



**BRIEFING**

**Peer-to-peer lending and the policy of the CCCF Act and FMC Act**

<b>Date:</b>	12 February 2016	<b>Priority:</b>	Medium
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2177 15-16

Action sought		
	Action sought	Deadline
Hon Paul Goldsmith Minister of Commerce and Consumer Affairs	Note that the Ministry considers that the current application of the CCCF Act to peer-to-peer lending services is appropriate, but areas of uncertainty and controversy remain in the market.	26 February 2016

Contact for telephone discussion (if required)			
Name	Position	Telephone	1st contact
Daniel O'Grady	Acting Manager, Competition and Consumer Policy	Withheld under OIA s.9(2) (a)	✓
Jason Le Vaillant	Principal Policy Advisor		

The following departments/agencies have been consulted					
<input type="checkbox"/> Treasury	<input type="checkbox"/> MoJ	<input checked="" type="checkbox"/> ComCom	<input checked="" type="checkbox"/> FMA	<input type="checkbox"/> DIA	<input type="checkbox"/> TPK
<input type="checkbox"/> MFAT	<input type="checkbox"/> MPI	<input type="checkbox"/> MoT	<input type="checkbox"/> DPMC	<input type="checkbox"/> MPIA	<input type="checkbox"/> RBNZ
<input type="checkbox"/> Other:		N/A			

Minister's office to complete:

- |   |  |
|---|--|
| <input type="checkbox"/> Approved             | <input type="checkbox"/> Declined            |
| <input type="checkbox"/> Noted                | <input type="checkbox"/> Needs change        |
| <input type="checkbox"/> Seen                 | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn           |

Comments:

26. At the time that the FMC Act was being developed (2010–2013), New Zealand only had one prospective peer-to-peer lending service – Nexx New Zealand Limited (which did not subsequently launch). Nexx confirmed at the time that they had received advice on compliance with the CCCF Act, and considered that compliance would not be difficult. We are not aware of what advice they received about how the CCCF Act applied. The Securities Act 1978 was seen as the main barrier to the development of peer-to-peer lending in New Zealand. There was therefore relatively little consideration given to compliance with the CCCF Act.
27. The two main policy and legal issues that have been raised in respect of the CCCF Act are:
- restrictions on unreasonable fees (which in this context includes a fee that contains a profit element) – in particular, whether these restrictions are appropriate for fees charged to borrowers by a service that is merely an intermediary between investors and borrowers
  - who is legally a “creditor” – in particular, whether the investors under a peer-to-peer lending service are “creditors” under the CCCF Act, and therefore subject to the legal obligations of creditors (including being named on disclosures and in some circumstances registering under the Financial Service Providers (Registration and Dispute Resolution) Act).
28. There were a number of discussions between the Ministry, the Commerce Commission and Harmony on the definition of “creditor” before Harmony launched. [redacted]

Withheld under OIA s.9(2)(b)(ii)

There were also discussions between the Ministry and Harmony on the issue of unreasonable fees. [redacted]

Withheld under OIA s.9(2)(a)(i), 9(2)(b)(ii)

### Issue 1: Restrictions on unreasonable fees

#### *The prohibition in the CCCF Act*

29. Section 41 of the CCCF Act states that “a consumer credit contract must not provide for a credit fee or a default fee that is unreasonable”.
30. A credit fee is essentially any fee paid by the borrower to, or for the benefit of, the creditor. A credit fee does not generally include fees paid to third parties. A typical credit fee would be the establishment fee paid by a borrower taking out a mortgage with a bank. A credit fee would not include a fee charged to the borrower by an unrelated mortgage broker who helped to arrange the loan.
31. What exactly is meant by the prohibition on “unreasonable” fees is a matter of dispute in the current *Commerce Commission v Sportzone Motorcycles Limited and MTF* appeal before the Supreme Court. Roughly speaking, the earlier decisions found that for fees to be not “unreasonable” they must only cover costs that are closely related to the particular loan transaction. They cannot cover general business overhead costs or profits. The appellants have argued that the required connection with costs is much looser, and more regard should be had to normal commercial practice.

#### *Application to peer-to-peer lending*

32. There are arguments for and against making fees charged by peer-to-peer services providers subject to the unreasonable fees prohibition.