

## Introduction

The lender responsibilities under the Credit Contracts and Consumer Finance Act 2003 (the Act) require Wayne Bishop Group Finance Limited trading as Enable Finance Group to meet all legal obligations to the Borrower and section 9F(l)(b)(vii) of the Act provides that the Responsible Lending Code may set out the processes, practices, or procedures that Enable Finance Group should follow to ensure that fees are not unreasonable in terms of section 41, 80 or 82.

Section 44B of the Act states that evidence of compliance with the provisions of the Code relating to fees is to be treated as evidence that a credit fee or a default fee is not unreasonable. However, the Code does not set out "safe harbours". Compliance with the Code is not deemed to be compliance with the fee provisions of the Act (see section 44B of the Act). Evidence of compliance with the Code will be weighed against other evidence.

The processes and practices that Enable Finance Group should follow to ensure that fees under consumer credit contracts are not unreasonable were the subject of the Supreme Court judgment, *Commerce Commission v Sportzone/MTF [2016] NZSC 53 (Sportzone)*. Although some of the relevant provisions have been amended by the Credit Contracts and Consumer Finance Amendment Act 2014, the Sportzone case remains relevant as some of the legislative wording in relation to the costs that lenders can recover through fees remains unchanged.

### **Fee definitions are as follows:**

- **Establishment fees** are defined as fees or charges that relate to the costs incurred by the creditor in connection with the application for credit, processing and considering that application, documenting the contract, and advancing the credit but do not include any fee or charge to the extent that it is a charge for an optional service. The relevant legislative provisions (see section 42 of the Act) provide that in determining whether an establishment fee is unreasonable, the Court must have regard to whether the amount of the fee is equal to or less than the creditor's reasonable costs (or average reasonable costs for the class of consumer credit contract) in connection with the application for credit, processing and considering that application, documenting the contract, and advancing the credit.

- **Prepayment fees** are defined as fees that relate only to prepayment in part or in full in respect of a fixed-rate contract and only for that part of the creditor's loss that arises from the prepayment as a result of differences in interest rates. The legislation (see section 43 of the Act) provides that a prepayment fee is unreasonable if, and only if, it exceeds a reasonable estimate of the creditor's loss arising from the part or full repayment. Section 54 of the Act provides that a fee payable for full prepayment must be calculated in accordance with the procedure provided in the regulations or through an appropriate procedure set out in the consumer credit contract. Lenders may also impose a credit fee relating to administrative costs associated with prepayment, which is subject to the credit fees provisions in section 44 of the Act.
- **Credit fees** are defined as fees or charges payable by the debtor under a credit contract, or payable by the debtor to, or for the benefit of, the creditor in connection with a credit contract. In determining whether a credit fee (other than an establishment fee and a prepayment fee) is unreasonable, the Act (see section 44) provides that the Court must have regard to, in relation to the matter giving rise to the fee, whether the fee reasonably compensates the creditor for any cost incurred by the creditor. This includes the cost of providing a service to the borrower if the fee relates to the provision of a service. In determining whether the fee reasonably compensates the creditor for that cost or the provision of that service, the Court must have regard to reasonable standards of commercial practice.
- **Default fees** are fees or charges payable on a breach of a credit contract by a debtor or on the enforcement of a credit contract by a creditor but do not include default interest charges. For default fees, the Act (see section 44A) provides that the Court must have regard to, in relation to the matter giving rise to the fee, whether the fee reasonably compensates the creditor for any cost incurred by the creditor and for a reasonable estimate of any loss incurred by the creditor as a result of the borrower's acts or omissions. In determining whether the fee reasonably compensates the creditor for that cost or loss, the court must have regard to reasonable standards of commercial practice.

**Fees do not include:**

- interest charges
- charges for an optional service
- government charges, duties, taxes, or levies
- fees and charges payable as referred to in section 45 if the other person, body, or agency referred to in that section is not an associated person of the creditor.

**Fees or charges passed on by creditors** as governed under section 45 and referred to as direct costs in the context of this policy. Examples of this include the PPSR fee, immobiliser fee, etc. In determining whether a breach of the Act is due to a reasonable mistake the courts must take into account whether the lender has in place an appropriate compliance programme (S.107). A compliance programme:

- requires employees and agents to follow procedures or has automated procedures designed to ensure compliance with the Act; and
- ensures methods are in place to systematically identify deficiencies in the effectiveness of the programme; and
- promptly remedies any deficiencies discovered.

## Purpose

The purpose of this policy is to set out our responsibilities, processes and compliance with regards to setting and reviewing consumer fees.

## Policy

Enable Finance Group is committed to ensuring that any credit fee or default fee provided for in a consumer credit agreement will not be unreasonable. In considering if a fee is unreasonable, we will take into consideration legislative provisions, case law for interpretation of the legislative provisions and guidance published by the Commerce Commission or other authoritative sources. General management accounting concepts are applied to determine the appropriate level for each fee.

## Procedures

## Setting fees

In setting an **Establishment fee**, we will:

- a. assess the reasonable costs likely to be incurred by us in connection with the application for credit, processing and considering that application, documenting the contract, and advancing the credit. In doing so, we should:
  - i. identify the tasks undertaken in order to establish the credit contract and calculate the costs of undertaking each of those tasks;
  - ii. take into account past experience in relation to the level of reasonable costs incurred for those activities for that class of consumer credit contracts but apply that experience on a forward-looking basis to assess the reasonable costs that are likely to be incurred in the future; and
- b. ensure that establishment fees only seek to recover those likely reasonable costs.

The recovery of costs that are not closely relevant to the particular transaction and are related to the general business of lending is not permitted. General overheads for the business are recoverable in interest charges.

In setting a **Prepayment fee**, we should either:

- a. use a procedure to calculate a reasonable estimate of loss arising from the prepayment (being losses resulting from differences in interest rates) and ensure that any procedure it uses to calculate prepayment fees only seeks to recover those estimated losses; or
- b. use the formula set out in regulations 8 to 11 of the Credit Contracts and Consumer Finance Regulations 2004 to calculate fees for full prepayments.

Enable Finance Group Prepayment fees are calculated according to the methodology set out in Regulation 9 of the Credit Contracts and Consumer Finance Regulations 2004.

*LRE=VFP-u*

Where-

*LRE* is the reasonable estimate of the creditor's loss arising from the full repayment

*VFP* is the value of forgone payments calculated in accordance with subclause (2)

*U* is the unpaid balance at the time of the full prepayment.

The following formula has been used to determine the value of foregone payments (VFP):

$$PV = \left( \frac{p}{\left(1 + \frac{i}{12}\right)^{\left(\frac{12}{365} \times d\right)}} \right) \quad \text{w/Mre-}$$

$PV$  is the present value of the forgone payment  
 $p$  is the amount of each payment payable under the fixed rate contract  
 $d$  is the number of days between the due date of each forgone payment and the date of full prepayment  
 $I$  is the annual fixed interest rate determined in accordance with regulation 9 (4) and (5) of the Regulations and expressed as a decimal fraction

In setting a **Credit fee** (other than an establishment fee or prepayment fee), we will:

- a. identify the activities closely related to the matter giving rise to the fee;
- b. assess the costs likely to be incurred in relation to the matter giving rise to the fee. The assessment should take into account past experience in relation to the level of costs incurred for those activities for the same or similar credit products but apply that experience on a forward-looking basis to assess costs that are likely to be incurred in the future;
- c. ensure that the credit fee only seeks to compensate the lender for those likely costs; and
- d. ensure that any costs that are likely to be recovered through credit fees and the activities generating those costs are consistent with reasonable standards of commercial practice. A common commercial practice is not necessarily a reasonable standard of commercial practice.

In setting a **Default fee**, we will:

- a. assess the losses likely to be incurred as a result of the Borrower's default; and
- assess costs likely to be incurred as a result of the Borrower's default. The assessment should take into account past experience in relation to the costs incurred as a result of the Borrower's default for the same or similar credit products but apply that experience on a forward-looking basis to assess costs that are likely to be incurred in the future.

The default fee should only seek to compensate the lender for the above costs and losses. We should ensure that any costs that are likely to be recovered from default fees and the activities generating those costs are consistent with reasonable standards of commercial practice. A common commercial practice is not necessarily a reasonable standard of commercial practice. In other words, we must not use fees charged by other finance companies as a determinate for our fees.

## General Guidance

Enable Finance Group should ensure that costs recovered relate to the specific credit contract or that class of credit contract. Costs should be sufficiently close and relevant to the steps in the lending process to which the fee relates that they can reasonably be said to be incurred in relation to those steps. We may average the relevant costs across a class of credit contracts. When averaging using past experience, we should use a representative sample of transactions. Because fees are set on a forward-looking basis, it is not possible for there to be exact precision in terms of matching fees to likely costs and losses. However, we must undertake an assessment of costs and losses in order to set fees that meet the unreasonable fee provisions of the Act.

## Review of Fees

Enable Finance Group will review credit fees and default fees provided for in a consumer credit agreement to ensure they are not unreasonable whenever one of the following conditions occurs:

- a. Prior to or as soon as practicable following any material changes to our costs in providing the product due to:
  - i. Changes to the product itself
  - ii. Changes to the way we provide the credit product;
  - iii. Changes to our business or cost structure; and
- b. as soon as practicable after becoming aware that we generated a material profit through fees where it appears that
  - i. The profit was generated as a result of something other than the inevitable imprecision in matching fees with likely costs and losses, and
  - ii. the generation of a material profit is likely to continue on an ongoing basis.

- As soon as practicable, following any relevant changes to case law on what costs can be recovered through fees.

If none of the above conditions apply, fees will be reviewed on an annual basis.

In assessing reasonable costs, we will:

- a. take into account past experience in relation to those activities for that class of consumer credit contracts but apply that experience on a forward-looking basis to assess the reasonable costs that are likely to be incurred in the future; and

- b. ensure the fees only seek to recover those likely reasonable costs.

In setting fees, we will use an average of costs over a class of credit contracts. We will calculate the fees payable and record the calculation.

### Cost Recovery

If Enable Finance Group should manage to achieve cost recoveries for any of the inputs into the fee justification, the following should be noted:

- Indirect costs
  - Costs recovered from suppliers will be incorporated into the fee justification calculations for the year in which the recovery is received (and will hence benefit customers of a future year).
- Direct costs
  - In the unlikely event of cost recovery from a supplier of direct costs used in the justification of fees, the treatment of affected consumers will be considered at the time that this event occurs. Past treatment of errors detected has included refunding customers affected, but this will be determined at the time.

### Disclosure

The Act and CCCFA Regulations contain provisions governing the disclosure of credit fees and charges. All the fees and charges must be provided to and explained to customers before they sign the loan agreement.

### Complaints

Refer to the Complaints Handling Policy which incorporates processes to deal with any issues that may arise with respect to the Act. As part of that policy, any complaint where the Commerce Commission is involved should be prioritised as urgent and escalated immediately to the Chief Operating Officer.

## Controls

- Cost of borrowing policy
- Compliance monthly checks
- Annual external compliance assurance review
- Complaints handling policy