NEW ZEALAND BANKERS ASSOCIATION

Submission

to the

Commerce Commission

on the

Consumer Credit Fees Guidelines

28 October 2016

NEW ZEALAND BANKERS ASSOCIATION
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About NZBA

1. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes that contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.

2. The following fifteen registered banks in New Zealand are members of NZBA:

- ANZ Bank New Zealand Limited
- ASB Bank Limited
- Bank of China (NZ) Limited
- Bank of New Zealand
- Bank of Tokyo-Mitsubishi, UFJ
- Citibank, N.A.
- The Co-operative Bank Limited
- Heartland Bank Limited
- The Hongkong and Shanghai Banking Corporation Limited
- JPMorgan Chase Bank, N.A.
- Kiwibank Limited
- Rabobank New Zealand Limited
- SBS Bank
- TSB Bank Limited
- Westpac New Zealand Limited.

Background

3. NZBA welcomes the opportunity to provide feedback to the Commerce Commission (**Commission**) on the September 2016 Consumer Credit Fees Guidelines (**Guidelines**), and commends the work that has gone into developing them.

4. NZBA supports the stated objectives of the Commission in producing the Guidelines,[1] and considers the Guidelines will provide helpful guidance to lenders on the Commission's views on how lenders should approach fee setting under the requirements of the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**).

5. If you would like to discuss any aspect of the submission further, please contact:

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[1] Paragraph 7 of the Guidelines.

Key submissions

A single code

6. The current law relating to credit fees (**Relevant Law**) is set out in:

   (a) the CCCFA, including the *lender responsibility principles* set out in Part 1A of the CCCFA (**Principles**); and

   (b) the various case law, including *Sportzone*.[2]

7. In addition, guidance as to how to interpret and implement the law is provided in the Responsible Lending Code (**Code**).

8. This means that, in setting credit fees, creditors are currently required to consider the CCCFA (including the Principles), *Sportzone* and other case law, as well as the guidance in the Code.

9. As noted above, NZBA supports the Commission's objectives in publishing the Guidelines. However, NZBA's view is that there is significant benefit in confining credit fee guidance to a single code.

10. Limiting guidance to a single code would create simplicity and clarity, while at the same time reducing:

    (a) unnecessary costs; and

    (b) the potential for inconsistency,

    which stems from the proliferation of relevant law and guidance.

11. In NZBA's view that single code would logically be the Code, which could be amended to reflect the decision of the court in *Sportzone*.

12. If guidance *is* included in the Guidelines instead, NZBA's view is that the Guidelines should specifically acknowledge that the Code takes precedence.

Legal status of the Guidelines

13. Given their non-binding nature, NZBA submits the Guidelines should avoid making comment on areas of the CCCFA beyond existing legislative or judicial guidance. In making such comments, the Guidelines risk creating uncertainty in how to interpret the CCCFA. Examples are references to loss mitigation and creating a further test for the optional service fee which go beyond the wording of the CCCFA. We expand on such examples below.

[2] *Sportzone Motorcycles Limited (in liquidation) v Commerce Commission* [2016] NZSC 52 (12 May 2016).

Prepayment fees

14. NZBA submits the prepayment fees section of the Guidelines requires refinement to more accurately reflect the findings of the Court in *Commerce Commission v Avanti Finance Limited*.[3] We expand further on this submission below.

Reasonable standards of commercial practice

15. NZBA submits the Guidelines should provide guidance and examples of what would be considered by the Commission to be reasonable standards of commercial practice. In doing so, NZBA believe the Guidelines would become more helpful to larger organisations.

16. Currently, the relevant paragraphs in the Guidelines only provide examples of what *would not* be considered by the Commission to be reasonable standards of commercial practice.

17. We expand further on this submission below.

[3] (2009) 9 NZBLC 102,662.

Comments on specific content in the Guidelines

18. Whether guidance is included in the Guidelines or in the Code, NZBA believes it is critical that it accurately reflects the Relevant Law, and we have set out below where we believe Guidelines should be amended in order to ensure that they do so.

Paragraph	Section	NZBA response
6	The Act and fees provisions	NZBA is uncertain why the last sentence of paragraph 6 is included. If the Guidelines are not meant to apply in respect to third party fees, should paragraphs 139-148 of the Guidelines be deleted?
8	Purpose and scope of fees guidelines	NZBA suggests that this paragraph make reference to section 44B of the CCCFA and Section 10 of the Code.
13 (and throughout the Guidelines)	Overview of the fees provisions	Throughout the Guidelines are statements that consumer credit contracts cannot be used to recover "general business costs". NZBA believes it is correct that a number of costs were held by the Courts in *Sportzone* to be general overheads which were not closely connected to the activity for which the fee was charged. However, in the High Court in *Sportzone* a proportion of certain business overheads were recoverable provided a close connection could be shown. These cost allocations were not overruled by the Supreme Court. For instance (among other examples considered by the High Court in *Sportzone*): i) Premises costs and communication costs (land lines and cell phones) were held to be recoverable as part of the establishment, administration or default fees in the same proportion as staff salaries; ii) IT systems could be apportioned to establishment fees, administration or default fees provided that the IT system was closely connected to establishment, or administration or default activities; and

		iii) Stationary, printing and paper costs could be apportioned to establishment fees, administration or default fees provided that the stationary, printing or paper costs were closely connected to establishment, or administration or default activities. NZBA suggests that this language be amended as follows (underlined wording is additional): *Following Sportzone ~~it is now beyond doubt that~~ fees under consumer credit contracts cannot be used to:* *i) recover general business costs <u>unless a close connection can be shown between the particular business cost and the activity for which the fee is charged; or</u>* ii) *to generate profits.*
16	Lender Responsibility Principles	Paragraph 16 of the Guidelines, referencing section 44B of the CCCFA, states that "evidence of compliance with the Code is not conclusive evidence of compliance with the Principles". However section 44B of the CCCFA in fact says something different – it states that ".. *evidence of the creditor's compliance with the provisions of the [Code] […] is to be treated as evidence that a credit fee or default fee is not unreasonable*." To avoid inconsistency, NZBA's view is that paragraph 16 should be amended to accurately reflect the words of section 44B. NZBA suggests that the language be changed as follows: *We note that section 44B of the Act states that evidence of compliance with the Code is to be treated as evidence that a fee is not unreasonable. As mentioned above, the guidance on fees in the Code is set out in Section 10.*

29	Lenders must apply a transaction-specific approach to costs	As currently drafted, the Guidelines may be more helpful to small to medium sized lenders (rather than large institutional lenders). An example of where the Guidelines could be amended to cater for larger organisations is by referencing the ability to use averaging, which NZBA would consider to be a 'reasonable standard of commercial practice'. The ability to use the average costs for a particular fee-related task is not discussed until later in the Guidelines (paragraphs 83-86). As an example, NZBA suggests the following amendment to paragraph 29: *Fees that seek to recover costs that are not transaction specific are likely to be unreasonable. <u>However, provided there is a close connection between the cost and the activity for which the fee is charged, costs can be ascertained by averaging the costs across a class of loans and that can then be allocated to the proper fee</u>.*
33	Lenders must apply a transaction-specific approach to costs	Similar to the comment on paragraph 13 above, NZBA suggests that paragraph 33 be amended as follows: *In applying the transaction-specific approach, the Supreme Court was ~~quite~~ clear that general overheads should not be recoverable <u>unless there is a close connection between the overhead cost and the activity for which the fee is charged</u>.*
Example below paragraph 36	Lenders must apply a transaction-specific approach to costs	NZBA suggests the following changes to the example below paragraph 36: "Lender C charges a credit fee to customers to recover the cost of its general advertising and promotion. This fee is unreasonable because the costs incurred have no close relationship <u>to the activity for which the fee is charged</u> ~~the specific transaction between lender and borrower~~. As part of its Loan Administration Fee, Lender D seeks to recover the cost of its annual Christmas party. This fee is likely to be unreasonable as the costs of the Christmas party have no close relationship to <u>the administration of loans</u> ~~specific transaction~~ between the lender and borrower."

		NZBA would also suggest that in the first example, the purpose of the credit fee should be defined (for example, the credit fee might recover the cost of administering the account during the course of the loan). If the purpose of the fee is not stated, it is difficult for the reader to assess whether the cost is closely connected to the activity for which the fee is charged.
Example below paragraph 38	Charging a fee may be unreasonable	It may be difficult for the reader to assess whether the fee is reasonable without a description of what the Welcome Letter says. If the Welcome Letter in fact contains a disclosure in relation to the loan or information that is necessary to establishing the loan, then the cost of sending the Welcome Letter could be allocated in an establishment fee as part of the cost of "documenting the contract".[4] If the letter is merely a letter thanking a customer for taking out a loan, then that would not be an activity for which NZBA would expect a fee to be charged. NZBA suggests that further information is required as part of this example.
40	Costs must actually be incurred	The wording in paragraph 40 appears inconsistent with paragraphs 76-82 regarding forecasting costs, as well as relevant excerpts from the Code contained in the Guidelines (see paragraphs 78 and 135). NZBA suggests that the wording in paragraph 40 be deleted, as it would not be possible to set fees on this basis (also note our comment on paragraph 133.2 below).
41-43 and 48	Not all actual costs are reasonable & Consistency with a competitor's fees will not make a fee reasonable	NZBA notes that there is an inconsistency in the Guidelines in terms of the extent to which regard can be had to commercial norms: i) Paragraph 41 states that the Commission is unlikely to consider the level of a fee to be reasonable if it includes costs which are "unusually high". ii) Paragraph 42 states that "Costs may be unreasonably high where they are significantly above the commercial norm". iii) However, paragraph 48 states "The reasonableness of a fee depends on the lender's own costs and losses – and comparisons against other lenders cannot provide information about that."

[4] See the definition of "establishment fee".

		This creates a double standard where the commercial norm can be used to justify an argument that a lender's fees are too high, but not to support an argument that the lender's fees are reasonable. NZBA suggests the Commission consider the wording of both paragraphs.
43	Not all actual costs are reasonable	Paragraph 43 attempts to regulate not only a lender's method of setting its fees, but also its internal business practices. This has the potential to create unfair requirements on lenders when assessing business structures in the context of a reasonableness of a fee. Although a business will typically *not* adopt a business practice or structure that *unnecessarily* raises its costs, NZBA submits it is inappropriate for that decision to be regulated. Even if it were appropriate, the factors which will be taken into account in determining what is *necessary* and what is *unnecessary* will vary almost infinitely depending on the position of the business and its strategy – and ultimately the decision will always be subjective. Similarly, a business will usually be conscious of minimising costs – but even if, for example, some new *technology* is *reasonably available*, the decision as to whether or not to adopt it will turn on a variety of considerations; at a minimum the cost of that technology weighed against the likely benefit to the business as a whole (including, as part of the broader picture, any reduction of costs which are recovered through credit fees). In fact, it is theoretically possible that the acquisition of new technology which is used directly [for consumer credit] could in fact *increase* the costs recoverable through consumer credit fees, at least in the short term. These requirements could be interpreted to compel lenders to expend funds on upgrading technology and other practices to create cost savings, when there may be valid reasons for not doing so. In any case, whether or not to adopt *business practices* or *structures, or costs saving practices, technologies or structures,* are complex decisions, which will usually have a broader impact than only costs which relate to consumer credit fees, and which should always be made by the business itself.

		NZBA considers this requirement takes the obligation too far in the ability to pass judgement on the investments lenders should be making. NZBA's view is that that paragraph 43 should be removed, as it goes far beyond the purposes of the CCCFA (as set out in section 3) and is an unacceptable restriction on participants in a free market. If this submission is not accepted, NZBA suggests that the wording should be amended so that such practices/structures should only be unreasonable where their purpose is to artificially maintain or inflate costs.
50-52	Fees should be regularly reviewed	Paragraphs 50-52 state that lenders should review their fees regularly against costs, and that this should ideally be done annually. NZBA suggests that setting a timeframe on such a review is impractical for organisations as the exercise of costing fees is a major task (often taking a number of months to complete) and for most lenders, costs are unlikely to change materially from one year to the next. NZBA believes the Code provides sensible guidance for when fees should be reviewed (see paragraph 10.11 of the Code) and notes that the Code does not require annual reviews.
58-60	The fees provisions apply to consumer credit contracts	This section, which describes the loans which are subject to the CCCFA fee provisions (i.e. consumer credit contracts), is in an unnatural place. NZBA suggests that this is moved to one of the earlier sections of the Guidelines so that lenders and consumers can quickly see whether the fee provisions apply to their loan.
63	What transaction-specific costs and losses are recoverable?	Similar to the comments on paragraphs 13 and 33 discussed above, NZBA suggests that paragraph 63 be amended as follows: "Costs which cannot be clearly shown to be <u>closely related to the activity for which the fee is charged</u> ~~transaction-specific~~, although they may have a beneficial relationship to an activity, should not be included in the calculation of a reasonable fee."
64-71	What transaction-specific costs and losses are recoverable?	The Guidelines state at paragraphs 64-71 that the variable/fixed costs distinction would be a useful tool for lenders to ascertain whether certain costs should be included in fees. However, as the Guidelines note at paragraph 64, the Supreme Court in

		Sportzone "did not appear to find the distinction between fixed and variable costs to be of great assistance…" and the Court stated that the exercise is simply one of applying the CCCFA to the costs which have been claimed. Therefore NZBA does not consider that the fixed/variable distinction should form part of the Guidelines. If that submission is not accepted by the Commission, NZBA suggests some amendments to the language at paragraphs 66 and 68: i) Paragraph 66: "The High Court in *Sportzone* found, in the context of the facts before it, that some fixed costs were recoverable by fees. These were fixed costs that were ~~sufficiently~~ closely connected to the activity for which the fee was charged ~~steps taken in the particular loan transaction, that the costs could be considered to be transaction-specific~~ and therefore are recoverable in fees. ii) Paragraph 68: "Other fixed or general costs incurred in the lender's business that are not closely connected to the activity for which the fee is charged ~~transaction-specific~~ are not recoverable in fees, but can be recovered in the interest rate."
76	Forecasting costs	Schedule 1 of the CCCFA sets out the key information concerning a consumer credit contract which must be disclosed to a consumer. With respect to credit fees, it requires a lender to disclose the amount of each fee or charge payable under the contract, *but only if it is ascertainable* (Paragraph (n) of Schedule 1). If is it not ascertainable, the CCCFA allows the lender to disclose the *method of calculation*. However paragraph 76 of the Guidelines states that fees must be disclosed at the outset of the loan, with no qualification based on whether or not they are ascertainable at that point.

		NZBA's view is that paragraph 76 should be amended in a way which makes it consistent with the CCCFA.
83-86	Lender may average its establishment costs for appropriate classes of contract	Paragraph 83 states that a lender may average its costs for a class of contract in order to set the establishment fee for that class. Paragraphs 84 and 85 go into some further detail about how to determine a *class of contract*, and paragraph 85 suggests that where a lender *uses different procedures for different types of loans, or for borrowers with different risk profiles*, the lender should treat these as a 'class' and charge a fee which is reasonable for that class. The examples then go on to suggest that this is likely to mean that the establishment fee for a secured loan will be greater than that of an unsecured loan, and that the establishment fee for a guaranteed loan will be greater than that of a non-guaranteed loan. The difficulty with paragraphs 83–86 is that: (a) the view expressed as to what constitutes a *class of contract* is the Commission's alone – there is no authority to support that interpretation and no guidance given in the Act; and (b) the interpretation gives rise to practical difficulties. In order to determine the credit fees for a particular class of credit contract, lenders will usually divide contracts between classes according to the type of product. So, for example, a different set of fees would usually apply to a residential mortgage (on the one hand) and a personal loan (on the other). However, lenders do not generally further differentiate between classes based on the *features* of a particular loan (whether it is guaranteed, for example, or whether security is provided).

		In reality, the time taken to establish a particular loan may vary widely – and that variation will not always follow a predictable path. In some cases, a secured loan make take less time to establish than an unsecured loan, or a guaranteed loan might be established very efficiently. And it is worth noting that, in most cases, where fixed costs accompany a particular feature, they will be on-charged separately from the credit fee (for example the costs of registering security on the PPSR). While it is generally possible for a lender to allocate costs to a *type of product* – and it will do this as part of its cost accounting exercise in setting credit fees: (a) it would be prohibitively difficult to allocate costs based on the *features* of a particular loan; and (b) given that those features may not always impact costs in a predictable way, may produce an arbitrary result. It could also result in a lender having an unhelpful proliferation of fee disclosure – for a personal loan product, for example, a lender would need to disclose not just one set of fees, but variations based on whether the personal loan is unsecured, unsecured but guaranteed, secured and guaranteed or secured but not guaranteed. This creates unnecessary complication and potential confusion – without necessarily furthering the purposes of the CCCFA. The better approach, in NZBA's view, is to accept the position in *Sportzone*, which is that some averaging across a *class of contracts* would be required, some 'unders and overs' are a necessary consequence, and (by omission) that lenders are best placed to determine what constitutes a class. At a minimum, NZBA submits the examples set out under paragraph 86 are unhelpful and should be removed.

85	Lender may average its establishment costs for appropriate classes of contract	NZBA suggests that paragraph 85 include a footnote referring to the relevant section(s) of the CCCFA.
94-98	Reasonable standards of commercial practice	These paragraphs appear to provide guidance and examples of what *would not* be considered by the Commission to be reasonable standards of commercial practice. NZBA suggests that some examples of what *would be* acceptable are included here.
102-105	Charges for optional services	These paragraphs contain new guidance on what fees might be considered as "optional service" fees. NZBA submits that paragraph 104 should be amended. A service should be regarded as "optional" where a debtor who chooses not to accept the service is not materially disadvantaged, so far as the provision of credit is concerned, relative to a debtor who accepts the service. This approach is consistent with Canadian case law which has considered the same concept (see *Re Cash Store Inc* 2008 NSUARB 87). Below paragraph 105, the Commission gives the example of an overseas automatic teller fee as a credit fee (and not a fee for an optional service). NZBA submits that this example should be removed. A credit card is a bundle of different services including payment services, transaction services, foreign currency conversion services, loyalty rewards and ATM cash withdrawal functionality. The example appears to cover both currency conversion fees and overseas cash withdrawal fees. We submit that both these charges should be regarded as charges for optional services. A currency conversion fee is a fee paid for currency conversion services rather than for credit services, and should be regarded as a charge for optional services. This fee will apply whether the customer uses his or her own funds to make the withdrawal or uses credit. There are many ways for a customer to complete a foreign currency transaction, for example using travellers cheques, exchanging cash or withdrawing cash from a dynamic currency conversion enabled ATM. None of these other modes of currency exchange are regulated by the CCCFA. It would therefore be anomalous for this fee to be regulated. The ability to access credit in an overseas currency is best considered as an additional feature that extends the transactional reach of the credit

		card, rather than something a reasonable debtor would consider as intrinsic to the provision of credit through the card. Similarly, an overseas cash withdrawal fee is also a charge for optional services. Withdrawing foreign cash from an overseas ATM is simply an additional feature and electing not to take the overseas cash withdrawal service would not materially disadvantage the customer as far as the provision of credit is concerned. In many cases the customer will be able to avoid the fee by using overseas ATMs which are owned by or associated with the same banking group, or by withdrawing cash before travelling.
107-128	Prepayment fees	Paragraph 111 states that a creditor can charge a prepayment fee only where the fee "is no more than any loss" that arises from the prepayment and is a result of differences in interest rates. NZBA suggests amending this statement to better reflect section 43(1) of the CCCFA, which provides that the fee must recover a reasonable estimate of the creditor's loss. The fee may be greater than the loss – provided it is still a reasonable estimate of that loss. While this is addressed later in paragraph 113 of the Guidelines, NZBA submits this should be reiterated in the earlier paragraph. NZBA also notes paragraph 45 in *Avanti* in which the Court states that: *a reasonable estimate does not require a perfect estimate. Indeed, given the big variations in market conditions, a perfect estimate in the sense of a formula which will always lead to a calculation of the exact loss is impossible. Such a formula cannot be devised.* NZBA also suggests clarifying paragraph 112. NZBA agrees that a creditor cannot charge a prepayment fee for any amount where a variable interest rate applies to the lending. However, a creditor may charge an administration fee under section 44 to recover any costs from processing that prepayment, regardless of whether the loan has a variable interest rate. NZBA suggests deleting the statement "Any amount in excess of that risks being an unlawful penalty" from paragraph 122. This is not reflected in the *Avanti* judgment. At paragraph 31 in the judgment, the Court states that a prepayment fee will be unreasonable if it results in a creditor recovering significantly more than its actual loss arising from the prepayment. The Court held that would be 'unfair' on a consumer,

		who would effectively be giving the creditor a bonus payment. The Court did not hold this would lead to the amount being a penalty – that will be a factual matter as to whether it constitutes a payment in terrorem (see paragraph 51 of the judgment). NZBA also suggests deleting the statement at paragraph 123, and the content in paragraphs 124-127. We explain why below. The Court in *Avanti* did not hold that a creditor was required to mitigate loss when calculating a reasonable estimate of loss under section 54. See paragraphs 40 and 41 of the judgment: *Indeed, to the contrary, it supports the proposition that the contracting party is entitled to be compensated for the loss of profit on a sale in the event of default, where supply exceeds demand and no replacement sale can be made to mitigate the loss. Avanti was in a position where its supply of funds for lending exceeded demand. When prepayment occurred, Avanti had one loan less that it otherwise would have had. It therefore lost the profit on that loan. There could be no onlending of the funds in the sense of the loss being mitigated by a new loan contract. The new contract would have been enjoyed by Avanti in any event because it had funds available for all customers.* *The analysis shows that the premise upon which the Avanti formula was based was a reasonable premise. It is in accord with common law principles developed over the years relating to the assessment of loss. It assists in the interpretation of the alternatives in s 54(1).* See also paragraph 44 of the judgment: *The legislature chose to allow the creditor to be compensated for actual losses arising from early prepayment. The only benchmark is reasonableness. It is perfectly reasonable for a loss to take into account the fact that a new loan will not replace the old, and that the profit on a loan is lost through prepayment.*

		The loss of the benefit of the profit on the loan is as real as any other sort of contractual loss. The safe harbour formula does not contemplate an excess of supply over demand. It presupposes that the creditor will be able to enter into a replacement contract with a new customer and thereby suffer no loss at all if the interest rate remains the same. And at worst will only suffer the loss of the differential interest rates. However, as cases show, this is not always a fair test of loss. We also note paragraph 48 of the judgment: *In any event, such efforts are not required, as there is nothing intrinsically unfair to the consumer in a formula which presupposes supply exceeding demand.*
129	Default fees	This paragraph states that: "Outsourced collection functions, relating to steps taken to enforce repayment of a debt, are costs that come within the definition of a default fee." NZBA thinks these types of activities relate to third party activities and therefore section 45 applies. NZBA therefore suggests deleting this sentence.
133.1	Default fees	Paragraph 133.1 of the Guidelines does not accurately reflect section 44A(2) of the CCCFA, which is quoted at paragraph 130. Paragraph 133.1 states that a "key concept" is that the default fee "must not exceed a reasonable estimate of the lender's loss". However the correct test, as set out in section 44A, is that, "in determining whether a default fee is unreasonable, the court must have regard to any cost incurred by the creditor, and/or a reasonable estimate of any loss incurred by the creditor as a result of the debtor's acts or omissions". NZBA submits that paragraph 133.1 should be amended in a way which makes it consistent with the CCCFA.

133.2	Default fees	Paragraph 133.2 states that a lender should only recover the loss caused by the borrower, not by some other borrower or class of borrowers. This effectively implies that fees should be set on a backward-looking basis in respect of a single borrower, which is not possible and inconsistent with other parts of the Guidelines and the Code. NZBA believes the appropriate guidance is set out in paragraph 135, and suggests that the text after the quotation mark in paragraph 133.2 be deleted.
134 and 138	Default fees	At paragraph 134, the Guidelines state that: *As with prepayment fees, the common law provides guidance on estimating loss, and the Courts have held that the standard principles of causation, remoteness and mitigation of loss will apply. Based on those principles, the loss that is charged in this fee must be loss of a kind that is within the contemplation of the parties to the loan.* With regard to the first sentence, please refer to our comments above on prepayment fees regarding mitigation of loss. This is not the test under the CCCFA; what is required is a calculation of a reasonable estimate of any loss incurred. In relation to the second sentence, NZBA does not think it is correct to say that consumers who take out loans would be in a position to contemplate the types of losses that a large bank or other lender would suffer as a result of a default. NZBA therefore suggests that the text above be deleted. In the table below paragraph 138, the Guidelines state that costs related to debt recovery can be recovered within default fees "if the debt recovery costs closely relate *to the particular borrower's acts or omissions*". For the reasons articulated elsewhere in this submission (for example, in relation to paragraphs 29 and 133.2) NZBA suggests the following amendment: *…if the debt recovery costs closely relate to the particular borrower's <u>or class of defaulting borrowers'</u> acts or omissions…*

		The table below paragraph 138 also suggests that costs of provisioning and cost of capital cannot be recovered within default fees. NZBA submits the Guidelines should address the recent High Court of Australia litigation (*Paciocco*) which recognised the recovery of the costs of provisioning and the cost of capital as appropriate. NZBA submits the Commission should engage further with the industry on this issue via the NZBA.
140	Third party fees	NZBA suggests substituting the word 'paid' in paragraph 140 for the words "paid or payable", which are the words used the equivalent section of the CCCFA (section 45).
143	Third party fees	NZBA submits that paragraph 143 does not appropriately reflect the definition of "credit fees" in section 5 of the CCCFA, in particular the exclusions in subsection (b) of the definition. NZBA suggests that paragraph 143 should be amended as follows: *Where a third party fee is paid to an "associated person" of the lender, the fee will be a credit fee and must be reasonable – it cannot simply be passed on at cost, unless it is reasonable. <u>Where the charge relates to an optional service it is not treated as a credit fee under the Act.</u>* NZBA also notes that the reference in footnote 91 is incorrect. The correct citation is "s 5 definition of credit fee (a)(iv)".
144	Third party fees	It is not apparent to NZBA what "third party <u>default</u> fees" are. NZBA also notes that section 41 of the CCCFA (referred to in the footnote) states that credit fees and default fees must not be unreasonable. It is unclear why this provision is relevant to this section of the Guidelines as third party fees are not credit or default fees. NZBA recommends that paragraph 144 should be deleted to avoid possible confusion, as NZBA believes what the Commission is trying to achieve in paragraph 144 is addressed in paragraph 148.

General	Precision with fees	There is currently no recognition in the Guidelines that lenders are not expected to achieve exact precision with the costing of fees. As recognised in the Code at paragraph 10.10: *Because fees are set on a forward looking basis, the Guidance is not intended to suggest that there can or should be exact precision in terms of matching fees to likely costs and losses. However, lenders must undertake an assessment of costs and losses in order to set fees that meet the unreasonable fees provisions of the Act.* This was also stated by the Supreme Court in *Sportzone* at [116]: *The 'reasonableness' standard is imprecise and difficult to apply to particular situations. Fees have to be set in circumstances where the creditor may not have precise information on its costs and will not know how many transactions it will enter into during the period that the fee level is applied. Allowance has to be made for the situation where circumstances transpire that do not reflect those that the creditor predicted would apply. In applying the 'reasonableness' standard lines have to be drawn. Reasonable minds may differ on where those lines should be drawn.* As mentioned above, NZBA believes averaging of costs incurred across a representative class of loans is permissible as a reasonable standard of commercial practice. Where the averaging approach is used, a lender does not need to ascertain the precise cost which the lender incurred in relation to that particular borrower for establishing a loan. NZBA suggests that paragraph 10.10 of the Responsible Lending Code be repeated in the Guidelines.
General	Permissible costs	Throughout the Guidelines there are tables setting out what costs can be included in fees. There are other permissible costs that were referred to in the *Sportzone* judgments which NZBA suggests should be added.