
 - A uniform disclosure regime;
 - The right to claim statutory damages if the disclosure requirements are not met by creditors;
 - Rules specifying how interest can be debited;
 - Rules governing how full prepayment (early payment) charges for consumer transactions are to be calculated;
 - The statutory right to relief for consumers experiencing unforeseen hardship;
 - New rules requiring credit fees to be “reasonable”;
 - The ability to obtain refunds and other remedies from the Courts where unreasonable credit fees are charged;
 - Additional protections in relation to buy-back transactions, in particular the requirement for independent legal advice.
 - An extension of the right to cancel loan transactions to all consumer credit contracts, with the exception of revolving credit contracts⁹⁶.
6. Also, for the first time in New Zealand, an enforcement agency, the Commerce Commission, was charged with promoting compliance with consumer credit law by investigating alleged breaches of the Act and being able to initiate prosecutions and civil proceedings for non-compliance with the Act. The Commission was also given the role of monitoring credit markets and making information available to consumers, creditors and others in order to promote compliance with the Act.
7. The Commission’s powers under the Act⁹⁷ include:
 - Search and seizure powers;
 - The ability to compel the production of evidence, documents or information⁹⁸;
 - The power to prosecute for breaches of the Act;
 - The ability to take class actions on behalf of consumers⁹⁹;
 - The ability to apply for injunctions restraining conduct breaching subparts 2-8 of Part 2 of the Act and Part 3 of the Act¹⁰⁰, attempting to

⁹⁵ Section 3 “The purposes of this Act are – to protect the interests of consumers in connection with credit contracts, consumer leases, and buy-back transactions of land ...”.

⁹⁶ Previously this right had been limited to those contracts covered by s22(2) Credit Contracts Act 1981

⁹⁷ Some of which are imported from the Commerce Act 1986

⁹⁸ Section 98 Commerce Act 1986

⁹⁹ Sections 125(5), 90(4), 95(3)

- breach the same provisions, aiding or abetting a breach of those provisions, or conspiring to breach those provisions under the Act¹⁰¹;
- The ability to apply for banning orders under the Act¹⁰²;
 - The right to appear, provide evidence and cross examine witnesses¹⁰³ in any proceedings brought under the Act, irrespective of whether the Commission was a party to the proceedings during any earlier stage of the proceedings.
8. The Commission’s approach to enforcement of the Act recognises the important role of competition within our economy. Informed debtors, those able to make rational information-based decisions promote competition. Effective enforcement of regulation designed to replicate competitive forces also promotes competition. Competition in turn can provide “both carrots and sticks to encourage the best from everyone [trading within markets]”¹⁰⁴. Competition within credit markets can also result directly in reduced costs to consumers, innovation and efficiency within markets.
9. Disclosure and the ability to switch are two key tools to ensure consumers are informed and have the ability to act on their choices. Disclosure ensures transparency of information before debtors are irrevocably committed to the credit arrangement. Even after consumers have committed to credit arrangements, the Act provides debtors with statutory rights to prepay or cancel contracts, specifically removing a disincentive to switching between credit providers and products. Debtors’ ability to switch products and providers within credit markets functions, in the same way as within the telecommunications and energy sectors, as a powerful driver of competition.
10. Informed consumer choices reinforce messages sent by the Commission’s enforcement actions; those creditors complying with the Act receive incentives – consumers select their products and services, and they can reap the benefits of the level-playing field enforcement action promotes. Those failing to comply with the Act will lose any incentives to breach the Act as a result of having to remedy any breaches and losing consumer confidence and willingness to purchase their products and services. If consumers make choices based on inaccurate or misleading information, they may end up buying the wrong credit or insurance product, and supporting the less efficient business.

¹⁰⁰ These provisions deal with disclosure, interest, unreasonable fees, fees or charges passed on by the creditor, payments, prepayments, unforeseen hardship and the provisions specifically in relation to consumer leases and buy-back transactions of land.

¹⁰¹ Section 96(1)

¹⁰² Section 108,109. These powers are not limited to the Commission however.

¹⁰³ The right to cross examination is limited to those proceedings that are not on appeal

¹⁰⁴ Commerce Commission Statement of Intent 2007-2010 “Chair’s Foreword”.

Unreasonable consumer lending practices

11. As the agency enforcing the Act, the Commission is in a unique position. It has the opportunity to focus on individual creditor's practices through its investigations and enforcement actions but in doing so has also built up a wider picture of general practices across the credit industry.
12. When considering "unreasonable consumer lending practices" the initial focus for the Commission is whether a practice complies with the provisions of the Act.
13. The Commission will also consider whether the creditor's conduct breaches the Fair Trading Act. It is important for creditors to be aware that the Commission can take action in relation to breaches of the Fair Trading in situations where debtors have been misled about any of their statutory rights. Those statutory rights are not limited to those under the Act but could include rights under the Property Law Act, Credit (Repossession) Act, Consumer Guarantees Act, Privacy Act, and the Second-hand Dealers and Pawnbrokers Act. Additionally in situations where creditors make misleading representations about the contractual rights of classes of debtors, (notwithstanding their individual rights to remedies), closer scrutiny by the Commission may be warranted.
14. The Commission sets its threshold for unreasonable lending practice as being any practice which fails to comply with the Act. Our role is clearly limited to enforcement, monitoring and educative activities designed to promote compliance with the Act.
15. While the Commission does not become involved in larger social equity issues within the markets it regulates, its enforcement criteria does consider the extent of public interest in an issue and also whether conduct affects vulnerable consumers. The Commission recognises that other agencies or consumer advocates may have different thresholds for assessing whether a practice is unreasonable and that some of those practices may not be contemplated by the Act. While such practices may not necessarily constitute oppressive conduct under the Act, or in fact be illegal in any way, the conduct involved can exceed perceptions of reasonable and acceptable standards of commercial practice.
16. The Commission receives a number of complaints about allegedly "unreasonable", "unconscionable", "unfair", "oppressive" or unreasonable lending practices and it encourages consumer advocates to raise these issues with the Commission. Similar practices were discussed in the Ministry of Consumer Affairs 2007 report into Pacific consumers' experiences within the credit markets¹⁰⁵. They include:
 - Including "hidden" costs within loans;

¹⁰⁵ Ministry of Consumer Affairs "*Pacific Consumers' Behaviour and Experience in Credit Markets, with Particular Reference to the 'Fringe Lender' Market*" (August 2007)

- Taking enforcement action that failed to comply with debtor's statutory rights;
 - Advertising or business practices aimed at attracting particular ethnic or socio-economic groups of debtors;
 - Aggressive marketing practices;
 - Advertising targeting vulnerable creditors which promises "easy credit" and identifies lenders as having particularly low lending criteria (i.e. "bankrupts welcome", "lo doc" "no drivers licence required" approach seen within the some sectors of the market providing car loans);
 - Offering high cost lending to enable debtors to use funds for specific cultural practices in circumstances where they might otherwise not be able to access loans for these purposes.
17. There have also been issues raised by consumers, consumer advocates and within the credit industry about "socially responsible lending" and a push towards creditors being more accountable for ensuring loans are affordable and tailored to individual circumstances.
18. The Commission has specifically focussed some of its efforts on informing consumer and industry groups and developing relationships with them as their referrals assist the Commission's monitoring of unreasonable lending practices, and those who use these practices, allowing the Commission to identify the worst behaviours within the industry.
19. Further, referrals about these practices from consumer groups in particular, enable the Commission to identify creditors and debtors that might not otherwise come to the Commission's attention.
20. In some cases, practices that consumers and consumer groups allege to be unreasonable or unconscionable may assist the Commission in identifying smaller creditors operating outside the mainstream credit industry; those effectively operating "back-yard businesses" or upon further enquiry, other practices which breach the Act and/or Fair Trading Act. These have recently included:
- Mobile truck operators providing credit, and
 - Fringe lenders providing credit mainly to the Tongan community.

Enforcement Actions

Disclosure breaches

21. During the early stages of its enforcement of the Act, the Commission took an educative approach to its compliance activities. Our initial enforcement

actions focused heavily on encouraging voluntary compliance and giving feedback to credit providers where it identified issues indicating potential breaches of the Act.

22. The Commission also focused on ensuring creditors provided full disclosure. Initial disclosure, one of the pillars of the Act, addresses issues of asymmetric information between creditor and debtor, ensuring that debtors have sufficient information to compare competing credit arrangements before being irrevocably committed to them. A creditor's failure to meet disclosure requirements impacts directly on the debtor's ability to be informed, thus reducing their choices and reducing competition within credit markets. This impacts negatively on consumers and competitors and distorts market signals.
23. The Commission's first prosecution related to a disclosure breach by Senate Finance Limited. Senate Finance provided finance to debtors buying motor vehicles. Debtors conducted the transaction initially through car dealers, with the dealer faxing the relevant credit application to Senate Finance. If Senate accepted the transaction it subsequently faxed back the relevant disclosure information to the car dealer who then provided it to debtors. The fax process rendered some of the disclosure information so illegible that in one case a car dealer even suggested the debtor use a magnifying glass to read it. As the Act prohibits the enforcement of consumer credit contracts until disclosure is made, Senate also subsequently breached the Fair Trading Act when it made false representations that it had the right to enforce the contracts. The Court fined Senate Finance \$59,000 and ordered statutory damages totalling \$13,700 to be refunded to 17 debtors.
24. Dolbak Finance was also successfully prosecuted by the Commission for failing to make adequate disclosure when it failed to include information about the fees they were charging debtors in their disclosure statements. The omitted charges included a \$5 fee for warning letters sent when payments were missed, \$20 fees for repossession notices and \$75 fees for preparing repossession authorities. Dolbak Finance was fined \$100,000 and ordered to make refunds of \$46,600 to over a hundred debtors.

Credit Related insurance, extended warranties, repayment waivers

25. During the course of the Commission's investigations it became clear that debtors were buying relatively expensive insurances but were not aware or did not realise they were purchasing these products until well after they'd entered the loan transaction and either did not understand how or when to access these services or could not access the benefits under these products, as they simply didn't apply to the debtor's circumstances. The Commission knows retailers and creditors can receive substantial commissions from the sale of these products. However, when selling these products retailers and creditors need to ensure products sold are suitable for debtors' needs and purposes¹⁰⁶.

¹⁰⁶ Failure to do so may have implications under the Consumer Guarantees Act, Fair Trading Act or Credit Contracts and Consumer Finance Act.

26. The Commission has recently issued compliance advice regarding an industry wide practice of selling credit related insurance products, repayment waivers and extended warranties to debtors as part of a “pre-packaged” loan. In some of these cases, as the computer software used defaults to a setting assuming the products are purchased, debtors must actively “opt out” of purchasing the products. In other cases, agents are selling these products on behalf of creditors (for example at car dealerships or other retail outlets) and may not be aware of the serious consequences for creditors (or potentially their own employers) of selling these products without undertaking an adequate assessment of their applicability to the debtor’s situation and needs. The Commission is concerned with the apparent lack of care taken by some agents when selling these products. The compliance advice informed industry of the Commission’s enforcement approach to these practices in an effort to ensure that debtor’s actively consent to the purchase of these products or that debtors receive the full statutory protections the Act provides in relation to these products, and that the products sold are suitable for individual debtors. The Commission’s enforcement approach is where a creditor fails to ensure that a debtor understands that they do not need to take out the product we will take the approach that the creditor has required the product within the meaning of the Act.
27. The consequences of “requiring the product” are that the creditor must take steps to ensure that it complies with section 69¹⁰⁷ and 70¹⁰⁸ of the Act, it discloses the charges in accordance with sections 17 and 32 of the Act and that the fees charged for these services comply with the provisions in section 41-45 of the Act.
28. Industry had previously been warned about the dangers of packaging products on a “one size fits all” basis when Club Finance had entered a \$788,000 settlement with the Commission as a result of selling over 1500 of its unemployed debtors redundancy insurance. Club Finance required these debtors to purchase the insurance, despite a clause in the insurance contract preventing debtors who were unemployed at the time of purchasing the insurance from being covered by the insurance, even if they later became employed.
29. The Commission had also previously issued guidelines to the credit industry detailing its enforcement approach to commissions charged on credit related insurance products, and providing an indication of an appropriate level of commission, and has subsequently put insurers on notice that the Commission will consider taking injunctions against those who aid or abet breaches of sections 69, 70, 17, 32, or 41-45 of the Act.

¹⁰⁷ The requirement by a creditor to purchase the product must be reasonably necessary for the protection of its legitimate interests or is reasonably justifiable in light of the risks undertaken by the parties to the arrangement.

¹⁰⁸ Requirement to provide a copy of the terms of the product within 15 working days.

30. The recent compliance advice to industry has also reminded creditors of their obligations to rebate unused credit related insurance premiums when debtors pay their loans off early. If the insurance is financed under the loan contract, creditors need to consider whether the insurance contract is also terminated, and if so they must calculate any refund in accordance with the formula contained in the Act. The Commission recently settled with Geneva Finance Limited in relation to this issue. Geneva refunded approximately 3700 debtors over \$510,000 as a result of failing to correctly rebate insurance premiums when debtors paid loans off early.

Enforcement action that failed to comply with debtor's statutory rights

31. Geneva Finance also has entered into with the Commission in 2007 in relation to a breach of section 13(i) of the Fair Trading Act. It was alleged that by making representations that Geneva Finance had the right to interest and fees on loans where securities had been repossessed and sold, when that was prohibited under section 35 of the Credit Repossession Act, Geneva Finance had breached the Fair Trading Act. Under that settlement, a total refund of \$589,114 was provided to over 900 debtors, being the total overcharged fees and interest.
32. The Commission has taken a number of enforcement actions against creditors who breach debtors' statutory rights. These actions have been taken under section 13(i) of the Fair Trading Act. Section 13(i) states:
- “No person shall, in trade, in connection with the supply or possible supply of...services...make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy ...”..*
33. The most common example of this type of breach is when creditors fail to meet the disclosure standards or disclose fully and subsequently attempt to enforce the consumer credit contracts. Section 99 prohibits the enforcement of consumer credit contracts where disclosure under section 17 or 22 has not been made and representations that the contract is enforceable will breach section 13(i) of the Fair Trading Act. Lelei Finance, Galistair Enterprises Limited, Dolbak Finance and Senate Finance Limited were all prosecuted in relation to disclosure breaches and breaches of section 13(i) when they later attempted to enforce consumer credit contracts that were subject to the section 99 prohibition on enforcement. A number of similar breaches have also been detected and addressed through settlements the Commission has undertaken with creditors.
34. Debt collection agencies also need to be aware that they may breach the Fair Trading Act if they attempt to enforce prohibited contracts where creditors have failed to meet the disclosure requirements of the Act. As a matter of best practice, the Commission encourages debt collectors to review their compliance programmes and consider what, if any, steps they undertake to

verify whether they can enforce consumer credit contracts without breaching the Fair Trading Act.

Full prepayment fees – switching costs?

35. While the majority of creditors the Commission has seen disclose their full prepayment formula as required under section 17 of the Act, it has become clear that creditor's are using a number of different methods to calculate their loss in situations of full prepayment.
36. While the Act allows creditors to either use the safe harbour formula or an alternative "reasonable" procedure the Commission took the position that any alternative procedure should be based on similar general principles to the safe harbour formula.
37. The Commission has recently prosecuted Avanti Finance in relation to its full prepayment formula. Avanti Finance was found not guilty however the matter is currently the subject of further proceedings.
38. Why is this issue important? The Act gives debtors a statutory right to full prepayment¹⁰⁹, enabling debtors to switch between different loans and creditors if that proves cheaper (or otherwise better suits their needs). This right removes disincentives to switching between credit providers and products. Debtors can build up or re-establish their credit histories within the lower tiers of the credit market, where credit is more accessible but often more costly, and then switch to cheaper loans from mainstream creditors once lenders have information to assess their risk profiles. Debtors' ability to switch products and providers within credit markets functions in the same way as within the telecommunications and energy sectors, as a powerful driver of competition. It also gives creditors the ability to recover their relevant administration costs and a reasonable estimate of their loss if this is authorised within the loan contract¹¹⁰. Generally the ability for consumers to switch promotes competition, innovation and drives costs down. Switching is important as it sends accurate, effective and timely signals to traders and competitors within markets.
39. Within the Act there is some tension between the debtor's and creditor's positions, the key issue being how to balance the ability to switch with creditors needs for certainty in situations of full prepayment. The guidance given by the Act is that an alternative procedure for estimating creditor's loss must be "appropriate"¹¹¹.
40. Allied Nationwide Finance Limited accepted it had breached the full prepayment provisions of the Act and agreed to refund over 1200 customers who were charged the equivalent of 31 days interest on the outstanding loan

¹⁰⁹ Section 50

¹¹⁰ Section 51

¹¹¹ Section 54

balances at the time of prepayment. Customers received approximately \$173,000 in refunds. Allied stopped charging this calculation of creditor's loss in August 2007 following the Commission's investigations being initiated.

41. What is clear is that creditors have a responsibility to mitigate their losses in the circumstances of full prepayment. The key issue with full prepayment continues to be that creditors need to be able to justify the procedure used to determine their loss and if necessary be prepared to explain it to both the Commission and Courts.

Targeting particular groups of debtors

42. The Commission has also taken enforcement action against a number of traders targeting vulnerable debtors, particularly those with English as a second language or in lower socio-economic areas. The Commission's enforcement criteria specifically considers whether more vulnerable consumers are targeted by non-compliant conduct, whether there is likely to be widespread public interest in the issue or if there are any aggravating features involved in the alleged conduct.
43. Recently the Commission successfully prosecuted Lelei Finance for failure to provide disclosure to over 600 debtors and subsequent breaches of the Fair Trading Act when it published pictures of "defaulting" debtors in a Tongan language newspaper Te Taimi o Tonga, despite the fact that the failure to disclose the terms of the credit contracts rendered the contracts unenforceable¹¹². Lelei Finance specifically targeted Tongan debtors, advertising the newspaper and accepting traditional Tongan mats and tapa as security for loans. Lelei had previously been warned by the Commission in relation to its non-compliance with the disclosure provisions of the Act and elected not to change its documentation accordingly.
44. Lelei Finance had initially come to the Commission's attention as a result of feedback about it publishing defaulting debtor's photographs, a practice that at the time was considered unreasonable by the complainant, a consumer advocate.
45. The Commission recognises the challenges it faces in dealing with vulnerable consumers and has responded by developing relationships with key organisations these consumers are comfortable and familiar with using. The importance of these relationships was illustrated again during the course of this investigation. In an attempt to identify affected debtors, the Commission ran a quarter page advert in the same publication Lelei Finance used both to advertise and to "name and shame" defaulting debtors. The advert requested debtors to contact the Commission, it provided a free phone number, was run both in Tongan and in English and also stated that a

¹¹² Section 99. See the Commission's CCCF Act media releases for further information www.comcom.govt.nz

translation service would be available if required by callers. The Commission received one response to that advert, despite the fact that 616 debtors were eventually awarded total statutory damages of \$12,520 as a result of the Commission investigation.

46. The Commission also became aware of other creditors targeting the Polynesian community. These creditors had also failed to comply with the disclosure provisions of the Act. In those cases, the creditors had provided some but not all of the information required to be disclosed in accordance with Schedule One of the Act. Nine creditors were subsequently warned and others provided with compliance advice letters and were later invited to attend a training seminar on the Act and the Commission's enforcement of it run jointly by the Commission and the Ministry of Pacific Island Affairs.
47. The Commission also prosecuted Galistair Enterprises Limited trading as xtraCash for failing to disclose key information; including the annual interest rate, the method used to calculate full prepayment, and how and when customers could cancel their loans; calculating interest on the total amount of the initial loans instead of on the decreasing unpaid balance and charging establishment fees ranging from \$300 - \$500 per loan. Galistair admitted that in setting these fees it included the cost of processing other customers' unsuccessful applications. The Auckland District Court found that successful applicants were charged a fee which, in effect, covered the cost of processing up to five unsuccessful applications. Judge Aitken said that this was "palpably an unfair and inappropriate business practice where the client base comprises some of the more vulnerable and desperate members of society." District Court Judge Aitken agreed with the Commission that Galistair Enterprises was "utterly reckless" when it provided top-up loans or additional advances to existing customers without entering into written agreements. Judge Aitken said that the potential for abuse was considerable, particularly as the company kept poor records. Galistair provided both pawn broking and personal loan services and had franchises throughout New Zealand.
48. In a similar case, the Commission also took enforcement action against four mobile truck operators, after receiving a number of complaints about these traders from consumer organisations. The complaints ranged from general concern about the industry and the ability of the debtors to make informed choices about whether to use the services to specific concerns based on comparisons of prices of products sold by the mobile shops and competing traders. Mobile shops provide a service where debtors can purchase household items, including groceries, clothing, and small appliances and pay for them using credit. In the cases the Commission considered, the creditors did not charge interest and most did not charge any sort of fees either. However the products they sold were more expensive than those you could purchase elsewhere. Mobile shops generally target lower socio-economic areas.
49. As a result of these complaints, the Commission undertook an industry wide investigation of mobile shops and four of the main mobile shop traders were

warned after they failed to disclose all of the information required by the Act. During the course of these investigations the Commission also considered whether there were elements of undisclosed interest included within the prices of the goods these creditors sold as the complaints alleged, however the Commission did not take action against the traders on this basis. The lack of disclosure did however have consequences under the Act for the mobile shop traders: section 99 prohibits the enforcement of contracts if debtors have not received adequate disclosure.

Credit Fees

50. The Commission's current enforcement focus for the 2007/08 and 2008/09 years is on taking action with respect to reasonableness of credit fees, for instance loan establishment, administration, and default fees. The Commission will be actively pursuing litigation with regard to credit fees considered to be unreasonable. The Commission has communicated this to the credit industry¹¹³ on a number of occasions.
51. Ensuring fees are reasonable and disclosed will reduce an area of significant detriment for consumers as well as encouraging competition. Certainty on the acceptable components of various categories of fees will enable creditors to compete on the level of fees, or on interest rates, or on both. Inefficient creditors, who fail to comply with the Act and are currently over-recovering fees, will be exposed so that consumers are able to accurately compare creditors on the fees and interest rates charged.
52. The consumer detriment in unreasonable fees cases can be considerable, impacting adversely on the debtor's ability to repay the loan and their subsequent credit opportunities, as well as restricting their real ability to switch. While the Court is able to order refunds or reductions of unreasonable fees, the potential impacts of breaching the Act in this area can be significant. Although the competitive process presumes that those businesses responding to market signals will thrive and others will fail, the reality is failure can have significant personal impacts on employees, debtors, and investors alike.
53. Litigation is a priority for the Commission. The Commission intends to use civil and criminal proceedings to address alleged breaches of the Act, give creditors greater certainty about the obligations imposed under the Act and an indication of how various provisions of the Act will be interpreted by the Courts. It is only through the development of a body of case law that the issues relating to reasonableness of fees will be clarified.
54. The Commission will also be looking to provide greater guidance on its position with regard to credit fees in upcoming months. The area is a complex one and it has taken time to develop the necessary analytical framework. We are aware that there are creditors seeking this guidance.

¹¹³ For further information see Communique issue 15: May 2008 www.comcom.govt.nz

55. The Commission has already communicated a number of positions on credit fees over the last 18 months to the industry however there are some creditors who have not accepted those views. This may not be unexpected given the revenue creditors generate through charging credit fees. Therefore the Commission has few options but to take litigation to ensure creditors comply with the Act in those cases. There is evidence that since the introduction of the Act some creditors:
- Have taken advantage of the lack of clarity regarding the unreasonable credit fee provisions to over-recover their costs, and have increased credit fees accordingly;
 - Are setting fees at the same level of competitors, without regard to their own costs as required by the Act.
56. While the Commission recognises that justifying fees under the Act can be a complex process involving consideration of accounting, economic and commercial issues, the Commission still expects this process to be undertaken adequately if creditors elect to charge fees, rather than recovering their costs through interest rates. The Commission strongly encourages creditors to carefully consider how they would justify their fees before they are required to do so and to establish effective compliance systems for reviewing fees, in order to decrease their likelihood of breaching these provisions.
57. The Commission understands that discussions around potential amendments from an unconscionable to unreasonable fees test have also occurred in Australia. Given this, we are conscious that action taken in New Zealand may be followed closely by Australian observers as part of the wider public interest affecting CCCF Act enforcement.

Conclusion

58. The Commission has clearly signalled to industry that it will take strong enforcement action to ensure compliance with the CCCF Act and the Fair Trading Act. We have around 40 open investigations for a range of alleged breaches, but predominantly credit fee related investigations.
59. To date the Commission's enforcement action has recovered in excess of \$3,000,000 of refunds or statutory damages for almost 25,000 debtors. Creditors who have failed to comply with the Act and been the subject of Commission enforcement action have also been fined over \$240,000.
60. The consequences for creditors of failing to comply with the Act can be severe, while the Commission recognises the challenges faced by the credit industry; the Commission is committed to enforcing the Act to ensure the dual objectives of consumer protection and competition within the Act are upheld.