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Responsible Lending Code  
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## Responsible Lending Code – Discussion Document

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Ministry of Business, Innovation and Employment's discussion document *Responsible Lending Code* (discussion document). The Law Society understands that the Ministry is likely to construct both a Code and explanatory guidance notes for both lenders and consumers, a concept that the Law Society supports.

### Introduction

- 1. Do you agree with the proposed criteria for assessing what guidance should be set out in the Code as set out above? Should retaining sufficient flexibility to allow lenders to adapt the guidance to different products and business models be another criterion? Are there any other key criteria to be considered?**

The Code should not be so prescriptive as to prevent lenders adapting the guidance to different products and business models. This should be included as a criterion.

- 2. Are there any particular features of the New Zealand market which would differentiate our approach from international approaches?**

New Zealand does not have deep or strong capital markets and so the opportunities for consumers to borrow money are limited. Lenders charge high interest rates compared to other jurisdictions, possibly reflecting to some extent their higher costs of borrowing. These features differentiate New Zealand from other markets. New Zealand's approach to the Code should reflect these features by ensuring that current quality lenders are able to continue to operate in New Zealand's markets without significantly increased compliance costs.

As experience with financial advisers' legislation showed, engaging buy-in from the parties to be regulated will be key to the success of the Code. From the consumer perspective, we understand that consumers have easier access in New Zealand to dispute resolution services and the Disputes Tribunals but that they are largely unaware of their rights. It would be helpful if a requirement to provide information on rights became a focus for the Code and for guidance notes. This is addressed further in the response to the next question.

**3. We consider that the structure of the Code should reflect the lifecycle of a consumer credit contract, do you agree?**

Although this suggestion appears reasonable, the size and extent of the Code being considered causes concerns as to its workability. Is its purpose to protect lenders by providing safe harbour processes, or to protect consumers?

Although the Code is not binding, a better regulatory outcome would be achieved by developing the principles and spirit of the Code rather than providing technical safe harbours. Lenders should be offered guidance, but true guidance should help lenders and not be used against them as evidence of non-compliance with the lender responsibility principles.

The purpose of the Responsible Lending Code is (a) to elaborate on the lender responsibility principles specified in section 9B(2), and (b) to offer guidance on how those principles may be implemented by lenders. An alternative structure would be to split the Code into two sections in keeping with the legislative intent. The first section could elaborate on the lender responsibility principles and would develop the spirit of the Code. Compliance with this part of the Code should be taken as evidence that no oppressive conduct had occurred. The second section could contain guidance. The guidance section could be flexible and detailed in order genuinely to assist lenders to create and maintain fair processes. In order to maintain flexibility, this part of the Code would be true guidance and non-compliance with it should not be taken as evidence that oppressive conduct had occurred. As guidance notes are drawn up, it would be helpful to include notes directed at specific segments of the lender market as well as more general guidance.

It may be appropriate to consider whether it is necessary to replicate protections that are already provided in other legislation, for example the provisions on advertising. Consumers are already protected by the Fair Trading Act 1986 against misleading and deceptive conduct, unsubstantiated representations, false representations and unfair practices. The Commerce Commission and the Financial Markets Authority (FMA) produce guidance on these protections (and the equivalent sections of the Financial Markets Conduct Act 2013). Consumers are generally unaware of their rights, and these guidance notes available from various sources are therefore of little value to them. Lenders may be similarly unaware of the practical implications of their obligations to consumers. What would be most helpful to consumers in particular and also to lenders would be practical guidance on what to do where there is a problem. We understand from budget advisors that when they are able to give consumers and lenders published information prepared by the relevant authority on consumers' rights, matters tend to resolve more easily.

With respect to guidance notes in particular, there will be developing case law on the Code and its provisions. Thus it will be important to review and update the Code and in particular guidance notes as the law is clarified.

Following the structure suggested above, the 'elaboration of lender responsibility principles' part of the Code should focus on the consumer protections that are unique to the Credit Contracts and Consumer Finance Amendment Act 2014 (such as unreasonable fees and repossession of consumer goods under credit contract). Other than the fundamental requirement that advertisements should accurately represent the services, rights and responsibilities that will be extended to the consumer, if lenders and consumers really need additional guidance on advertising, that guidance could be included the 'guidance' section of the Code.

**4. Are there lenders/borrowers/agreements or classes of lenders/borrowers/agreements that should be treated differently under the Code? If so, why, in what way and how should any such lenders/borrowers/agreements be defined?**

Although flexibility in regulation is commendable, anecdotally the greatest risk to consumers comes from the smaller providers lending primarily to consumers with low incomes, and in particular those commonly referred to as payday lenders. As these lenders tend to provide credit only via shopfronts,

they fit within the core provisions of the Credit Contracts and Consumer Finance Amendment Act. On that basis, different lenders should not be treated differently.

However, there are categories of lender whose scope extends beyond this. These include providers who supply goods via mobile shops at consumers' homes or workplaces. These lenders and their consumer customers will need additional information.

From the consumer perspective, there also appears to be merit in providing additional protection and information to those who are vulnerable because of lack of education or money, or language or cultural background differences. There is merit, for example, in providing simple explanations of the Code in all relevant languages.

**5. Should the concept of “scalable” guidance apply to the Code? If so, which principles or responsibilities should be scalable?**

Please see the answer above. The most effective Code would be a basic code that is simple and universal, with universal guidance notes plus specific further guidance notes addressing specific market segments.

**6. How prescriptive should the guidance in the Code be?**

Risk-based regulation of the market is more effective than a long, detailed Code. Most quality lenders already have processes in place that comply with their obligations under other legislation. These processes can be significantly different between different lenders, with no difference in the quality of the consumer outcome. We understand from budgeting services that the payday lenders and lenders who finance direct sales are less likely to have a grasp of the significant legal requirements. We suggest that this is better dealt with by clear plain language guidance notes rather than prescriptive provisions in the Code.

**7. Should the level of prescription differ for different classes of lenders/borrowers /agreements? If so, which classes and why?**

Not within the Code, see answer to Q4 above.

**Before entering into a consumer credit agreement**

*Advertising*

**8. What are the elements of a best practice internal process to ensure that advertising is not misleading, deceptive or confusing? (For example, in relation to training and checking marketing material.)**

The Law Society concurs that the Code should include guidance on best internal process to ensure that advertising is not misleading, deceptive or even confusing. It notes that many New Zealand businesses are aware of and work to current guidelines from the Commerce Commission. Many lenders also comply with the Advertising Standards Authority (ASA) Code for Financial Advertising (to which lenders should be referred in guidance notes).

The Law Society suggests that where possible, the Code and its guidance notes should be consistent with other guidance material so that businesses themselves do not become confused between different standards. It is particularly important to ensure costs of compliance do not become a barrier to compliance.

Having said that, specific guidance around the use of daily/weekly interest rates and incorporation of an annual interest rate and around initial promotional periods (as with the Australian guidance) would also be useful – particularly as this assists consumers to compare offerings.

The Law Society notes that the Code is not binding. Examples can be useful, but will need to be clearly described as such; it should be made clear to lenders that they are not a complete, prescriptive checklist of standards to follow.

**9. Should guidance on advertising processes take account of the size and nature of the lender? If so, how?**

In the Law Society's opinion the size of the lender is not particularly relevant. The purpose of the Code is consumer protection, and that protection should be afforded to consumers whatever the size of the lender.

However the nature of the lender may well be relevant. There are differences between high-cost, short term lending for example, and long term lending at competitive interest rates. It is the outcome of the process that is important, and the lender should be given guidance as to appropriate conduct that is consistent with the Code (as opposed to a checkbox, prescriptive approach to process that ignores the substance).

**10. What existing guidance or codes of practice for advertising will help inform the Code? Should these codes be referred to or translated into the Code?**

The Code should be standalone as it is a product of statute; lenders should be able to refer to it without needing to refer to other guidance and codes, other than those available through the Code. It is a question of accessibility – and greater accessibility should assist with greater compliance.

The Code should incorporate the existing guidelines provided by the ASA and the Commerce Commission guidelines on the Fair Trading Act, either directly or by links.

**11. Are there specific advertising practices that lenders should follow? Or are there specific advertising practices that lenders should refrain from following?**

The Law Society believes there are areas whereby specific advertising practices are appropriate (such as annual interest rate for longer term loans, to allow easy comparisons by consumers), with increases in interest rate to be as visibly promoted as initial "promotional" rate where the promoted rate will not last for the term of the loan.

Further, the Law Society is aware that annual interest rate is a vexed issue for short term loans, because the interest dollars may be quite low but will be stated as a high annual rate. Consumers will not be in a position to compare apples with apples based on annual interest rates. At this level, other factors may be more appropriate such as the total cost of the loan. Having sample loan calculators available to consumers may well be helpful.

**12. Should advertising of certain credit products be accompanied by risk warnings?**

The Law Society believes there is merit in considering this, but notes that there would need to be data as to the effect of credit products and their method of offering in New Zealand, in order to identify which products might need risk warnings.

Further, credit products of all kinds have different risks and benefits. It may be appropriate to publicise this as generic consumer information which could be supplied by the Ministry to consumers and consumer groups, rather than requiring creditors to advertise risks as part of their compliance with the Code. Of course, it will be necessary for all significant aspects of the supply of credit to be disclosed to consumers.

**13. Should there be specific guidance in relation to advertising which is targeted at a specific group or persons known to have specific characteristics? If so, which groups/characteristics?**

Advertising should be in plain language, and should not be misleading or deceptive. There should be a recommendation that if advertising is targeted to a group which has a first language other than English, the explanatory notes should be in that language.

**14. What other matters should the Code address in relation to advertising?**

The Code should encourage advertisers to provide full information where online or social media advertising is used.

*Assisting informed decisions*

**15. Apart from complying with disclosure obligations, how do/should responsible lenders assist borrowers to understand the terms of the credit agreement? How should any guidance cover different modes of providing credit? (e.g. online applications) Should certain information be required to be given orally for face-to-face or telephone interactions with customers?**

The Law Society considers that online guidance applications should be made available to borrowers. Lenders' guidelines should encourage lenders to direct prospective borrowers to calculators for assessing the true cost of the particular credit application. We are unsure as to the desirability of telephone interactions in view of comments elsewhere regarding the need to correctly identify customers for credit-checking purposes.

**16. What are/should be responsible lenders' practices where English is not a borrower's first language?**

Lenders should be encouraged to ask borrowers to bring an interpreter (including sign language interpreters) to meetings, but should not be required to insist on the presence of an interpreter. Simple general guidelines for borrowers should be made available in all likely languages (including sign language), and lenders could be required to provide these to borrowers as part of their compliance with the Code.

We note that this is not only an issue of English as a second language: it applies also to borrowers with limited reading skills or dyslexia, so the use of graphics is important.

**17. What opportunities do/should responsible lenders provide to borrowers to ask questions about the agreement? Would providing access to frequently asked questions be sufficient?**

Depending on the circumstances (and taking into account the comments in the previous question) this may well be sufficient, provided the key information about the cost and consequence of credit is explained carefully to the consumer.

**18. What practices do/should responsible lenders undertake to ensure that credit agreements are in plain English, clear, concise and intelligible?**

The Law Society is not in a position to comment on this question.

**19. How do/should responsible lenders assist borrowers to understand the implications of the credit agreement? E.g. if technical or legal concepts are referred to, should the agreement explain the implications of those concepts?**

The agreement itself should not explain the implication of contractual concepts as this is likely to affect interpretation not only in contract law, but also in relation to any potential Consumer Guarantees Act issues. First, the agreement should be sufficiently plainly drafted that the implications are clear to most borrowers. Secondly, explanatory information should be available. We understand from budgeting services that it should not be assumed that even the most basic concepts (such as “if you borrow money, you must pay it back”) are understood by all borrowers.

**20. Can you point to good examples of credit agreements that are in plain English, clear, concise and intelligible?**

The Law Society is not in a position to comment on this question.

**21. What are/should be responsible lenders’ processes in relation to independent budgeting or legal advice for borrowers and guarantors? In which circumstances should the lender require or recommend independent legal advice?**

In keeping with other areas of consumer law reform, the Law Society would expect there to be a recommendation that borrowers seek legal advice. However we will be interested to hear the views of industry participants, as there is a suggestion that the people most at risk will not have the funds to seek legal advice, and that a Code recommendation or requirement for legal advice may therefore simply be an easy ‘out’ for payday lenders.

**22. What do/should responsible lenders do to assist guarantors to make informed decisions?**

We suggest that guidance notes should be provided for guarantors.

**23. What information do/should responsible lenders give a borrower to assist them to make an informed decision on credit related insurance?**

We suggest that guidance notes should be provided.

**24. How do/should responsible lenders ensure that any advertising of credit-related insurance products distributed by the lender is not misleading, deceptive or confusing?**

The Law Society does not have a view on this. Whether or not advertising is potentially misleading or deceptive or even confusing involves a number of parameters including the target market of the advertising and the nature of the product (simple, complex, established or new). This is no different from any other form of advertising.

**25. How do/should responsible lenders ensure that borrowers have sufficient time to make informed decisions?**

We note that if the lenders are required to make specific enquiries of borrowers, this in itself will take time. Also, it should be borne in mind that some borrowers necessarily do not have time in which to consider the decision, because of the urgency of their need. This is not a matter lenders can deal with.

**26. What processes and practices do/should responsible lenders undertake to assist informed decision for agreements when the application and approval is undertaken remotely?**

Where an agreement is made online, it is possible to provide a considerable amount of detail using links, graphics and mouseovers. It is also possible to require borrowers to check that they understand specific obligations before moving through the contract.

It is acknowledged that this is difficult over the phone, and the Law Society suggests that rather than making specific recommendations lenders should be encouraged to record their explanation of key obligations to borrowers, and the borrowers' agreement to those obligations, in the same way that is common in the mobile phone and electricity industries. Lenders should be advised that this is inappropriate for contracts of guarantee which must be in writing signed by the guarantor, as this point may well not be understood by smaller lenders.

**27. What other matters should the Code address in relation to assisting informed decisions?**

The Law Society is not in a position to comment on this question.

*Making reasonable inquiries*

**28. What information do/should responsible lenders require from a borrower when they apply for credit? How much reliance should a lender place on a credit check?**

The Law Society is not in a position to comment on the operational parameters for credit checks, but notes that for larger loans these should be carried out. Further, under the new positive credit information rules, lenders should be encouraged to enter appropriate information relating to the borrower.

**29. What do/should responsible lenders explain to the borrower in relation to the purpose of the checks and assessments of affordability?**

Among other matters, lenders need to explain how a credit check works and where information can be found on it, the impact of credit checks being undertaken (data is retained as part of a credit record) and also more significantly, the effect of a default on credit history.

Likewise, borrowers should be put in the position of understanding what other checks are being undertaken or information considered, the outcomes of such checks and assessments, any complaints or queries the individual can make about those results.

Borrowers also need to understand the reasons for providing accurate and complete responses – which is not only in the lender's interests but their own, if the lender is a responsible one.

The Law Society notes that the ASIC code contains a number of practical inquiries that a lender can and should address.

**30. How do/should responsible lenders assess whether the information a consumer has provided is correct? In what circumstances do/should responsible lenders be able to rely on information provided by a borrower?**

The Law Society suggests that the first question is not capable of being addressed in the Code, because of the broad range of issues that can be raised by consumer information. There is also a real problem for lenders where borrowers present with clear and imminent hardship that could be alleviated by a small loan. A further issue is that detailed prescriptive assessment rules could place lenders in a position of being parties to an offence under the Crimes Act (e.g. obtaining by deception) where a borrower does not tell the truth.

In response to the second question, if lenders fully explain why accuracy and completeness of information is important, lenders should be able to rely on information provided, save that if it contradicts information the lenders themselves hold, they should make reasonable enquiries to satisfy themselves as to what that means, and they should not in any circumstances be "wilfully blind".

**31. How does/should a responsible lender's checks differ for existing customers and new customers?**

Again, the Law Society is not in a position to comment on this in detail, save that it is relatively obvious that a returning borrower who has successfully completed loan payments may need a check merely to uncover matters (e.g. employment or family status) that may have changed in the interim.

The Law Society also notes that for new customers it is important that lenders check the legal name of the applicant, using a passport or driver's licence, to reduce the risk of borrowers taking multiple loans under different names. Credit checks may need to be carried out under all names.

**32. How do/should responsible lenders consider whether credit does/does not meet the requirements and objectives of the borrower?**

The Law Society considers that no lender is in a position to do this, because it cannot realistically put itself into the borrower's mind or understand the complexity of the borrower's lifestyle, and nor can it make the decision for the borrower. It is more important that the borrower is advised of the characteristics of the loan and its obligations.

**33. How should the lender responsibility to be satisfied that it is likely that the credit will meet the borrower's requirements and objectives be balanced against not unduly restricting consumer choice?**

The Law Society is of the view that a clear explanation of the detail of the credit and evaluating it against the borrower's expressed needs is all that can be realistically expected of the lender. See the answer to the previous question.

**34. What proportion of credit applications are processed without the involvement of financial advisers permitted to give personalised advice in relation to category 2 products under the Financial Advisers Act 2008? Will regulation under both the lender responsibilities and the Financial Advisers Act impose significant costs for lenders?**

The Law Society is not in a position to comment on this question.

**35. How do/should responsible lenders deal with the potential conflicting incentives posed by payments of commission/bonuses and the need to be satisfied that it is likely the credit agreement meets the requirements and objectives of the borrower and will be repaid without substantial hardship?**

The Law Society is not in a position to comment on this question.

**36. What factors should be taken into account in considering what should constitute substantial hardship?**

The Law Society regards this as a complex operational matter, but notes that a responsible lender is likely to look at the borrower and his or her needs as a whole, which may require considering not only the borrower's ability to repay, but also the consequence to the borrower of being refused a loan.

**37. Should substantial hardship be assessed by reference to any particular indicators or reference budgets?**

See the answer to the previous question.



**38. Should the Code specify a threshold for substantial hardship? If so, what is an appropriate threshold?**

The Law Society considers that “substantial hardship” is too complex a concept for a threshold to be specified.

**39. To what extent do/should responsible lenders take into account likely future market conditions (e.g. interest rate rises) when assessing affordability for the borrower (particularly for long term credit agreements such as mortgages)?**

The Law Society is not in a position to comment on this question but expects that there will be submissions from the banking industry addressing it.

**40. Do/should responsible lenders engage in lending that relies primarily or solely on the value of any security provided by the borrower?**

Again, this question raises complex issues and cannot be answered by a “yes” or “no”. The most that could be said is that it might well be one of many matters to be taken into consideration.

**41. Are there circumstances in which it should be presumed that the consumer will only be able to make repayments with substantial hardship?**

See the answer to question 36.

**42. What policies do/should responsible lenders have in place to assess whether the security taken is excessive relative to the size and length of the credit provided?**

The Law Society considers that the value of the security relative to the size and length of the credit is not necessarily a significant factor. The security may well be the only asset available to the borrower, and it would seem counterintuitive to deny a borrower credit purely on the basis that they had too much security.

**43. What other matters should the Code address in relation to making reasonable inquiries to assess whether the credit agreement meets the borrower’s requirements and objectives and can be repaid without substantial hardship?**

The Law Society has no further comment on this question, but notes that the ASIC rules form a practical basis for the Code.

**During the life of a consumer credit agreement**

*Dealing during the term of the agreement*

**44. What practices and processes do/should responsible lenders have in place to assist borrower decision-making in relation to variations to a contract (e.g. credit card limit increases) or refinancing? What types of variations do/should such practices apply to?**

Provisions equivalent to the UK Financial Conduct Authority Consumer Credit Sourcebook rules (CONC) would be appropriate in the New Zealand markets for variations or refinancing.

- 45. What practices and processes do/should responsible lenders have in place in relation to whether a credit agreement would likely meet the borrower's requirements and objectives and can be repaid without substantial hardship following a variation or refinancing? What types of variations do/should such practices apply to?**

Further to the comments above regarding the borrower's ability to repay, it is noted that the cost to the lender of collection activities is likely to be passed onto the borrower, whereas the cost of refinancing may well be considerably less, particularly where repayment time is extended.

- 46. Other than complying with disclosure requirements, what information do/should responsible lenders provide to borrowers in relation to the credit agreement during the life of the agreement? For example, should lenders provide certain information to borrowers to enable borrowers to make decisions as to whether to exercise their rights under the agreement?**

Other than disclosure, the borrower should be informed of any other circumstances that might lead to default or enforcement of the credit agreement – such as default by a co-borrower. Consideration should also be given to whether the borrower should also be informed of any substantial change in enforcement approach by the lender, for example because of sale or factoring of the credit agreement where that would lead to unexpected detriment to the borrower.

- 47. What practices do/should responsible lenders refrain from during the life of the credit agreement? (For example, should responsible lenders refrain from the practice of holding multiple direct debit forms so that one can be re-submitted if a form is cancelled?)**

Yes, the practice of holding more than one direct debit form appears unacceptable. Consideration could be given to rules addressing any power of attorney entitling the lender to approach the borrower's employer for wage deductions without a court order, and in particular whether this should be done at all, and if it can, whether there should be a limit on the percentage of the borrower's pay that can be appropriated.

#### *Fees*

- 48. What practices should lenders follow in order to set a fee that is not unreasonable?**

If fees are defined as establishment fees, credit fees and default fees (as considered in the draft guidance), they should reflect true additional costs of doing business with that particular borrower. The lender should have sufficient capital to operate its business as a lender without passing on costs that apply to all borrowers through fees. It should be noted however that the basic operation of the lender's business is therefore likely to be funded through interest charges.

Well-educated borrowers with other assets are likely to negotiate and seek reduction or waiver for these fees.

- 49. What costs should the lender be able to recover through establishment fees (e.g., overheads, administration costs)?**

These fees will be incurred for any loan that is issued and should be priced into the lender's business model as the cost of doing business. The lender can limit the level of establishment fees through good business processes.

**50. What costs should the lender be able to recover through credit fees generally?**

The lender should be able to recover any additional costs that apply only to that particular borrower, not all borrowers. It is noted that proper compliance with the responsible lending code in relation to each customer will increase these costs.

**51. What costs or losses should the lender be able to recover through default fees?**

Unlike the establishment of the credit agreement, default is not certain to happen. As such, there is no reason why the lender should price default into its business model. Accordingly it is reasonable for a lender to pass these costs onto the borrower. However, any such costs must reasonably reflect the cost to the lender.

**52. Are there any particular reasonable standards of commercial practice that should be taken into account when deciding whether a fee reasonably compensates the lender for a reasonable estimate of costs or losses incurred by the lender as a result of the borrower's acts or omissions?**

The Law Society is not in a position to comment on this question.

**53. How and when should fees be reviewed to ensure they remain reasonable?**

Fees should be reviewed from time to time. The then current fees should be used when the credit agreement is varied, particularly if the amount of the loan is increased or when the borrower, having paid off one loan, takes out a second loan. It is noted that subsequent loan fees and variation fees should be lower than upfront administration fees because the borrower's key records are already with the lender.

**54. What is a reasonable amount of commission for a lender in relation to credit-related insurance?**

The position of the lender is conflicted in this situation as both the lender and the borrower will benefit from the insurance. Any commission received by the lender over and above the cost of administration of the insurance application together with overheads should ideally be passed on to the borrower through a reduction in borrowing rates or fees. Alternatively the commission should be disclosed to the borrower.

Depending on the nature of the credit, the lender may attract only one layer of commission as a sub-agent. In the life industry it is normal for commission to be significantly more than the first year's premium. For general insurance products the commission is usually significantly less (20-30% of the first year's commission).

**55. Should the Code incorporate parts of the Commerce Commission draft guidelines on fees? What changes would be needed to those guidelines to reflect subsequent case law, views on unreasonable fees and changes to the CCCFA?**

No, the Code should have stand-alone guidance notes. The Commerce Commission necessarily has an enforcement view, and reliance on its guidance notes alone would allow it to set a high threshold from the practical perspective. The Ministry should prepare its own guidance notes reflecting policy in the context of contemporaneous practice and issues, and its guidance notes should be promptly updated to reflect case law developments but only where that is consistent with the Credit Contracts and Consumer Finance Amendment Act 2014.

**56. What other matters should the Code address in relation to fees?**

The key to fees is disclosure. Consideration should be given to describing fees by visual diagrams that show how the fees and interest charged relate to the sum being borrowed. UCITS funds disclose Synthetic Risk and Reward Indicators (SRRI) to illustrate the relationship between risk and reward. Similar visual diagrams are being considered in New Zealand for Financial Markets Conduct Act 2013 disclosure for managed funds (<http://www.med.govt.nz/business/business-law/current-business-law-work/financial-markets-conduct-act/draft-regulations/managed-funds-2013-fund-update-mockup-518-kb-pdf>). The fees and interest over the life of the credit contract should be shown in relation to the total of the amount being lent under the credit agreement.

The Law Society is aware that budgeting services have suggested that easy and visually attractive calculators should be made available to lenders and borrowers both online and as apps, to assist in decision making. The Law Society supports this concept and further suggests that aspects of the Code could well be met by lenders verifying that these calculators have been used by borrowers.

**Default, enforcement and the end of a consumer credit agreement**

*Repayment difficulties and other problems*

**57. How do/should responsible lenders monitor whether the borrower may be facing actual or possible repayment difficulties? Is it practical to check for possible repayment difficulties?**

It would appear onerous and inefficient for lenders to be required to monitor possible repayment difficulties, in the absence of an approach by borrowers or accounts falling into arrears.

**58. What policies or procedures do/should responsible lenders have in place for dealing reasonably with borrowers who have or may breach the agreement or when other problems arise? (e.g., in relation to assistance to be provided to the borrower)**

The insertion of the Credit (Repossession) Act provisions into the Credit Contracts and Consumer Finance Amendment Act will assist with this, together with the revised hardship provisions.

**59. What do/should responsible lenders do to assist borrowers to be informed of their rights? (e.g., in relation to unforeseen hardship relief and access to dispute resolution schemes.)**

First, it is important that accurate and practically worded statements of both lenders' and borrowers' rights should be available online, particularly in a format easily readable on a smartphone. These should include translations into commonly used languages. Borrowers should then be required to direct consumers to those information pages in communications with lenders.

**60. How do/should responsible lenders communicate with borrowers in relation to breaches or potential breaches of the agreement to ensure that they treat borrowers reasonably and in an ethical manner? (E.g. in relation to staff training and policies and enforcement of those policies)**

This is an issue which relates to internal matters for the lenders. Appropriate training information should be included in guidelines, which should be in plain language. It is important that these materials enable lenders to carry out training in an efficient manner to minimise flow-on costs which can be funded only by borrowers.

**61. What do/should responsible lenders take into account when considering repayment plans proposed by a borrower (in connection with an application for unforeseen hardship relief)?**

The Law Society considers that others will be better placed to answer this question and other questions related to enforcement, all of which involve practical matters. It points out that efficient and effective enforcement is critical to the financial viability of lenders and thus to the costs of credit.

- 62. What are the elements of a good internal complaints process?**
- 63. What other matters should the Code address in relation to borrowers facing repayment difficulties or other problems?**

The Law Society is not in a position to comment on Qs 62 and 63.

*Enforcement action and the end of the credit agreement*

- 64. What is the range of enforcement responses that lenders take in response to default by the borrower?**

Enforcement responses are set out in the Credit (Repossession) Act 1997 and the Credit Contracts and Consumer Finance Amendment Act 2014.

- 65. What policies or procedures do/should responsible lenders have in place for considering whether their enforcement response is proportionate?**
- 66. What steps do/should responsible lenders go through before taking enforcement action? For example, before sending debts to a debt collection agency?**
- 67. What are/should be responsible lenders' practices in relation to charging interest and/or fees once they have started enforcement action? (For example, once a debt has been sent to a collection agency.)**
- 68. What steps do/should responsible lenders take to ensure that they treat borrowers and their property reasonably and in an ethical manner during the course of any enforcement action (including the manner in which the lender or their agents communicate with the borrower)?**
- 69. What other matters should the Code address in relation to enforcement action?**

The Law Society considers that others will be better placed to answer these questions related to enforcement, all of which involve practical matters.

- 70. What do/should responsible lenders do once they have been fully repaid? (For example, arranging release of securities.)**

The Law Society points out that even if securities are not released, a lender cannot make any claim against them if there is no outstanding debt. There are circumstances where a consumer might well prefer to have a security interest remaining in place to secure future loans. However security interests must be released if a consumer with no outstanding debt requests its release.

*Repossession*

- 71. How/what steps should a lender take to satisfy itself on reasonable grounds that goods are at risk in accordance with Part 3A?**
- 72. What policies do/should responsible lenders have in place in terms of considering alternative options that could be explored before exercising the remedy of repossession?**

73. **Should the Code provide guidance on the repossession of items of little economic value?**
74. **What arrangements should a responsible lender have in place for borrowers to voluntarily return goods when a repossession warning notice is issued?**
75. **Should the Code refer to the internal complaints resolution process used to resolve borrower complaints (given that a lender must not begin or continue repossession enforcement action until a borrower's complaint in relation to any repossession enforcement action has been resolved)?**
76. **What guidance should the Code provide in terms of how lenders or their repossession agents should enter premises?**
77. **What policies do/should responsible lenders have in place to consider whether repossession (and the costs involved in repossession) is proportionate to the scale of the default?**
78. **How do/should responsible lenders ensure that ethical behaviour is observed when effecting a repossession?**
79. **Should the Code provide guidance about how responsible lenders should carry out the process of selling repossessed goods?**
80. **What other matters should the Code address in relation to repossession?**

The Law Society considers that others will be better placed to answer these questions, all of which involve practical matters.

We hope you find these comments helpful. If you wish to discuss the submission, the convenor of the Law Society's Commercial and Business Law Committee, Stephen Layburn, can be contacted through the committee secretary, Vicky Stanbridge (ph (04 463 2912/ or email [vicky.stanbridge@lawsociety.org.nz](mailto:vicky.stanbridge@lawsociety.org.nz)).

Yours sincerely



Allister Davis  
**Vice President**