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# Rae Nield Marketing Law

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Financial Markets Policy  
Building, Resources and Markets,  
Ministry of Business, Innovation and Employment  
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**Re: Submission on Consultation Paper and Exposure Draft Bill – New Financial Advice Regime**

1. This submission is made on behalf of the Exercise Association of New Zealand Incorporated, and is on behalf of exercise facility operators throughout New Zealand. It:
  - Addresses Part 6 of the Draft Bill and in particular question 19 of the Consultation Paper.
  - Raises serious concerns regarding the coverage of the definition of financial service provider, which is sufficiently broad that it covers providers of non-financial services on long-term contracts such as fitness contracts, in particular where those providers contract out payment management services to financial service providers.
2. This matter was raised in response to the Ministry's Issues paper: a copy of that submission is attached with this submission. However, looking at the draft Bill, the problem has not been addressed. This submission clarifies the breadth of the problem.
3. It does appear that this is an accidental problem: after all, exercise service providers are generally not in the business of providing financial services directly. It seems likely that the type of monitoring required for financial advisers and financial service providers and in particular the financial services dispute resolution schemes have no relevance to suppliers of nonfinancial services. Their consumer members have already simple alternative remedies available under the Disputes Tribunal.
4. A suggested solution is set out in this submission at paragraph 3 below.

5. Please would you address correspondence to me.

Yours sincerely

Rae Nield  
Solicitor

Copy: Hon Jacqui Dean, Minister of Commerce and Consumer Affairs  
[j.dean@ministers.govt.nz](mailto:j.dean@ministers.govt.nz)

## THE PROBLEM FOR EXERCISE FACILITIES

### 1. Summary

- 1.1. The problem addressed by this submission is that, because of minor drafting changes to the definition of “credit contract” and “creditor” in the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSP Act), some service suppliers under long-term contracts that are not paid in full in advance by the consumer are required to register as financial service providers on the Financial Service Providers Register and to join dispute resolution schemes.
- 1.2. The definition of “financial service provider” as set out in section 5 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 now includes “being a creditor under a credit contract” (emphasis added). The effect of this is to bring into the regime providers of non-financial services which are deemed (under the Credit Contracts and Consumer Finance Act 2003) to be creditors. The background and issue is set out in more detail below in the response to question 19.

### 2. Analysis

- 2.1. Question 19 asked: *Do you have any comments on the proposed categories of financial services? If you're a financial service provider, is it clear to you which categories you should register in under the proposed list?*
- 2.2. The earlier submission (attachment “A”) to the draft Bill addressed the effect of the broad definition of “credit contract” under section 4 of the FSP Act. The reference to “credit fees had the effect of potentially bringing in as deemed credit contracts fitness contracts which had fees that could be considered to be credit fees. That is still the case, but the suggested solutions below would resolve both issues.
- 2.3. This submission addresses a related issue: that of non-financial services, and in particular providers of exercise services being deemed to be financial service providers merely because their contracts with consumers are collateral with credit contracts.
- 2.4. This arises as a result of the exercise services provider working in conjunction with a payment services provider (whether or not the payment services include payment for credit fees) to provide efficient handling of consumer payments.
- 2.5. The reason that this is a new problem is because the problem arose as a result of an amendment in 2014 to the “creditor” definition of financial service provider in section 5(1)(e) of the Financial Service Providers (Registration and Dispute Resolution) Act. brought about by the 2014 Amendment to the “creditor” class of financial service provider. Originally, “creditor” was limited to actual providers of credit only, for obvious reasons. This was amended, as from 6 June 2015, by section 7 Financial Service Providers (Registration and

Dispute Resolution) Amendment Act 2014 (2014 No 34) which substituted “being a creditor” for “providing credit”. While this amendment was no doubt intended to reduce the risk of wilful separation of responsibilities, it has had the unfortunate side effect of bringing in suppliers of non-financial services who offer their customers collateral credit contracts with third parties who are indeed financial service providers, such as payment services providers. This happens because of the broad definition of “credit contract” in the Credit Contracts and Consumer Finance Act (CCCFA) section 7(2):

*If, because of any contract or contracts (none of which by itself constitutes a credit contract) or any arrangement, there is a transaction that is in substance or effect a credit contract, the contract, contracts, or arrangement must, for the purposes of this Act, be treated as a credit contract made at the time when the contract, or the last of those contracts, or the arrangement, was made, as the case may be.*

- 2.6. That provision clearly contemplates that the providers of non-financial services (and goods, presumably) under collateral will all be jointly and severally liable under the CCCFA. While the definition of “creditor” in s 5 of the CCCFA would appear to limit this to the financial services only (“*creditor means a person who provides, or may provide, credit under a credit contract; and, if the rights of that person are transferred by assignment or by operation of law, includes the person for the time being entitled to those rights*”) section 7(2) broadens this so that the supplier of goods or non-financial services is operating under a collateral contract which is then treated as an element of the credit contract. That may well be acceptable under the CCCFA regime, but under the financial service provider regime it adds costly burdens onto providers of non-financial services.
- 2.7. Clearly, the providers of non-financial services are in fact operating outside the extent of financial service provider regime. The real problem for exercise service providers is that their responsibilities as deemed financial service providers include a requirement to register as a financial service provider, and to become a member of a financial services dispute resolution scheme (costly where disputes involve low value consumer contracts) plus other reporting requirements which are irrelevant to their circumstances and to the purpose of statutory regulation of financial service providers.
- 2.8. On the other hand their contracted providers of payment services would still fall within the regime, because they would be providing financial services.
- 2.9. For the exercise industry, a real problem would be the difficulty in retaining members on long term contracts, where individual members could threaten to bring a costly dispute to a dispute resolution scheme. The dispute resolution scheme itself would find itself in the position of being asked to adjudicate on a non-financial dispute. The reality would be that no exercise service provider could ever rely on its contracts, and indeed might be forced to provide compensation to members merely to keep its costs down.<sup>1</sup>

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<sup>1</sup> A similar issue was addressed in submissions on the introduction of unfair contract terms provisions into the Fair Trading Act in 2010. It was decided not to follow the Australian model of permitting every consumer

### 3. Recommended solution

3.1. The simplest solution would be to provide an exemption from the definition of “financial service provider” for suppliers of services under long-term contracts in the ordinary course of a non-finance business.

3.2. This exemption could be made by amendment to Regulation 10 of Financial Service Providers (Exemption) Regulations 2010 (the Regulations). The current regulation reads:

**10 Exemption for credit provided, on interim basis, by non-financial service business**

*A non-financial service business is exempt from the application of the Act in respect of the provision of credit under credit contracts to its customers if—*

- (a) the credit is provided in order to facilitate the provision of goods or services to those customers; and*
- (b) the non-financial service business, in the ordinary course of its business, assigns the credit contracts to another person within 1 working day of providing the credit.*

3.3. Regulation 10 exempts suppliers of non-financial services (and goods) but only where there is a third party credit contract which is assigned within one working day. It therefore does not address the common situation where the consumer signs two collateral contracts:

- (a) the exercise facility provider’s own contract; and
- (b) the financial services provider’s contract (which typically includes a direct debit consent form).

3.4. In this common scenario there is no assignment, but the two contracts are clearly collateral contracts.

3.5. The Exercise Association requests either that:

- (a) the exemption of non-financial service businesses be extended in the Regulations so that the assignment provision is broadened to include collateral contracts of a non-financial service nature; or (preferably)
- (b) providers of non-financial services should be expressly excluded from the provisions of the Act, by amendment of either section 5(1)(e) or section 7(2).

4. The Association seeks a prompt resolution to this unnecessarily complex issue.

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under a consumer contract to refer a dispute to the Australian equivalent of the Disputes Tribunal, but to address unfair contract terms on the application of the Commerce Commission to the Court. See attachment B: submission of Les Mills New Zealand Ltd on unfair contract terms.

