



2 September 2011

Professor Geoff McLay  
Commissioner  
Law Commission  
PO Box 2590  
Wellington 6011

Dear Professor McLay

### **Review of the Credit (Repossession) Act 1997**

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Law Commission's *Review of the Credit (Repossession) Act 1997* issues paper. The submission has been prepared with assistance from the Law Society's Commercial and Business Law Committee. Comments are set out below.

#### **Chapter 2 – Principles and scope**

*1. What are your views on the nature and extent of the problems occurring with the Credit (Repossession) Act? Have you suffered, or do you know of people who have suffered harassment or oppression in the context of a repossession? Describe and give examples of the problems.*

The Law Society finds it difficult to comment on this. Members are aware of complaints of harassment and oppression from consumers in circumstances where repossession is carried out in a legitimate manner but because of the nature of the goods which are repossessed (for example, beds or refrigerators), the removal of those goods creates difficulties for the consumers concerned. That is not to say that repossession is always carried out within the rules set by the Credit (Repossession) Act.

#### **Chapter 3 – The Act generally**

*2. What are your views on whether the Credit (Repossession) Act currently strikes the right balance between the interests of consumers and lenders? Why?*

Taken in isolation, the Law Society's view is that the Credit (Repossession) Act does strike the right balance between the interests of consumers and lenders. As noted by the Law Commission, it is unfortunate that this review is isolated from a review of the Credit Contracts and Consumer Finance Act 2003 (CCCFA) and in particular from the suggestion that lenders should be required to ask consumers to declare their ability to make repayments in relation to each credit contract entered into. Due diligence before the contract is made would reduce the risk of repossession. A further point is that the hardship provisions of the CCCFA should be able to seamlessly coordinate with the severe remedy of repossession.

The Credit (Repossession) Act has done much to tidy up the repossession industry.

*3. Do you agree that the Credit (Repossession) Act should be incorporated into the Credit Contracts and Consumer Finance Act?*

Yes. By way of example, when the CCCFA came into force in 2005, the Commerce Commission (newly charged with enforcing the Act) published an excellent guide for the credit industry. However, that guide made no mention of the Credit (Repossession) Act which of course fell outside the Commerce Commission's brief. A further example is the lack of detail about repossession in the CCCFA disclosure statement.

From the perspective of the finance industry, it is important to have all of the obligations encapsulated in one statute. The Law Commission's holistic approach is supported.

*4. Is the Credit (Repossession) Act, in your view, so fundamentally flawed that it requires total replacement? If so, what are the policy issues (if any) that lead you to this view? What are the drafting issues?*

The Law Society does not believe the Credit (Repossession) Act is fundamentally flawed. It sets out simple and clear procedures which are intended to give debtors opportunities to avert repossession.

*5. Are there other issues with the operation of the credit (Repossession) Act that our review of the Act should address?*

Credit repossession is inextricably linked with other enforcement activities under the CCCFA. The Law Society therefore is of the view that the Credit (Repossession) Act should form part of the CCCFA, either as a separate Part or as a schedule.

#### **Chapter 4 – Better protecting the parties**

*6. Do you support adopting the Canadian approach in New Zealand, which prohibits certain items from being taken? Why?*

In concept, prohibiting the seizure of certain items is supported (see answer to next question). However the items listed in the Canadian example are the very items which might well be the subject of a credit contract and in any case could represent the significant tangible assets of the applicant for credit. If they could not be used as security, the applicant could be denied credit, particularly where that credit was for goods of lesser value but of household significance, for example refrigerators.

*7. Would the proposed prohibited items from the Moneylenders (Licensing and Regulation) Member's Bill be useful inclusions in a new clause of this kind?*

Yes. But the key point is that they should not be used as security, unless the credit was advanced for their purchase. It is also suggested that taonga such as tapa should be considered for inclusion in the list, as that is the kind of fragile collateral which could be seized and used to pressure debtors into waiving their rights to apply for a credit contract to be reopened.

*8. Should a provision similar to section 25 of the Hire Purchase Act 1971, relating to variable credit, be introduced?*

It is important to remember that the Hire Purchase Act 1971 predated the existence of credit cards, let alone debit cards, and was drafted at a time where even mortgages were difficult to get, let alone personal loans. At that time variable hire purchase agreements were relatively common and were probably the only way for consumers to acquire ongoing credit. A more sensible approach with respect to revolving credit contracts would be to assess the collateral which could be repossessed from the perspective of that last purchased, i.e. work backwards from the most recently purchased items until sufficient collateral was repossessed.

*9. Should provisions for the voluntary return of goods, in sections 36A and 36B of the Act, be strengthened, by requiring creditors to accept the return of goods for resale?*

No. This would effectively abrogate the contract for sale and purchase and place a considerable burden on creditors and retailers. Further, it would be open to abuse by consumers who did not necessarily suffer hardship but just decided they wanted to upgrade their goods. It would therefore raise the cost of credit for all consumers. Having said that, if it is decided that creditors should be permitted to return voluntarily, creditors should be able to make use of procedures which parallel post-repossession procedures in order not to be disadvantaged, with the exception that the return, being voluntary, should be final. If it were not, creditors could be subjected to continual return and recovery by consumers.

*10. Is there support for a provision modelled on section 24, wiping all interest and default charges off the debt, if prescribed timeframes have been breached? Why?*

No. Again, this would be open to abuse by consumers who could (and can) easily cause time frames to be exceeded. There is already a sanction against creditors who exercise rights too early: they are misleading consumers as to their rights and therefore breaching section 13(i) of the Fair Trading Act 1986.

*11. Should New Zealand have more explicit anti-harassment provisions in the Credit (Repossession) Act, governing the conduct of the repossession itself, and/or other contact between debtors and creditors? If so, what particular kinds of harassment should be prohibited (eg, might sexual harassment be an issue, as well as intimidation)?*

This is doubtful. While the definition of “harassment” or “intimidation” might be made more explicit, it would inevitably lead to allegations against those who did not in fact intimidate, while creditors who did intimidate would still frighten consumers, discouraging them from taking further action. The oppressive conduct provisions of the Credit Contracts and Consumer Finance Act 2003, coupled with offences under the Crimes Act 1961 (demanding money with menaces) are sufficient.

*12. Should New Zealand consider a provision, requiring consent of a court order or other enforcement agency for repossession, when the amount of debt owing has been reduced? If so, which of the Australian and United Kingdom models (the United Kingdom one being slightly simpler, with no proviso) is preferred, and what should the threshold be (eg, less than 25% owing, or a larger amount)?*

No. This would act as an incentive to the small but significant number of consumers who would prefer to pay the minimum sum and then pay no more, on the reasonable assumption that it would be more problem than it was worth for the creditor to pursue enforcement action. Other

consumers would therefore pay (via interest rates) for the deficit. A court order would be useful only in situations where the collateral has been removed to another location under the control of a party other than the debtor.

*13. Should a good faith requirement be introduced in New Zealand? If so, would a generically drafted provision suffice, like Alberta's, that simply requires lenders to act in good faith, or would more detail be required to make it work?*

Good faith is a difficult concept.<sup>1</sup> If any good faith requirement were to be introduced, it should apply to consumers as well. (See also the answer to question 16 below).

*14. What are your views on a code of ethics for the lending industry, analogous to the real estate agents', builders', and private investigators' examples?*

In concept a code of ethics is a good idea in that it creates a coherent standard for conduct. However, there would have to be a mechanism for drawing in all lenders. Use of the term "industry" implies a degree of relationship between all lenders. This is far from the case as was discussed at the Financial Summit on 11 August 2011. A code would be useless if fringe lenders (whether legitimate or illegitimate) could avoid it. The Society also notes the Financial Services Federation's Responsible Lending Guidelines (attached) which are also worthy of consideration as a model.

*15. Are there gaps or problems with the Credit (Repossession) Act, from creditors' point of view?*

The Credit Repossession Act appears to work reasonably well.

*16. What are your views on the North Western Territories provision, under which a debtor may be penalised for acting in bad faith? Should New Zealand introduce a provision of this kind?*

Yes. This is an all too frequent occurrence. It would also be appropriate to list factors which are inherently seen as bad faith, for example the consumer sells or moves the goods before repossession and refuses to give the creditor accurate information as to their current location.

## **Chapter 5 – Remedies**

*17. Do you have any comments on the adequacy of post-possession remedies? Do you agree with our preliminary view, that there seem to be some gaps in this part of the Act?*

Breaches of the repossession and post-possession procedures carry sanctions, since they mislead consumers as to their rights and thus breach s 13(i) of the Fair Trading Act 1986.

*18. What are your views on the three options set out, for possible changes to the relief provision? If you consider that change is required, can you give examples of ways in which the current provision is less than effective?*

There is no particular need to provide additional sanctions in view of the consumer's rights under the Fair Trading Act 1986. The interplay between this Act and the Credit Contracts and

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<sup>1</sup> See *Drafting Commercial Contracts*, F. Goldsmith & D. Webb, 1 April 2004, NZLS Continuing Legal Education.

Consumer Finance Act 2003 is often overlooked, although not always by the Commerce Commission which is the enforcement body for both. Discretionary relief should not be a sanction on creditors, but a flexible remedy for consumers which takes account of the circumstances. No change is needed.

*19. Do you think that the Australian approach is likely to be more, or less, effective than New Zealand's, in being more specific about the types of remedy?*

In our view it is likely to be less effective. When remedies are highly prescriptive, it is easier to work around them.

*20. Do you think that there is any merit in separate provision for invalidation, given the current scope of the existing relief provision? If so, why?*

Where a contract is illegal, the Illegal Contracts Act 1970 makes that contract per se unenforceable. It is for the creditor to ask the Court to validate the contract so it can be enforced in whole or in part. No change is needed. By way of clarification only, it may be appropriate to point out in the enforcement provisions in the Credit (Repossession) Act and the CCCFA that the provisions of the Illegal Contracts Act apply to credit contracts, although this is the status quo.

*21. Is the pre-possession offence in section 11 effective? Should anything be done to make it more effective? Should there be similar offences for repossession and post-possession breaches?*

We agree with the sentiments set out in paragraph 5.24: invalidation would add confusion. There are already offences under s 13(i) of the Fair Trading Act for breaches of procedures. These relate to post-contractual conduct and are therefore not affected by the Illegal Contracts Act.

*22. Alternatively, should offences targeted at creditors be abandoned, and (perhaps amended) provision for relief relied upon instead, as a more effective deterrent?*

This is worthy of consideration. It is difficult to see statutory penalties as other than something which could be taken into account as a cost of doing business. There are already sufficient offences targeted at creditors. Note that this is quite independent of provisions for relief.

*23. Should repossession agents be personally liable for breaches of the Act? Or is the status quo appropriate, where liability rests on the creditor?*

Both repossession agents and creditors should be strictly liable, with defences parallel to those set out in section 44 of the Fair Trading Act 1986.

*24. Do you agree breaches of the Credit (Repossession) Act should have possible repercussions for the licensing of lenders, under the Financial Services Providers (Registration and Dispute Resolution) Act 2008? Why?*

Not necessarily, unless they have been convicted of other criminal offences. It is noted that a person subject to a banning order under section 108 of the Credit Contracts and Consumer Finance Act 2003 is disqualified from registration as a registered financial service provider (Financial Services Providers (Registration and Dispute Resolution) Act 2008, s 15(2)(c)). This is in its own

right a sufficient sanction. Any contracts entered into by unregistered lenders are inherently illegal contracts and thus unenforceable without the sanction of a court.

*25. Should the Financial Service Providers (Registration and Dispute Resolution) Act 2008 require any sort of qualitative assessment of the fitness of a financial service provider? Should such a requirement address only consumer credit providers (who offer one particular type of financial service), or all financial service providers?*

The definitions in the Financial Service Providers (Registration and Dispute Resolution) Act are so broad that it might well be difficult to limit this. Again, the Commission's attention is drawn to section 108 of the Credit Contracts and Consumer Finance Act 2003 which would seem to achieve this objective already.

*26. Do you think that repossession agents need to be licensed? If yes, are your views on this affected by whether licensing of lenders is also introduced (ie, might the latter approach offer an acceptable substitute, if the conduct of agents used by those lenders was a relevant factor)?*

Yes. Repossession agents are usually independent contractors. Licensing of lenders only assumes that every lender has been able to check on the status of every repossession agent it is likely to use. It is common, for example, for lenders to instruct repossession agents in other parts of New Zealand where goods have been relocated. Licensing would give a degree of assurance to lenders.

*27. What are your views on the pros and cons of court-ordered entry requirement? If you do not support such a requirement, why not? Why is the New Zealand context different from those in Australia and the United Kingdom?*

We strongly doubt the efficacy of this requirement in the current environment: the doubts raised in paragraph 6.22 are supported. It is also understood that in many repossession situations goods are voluntarily relinquished where consumers do understand their obligations.

The New Zealand context is different from the Australian context because of New Zealand's history of nationally consistent law with much more open consultation at a national level. Also, New Zealand has had consistent contract law statutes for a much longer period, so the law is better and more coherently understood. The UK situation is now modified by the need to comply with EC directives. The regimes are not comparable at all.

*28. Should a court take this role, or some other authority? If another authority, who would you suggest?*

If a special permit is required, only a court should be able to provide it. This would be an issue for the justice system only – from the perspective of both creditor and debtor.

*29. Should the right of entry to residential premises remain contractual, or be conferred by the Credit (Repossession) Act?*

A statutory right would clarify the parties' obligations and reduce the risk to creditors.

30. *What are your views on the likely efficacy of the Financial Services Providers (Registration and Dispute Resolution) Act 2008? Do you think it will make a difference to any problems currently being experienced?*

The Financial Service Providers (Registration and Dispute Resolution) Act may not make much difference to the problems experienced in the short term. Problems are often caused by unregistered fringe lenders. It is more likely that these persons will still fall under the radar (as disclosed in the research papers provided to the August 2011 Financial Summit, approximately 40% of lenders appear to be unregistered). Of more use is the fact that credit contracts entered into by an unregistered lender are illegal and per se unenforceable. Further, the Financial Service Providers (Registration and Dispute Resolution) Act provides for disqualification of persons found to be acting as unregistered financial service providers. It is the Law Society's view that unregistered lenders will always appear in the market place, but are likely to reduce over time as consumers realise that their contracts are unenforceable.

31. *Do you support the Commerce Commission taking on the Credit (Repossession) Act enforcement role?*

The Commerce Commission already has this role through its enforcement of both the Fair Trading Act and the Credit Contracts and Consumer Finance Act 2003.

32. *If not the Commission, who else? An existing agency, and if so, which? Or perhaps, a new industry-funded body?*

See above. Further, the Society is concerned that enforcement by an industry-funded body would oust the jurisdiction of the Court and would result in an inherent conflict of interest.

Thank you for the opportunity to comment on the issues paper. If you wish to discuss this submission, the Commercial and Business Law Committee convener John Horner can be contacted through the Committee Secretary, Vicky Stanbridge (email [vicky.stanbridge@lawsociety.org.nz](mailto:vicky.stanbridge@lawsociety.org.nz), or ph (04) 463 2912).

Yours sincerely



Anne Stevens  
**Vice President**

# WHAT YOU CAN EXPECT WHEN YOU APPLY FOR A LOAN

When you apply for a loan, the organisation lending you money (the lender) has some responsibilities to you.

Lenders need to make sure they understand your situation and your needs.

This brochure tells you what a responsible lender will do to help you and make sure you don't get a loan that you can't repay.

These guidelines are provided for consumers who are borrowing money under a contract governed by the Credit Contracts and Consumer Finance Act 2003.

W R I T E M A R K  
PLAIN ENGLISH STANDARD

## IF YOU HAVE A COMPLAINT ABOUT YOUR LOAN.

If talking to your lender doesn't help, you can make a complaint to the lender's independent dispute resolution scheme. The scheme will be one of the four schemes listed below. Ask your lender which scheme you should contact. These complaint schemes are free for consumers.



### THE BANKING OMBUDSMAN SCHEME

Freephone: 0800 805 950  
Email: [help@bankomb.org.nz](mailto:help@bankomb.org.nz)  
Website: [www.bankomb.org.nz](http://www.bankomb.org.nz)



### THE INSURANCE AND SAVINGS OMBUDSMAN SCHEME

Freephone: 0800 888 202  
Email: [info@lombudsman.org.nz](mailto:info@lombudsman.org.nz)  
Website: [www.lombudsman.org.nz](http://www.lombudsman.org.nz)



### FINANCIAL SERVICES COMPLAINTS LIMITED

Freephone: 0800 347 257  
Email: [info@fscl.org.nz](mailto:info@fscl.org.nz)  
Website: [www.fscl.org.nz](http://www.fscl.org.nz)



PART OF THE FINANCIAL DISPUTE RESOLUTION SCHEME

### FINANCIAL DISPUTE RESOLUTION

Freephone: 0508 337 337  
Email: [enquiries@fdri.org.nz](mailto:enquiries@fdri.org.nz)  
Website: [www.fdr.org.nz](http://www.fdr.org.nz)

For more information about the  
Financial Services Federation, go to [www.fsfi.org.nz](http://www.fsfi.org.nz)

# RESPONSIBLE LENDING



FINANCIAL SERVICES FEDERATION

## Understanding your needs

A responsible lender will do everything they can to understand you and your situation, so you can make good decisions about your loan. Lenders must keep all your information confidential.

Responsible lenders may need to ask questions about your financial situation

Depending on your circumstances, lenders may ask about your:

- income or benefits (including whether you have a full-time, part-time, or casual job)
- fixed expenses (such as rent, repayment of other debts, child support, and monthly or yearly expenses such as insurance)
- other expenses that come up from time to time (and any special or unusual circumstances that might change your ability to repay a loan)
- existing loans and whether your new loan will be used to repay your existing loans
- credit history
- personal circumstances, including your age (especially if you are under 18) and the number of people who are financially dependent on you
- assets and their value (such as a house or car).

Responsible lenders may need to ask for proof about your financial situation

Depending on your circumstances, proof may include:

- getting a copy of your credit report
- asking for copies of payslips, tax returns, and bank statements
- asking to see identity documents (e.g. a passport)
- with your permission, talking to your employer or accountant
- asking to see original documents, not just photocopies
- checking in other ways (with other lenders for example, especially if any information or documents provided do not match).

Responsible lenders will do their best to understand your needs and goals

Depending on circumstances, lenders may ask about:

- the amount you would like to borrow
- the date you need the money and how long you need it for
- what you need the money for
- the type of loan that would suit you best.

## Deciding if the loan is right for you

Lenders need to work out whether you are able to repay a loan. A responsible lender may decide not to give you a loan if they believe that:

- you would be unable to repay the loan
- you would find it extremely hard to repay the loan
- the type of loan will not meet your needs or goals.

## Making sure you understand

A responsible lender should:

- do their very best to make sure you understand everything about the loan, including your rights and responsibilities, before you sign a contract
- give you fair terms and conditions, including clearly explaining interest rates and fees
- make fair decisions about the property being used as security for your loan
- make sure that any property used as security for your loan is clearly described in your loan documents and is understood by you
- make sure you understand the risks that come with having a loan, and the result of not repaying it, which might include repossession or the sale of any property you provide as security
- give you this information at the time you apply for the loan.

## Helping you if things go wrong

If you are having trouble paying your loan you should contact your lender as soon as possible.

A responsible lender should:

- treat you reasonably if you miss payments. This may include renegotiating the terms of your loan where it is possible to do so
- work with you to find solutions if you are having problems with your money, or suddenly face hardship. This may include referring you to someone who can give you advice about how best to manage your money
- refer you to a budget advisor and work with the budget advisor if you ask for that
- help you to deal with any social service provider (such as Work and Income New Zealand) if you ask for that
- make sure that, if your property has to be repossessed, you are treated fairly, remembering that the lender also has a right to be repaid. Being treated fairly includes:
  - making reasonable efforts to tell you about other payment options before the property is repossessed
  - repossessing only the property named as security in the loan contract
  - treating you and your property with dignity and making sure the repossession agents also treat you fairly.

Members of the Financial Services Federation have made a commitment to uphold these Responsible Lending Guidelines

Websites which provide useful information about borrowing money:

- [www.sorted.org.nz](http://www.sorted.org.nz)
- [www.consumeraffairs.govt.nz](http://www.consumeraffairs.govt.nz)
- [www.comcom.govt.nz](http://www.comcom.govt.nz)
- [www.fsf.org.nz](http://www.fsf.org.nz)