



COMMERCE COMMISSION

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Chief Executive Officer
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Dear Sir/Madam

CREDIT CONTRACTS AND CONSUMER FINANCE ACT 2003 SECTION 45 – FEES OR CHARGES PASSED ON BY CREDITOR

The Commerce Commission (the Commission) is responsible for enforcing the Credit Contracts and Consumer Finance Act 2003 (CCCF Act).

The Commission has been made aware that there is some uncertainty in both the credit industry and the insurance industry about the interpretation of section 45 of the CCCF Act particularly as how this section affects commissions on credit related insurance.

The Commission is concerned about the impact of this uncertainty on consumers and on the industries involved. In order to give some guidance in this area the Commission has elected to publish its approach to the interpretation of section 45.

It should be noted that the Commission's approach to section 45 is not a binding legal interpretation but simply reflects the Commission's enforcement approach. Parties are able to take action privately under the CCCF Act. An insurer or creditor that acts in accordance with the Commission's approach will not necessarily be immune from private third party proceedings.

The Commission's approach to the Act will evolve alongside legal developments which will include court judgments and enforcement experience.

Background to Section 45

Section 45 of the CCCF Act relates to third party fees or charges passed on by a creditor to a debtor under a consumer credit contract.

In summary, the section provides that, if a creditor has the right, under the terms of a consumer credit contract, to recover from the debtor any amount paid or payable to a third party, the creditor must claim from the debtor only the amount it actually pays to the third party. The creditor cannot charge any mark up on the fee and must also pass on to the debtor any discounts or allowances it receives from the third party. If the creditor expects to get an

account from a third party and charges the debtor in advance the creditor must refund any difference between the amount charged to the debtor and the amount actually paid to the third party.

The purpose of the section is to prevent creditors “clipping the ticket” on third party fees on consumer credit contracts.

Commission’s Approach

The Commission approaches section 45 as follows:

- Section 45(1) applies to any amount paid or payable by the debtor to the creditor, where that fee or charge is claimed by the creditor to be reimbursement for fees or charges paid by the creditor to a third party, in connection with the consumer credit contract. Section 45(1) applies to all such payments, regardless of whether the fee or charge is incurred directly by the creditor (a creditor-third party contract) or paid by the creditor on behalf of the debtor (a debtor-third party contract), and regardless of whether the fee meets the definition of a “credit fee” in section 5 of the Act.
- Fees or charges will be paid by the creditor in connection with the credit contract if either:
 - (i) the fee or charge would not have been incurred or paid but for the credit contract; or
 - (ii) The fee or charge is included in the initial unpaid balance or otherwise added to the amount due under the credit contract.

The Commission considers that this will, for example, cover all fees or charges for credit related insurance (optional or compulsory) and warranty products that are financed under the credit contract.
- Subsection 45(2) requires the creditor, when calculating the actual amount to be paid by the debtor, to take into account and credit to the debtor, any rebate, discount or allowance received by the creditor from the third party. Section 45(2) will capture any such rebate, discount or allowance even if it is described as a commission.
- Section 45(5) creates a narrow exception to section 45(2) in that creditors do not have to take into account or give credit for reasonable commissions on credit related insurance taken out by the debtor.

In the absence of any statutory guidance or court decision determining the appropriate interpretation relating to what a “reasonable” commission on credit related insurance might be, the Commission intends to apply a threshold based on the approach taken in the Australian Uniform Consumer Credit Code. Accordingly any commission on credit related insurance that is 20% or less of the gross premium paid by the debtor will be unlikely to meet the Commission’s enforcement criteria. However, the Commission will assess each case based on the extent of detriment to consumers, the seriousness of the conduct and whether or not enforcement action would be in the public interest.

Any complaint received by the Commission in relation to section 45 issues will be assessed against the Commission's enforcement criteria.

If you are unsure how this affects your current business practices please seek your own legal advice.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Dot Benson', with a long horizontal flourish extending to the right.

Dot Benson
Senior Adviser
Fair Trading Branch
Commerce Commission