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LAW·COMMISSION
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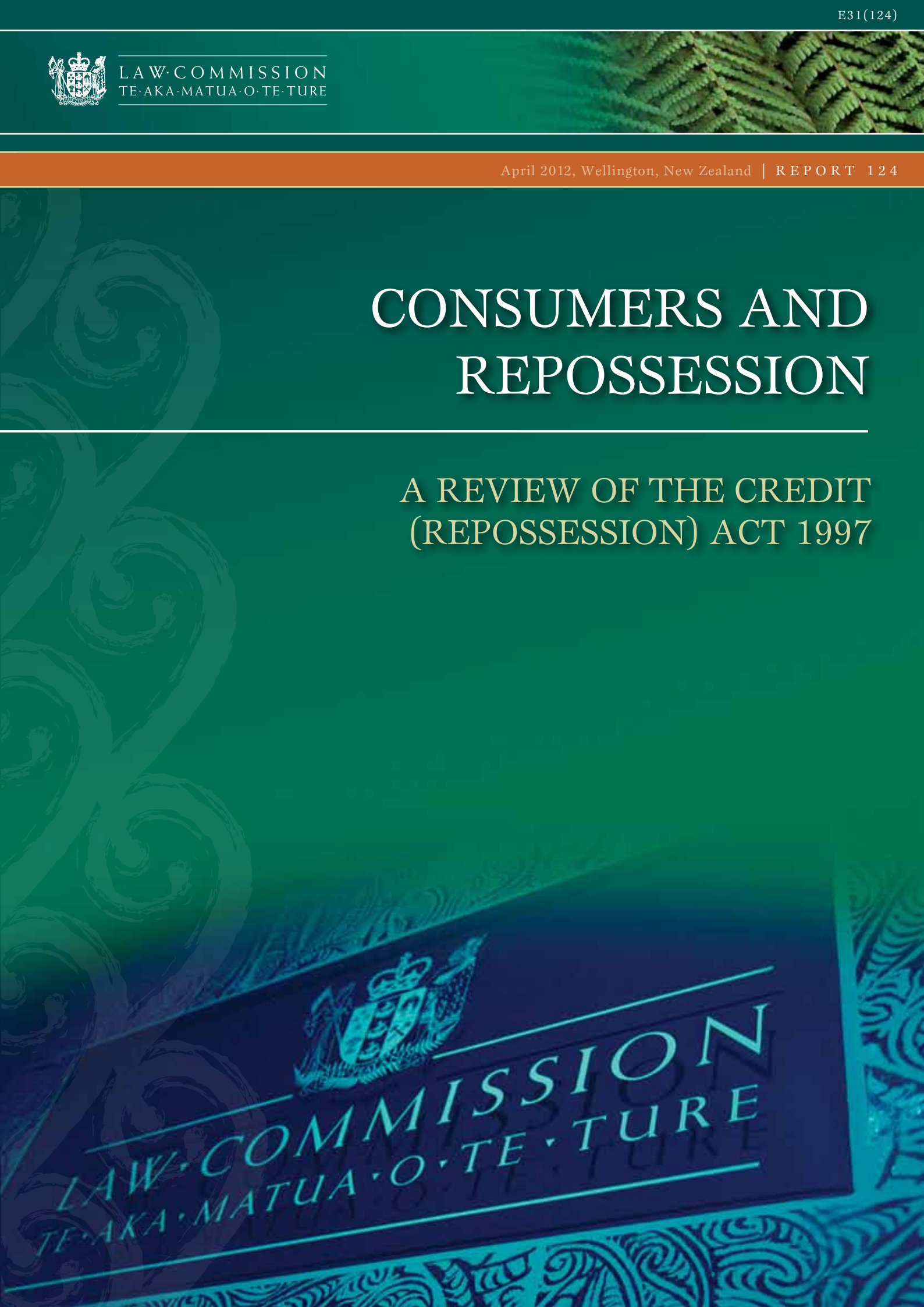
April 2012, Wellington, New Zealand | REPORT 124

CONSUMERS AND REPOSSESSION

A REVIEW OF THE CREDIT (REPOSSESSION) ACT 1997



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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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Hon Judith Collins
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

23 April 2012

Dear Minister

I am pleased to submit to you Law Commission Report 124, Consumers and Repossession: A Review of the Credit (Repossession) Act 1997, which we submit under section 16 of the Law Commission Act 1985.

Yours sincerely

Grant Hammond

President

FOREWORD

Without credit – the institution of borrowing and lending – the economic history of our world as we know it could not have evolved. The famous song from the musical Cabaret about money making the world go round is not literally true. But it does drive people, goods and services hugely, and at many levels, in the human enterprise.

One level is that of consumer credit. People need to be able to finance fridges, cars, sports goods and the like. Sometimes all goes well. Consumers have good information, buy sensibly, and are able to finance their purchases responsibly. All sides of the credit transaction are then well enough satisfied.

But this is not always the case. Consumer law has to grapple with cases of poorly informed consumers, rash decision-making by consumers, over-reaching and even rapacious lenders, and lender credit recovery practices that can fall well below any appropriate standards.

It follows that while the institution of credit as such is a good and necessary thing; and security of lenders is necessary; a proper balance between the two is essential in any well-structured legal system.

The Ministry of Consumer Affairs has been conducting an in-depth review of the law relating to when and how credit is granted and enforced, and what appropriate legal conditions should be in place in that respect.

One particular subset which has given rise to some difficulties in recent years is that area of the law under which lenders seek to enforce repossession of goods over which they took security. The Law Commission was asked to provide a report on this subset.

In the Commission's view, some legislative change is required in this subject area. We are strongly of the view that all legislation of this kind should be included in the one statute. If ever there was an area of the law in which accessibility is at a distinct premium, this is it. If consumers do not know their rights, then they will on occasion be taken advantage of, sometimes in distressing personal circumstances. Given that the wider scale review by the Ministry of Consumer Affairs has resulted in prospective legislation, in our view the Commission's suggested reforms, which are set out in the Summary, should be included as a necessary part of that exercise.

The Commissioner responsible for this reference was Geoff McLay, and the Senior Legal and Policy Advisers were Claire Browning, Allison Bennett and Nicola True. They were aided by law clerks Lara Teesdale and David Neild.

Hon Sir Grant Hammond KNZM
President

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Summary

The Ministry of Consumer Affairs has been charged with reconsidering and rewriting the law relating to when and how credit is granted; and on what terms. A distinct but important part of this body of consumer law is the repossession of goods over which security has been granted and their subsequent sale. The Commission was given responsibility for reviewing this area of law, and this report sets out our recommendations.

This Report necessarily reflects the premises accepted by the Ministry of Consumer Affairs and endorsed by the Government in its October 2011 decisions that it is necessary and appropriate for consumer credit to be available in New Zealand society, but that such credit should only be advanced in a responsible manner. While repossession ought to be possible, the law should make clear the circumstances under which a repossession can occur, and the repossession process ought to be as efficient and fair as possible.

It is the Commission's view that legislative changes to the current regime are necessary to ensure clarity, efficiency and fairness. Moreover, those changes ought to be incorporated into the reforms to the Credit Contracts and Consumer Finance Act 2003 that the Government is currently promoting to implement its October 2011 decisions. The remedies available to creditors to enforce their debts are part of the same credit process and the relevant law should be encompassed within the same Act.

Our detailed recommendations all reflect our principal recommendation that the repossession part of the reformed Credit Contracts and Consumer Finance Act should be premised on creditors exercising well defined rights in a manner that is responsible, just as they will have to act responsibly when entering into and administering credit contracts.

Our core recommendations are:

- The Credit Contracts and Consumer Finance Act should be extended to include what is now covered by the Credit (Repossession) Act and repossession should be included in the Code of Responsible Lending;
- The consumer credit repossession legislation should include a checklist setting out when repossessions can occur so that disputes at the time of repossession can be avoided, and breaches of the pre-possession and repossession requirements should be an offence;

- Only goods that are individually identified as being subject to repossession in the original credit contract can be repossessed;
- Some goods should not be subject to repossession at all: bedding, washing machines, portable heaters, passports and identity documents, and keys (except when giving access to a secured good), and the Code of Responsible Lending should deal with the taking of security and repossession of goods of emotional sensitivity but low or no economic value;
- There should be better disclosure of rights and remedies at the original time of contracting, and at pre-possession (when the consumer is warned that repossession is possible), repossession and post-possession;
- Compensatory remedies, including for non-financial loss, should be available from the Disputes Tribunal and the courts, and in the case of registered financial service providers, the relevant dispute resolution schemes should be required to have rules to that effect;
- Where the debtor has made a complaint or brought a dispute, the consumer credit repossession legislation should be amended so as to prevent repossession under a pre-possession notice or the sale of repossessed goods before the complaint has been dealt with by the creditor or the dispute resolution scheme;
- Repossession agents should be licenced by an appropriate body. Licensing and the loss of licence for breaching the consumer credit repossession legislation are important parts of the proposed regime. Licences must be carried during the repossession process as part of an assurance that the agent is not otherwise prohibited; and
- Repossession agents should be able to be excluded from the industry under s 108 of the Credit Contracts and Consumer Finance Act or the repossession chapter of the Code of Responsible Lending.

Chapter 1
Introduction

SUMMARY

This chapter sets out the background to our review and Issues Paper, our consultation and submission process, discusses the Government's decisions on its parallel review of the Credit Contracts and Consumer Finance Act 2003, and outlines the general approach we have taken in this report.

OUR REVIEW

1.1 We were asked to review the operation of the Credit (Repossession) Act 1997. Our terms of reference are as follows:[1]

> The Law Commission will work closely with the Ministry of Economic Development in a project to rewrite the Credit (Repossession) Act 1997 which has been found to have many practical difficulties with it. It is an important commercial subject to ensure creditors have adequate remedies. The Act is one that has considerable impact on both debtors and creditors alike.

1.2 We note that the reference to the Ministry of Economic Development should have been to the Ministry of Consumer Affairs, which has been undertaking a review of the Credit Contracts and Consumer Finance Act 2003 in parallel with our review.

1.3 We released our Issues Paper on 18 July 2011.[2] We acknowledged in the Issues Paper the lack of statistics and official collated information about repossession in the context of consumer finance arrangements. Accordingly, our Issues Paper was written primarily with the goal of eliciting information about experiences with the operation of the Credit (Repossession) Act, and the nature of any problems arising.

1.4 In the absence of firm information about the nature of the problems being experienced with the Act, our Issues Paper focused on an analysis of New Zealand's law in comparison to the law in like jurisdictions and highlighted the areas where our law differs. We found several significant differences between the Credit (Repossession) Act and the legislation in Australia, the United Kingdom, and some of the Canadian jurisdictions. So, along with questions about experiences of, and problems with, the Act, we sought views on whether these different approaches should be adopted in New Zealand.

1.5 We note that as a result of the Issues Paper proceeding as a problem-identification exercise, a number of issues have been raised with us during consultation that were not identified or canvassed in our Issues Paper. Where these fall within the scope of our terms of reference, we have nevertheless attempted to address them in this Report.

OUR CONSULTATION AND SUBMISSION PROCESS

1.6 The fact that our review proceeded in parallel with the Ministry of Consumer Affairs' review of the Credit Contracts and Consumer Finance Act unfortunately meant that we needed to set an unusually short timeframe for receiving submissions. We are most grateful for the considerable efforts that submitters made to respond to our Issues Paper under these time pressures.

1.7 We received a total of 39 written submissions. These represent the views of three individuals; 40 banks, finance companies, and organisations of financial services providers;[3] three debt collection specialists and/or repossession agents; nine consumer advice and/or advocacy groups; and three bodies with oversight/dispute resolution roles in relation to repossessions and credit matters. We also received submissions from one government department, two Crown entities, and the New Zealand Law Society. The full list of submitters is set out in Appendix 1 to this Report.

1.8 In addition to the written submissions we received, we were able to meet with many people and organisations with first-hand knowledge and experience of the Credit (Repossession) Act. We had a series of one-on-one meetings with representatives of the finance industry, consumer advice and advocacy groups, and debt collection specialists. We also met with Peseta Sam Lotu-Iiga, one of the Members of Parliament responsible for a Member's Bill addressing the issues arising in this area.

1.9 During our consultation period, we were fortunate enough to be able to attend and participate in the 2011 Financial Summit that was hosted by the Minister of Consumer of Affairs in Auckland on 11 August 2011. We took the opportunity while in Auckland to host three meetings the day before the Summit to which consumer representatives, financial service providers, and regulatory and dispute resolution bodies, which had accepted the invitation to the Summit, were invited.

1.10 We also travelled to Auckland on a separate occasion, when we hosted public meetings in Otara and Glen Innes so that communities could meet with us and share their experiences. We are grateful for the assistance of the Ministry of Consumer Affairs in organising these meetings.

1.11 In addition, we attended a community groups' training day hosted by the Ministry of Consumer Affairs, which provided a valuable opportunity to discuss the issues with a number of people working with consumers. This meeting was well attended by representatives of community law centres from around the country, among others.

1.12 While much is made anecdotally of consumer credit and repossession problems in South Auckland in particular, we were interested to see whether these issues occur nation-wide. At the request of representatives of the finance industry, we also travelled to Christchurch. There we met with both financial service providers, and groups providing advice, support and advocacy for consumers in need.

GOVERNMENT REVIEW OF THE CREDIT CONTRACTS AND CONSUMER FINANCE ACT 2003

1.13 At the Financial Summit in August 2011 the then Minister of Consumer Affairs, the Hon Simon Power MP, signalled his intention to reform consumer credit laws. The focus of the Summit was strongly on responsible lending practices. There also seemed to be widespread support for law reform to address perceived problems of predatory and irresponsible lending practices.

1.14 In October 2011, the Government decided to pursue a package of reforms aimed at ensuring credit providers lend and manage credit contracts responsibly.[4] The key reforms are as follows:

- A responsible lending duty requiring a lender to exercise the care, diligence and skill of a responsible lender at the time of considering an application for credit and throughout the contract term, with a supporting Responsible Lending Code to provide guidance on responsible lending practices;
- Provide for conditions on or cancellation of a lender's registration for lack of compliance with the Responsible Lending Code;
- Enhanced disclosure requirements, including requiring advice on dispute resolution and hardship provisions to be added to the key information and requiring the contract to specify the goods over which security for a loan is taken;
- extension of the three working day "cooling off" period following the making of a consumer credit contract to five working days;
- provision for a borrower to be excused from liability for costs of borrowing where the lender is not registered as a financial services provider;

- amendment of the oppressive credit contract provisions to specifically provide for consumer credit contracts separately from business credit contracts;
- extension of the hardship provisions to allow hardship applications by borrowers who are up to two months in default, require lenders to process applications within certain timeframes and provide reasons for declining an application, and to preclude lenders charging application and default fees; and
- provide that the goods specified in the Insolvency Act 2006 as exempt from bankruptcy are also protected from secured creditors except where the credit contract is for the purchase of such an item.

1.15 While the other matters covered in this reform package relate to the earlier part of the credit contract process (that is, prior to default), we consider that they will have some impact on the issues falling within our review. This is particularly so with the proposed reform of disclosure requirements and the hardship and oppression provisions. Accordingly, in considering and assessing the policy options available to address the issues that have been brought to our attention, we have taken these proposed reforms into account. Where relevant, they are discussed in the body of this Report.

1.16 Cabinet also directed the Ministry of Consumer Affairs to consult with the Treasury, the Ministry of Economic Development, the Commerce Commission, and the Financial Markets Authority on the proposal that the latter be given regulatory responsibility for both the Credit Contracts and Consumer Finance Act and the Credit (Repossession) Act.

1.17 These reform proposals are discussed in further detail throughout this Report as, not surprisingly, many of them are closely related to the issues arising under the Credit (Repossession) Act.

Note: On 4 April, and after this Report had been completed, the Ministry of Consumer Affairs released an exposure draft of the Credit Contracts and Consumer Finance Amendment Bill, through which it is intended to implement those policy decisions. That draft is available at http://www.consumeraffairs.govt.nz/legislation-policy/policy-development/credit-review. For reasons of timing, therefore, we have not referred to, or analysed, the provisions of that exposure draft in this Report and have only discussed the Government's policy decisions as announced in October 2011.

OUR VIEW ON THE PLACE OF REPOSSESSION LAW AND OUR APPROACH IN THIS REPORT

1.18 As we noted in our Issues Paper, the Credit (Repossession) Act is part of a network of credit and personal property and securities legislation.[5] We suggested that, in view of the fact that repossession is part of the same process that commences with the making of a credit contract, it might make sense for repossession to be dealt with as part of one statute governing the credit contract process as a whole.[6]

1.19 Indeed, the piecemeal and fragmented nature of law reform in this area has long been criticised. One commentator said in relation to the passage of the Credit (Repossession) Act that:[7]

> …the passing of the Act is unfortunate. It adds yet another chapter to the long history of ad hoc piecemeal reforms to credit and security law which has left us with a body of law riddled with anomalies and obscurities.

1.20 Another commentator noted that one of the arguments mounted against the enactment of the Credit (Repossession) Act was that it would perpetuate fragmentation of the law in the area of credit and security, which would do "no-one any favours".[8] He noted also that the Commerce Select Committee that considered the Credit (Repossession) Bill 1996 received submissions against dealing with repossession separately from more general credit reform. The Legislation Advisory Committee submitted that adding a separate Act "makes the issue of accessibility more acute and the task of borrowers and lenders more difficult."[9]

1.21 There was broad support for our suggested "one process - one statute" approach. Fifteen submitters supported the merger of the Credit (Repossession) Act with the Credit Contracts and Consumer Finance Act, with eight expressing opposition to a merger.

1.22 Of those in support, one submitter noted that consumers find multiple statutes confusing and thought that a single statute might assist lenders with staff training and compliance. Another noted that gaps or inconsistencies in the law applying to consumer credit arrangements could be avoided if there were not duplicate or overlapping statutes.

1.23 However, some submitters expressed the view that it is the content of the Act and not its location that matters. Others thought that whether the Act is part of a single statute dealing with credit contract issues is less important than repossession being regulated by the same body that oversees consumer credit generally.

1.24 We remain of the view that a holistic approach in this area is preferable. Ideally, we think that the statutory provisions governing repossessions should form part of the Credit Contracts and Consumer Finance Act, something that could be achieved through the Government's proposed reforms of that Act.

1.25 Despite these obvious links and the attractions of a "one process-one statute" approach, we have conducted our review and made recommendations that can either be incorporated as a new part of the Credit Contracts and Consumer Finance Act, or adopted as amendments to the Credit (Repossession) Act. The provisions of the Credit (Repossession) Act that are discussed in this Report should be redrafted and included in the Credit Contracts and Consumer Finance Act 2003, as part of the amendments to the latter Act that the Government is currently preparing. The provisions that are not discussed in this Report can simply be included in the Credit Contracts and Consumer Finance Act.

R1 The provisions of the Credit (Repossession) Act 1997 that are discussed in this Report should be redrafted and included in the Credit Contracts and Consumer Finance Act 2003, as part of the amendments to the latter Act that the Government is currently preparing. The provisions that are not discussed in this Report should simply be included in the Credit Contracts and Consumer Finance Act 2003.

1 Law Commission www.lawcom.govt.nz.

2 Law Commission *Review of the Credit (Repossession) Act 1997* (NZLC IP25, 2011).

3 One submission was made on behalf of 24 financial services providers.

4 Cabinet Office Minute *Responsible Lending Requirements for Consumer Credit Providers* CAB Min (11) 40/5.

5 Law Commission, above n 2, at [1.10]

6 Law Commission above n 2, at [4.11].

7 D W McLauchlan "Some Comments on the Credit (Repossession) Act 1997" (1998) 4 NZBLQ 156 at 157.

8 Barry Allan "Repossessions: A Critical Appraisal of the New Rules" (1998) 4 NZBLQ 134 at 135.

9 Allan at 135.

Chapter 2
Repossession and the case for regulation

SUMMARY

In this chapter, we set the scene by outlining the statutory context and go on to discuss certain features of the consumer credit market and the nature of the secured credit transactions to which the Credit (Repossession) Act 1997 applies. We discuss the various bases for intervention in credit markets, as well as the limitations of law reform in this area.

THE STATUTORY BACKDROP TO OUR REVIEW

2.1 The New Zealand statute book contains a raft of consumer legislation, which seeks to protect consumers from a number of practices. The Credit (Repossession) Act 1997 is just one part of the picture, focused on the remedy of repossession when exercised in relation to consumer goods. However, rather than protecting consumers directly, the Act applies to "consumer goods".

2.2 The Personal Property Securities Act 1999 is also highly relevant when considering reform in this area. Development of the Personal Property Securities Act had begun when the Credit (Repossession) Act was enacted. The adoption of the Personal Property Securities Act required considerable change to the Credit (Repossession) Act, to take account of the new regime, which focused on regulating the substance of the transaction, rather than its form.[10] This had the important consequence of protecting consumers regardless of the legal form of the security interest that they had given, be it a conditional sale, a chattel mortgage or a charge.

2.3 The Personal Property Securities Act applies to securities over consumer goods in the same way as it does to other goods, with a number of exceptions. The most important of these are the restrictions that prevent consumer goods being generally subject to after-acquired securities, and the special provisions that protect good faith purchasers of low value consumer goods that are subject to an otherwise valid security agreement.

2.4 Consumer goods have identical definitions in the Personal Property Securities Act and the Credit (Repossession) Act: "[c]onsumer goods means goods that are used or acquired for use primarily for personal, domestic, or household purposes".[11] In other words, it is the purpose for which the item is bought that decides whether it is brought under the protection of the Act. The Personal Property Securities Act provides a rather permissive regime, which allows consumers as well as businesses, to give security interests over their property. This continues a New Zealand tradition which has allowed consumers to give such interests beyond the hire purchase context through, amongst other mechanisms, the Chattel Transfers Act 1924. This system has enabled consumers to give security over their goods relatively easily.

2.5 To some, this may be desirable. It enables New Zealand consumers to access the wealth tied up in their possessions without having to sell those possessions. However, in creating such a permissive regime there could perhaps have been more consideration of the protections that ought to be given to consumers in such an environment.

2.6 In other jurisdictions, the wisdom of facilitating such security agreements without enacting considerable consumer protection regimes has been hotly debated.[12] The Personal Property Securities Act regime that exists in New Zealand was based on the model that exists in a number of Canadian provinces, and in particular, Saskatchewan.[13]

2.7 After comparing the regimes in place in various other jurisdictions, the authors of the preliminary Law Commission paper that ultimately led to the Personal Property Securities Act said:[14]

> If any reform is adopted in New Zealand based on Article 9 [of the Uniform Commercial Code] careful attention will need to be given to the relationship between the different overseas systems and also to the relationship between such provisions and existing consumer protection legislation. There is much to be said for leaving consumer protection provisions out of Article 9 type of legislation provided that adequate protection is given elsewhere.
>
> The experience of the USA (although not necessarily the Canadian provinces) is that the flexible regime of Article 9 facilitates the granting of secured credit and enables a consumer to avoid being locked in to one creditor. In Canada this latter advantage has been lost because of the traditional pattern of dominance by one of the banks of a debtor's affairs and the taking by banks of wide ranging security under the Ontario Act.

THE NATURE OF THE CONSUMER CREDIT MARKET AND SECURED CREDIT ARRANGEMENTS

2.8 One of the difficulties we have encountered in conducting this review has been identifying reliable sources of information about repossession practices and their prevalence. As we noted in our Issues Paper, repossession is a civil matter, administered without central oversight.[15] On the part of the borrower, repossession is often a matter giving rise to considerable embarrassment and therefore is not something widely talked about. Some submitters emphasised the lack of information about how the Act is working in practice and suggested that as a result, there should be no amendments at this time.

2.9 Some of the finance companies that made submissions estimated that repossessions occurred in relation to less than 1 per cent of their client base, with many defaulting debtors responding to earlier communications with the lender and re-establishing payment before repossession occurred. These finance companies often emphasised that repossession was, for them, a last resort procedure that they otherwise sought to avoid.

2.10 However, we are also very aware that the consumer credit market is a diverse one. As has been noted previously, while the basic elements of a credit transaction are identifiable, there may be major differences between the providers of credit.[16] There is little comprehensive information about which parts of the consumer credit market are most likely to enter into secured credit transactions and to resort to repossession in the event of the borrower defaulting, although a number of submitters expressed the view that, to the extent there are problems with the Credit (Repossession) Act, they are occurring in the third tier section of the market. The "third tier" section of the market was defined in a 2011 report by the Ministry of Consumer Affairs as:[17]

> Third-tier lenders are providers of personal non-mortgage credit who are not banks, credit unions, building societies or credit card providers. Some third-tier providers are quite large organisations with multiple outlets. Most are single outlet, small operations.

2.11 During the course of our review, the Ministry of Consumer Affairs revealed that between 35 and 40 per cent of third tier lenders were unregistered as financial services providers.[18] It is possible that this fact has coloured perceptions about where the problems may lie. Many finance companies who were registered and members of the requisite dispute resolution schemes pointed to this as being the major issue being faced by the industry.

2.12 Another matter that we became aware of during our consultation is the range of transactions to which the Credit (Repossession) Act applies. The very name of the Act suggests it is premised on a purchase money security interest model, given that the term "repossession" assumes prior possession of the secured goods. However, the Act is not limited in this way. In fact, one of the major drivers for its enactment was concern about situations in which lenders gave cash loans on the strength of security, generally in the form of an instrument by way of security, on all major contents of borrowers' homes.[19] There was concern to ensure that borrowers in such situations received the same protections in respect of the seizing of the secured property as applied to arrangements covered by the Hire Purchase Act 1971.

2.13 The permissive nature of the Personal Property Securities Act is reflected in the use of the so-called "all present and after acquired property" clauses ("APAAP" clauses). These clauses were raised with us frequently throughout our consultations. They purport to secure the loan against all of the property owned by a borrower, including any property owned at the time the loan is taken out and any property acquired in the future.

2.14 There is a divergence of views about the legality of enforcing these clauses. The Commerce Commission takes the stance that the Personal Property Securities Act requires that the debtor must specifically identify which after-acquired property is to be subject to the security interest and that a creditor may only repossess the identified property.[20] We received submissions that expressed a different view as to the correct legal position.

2.15 In any event, we gained the impression that these clauses are used reasonably commonly. We were advised that finance companies use them, as they consider that a broadly cast security will provide them with the best protection in the event of the debtor disposing of or significantly damaging goods before they can be repossessed.

2.16 We also gained the impression that a sizable proportion of securities over consumer goods involve motor vehicles. The Financial Services Federation told us that aside from residential mortgage lending, motor vehicles comprise the largest part of consumer finance by value. They are also the form of collateral that is most often offered, and taken, as collateral for consumer finance.[21]

2.17 We were also told that not all financial service providers engage in secured credit arrangements involving household goods. A credit management and debt collection agency we spoke to advised us that it had not undertaken repossessions of household goods for a number of years. The agency's experience was that such repossessions were often fraught situations and the inconvenience was generally not worth the low value of the goods recovered. Other attendees at the Financial Summit advised that they too avoided securing loans over household goods, due to the low value of the property and the difficulties associated with such repossessions.

2.18 The low values that will be realised from repossessed consumer goods seems to be a general problem. However, the threat of repossession may be more important than the value of the security. One lender told us:[22]

> Our experience is that household chattels are not worth repossessing due to the very low net realisable value. However, the threat of repossession is a very real one and does encourage people to pay. Even our own chattels, (and probably yours) excluding a piano and one or two paintings would struggle to make $3000 on Trade Me.

2.19 A number of other lenders also indicated that, for these reasons, repossession is generally an act of "last resort".

2.20 As one submitter noted, many consumer goods (for example, furniture) depreciate substantially upon the consumer purchasing and taking possession. Other consumer goods (such as motor vehicles) depreciate particularly quickly with use. We note also that, with constant updates in technology, not only do electronic goods depreciate quickly, but may also become out of date or obsolete within a relatively short time of being purchased.

2.21 The low values that repossessed goods may realise on sale means that the debt may not be extinguished and therefore repossession is not always the end of the matter. We were advised that this sometimes comes as an unwelcome and unpleasant surprise to debtors who often assume that repossession will bring the matter to a close. In contrast, a number of Canadian jurisdictions require creditors to elect between repossession and recovering the debt still owed under the security.[23]

2.22 This issue of the value of the security ties into another concern that was expressed frequently throughout our consultation process, regarding the proportionality of the secured property and the value of the loan. For example, the use of APAAP clauses seems to give rise to concern in some cases about the proportionality of the transaction, with all of a debtor's household goods being used to secure relatively small loans.

2.23 The main problem is that the secured property may be much more valuable in the debtor's eyes than in the hands of the creditor. As we noted above, many creditors see broadly cast securities as necessary to provide them with adequate protection due to the relatively low amounts that will be realised from the sale of used household goods. In these situations, the goods have a far greater value when in the hands of the debtor than they will ever have when repossessed and sold by the creditor.

2.24 Where relatively small loans were secured against property of much greater value, the debtor will not only lose the property and the amount of the debt minus the economic surplus, but also the costs of the repossession and sale. The consequences of default in such situations may be disproportionately harsh, especially where the goods that are repossessed are of great sentimental value or have a utility to the debtors that is not matched by that economic value.

2.25 Finally, a number of submitters and those with whom we met emphasised to us the importance and value to New Zealanders (and in particular, low income New Zealanders) in having access to readily available sources of finance. We made the point in our Issues Paper that it would be wrong to conclude that there is not a social need being met by lending services right across the lending industry, including those from the non-bank part of the industry.[24] While there may be debate about the circumstances in which loans ought to or ought not to be made, this general proposition has been borne out by our consultation.

2.26 In summary, while there are no centralised records or statistics relating to repossessions, there are a number of features of the consumer credit market and the secured transactions into which people enter that have been drawn to our attention during our review, and which we consider relevant in assessing law reform options in this area.

THE CASE FOR LAW REFORM

Policy justifications for regulation

2.27 While self-help by creditors was traditionally a feature in English commercial law, intervention in the consumer credit market has long been seen as necessary. This need has arguably increased as sophisticated and potentially risky financial products have become more widely available. All of the submissions that we received proceed on the assumption that some degree of regulation in this area is necessary.

2.28 Regulation necessarily imposes costs because of the restraints it places on individual freedoms. In a society that values individual freedom, limits on the circumstances in which people are free to engage in certain commercial activities must be justified. It is necessary to be clear what the basis for regulation is so that all rules and restrictions that are put in place are rational and achieve the overall objective in a manner that is cost effective.

Safety regulation

2.29 Regulation may prescribe particular standards or qualities of service. Where the consumption of goods and services carries risk, more intensive regulation may be justified. In some industries, such as those manufacturing medicines or preparing food for sale, regulation aims to eliminate risks. In others, including most service markets, consumer protection regulation seeks to moderate rather than eliminate risk.

2.30 Consumer protection is aimed at ensuring that consumers of services have adequate information, are treated fairly, and have adequate avenues for redress. The main regulatory tools used in consumer protection are disclosure requirements and conduct regulation. Disclosure regulation includes a general prohibition on false and misleading statements. Conduct regulation includes criminal sanctions for breaching prohibitions or specified standards of conduct. Occupational regulation and the regulation of certain types of services may be justified to protect the public or a section of it by ensuring that those providing the services or practising those occupations are competent and fit to do so.

2.31 Consumer protection may be justified on two grounds. First, as the complexity of the services and the vulnerability of consumers increase, so too does the risk of consumers misunderstanding the nature of the transactions or being misled. Secondly, the potential for misunderstanding creates an increased risk of disputes. In response, and partly due to the high disproportionate costs of litigation, some countries have developed specific regulatory regimes in relation to certain advisory and financial services, including the establishment of low cost complaints schemes for resolving disputes.

2.32 Consumer credit has been described as a "potentially dangerous product".[25] At the August Financial Summit, hosted by the then Minister of Consumer Affairs, there appeared to be a general consensus of the difficulties faced by some consumers. Consumer credit contracts present difficulties in terms of understanding the nature of certain terms of the contract, and in particular, key matters such as the overall costs of borrowing. Such credit products can be extremely costly to consumers both in terms of the total costs of credit and the risks to which such contracts expose the consumers.[26]

2.33 However, any regulatory response should recognise the mixed experiences of consumers and conflicting evidence about impacts of certain consumer credit arrangements on consumers.[27] There is also the reality that many, if not most, consumers ultimately manage their credit affairs adequately, as they do their repayment obligations. Reform should enhance rather than hinder the ability of consumers to make informed choices about their lives.

Market integrity

2.34 In the case of complex markets, such as financial markets, a case can be made for additional regulation aimed at promoting confidence in the efficiency and fairness of the market itself. A market integrity approach to regulation seeks to ensure that complex markets are sound, well ordered and transparent. Additional disclosure requirements and conduct rules might be justified on the basis that they are necessary to promote market integrity.

Information asymmetry

2.35 For a market to operate competitively, consumers and service providers both need to be well informed. However, the problem of asymmetrical information will arise when one party to a transaction has relevant information that the other cannot access. When accessing some types of complex advisory services, consumers are sometimes unable to obtain the information required to make well-informed decisions. This problem can be addressed by requiring disclosure to provide the consumer with the relevant information.

The limits of consumer rationality

2.36 Even if consumers have all the relevant information, however, they may be unable to make good decisions because they are unable to understand the information. This point has been made well in the behavioural economics literature. Behavioural economics draws on psychology and economics and suggests that:[28]

> Individuals have limited information processing capabilities, and use heuristics [understandings or filters] that may cause them to misestimate risks and create predictable biases in their decision making. Individuals are also poor statisticians, manifest a tension between an "impulsive self" and a "planner self" and do not always maximise their self-interest.

2.37 Behavioural economics is particularly relevant in consumer markets where individuals generally do not rely on professional advice. Disclosure alone (consumer protection) is not sufficient to address the asymmetrical information issue. No matter how much information the consumer was given by the service provider, they would not necessarily be able to make an effective choice.

2.38 Registration and licensing regimes provide the assistance that consumers require. The competence of doctors, teachers, lawyers and many other occupational service providers is assessed and monitored for the benefit of consumers by a third party (either a professional or occupational authority or publicly funded regulator). The regulator has the necessary knowledge, experience and judgement to assess the services, and only providers who meet an appropriate standard are registered or licensed. The consumer can then safely choose services from those that have been assessed and licensed by the regulator.

THE SPECIAL CASE FOR REGULATING REPOSSESSION

2.39 First, there are obviously concerns about the ability to enter somebody's home. Such an invasive power invites regulation to prevent it from being abused or exercised in a way that is unreasonable, and to ensure that it is used consistently with the underlying security obligation. Such protections already exist, as we discuss below, in the current Credit (Repossession) Act framework and we suggest a number of improvements that might be made to these provisions.

2.40 Even putting to one side concerns arising from the ability to enter property, there are particular concerns relating to creditor self-help remedies that perhaps justify additional regulation over and above what might be provided in relation to consumer credit contracts in general.

2.41 As we discussed above, there are often issues about the rapid depreciation in the value of secured property, the mismatch between the value of the loan and the value of the security, and the disparity between the economic value to the creditor to be gained from repossessing the property versus its utility in the hands of the consumer.

2.42 This latter disparity, often referred to in the literature as "the consumer's lost value", has led some commentators to argue that regulation of self-help remedies in relation to consumer credit contracts may be justified on economic grounds to prevent this mismatch between the economic value of goods on the one hand, and the utility in the hands of the consumer on the other.[29]

2.43 Care needs to be taken, however, not to extend this argument too far. While it may be true that there is a mismatch between the value of the secured item in the hands of the creditor as opposed to its utility in the hands of the debtor, attention must also be paid to the importance of the institution of secured lending. Any regulation needs to directly confront not only the particular instance where there might be a mismatch in value, but the need to maintain the institution. If creditors are too fettered in their ability to execute their security agreements by repossession, then that would have an effect ultimately on the institution, because creditors may reduce the amount of credit they are prepared to offer. Although repossession may seem harsh, it may be better than no credit in the first place.

2.44 Moreover, the value of the repossession remedy might be found not just in the ability to recoup possible losses by selling the secured item, but in the threat of the deprivation of that item from consumers who do not pay the cost of the credit they have been extended.[30]

2.45 Rather than focusing just on what happens when a debtor defaults, one needs also to look at how the credit contract itself came into being. Whatever its problems, the possibility of repossession may give the lender a degree of reassurance that the debtor will be incentivised to repay the amount owing.

THE LIMITATIONS OF LAW REFORM IN THIS AREA

2.46 Finally, there are limits to the extent to which the law can solve problems in an area such as this. Regulating industry participants or requiring greater disclosure cannot solve all the problems. One commentator has described the United States Truth in Lending Act 1968 (US), the model for regulation of consumer credit in many jurisdictions, as being unable to:[31]

> …substitute for usury laws or otherwise control the price of credit products …. It cannot save consumers from their own acquisitiveness, financial mismanagement or over-extension. It cannot protect consumers from true fraud or over-reaching. And it certainly cannot fix the economic disabilities of the poor. Nor is it the vehicle for resolving philosophical questions about whether consumer debt is good or evil.

2.47 It is important to note the limitations of the law in addressing a number of problems of which we have become aware during consultation.

2.48 Underlying many of the experiences and anecdotal accounts we heard are issues of poverty. We heard of borrowers who signed up to harsh contractual terms, due to desperation and a lack of better options. Moreover, we have no doubt that repossession is often only one of a series of bad things that have occurred to people in our communities who have the least resilience to deal with such things. We were also advised that in many communities affected by credit contract defaults and repossessions, over-indebtedness is common.

2.49 We also heard much about the limited financial literacy possessed by many who enter into secured credit transactions. Recent qualitative research undertaken in Australia with a group of low income consumers found that for many of the research participants emotions were often more important than the economics of the transaction. It also found that borrowers' capabilities were important. Many admitted to poor literacy skills, inexperience in financial markets, and a lack of access to advice that impeded their ability to understand the contract into which they entered.[32]

2.50 New Zealand research suggests that financial literacy may be an important factor. For example, research conducted by the Reserve Bank of New Zealand found that over 80 per cent of people are either not aware of financial disclosures, or if they are aware of them, do not use them for decision making.[33] The state of financial literacy in New Zealand has been described in the following way:[34]

> The surveys have indicated that New Zealanders are aware of some of the financial issues that they face, but they are ill-equipped to make financial decisions. They do not effectively understand the basic financial terms or instruments or, more worryingly, the concept of risk or return. Furthermore, they do not use existing financial disclosures or credit ratings in a manner that would enhance their understanding of financial exposures. On the positive side, New Zealanders are aware of their need for financial independence, and when basic financial concepts and disclosures were explained to them, were able to understand the link between these concepts and their needs.

2.51 Recent research shows that while there was an overall improvement in New Zealanders' financial literacy between 2006 and 2009 with more people demonstrating higher levels of financial knowledge, there was little change for those people with low levels of financial knowledge. In other words, for those most in need, there has been little recent improvement.[35] We were, for instance, told on a number of occasions that those in search of credit did not understand very basic concepts like compound interest, and were only interested in the amount of the next payment that might be due rather than the total cost of credit, or in the consequences of default.

2.52 The inability of law reform to deal with these matters was clearly recognised by one submitter who told us that amending the law will not address the underlying issues of demand for loans from lenders of "last resort", and nor will it solve issues of financial literacy. We agree.

10 See McLauchlan, above n 7, for critical comment on the enactment of the Credit (Repossession) Act 1997 before the Personal Property Securities Act 1999.

11 Personal Property Securities Act 1999, s 2.

12 Consumer protection was put to one side in the original drafting of Article 9 of the United States Uniform Commercial Code, which was the forerunner of the Canadian and New Zealand personal property security regimes. See the discussion in Grant Gilmore *Security Interest in Personal Property* (Little Brown and Co, Boston, 1965) at [9.2], which canvasses the controversy over the original consumer protection consumer clauses that were ultimately deleted in favour of more particular state consumer protections.

See also the summary of the debate over the reform of personal property securities law in the United Kingdom, as summarised by the England and Wales Law Commission *Registration of Security Interests: Company Charges and Property other than Land* (Consultation Paper No 164 2002) at [10.29–10.31].

13 Law Commission *Reform of Personal Property Security Law* (NZLC PP6, 1988)

14 Law Commission, above n 13, at 82.

15 Law Commission, above n 2, at 2

16 Nick McBride and Robert D Bowie "The Goals of Consumer Credit Law: The Approach of the Ministry of Consumer Affairs to its Consumer Credit Law Reform" (2001) 7 NZBQ 329 at 341.

17 Ministry of Consumer Affairs *Third Tier Lender Desk-based Survey 2011* (2011) at 2.

18 At 2. Lenders have been required to be registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 since 1 December 2010.

19 Allan, above n 8, at 135.

20 Commerce Commission "Budget Loans pleads guilty to misleading - $500,000 returned to consumers" (press release 26 July 2010).

21 Submission of Financial Services Federation to the Law Commission (24 August 2011).

22 Submission of Alan Liddell on behalf of 24 financiers, at [6(c)] to the Law Commission (7 September 2011).

23 See the discussion of these 'seize or sue' provisions in chapter 3.

24 Law Commission, above n 2, at [2.2].

25 Iain Ramsay "Consumer Credit Regulation as "The Third Way"?" (Australian Credit at the Crossroads Conference, Melbourne, Australia, 8 November 2004) at 5.

26 See for example, Owen Bar-Gill and Elizabeth Warren "Making Credit Safer" (2008) 157 University of Pennsylvania L Rev 1, which discusses the harm arising for consumers from usage errors with credit cards, mortgages and payday loans.

27 See John Y Campbell, Howell E Jackson, Brigitte C Madrian, Peter Tufano "The regulation of consumer financial products: An introductory essay with four case studies" (2010) Social Science Research Network www.ssrn.com, where the mixed evidence in relation to pay day loans is discussed at 29-30. The authors note that while pay day loans do cause real harm to some borrowers, for others there are real benefits when it is considered that the costs of not having access to credit can be extraordinarily high, for example, the loss of electricity or telephone services can involve considerable time and expense to restart the service, exceeding the costs of the pay day loan.

28 Ramsay, above n 25, at 8.

29 WC Whitford "The Appropriate Role of Security Interests in Consumer Transactions" (1986) 7 Cardozo L Rev 959 and Alan Leff "Injury, Ignorance and Spite – the Dynamics of Coercive Collection" (1970) 80 Yale LJ 1.

30 Robert E Scott "Rethinking the Regulation of Coercive Creditor Remedies" (1989) 89 Colum L Rev 730.

31 R J Rohner quoted in McBride and Bowie, above n 16, at 340.

32 Therese Wilson, Nicola Howell and Genevieve Sheehan "Protecting the most vulnerable in consumer credit transactions" (2009) 32 Journal of Consumer Policy 117 at 138.

33 Doug Widdowson and Kim Hailwood "Financial Literacy and its Role in Promoting a Sound Financial System" (2007) 70 (2) Reserve Bank of New Zealand: Bulletin 37 at 43.

34 Widdowson and Hailwood, above n 33, at 44.

35 Ministry of Consumer Affairs *Background Statistics for Considering Credit Issues: For the Financial Summit 11 August 2011* Auckland (2011) at 24.

Chapter 3
Repossession and the right to repossess

SUMMARY

This chapter considers how the Credit (Repossession) Act 1997 defines repossession, the process of repossession and the sorts of goods that can be repossessed. The chapter recommends that a new statute sets out in greater clarity when repossession may occur and requires that goods that are to be repossessed be specified in the loan contract. The chapter also considers whether necessities and other goods of low economic value should be subject to repossession at all.

A "CHECKLIST FOR REPOSSESSION"

3.1 One of the issues that was raised consistently in consultation with consumers and consumer groups was the lack of awareness as to where the right to repossess or to enter private property came from. The Credit (Repossession) Act 1997 does not give the right to repossess goods, or the right to enter property.[36] The way in which the Act currently sets out the requirements and restrictions on the right to repossess appears to have created a degree of confusion among consumers and consumer advisers.

3.2 We consider that there is considerable merit in setting out in the statute a check list that makes clear the conditions under which repossessions can occur, including those involving entry onto private property:

- the existence of a valid security;
- the contractual right to repossess specified goods;
- a contractual and irrevocable licence to enter private property to repossess;[37]
- that the debtor is in default or that the goods are at risk; and
- that an appropriate pre-possession notice has been sent, if necessary.

3.3 As we discuss in greater detail in chapter 4, we believe that disclosure should highlight such terms at the time the contracts are entered into and that some effort be made to ensure that the consumer who is entering into the contract is aware of the effects of those terms.

R2 The legislation should provide a 'checklist' that is both obvious and instructive as to when repossession can occur.

PROBLEMATIC DEFINITIONS

A definition for (re)possession?

3.4 Bill Bevan, a lawyer who regularly acts for consumers and who has authored texts on various aspects of consumer law, asked in his submission whether there ought to be a definition of "repossession" in the statute. He was concerned with the potential of disabling devices. For example, creditors might disable cars or electronic devices remotely, and essentially deprive the consumer of the right to use goods without having to observe the protections of the Credit (Repossession) Act, in particular the 15 day warning. Mr Bevan suggested a definition of repossession in the Act that includes "taking control of goods or disabling goods so as to render them not fit for use or for the purpose that those goods were acquired by the consumer."

3.5 Mr Bevan's concerns also extended to phone contracts where the service fee is in effect part of the cost of paying off the phone. He described his concern in the following way:

> The ability to suspend the services component of the contract is as effective in securing payments as actual repossession of the associated goods and regulation under the CRA is appropriate to give consumers fair warning of an intention to suspend use.
>
> Purchase of computer programmes which can be remotely suspended arguably also fall outside the ambit of the CRA. Software "repossession" involves the creditor simply entering a code into the debtor's computer system which either destroys or deactivates the software. A consumer's objections will not stop the advancing creditor from "repossessing" the property and consumers may never know exactly when the creditor will drop the repossession "bomb." The damage that may result from repossession, both to the debtor and to the repossessing creditor, may well exceed that caused by traditional repossession.

3.6 We have had some difficulty making a recommendation about this submission. The question is the degree to which the issue falls within the scope of our review, and to the extent that it does, whether what is described might already fall under the Act.

3.7 The Act is designed to deal with the traditional creditor's remedy of repossession when it is exercised in a consumer goods context. This remedy has always involved seizure and sale of goods. To this end, the Act provides a range of requirements that someone taking possession must fulfil in terms of valuing and putting the repossessed good up for sale. Disabling devices and disconnection of services do not fall within the scope of this model. To put them within this framework would essentially involve adding on something that is fundamentally different and does not fit with the procedures prescribed by the Act.

3.8 If what is actually being done is in fact a remote destruction or disabling of the goods,[38] it may be appropriate for protection to be provided elsewhere.

3.9 The use of immobilising devices on a car might in some circumstances come within this definition (and we do recommend that the repossession of a key of a secured item be deemed to be a repossession of the item). It would depend on whether the facts of the case fell within the concept of "possession", which does not always require the physical taking of the goods. We are wary of expanding the definition in the Act to provide for this situation, believing that the notion is better defined in a case by case way. The danger of a definition might be that it becomes both over inclusive of inappropriate cases and under inclusive of appropriate cases. It ought also to be remembered that for the car to be sold, it will have to be repossessed in accordance with the Act.

Application of the Act to leases of more than one year

3.10 The intention of the Credit (Repossession) Act is to cover all security interests in consumer goods. Section 2 of the Act defines security interest in goods in the following way:

> Security interest has the same meaning as in section 17 of the Personal Property Securities Act 1999; but excludes—
>
> (a) An interest in personal property created or provided for by a transfer of an account receivable or chattel paper, a lease for a term of more than 1 year, or a commercial consignment:

3.11 As a number of commentators have pointed out, this definition partially parallels the definition in s 105 of the Personal Property Securities Act.[39]

3.12 The concern raised by commentators is that failure to include the modifier "that does not secure payment or performance of an obligation" to leases of more than one year might be interpreted as excluding leases of more than one year that are designed to secure payment from the protections of the Credit (Repossession) Act. As those commentators observe, a likely interpretation is that such a modification might be read into the s 2 definition as a result of the terms of s 17 of the Personal Property Securities Act, which provides that the overriding policy is to catch all security interests:

> (1) In this Act, unless the context otherwise requires, the term security interest—

(a) Means an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to—

(i) The form of the transaction; and

(ii) The identity of the person who has title to the collateral; and

(b) Includes an interest created or provided for by a transfer of an account receivable or chattel paper, a lease for a term of more than 1 year, and a commercial consignment (whether or not the transfer, lease, or consignment secures payment or performance of an obligation).

3.13 Commentators have argued convincingly that the exclusion of the modifier to leases of more than a year from the s 2 definition is most likely an error.[40] There is no principled reason why leases of consumer goods of over one year's duration should be excluded from the Act if what is intended is that the lease secure repayment of an obligation. We agree with the concerns raised, and would recommend that the doubt be removed by expressly changing the s 2 definition to include leases over one year that secure payment or performance of an obligation.

R3 The definition of security interest in s 2 should be modified to more completely parallel that in s 17 of the Personal Property Securities Act 1999.

Security agreements for both non-consumer and consumer goods

3.14 There is a difference of opinion in commentaries as to whether the Credit (Repossession) Act might currently also extend to non-consumer goods that are secured as part of an agreement that secures consumer goods. Mr Bevan has argued that as the Act states that its coverage applies to agreements securing consumer goods, rather than just to securities over consumer goods, it applies to all goods that are subject to that agreement.[41] This interpretation would mean that all securities in an agreement are subject to the same repossession process. Against this interpretation are a number of provisions that refer to the repossession of consumer goods in particular. Other commentators have taken the position that the better view is that the Act covers only consumer goods.[42]

3.15 As we have explained above, the Act is designed to protect consumers through the restriction of repossession of consumer goods. Although we did not raise this point in our Issues Paper, we think that any redrafted legislation should resolve this. The consumer protection nature of the Act should mean that its protection applies only to consumer goods.

3.16 This distinction has an important consequence if the legislation is incorporated into the Credit Contracts and Consumer Finance Act, as we have recommended. Sometimes a consumer good will secure a non-consumer finance credit contract, but it is the policy of the current Act that it is nevertheless given the same protection. That policy should be carried over to the Credit Contracts and Consumer Finance Act. It is not clear to us, however, that the special protections for repossession of consumer goods ought to be extended to those non-consumer goods that may secure a consumer credit finance contract.

R4 The consumer credit repossession legislation should make clear that, in situations where a contract creates security interests in both consumer and non-consumer goods, it applies to the consumer goods only.

WHAT MAY BE REPOSSESSED

The need for specific identification of goods

3.17 At the moment, there is some ambiguity as to whether specification of goods is necessary. Specification is not always necessary under the Personal Property Securities Act to create a valid security interest. The Credit (Repossession) Act, for its part, does not require the specification of particular goods, but Schedule 1, which sets out the prescribed form for the pre-possession notice, requires that creditors "describe" in the prepossession notice the goods that are subject to repossession.

3.18 Consumer repossessions are stressful enough without disputes over which household goods might properly be repossessed. In submissions, and also in our meetings, this problem was often mentioned. A number of creditors to whom we talked, as well as debt collectors and repossession agents, emphasised the importance of goods being properly identified in order for them to be able to exercise their rights. Many creditors already go to considerable lengths to identify the goods that are to be subject to security, and we have seen a number of contracts in which there is such specification. During our consultations, there were often comments that cars gave rise to less repossession problems, as they are more easily identifiable. Indeed the Personal Property Security Register requires greater specification of motor vehicles.

3.19 As a result of our consultation, we believe that an important part of resolving the conflict around repossession is to ensure clarity as to which goods are liable to repossession and which are not. While we saw many contracts that do specify the goods that are being offered as security for a loan, we also saw some contracts that purported to make all present property part of the security. Such clauses make it difficult to distinguish property subject to repossession from other property, which gives rise to disputes about whether goods are in fact owned by the debtor or other people. We were told of a number of situations where goods that had been repossessed were actually owned by family members or other people like flatmates.

3.20 We think that this difficulty should be largely addressed by the express requirement in the statute that all consumer goods subject to repossession should be specified in the original security agreement with sufficient detail for them to be identified later. This recommendation is substantively the same as the Government's decision announced in October that would require "that any goods over which security is taken must be specified in the contract".[43]

3.21 As we have said before in this Report, we have been asked to review the Credit (Repossession) Act only, and therefore have avoided making recommendations that would require amendment to the Personal Property Securities Act. Our recommendations, therefore, do not extend to whether there can be a valid security under the Personal Property Securities Act, but are restricted to remedies available to secured creditors, and in particular, to not allowing repossession unless there is specific identification of items in the original loan agreement.

3.22 We acknowledge that requiring goods to be individually identified in the original loan contract will in some instances create extra costs in relation to some credit contracts. But insufficient identification of goods in the original security agreement leads to uncertainty and through that uncertainty to disputes (which in turn have cost implications). We see no alternative to requiring such a specification. If the parties decide subsequently to add other goods to the security, that should be done by a written variation to the credit contract that specifically identifies the property that is being added.

R5 The consumer credit repossession legislation should require that for goods to be repossessed they must be sufficiently identified in the original security agreement so they may be individually identified at the time of repossession.

After-acquired property

3.23 A number of contracts that we have seen include APAAP clauses, which provide that, in addition to all present property, the security includes property acquired after the security agreement.[44]

3.24 There are currently conflicting interpretations as to whether, and under what conditions, there can be a valid security agreement in relation to after-acquired consumer property. The relevant provision is not contained in the Credit (Repossession) Act, but rather in s 44 of the Personal Property Securities Act, which reads:

> **Attachment of security interests in after-acquired property**
>
> A security interest in after-acquired property attaches without specific appropriation by the debtor, unless the after-acquired property is consumer goods where—
>
> (a) Those consumer goods are not an accession or do not replace the collateral described in the security agreement; or

(b) The security interest in those consumer goods is not a purchase money security interest.

3.25 This provision exists in most of the Canadian Provinces, with the exception of Saskatchewan.[45] The authors of the leading New Zealand text write as they have written of the similar provisions in Canadian legislation:[46]

> Subject to specified exceptions, s 44 is intended to limit the operation of an after-acquired property clause where the collateral is consumer goods. It is designed to control the use of "blanket" or "dragnet" clauses in secured credit transactions under which a security interest is granted in all of the debtor's present and after acquired property clauses, including necessities.
>
> The existence of an exception for purchase money security (where the finance is provided for the very thing that is being secured) is a necessary one as it prevents creating difficulties in securing property that is not, by definition, the would be purchaser's at the time that the contract is concluded.

3.26 In a Canadian book, Cuming, Walsh and Wood explain:[47]

> The consumer goods exception is directed at so-called add-on plans under which a finance company takes a general security interest in all of the debtor's household goods as additional security under a purchase-money financing arrangement or a blanket security agreement under which the lender is given a security interest in all present and future assets of a consumer debtor. Accordingly, the proposition on the grant of security in after-acquired consumer goods does not apply to purchase money security interests. Unlike add-on security, which is used primarily for its in terrorem effect on the debtor, the imposition of a prohibition on purchase money financing the consumer goods would cause more harm than good.

3.27 The New Zealand provision departs from the Canadian ones in the important issue of contemplating "specific" appropriation. In Australia, the National Consumer Credit Act 2009 (Cth) contains a simple prohibition on security interests in after-acquired consumer property.[48]

3.28 It is important that a loan contract makes explicit which property is subject to repossession. We believe that after-acquired property should usually be excluded from the property which is subject to repossession. Such clauses seem to us to be rife with uncertainty as to what might be subject to repossession, and risk uncertainty both for the debtor and the creditor as to what might be repossessed. There is also a concern, as expressed by the Canadian authors, that such "dragnet" clauses are inappropriate in consumer credit contracts.

3.29 We recommend that the consumer credit repossession legislation ought to cover the issue of which property, if any, acquired after the execution of the security agreement can be repossessed. We do not advocate the amendment of the Personal Property Securities Act itself, preferring to leave that statute alone, but rather suggest the inclusion of a similar provision to that currently in s 44 of the Personal Property Securities Act, redrafted to make it more easily understood, in the consumer credit repossession legislation. The consumer credit repossession legislation would then govern whether after acquired property may be repossessed, but whether it is part of a security would be determined by the Personal Property Securities Act.

3.30 Such a redrafted provision should state that goods that are subject to a purchase money security can be repossessed regardless of whether the debtor had a property interest in the goods at the time the security agreement was concluded. Similarly, we recommend that a written variation to the original credit contract to add particular after-acquired property to the goods that may be repossessed under a security agreement should be valid. We are, however, concerned that some unnecessary confusion might have been caused by the phrase "specific appropriation," and suggest that this be replaced in the new Act by reference to "specific agreement."

3.31 We are also mindful of submissions made forcefully to us by finance companies during our consultations that they ought to be able to repossess goods that were bought in replacement of goods specified in the original agreement. A number of finance companies told us of the difficulties they had encountered with debtors who have disposed of secured goods (contrary to the terms of the credit contract) and bought other property to replace those goods.

3.32 We agree with the principle that the creditor's security should be, as far as possible, maintained even though one item has been substituted for another item. The ability to claim security in after-acquired goods that replace existing goods is, of course, already contemplated by s 44 of Personal Property Securities Act. We recommend that a similar provision be added to the new statute, or an equivalent, to confirm that after-acquired goods that have been bought in substitution for existing goods subject to repossession may also be repossessed.

R6 The consumer credit repossession legislation should contain a provision similar to the effect of s 44 of the Personal Property Securities Act 1999, which would prevent the repossession of after-acquired goods unless they represent a purchase money security, are bought in substitution of an item that is subject to security, or are added as security through the express agreement of the consumer.

Goods added through the exercise of power of attorney clauses

3.33 A further issue that arose during our consultations was the use of power of attorney clauses in consumer credit repossession contracts. We have been told that a number of creditors include power of attorney clauses in credit contracts, which purport to allow the creditor to add other goods to the security. We have seen some examples of clauses purporting to do this.

3.34 Like other agency relationships, powers of attorney import fiduciary obligations,[49] but while broadly worded powers of attorney are likely to be read down by the courts, the situation is more difficult when adding goods to the security is expressly within the scope of the power of attorney granted.[50]

3.35 There may be some merits in having such powers of attorney generally in loan or security agreements and they may serve a legitimate role.[51] However, the use of such powers of attorney to add to the security has the potential to undermine the policy of certainty over which goods are subject to potential repossession, consistent with our recommendation of specification of the property over which security is given.

3.36 As we discussed earlier in this chapter and in chapter 4, it should be clear to the consumer at the time that he or she enters into a contract what he or she is placing at risk by way of repossession on default.

3.37 We would therefore recommend that in so far as powers of attorney might be used to augment the goods subject to repossession, be they owned by the debtor at the time of the contract or purchased after the contract, then they should be ineffective.

R7 Powers of attorney should not be able to be used to add consumer goods to security that can be repossessed.

Necessities and other sensitive goods.

3.38 There has been considerable controversy over repossession of goods that are considered necessities or which for other reasons have high sentimental but low economic value, such as children's toys, family photographs or cultural goods. In our Issues Paper, we discussed two different approaches and asked for comment on the relative merits of both. The first option, based on a number of Canadian statutes, as well as the New Zealand Insolvency Act 2006, would have prevented the granting of security over household goods, including cars up to the value of $5000. The second approach would have been to create a "protected goods list" setting out particular kinds of goods that cannot be subject to repossession. As an example of such a list, we referred to the following clause in Pesata Sam Lotu-Iiga's private Member's Bill:[52]

> (a) any passport, driver's licence, or documents of identification issued by any Government or Government agency, educational institution, or borrower's employer; or

(b) any card or article used to access bank automated teller machines for the purposes of withdrawing or transferring money; or

(c) the clothing, bedding, bed, school books, stationery or toys of any child under the age of 16; or

(d) any item used for the care of infants; or

(e) any photographs of the borrower, the surety, or their family whether alive or deceased; or

(f) the keys to any dwelling or automobile, post office box or safety deposit box; or

(g) any medicine or medical equipment; or

(h) any prosthetic device, spectacles, or equipment to aid in the mobility of a disabled person; or

(i) any food or non-alcoholic beverages.

This list includes some items, such as passports, in which security cannot be legally granted.

3.39 Since our Issues Paper was published, the Government has announced changes to the Credit Contracts and Consumer Finance Act that would mean that:[53]

> … goods that are protected on bankruptcy under the Insolvency Act 2006 are also protected from secured creditors (e.g. tools of trade, necessary household furniture and effects, and a motor vehicle up to the value of $5,000), except if the credit contract is for the purchase of it.

3.40 There was general support in submissions for some kind of provision preventing the repossession of necessities of life, and items like children's toys (excepting gaming consoles). However, some submissions, especially from finance companies, forcefully put to us that a balance needs to be struck appropriately between preventing unacceptable hardship on the one hand, and the individual's freedom to choose to use the assets as a way of securing credit.

3.41 While there was some support among a few submitters for a blanket approach to the protection of household items below a certain value, most submitters opposed that option. Many finance companies were very concerned by that approach, and pointed out that many of the credit contracts they write are secured by low value goods, and that indeed this reflects the reality of the market in which such credit is provided. From the perspective of creditors, the possibility of repossession fulfils a range of objectives. The Financial Services Federation noted that while its members:[54]

> … only rarely repossess items that secure loans, maintaining the viability of the system of taking security over goods is important for other reasons. For example, those firms that are subject to the capital requirements of the Non-Bank Deposit Takers Regime are able to receive a lower risk weighting for assets against which security is held as compared to those that are not.

3.42 From the debtor's perspective, as many submissions commented, there is a risk that if too wide a category of goods were to be exempted from repossession or a blanket prohibition on repossession of goods below a particular value imposed, some would be prevented from accessing credit. From an economic perspective, there would also be the fear that this might prevent poorer people from being able to use whatever limited equity they have to finance credit. Overly paternalistic legislation risks undermining the interests of those it seeks to protect.

3.43 We believe that our recommendation to require secured property to be specifically identified in the loan agreement will go some way to addressing the difficulty of debtors suddenly being told that sentimental items, including children's drawings or family photographs, can be repossessed because there is an APAAP clause.

3.44 In addition to the question of what goods ought to be added to the list initially, there is the question of how goods might be added. Our recommendation is that this be done by regulation. A group of finance companies argued that the list should only be amended by Parliament, but we believe that the regulation-making process gives sufficient public oversight and formality to the process.

R8 The list of goods or classes of goods that are deemed to be exempted from repossession should be prescribed by regulation.

Purchase Money Securities

3.45 In our Issues Paper, we suggested that any restriction on the type of goods that can be repossessed should not apply to purchase money securities, otherwise there may be problems obtaining them in the first place. Almost all submitters, particularly finance companies, saw the exclusion of purchase money securities as essential. We agree and recommend such an exclusion. We note that the Government has decided that such a provision should form part of its package of reforms.[55]

3.46 In response to a submission from a finance company that finances family portrait photographs, we would emphasise that while photographs are the kinds of goods that ought ordinarily not to be repossessed, they too ought to be included within the purchase money security provision.

R9 Purchase money securities should be excluded from any list of goods or classes of goods that are deemed to be exempted from repossession.

How to define which goods should be on a protected goods list

3.47 There is considerable difficulty in describing what is necessary and what is not. What some consider to be necessities, others might consider to be luxuries. Although the debate might be familiar, it has a further ramification in the context of repossession. Excluding certain kinds of goods from repossession, even if they may still be registered as security under the PPSA, means that by and large they will not be available for secured lending, and the only way that the capital invested in the goods can be used is to sell them.

3.48 The basic concept was well expressed by the Citizens' Advice Bureau which submitted that the law should prevent repossessions that "would significantly impact on the wellbeing of the debtor, such as medical equipment, food and bedding." It should also include basic means of cooking and heating. What would detrimentally impact on wellbeing is not a sufficiently certain test, and we would suggest that there be a prescribed list. The need for certainty was stressed by creditors. The risk is that beyond medical equipment, food, bedding, heating and cooking equipment, any list risks becoming arbitrary and futile if the result is that consumers are required to sell or pawn what they cannot secure to raise funds.

3.49 One possibility that we have considered is the list used by the Ministry of Social Development for determining Temporary Additional Support applications. This benefit provides additional support for hire purchase payments on essential items which beneficiaries are no longer able to afford. The list is provided in sch 2 of the Social Security (Temporary Additional Support) Regulations 2005 and provides for the following items: beds (including mattresses), combined refrigerator-freezer or separate refrigerator and separate freezer, dining suite, lounge suite, portable heaters, a washing machine, a stove and a television set.[56]

3.50 Again a balance needs to be struck between preserving the ability of individuals to charge goods and ensuring that those things that are truly essential are retained. We would not therefore be prepared to recommend that television sets be included in the protected goods list. Some finance companies have suggested that washing machines also not be included. We however consider that, especially for those with small children, washing machines are a necessity, and it ought to be remembered that washing machines bought with purchase money securities will be potentially subject to repossession. The same is true of stoves. We have also considered whether lounge suites or dining room suites ought to be similarly treated. If they were to be included, there would have to be an exception for antiques and more valuable furniture. Moreover, while we accept that the repossession of such items might be distressing, such items do not give rise to the same health or wellbeing concerns as bedding or washing machines.

R10 The following goods should not be subject to repossession (except when financed through a purchase money security): medical equipment, bedding, portable heaters, stoves, washing machines and cooking equipment.

Cars

3.51 We received a number of submissions seeking to have cars excluded from any potential protected goods list. These submissions came from a range of lenders, from trading banks to those who described themselves as high risk lenders. Many submissions pointed out that cars are the most common form of security in many of the market segments, and the reality is that many New Zealand cars used as security are valued below the suggested $5,000 threshold. The following response from one finance company was typical:

> The Canadian approach exempts one car with a value of less than $5,000. Such a provision would prevent the vast majority of car owners in New Zealand from obtaining credit using cars as collateral. The availability of car finance and consumer finance using cars as collateral would contract considerably. Further, there would be the following unintended consequences: finance would be unavailable to a significant portion of the community, the finance market could move to unsecured lending with higher annual interest rates for the limited number of people that would qualify for lending, and an increased number of pay day lenders or unsecured lenders with exorbitant interest rates. The effect of a prohibition would be to exclude many New Zealanders from being able to access secured lending.

3.52 The Financial Services Federation also argued that the comparison to the Insolvency Act was not apt, since that Act itself did not prevent secured creditors from repossessing goods over which there were attached security interests.[57]

3.53 We are mindful of the importance that cars have for many people. We are also mindful that not having access to a car can create difficulties if people are not able to shop conveniently at larger, cheaper stores. Our concern is that any such restriction might unduly prevent New Zealanders from using what might be their major asset as security for other borrowing. We have therefore decided not to recommend any restrictions on the repossession of cars.

Computers and electronic goods

3.54 Computer equipment has become important for many New Zealanders. A number of finance companies argued that computer equipment should not be included in the protected goods list. The arguments that were run are similar to those made in relation to cars, namely, that excluding what may be a family's major asset from the list of assets that can be subject to repossession risks depriving that family of the ability to be able to secure borrowing.

3.55 On the other hand, we received submissions from the Canterbury Community Law Centre that computers ought to be on such a list of protected essential items. In part, the Community Law Centre based its submission on the realities of life since the first Canterbury earthquake in September 2010. Since then, computers have played an important part in re-establishing communications and daily lives. During our visit to Christchurch, it was emphasised to us that computers have for many formed an essential part of life during the last year of disruption and difficulty.

3.56 We have considered this submission, and also the reality that because of the way that consumers customise them and use them to store important data computers are not as easily replaceable as say dining room chairs. However, we are not recommending that computer equipment be included in the protected goods list. We see considerable difficulty in trying to define what might be considered to be a "necessary" computer as opposed to a "luxury" computer.

3.57 We are also, however, mindful of the point made by the Christchurch Community Law Centre that computers and computer equipment can contain essential data, private information or personal pictures that debtors ought not to be deprived of, and which may raise privacy concerns.

3.58 We recommend, therefore, that when equipment containing data is repossessed, the debtor should be given a reasonable opportunity to retrieve the data, and that the creditor ought to take reasonable steps to safeguard the privacy interests of the debtor both when in possession of the repossessed equipment, and when equipment is sold.

R11 When computers and other equipment containing a debtor's data are repossessed, the debtor must be given a reasonable opportunity to retrieve that data, and the creditor must take reasonable steps to preserve the consumer's privacy.

Toys and other goods of high sentimental and low economic value

3.59 A number of submitters think that children's toys should be included on a protected goods list. This appears to come from a view that there is often little of value in children's toys that would merit repossession in an economic sense and that the possibility of losing such toys might put undue emotional pressure on a debtor.

3.60 In part, the problem may be eased by our recommendation that goods that are to be subject to repossession must be specified at the time of the contract. Parents would therefore have to expressly consent to the toys that were not in fact owned by the children being added to the security, and it is not clear whether many creditors would be prepared to accept security over low value toys in any event.

3.61 While the inclusion of children's toys in a list of necessities or sensitive goods was supported by a number of submitters, several finance companies argued that computer gaming consoles be excluded, as these were often offered by way of security, and presumably were felt to be beyond what one might consider to be "ordinary children's toys".

3.62 If toys were to be exempted from being repossessed there would have to be some care in the drafting of the exception. It seems to us, given the amount of toys that have embedded electronic equipment and the likelihood that such embedding will continue, that simply excluding "electronic" toys from the protected goods list would be problematic. Outdoor equipment, such as trampolines, might be described by some as "toys" but nevertheless can be reasonably expensive, and therefore suitable for security.

3.63 On balance we have decided not to recommend the exclusion of toys in regulations from the list of goods that might be subject to repossession, but suggest that consideration be given when the Code of Responsible Lending is created, to providing guidance as to the circumstances in which taking such security is responsible.

3.64 We also recommend that the Code should deal with the similar issue of the repossession of goods that have no or extremely limited economic value, but which may have high sentimental value.

R12 The Code of Responsible Lending should explicitly deal with the issue of the granting of security and the repossession of goods, such as children's toys, that may have high sentimental value but little or no economic value.

Travel and identity documents and bank cards

3.65 Some of the items that we suggested in the Issues Paper ought to be exempted from repossession included passports and credit and eftpos cards. During consultation, we heard anecdotal second-hand accounts that indeed such things are sometimes purported to be taken as security.

3.66 In its submission, the Department of Internal Affairs, the Department responsible for the New Zealand Passport system, pointed out that New Zealand passports cannot be given or taken as security,[58] and nor can Samoan passports.[59] The Department takes the view that the fact that security interests cannot be taken in passports ought to be made clear in the Credit (Repossession) Act.

3.67 In our view, the prohibition on repossession should cover not only New Zealand passports, but the passports of other countries and other identification documents that enable or allow people to identify themselves. Being able to travel freely is a right enjoyed by all in New Zealand subject to restrictions that might be reasonably imposed by law.[60]

3.68 As credit cards or bank cards remain owned by the financial institution that issued them, debtors are unable to grant security over those cards and they cannot be subject to repossession within the meaning of the Credit (Repossession) Act. Again, we recommend that such cards be expressly excluded from the definition of goods that can be repossessed, so as to remove any doubt whether such securities are valid.

R13 The consumer credit repossession legislation should include an express restriction on the granting of security and the subsequent repossession of passports, identity documents and credit and cash cards.

Keys

3.69 The concern in allowing repossession of keys appears to be that in and of themselves they have limited economic value, and that taking possession of them is essentially an attempt to obtain physical control of the item to which the key gives access for the debtor. What submissions we did receive on keys made the point strongly that any prohibition on repossession of certain goods should not extend to keys that open or provide access to goods that are otherwise subject to a security. When someone is taking possession of the underlying item they ought to be able to take the keys. The taking of keys to a secured item should likewise be deemed to be the repossession of the goods that they give access to, and thereby trigger the protections of the Credit (Repossession) Act.

R14 Taking possession of the keys that open or provide access to secured property should be deemed to be repossession of the secured property for the purposes of the consumer credit repossession legislation.

Culturally sensitive items

3.70 At various stages in our review we have been told of situations in which there have been repossessions of items that might be considered to be culturally sensitive, especially in the Pacific communities in Auckland.

3.71 We have decided not to make any recommendation about placing such items in the list of essential or sensitive goods. Too broad a statement of culturally sensitive items may catch too much, and any more specific definition risks being overly paternalistic in saying that owners of particular goods may not choose to use them as security.

3.72 Requiring goods that are to be subject to repossession to be specifically identified may go some way to addressing this situation. Furthermore, a number of our recommendations in Chapter 4 are intended to ensure disclosure in credit contracts is in a form that makes it clear what granting security means and to that which it applies. We repeat that security is a difficult concept for many New Zealanders, and that disclosure should make the prospect of losing collateral on default real to those who give security over their property, including items of cultural significance.

DEBTORS' LIABILITY FOR OUTSTANDING AMOUNTS

The Canadian seize or sue provisions

3.73 Some Canadian provinces require that creditors choose whether to 'seize or sue' the collateral. A 'seize or sue' provision essentially requires the creditor to elect whether to pursue the amount owed through ordinary debt recovery proceedings or to repossess the secured property and sell it. If the creditor elects to repossess, the whole debt is discharged; the creditor has no recourse for any other money owing on the debt after the security is sold. In British Columbia, this applies to all security interests over consumer goods.[61] In Alberta, it applies only to conditional sale agreements.[62]

3.74 A 'seize or sue' provision means that the debtor is not left in the situation of no longer having a car and yet still owing money on the car, and goes some way to dealing with the issue identified earlier which, in our view, is at the heart of the need to regulate consumer credit repossession contracts, namely, that the utility of the goods in the hands of the debtor often exceeds the economic value in the hands of the creditor. 'Seize or sue' provisions deal with this indirectly by forcing the creditor to make a choice as to whether it really is worth enforcing the security agreement or whether it is better to use other debt enforcement mechanisms. It means that the creditor must make an election between repossession and other debt collection mechanisms and will be bound by that election. But perhaps even more importantly the nature of the 'seize or sue' provision forces creditors who are anxious about being able to recover the whole of the debt from realising security to consider in a focused way the adequacy of security at the time of concluding the loan. It provides an incentive for the creditor to engage in responsible lending.

3.75 The current position in New Zealand is that credit contracts may provide not only that in the event of default there may be a repossession, but that after repossession, any excess that is owed after the proceeds from the sale of the goods have been applied remains a debt owed by the debtor to the creditor.[63] Accordingly, New Zealand law does not require creditors to elect between pursuing the outstanding debt and repossessing as the Canadian provisions do.

3.76 Such a provision would assist some New Zealand consumers whose goods have been repossessed, but inevitably such a reform would involve a significant recalibration of substantive rights between creditors and debtors. In some consultation meetings, there was discussion about lack of consumer awareness that consumers might remain liable for the shortfall after repossessed goods are sold. That lack of awareness can be dealt with by better disclosure to consumers that they will remain liable for a shortfall.

3.77 The proposed Code of Responsible Lending might forestall the need for a 'seize or sue' provision. Importantly, the principal aim of the Code of Responsible Lending is that lenders "exercise the care, diligence and skill of a responsible lender at the time of considering an application for credit and throughout the contract term." Later in this Report, we recommend that the Code of Responsible Lending also apply to repossession (see recommendation 27). The result will be to require responsibility within an environment where acting irresponsibly in making their decisions to lend will have real consequences, without the possibility of unintended consequences from enacting a 'seize or sue' provision. If, on the other hand, the Code of Responsible Lending was not ultimately enacted or not extended to repossession, we recommend that the Government should seriously consider enacting a 'seize or sue' provision similar to that in British Columbia.

Section 35 and debtors' liability for future interest after sale of repossessed items

3.78 Section 35 of the Credit (Repossession) Act provides for a kind of limited election: once there has been a repossession, the creditor is only entitled to the amount required to settle the agreement under s 31. Section 35 is the successor to previous provisions in the Hire Purchase Act 1974[64] and reads:

> **35 Limit on creditor's right to recover from debtor**
>
> If the net proceeds of sale are less than the amount required to settle the agreement under section 31 as at the date of the sale, the creditor is not entitled to recover more than the balance left after deducting those proceeds from that amount (whether under a judgment or otherwise).

3.79 In turn, s 31 provides:

> **31 Debtor's right to settle agreement**
>
> (1) The debtor may, at any time after the creditor has taken possession of the consumer goods and at any time before the creditor sells or agrees to sell the consumer goods in accordance with this Act, settle the debtor's obligations under the security agreement —
>
> (a) By paying to the creditor the amount required to settle the agreement; or
>
> (b) Where the agreement secures the performance of an obligation other than the payment of money, by performing that obligation.
>
> (2) In this section, the amount required to settle the agreement—
>
> (a) means the balance of the advance outstanding, together with any interest and charges payable under the agreement; and
>
> ....

(c) Includes the reasonable costs and expenses of the creditor of and incidental to taking possession of, holding, storing, repairing, maintaining, valuing, and preparing the sale of, the consumer goods and of returning them to the order of the debtor; and

(d) Includes the costs reasonably and actually incurred by the creditor in doing any act, matter, or thing necessary to remedy any default by the debtor.

(3) Where the right to settle the agreement is exercised,—

(a) Upon the receipt of that amount, or confirmation of the performance of that obligation, the creditor must forthwith return the [[consumer]] goods to the debtor; and

(b) The agreement terminates, with the rights and obligations of the parties to it satisfied.

3.80 Panckhurst J has described the effect of s 35 in the following way:[65]

> … the debt is crystallised as at the date of sale and, in particular, interest at the finance rate does not continue to accrue. That does not mean that some element of future interest may not be payable. The vendor/assignee is entitled to recover the amount required to settle the agreement in terms of s 30 of the Act, which amount by definition includes interest as under the agreement although subject to an element of rebate on account of early termination.

3.81 Section 35 is a rather cryptic provision, but the core of the underlying policy is, as Panckhurst J observes, to crystallise the debt. There are two aspects to this: first, any future interest payments which would have arisen in the normal life of the loan if there had been no default, and secondly, any judgment interest incurred on debt through the Judicature Act 1908. Section 35 has been interpreted as excluding interest under the Judicature Act.[66] Future interest payments should also be excluded from the amount required to settle the agreement.[67]

3.82 Some submissions have been made by finance companies arguing that s 35 ought to be removed so that creditors can repossess without losing the future interest that would otherwise be due on the principal debt. An argument has been made that the section reflects a different, more paternalistic approach to the regulation of credit transactions, and that s 35 can be unfair since it is triggered by the repossession of only one item, even when a number of items are subject to repossession.[68]

3.83 We, however, see some merit in the retention of s 35, requiring as it does that there be a partial election between suing for the debt and repossessing. Having said this, we agree with submitters that s 35 could be better drafted. The section should be clearer that future interest is not recoverable and that judgment interest should not be applied under the Judicature Act should the creditor sue the debtor for the outstanding amounts.

3.84 A further issue is at what point the section is triggered, crystallising the debt. As a provision that has been brought over from the hire purchase legislation, it appears to have been drafted with purchase money securities in mind, where there is one particular good against which debt is secured. As a matter of practice, many security agreements will involve multiple goods. There is, therefore a question regarding the point at which the s 35 protection should be triggered, should the triggering event be repossession of some, all or most of the secured goods?[69] We prefer that the triggering event is when one item is repossessed.

3.85 We acknowledge that there is a risk that if the repossession of one item is sufficient to trigger the provision some creditors might feel that since they are penalised for taking one item in terms of lost future interest, they might as well take more. However, requiring all the secured goods to be repossessed before s 35 took effect would potentially make the provision irrelevant. Any intermediate triggering step would in our view present drafting difficulties.

R15 Section 35 should be redrafted in the new consumer credit repossession legislation to more clearly reflect the policy underlying it, namely that a debtor's obligations are frozen at the time of the sale of the secured property.

ACCELERATION AND THE CREDIT (REPOSSESSION) ACT 1997

3.86 Mr Bevan also raised the issue of creditors' contractual ability to accelerate the loan, that is, to require greater repayment of the principal on the debtor's default, even though that principal might not have otherwise been due under the agreement.

3.87 The issue of acceleration is partly dealt with by the Credit (Repossession) Act already. The Act prevents accelerated amounts being included in the amount necessary to reinstate the agreement. Section 28 provides:

> (1) The debtor may, at any time after the creditor has taken possession of the consumer goods and at any time before the creditor sells or agrees to sell the consumer goods in accordance with this Act, reinstate the agreement by—
>
> (a) Paying to the creditor the amount required to reinstate the agreement or, where the agreement secures the performance of an obligation other than the payment of money, performing any accrued obligations; and
>
> (b) Remedying any default in so far as it is capable of being remedied.
>
> (2) In this section,—
>
> (a) The amount required to reinstate the agreement means the aggregate of—

(i) Any amounts which have fallen due for payment under the security agreement and have not been paid, including, without limitation, interest and other charges, but excluding, where the agreement provides that the total advance falls due for payment immediately on the debtor's default, that part of the advance which would not have fallen due but for that provision; and

(ii) The reasonable costs and expenses of the creditor of and incidental to taking possession of, holding, storing, repairing, maintaining, valuing, and preparing for the sale of, the consumer goods and of returning them to the order of the debtor; and

(iii) The costs reasonably and actually incurred by the creditor in doing any act, matter, or thing necessary to remedy any default by the debtor:

(b) Accrued obligations means any obligations which have fallen due for performance under the security agreement and have not been performed.

(3) This section applies except as provided in an order under section 13(3) (vexatious applications).

3.88 Mr Bevan's submission said:[70]

> What the CRA fails to address is the right to accelerate the loan per se, so that a creditor can accelerate a loan for breach of an instalment, issue a pre-possession notice stipulating the accelerated amount as being due, and validly repossess the goods when the full accelerated amount remains unpaid. The net effect of this practice is increased fees and penalties on top of arrears the consumer is already struggling with.

3.89 In a recent District Court judgment, *Budget Loans Ltd v Robinson*[71] it was accepted that amounts that result from acceleration ought not to be included in the amount for reinstatement. The inclusion of that amount did not amount to a sufficient error to invalidate the post-possession notice in that case, as the Act talked of estimates that could be challenged by the debtor.

3.90 In terms of the wider point raised by Mr Bevan, we are conscious of the limitations of our review. Judge John Walker held in *Budget Loans*:[72]

> The acceleration of loans that are in arrears is certainly not an unusual practice and it is contemplated by s 28(2)(a)(i) of the CRA. The Court of Appeal held in *Bevin v Public Service Investment Society Ltd* (1994) 2 NZ ConvC 191,821 that something more than a creditor exercising rights which the contract provides is required to amount to oppressive conduct.
>
> In this case [the debtor] has consistently breached his obligation to pay on time and breached promises made to the creditor who has been particularly patient. It must be remembered that those who lend on the security of a motor vehicle have a security which is always depreciating in value and in the case of persistent default it seems to me to be reasonable to call up the balance secured by such an asset.

3.91 In our view, the use of acceleration clauses is not a repossession matter per se, but relates more to the substance of the credit contract itself. Goods cannot be repossessed, unless there is a default under the original credit contract. We therefore consider that the Credit (Repossession) Act has the balance about right as it stands.

3.92 What, however, does concern us is an interpretation of the Act that might mean that if creditors having been required to state only the amount owing in the prepossession notice, repossess the goods but then have to return the goods once they have been provided with the correct reinstatement amount, which will include the costs of the repossession, all that will have been achieved is requiring the debtor to pay the repossession fees.

3.93 Our recommendation is that the debtor should be clearly given the option of paying the creditor a non–accelerated amount to forestall repossession. The prescribed form would therefore provide the total amount owed (which might include an accelerated amount) and the amount that is required to reinstate the agreement, which would exclude the acceleration.

R16 Pre-possession notices should include a statement of the amount needed to reinstate the agreement and payment of that amount should forestall repossession.

36 Credit (Repossession) Act 1997, s 6.

37 For the difficulties that the common law has with defining the conditions under which a repossession has occurred, see C Turner "Repossession under the Australian 'Uniform' Hire-Purchase Legislation" (1973) 7 Sydney Law Review 1.

38 Computer Software is defined as a good in the Sale of Goods Act 1908, s 2.

39 See Michael Geyde, Ronald CC Cuming and Roderick J Wood *Personal Property Securities in New Zealand* (Thomson Brookers, Wellington, 2002) at [105.3]; W O (Bill) Bevan *Consumer Credit* (LexisNexis NZ Limited, Wellington, 2005) at [10.9]; Roger Fenton *Garrow and Fenton's Law of Personal Property in New Zealand Vol 2: Personal Property Securities* (LexisNexis NZ Ltd, Wellington, 2010) at [22.2].

Section 105 of the Personal Property Securities Act 1999 provides:

This Part applies only to security interests that—

(a) Are not security interests in consumer goods to which the Credit (Repossession) Act 1997 applies; and

(b) Are not created or provided for by—

(i) A transfer of an account receivable or chattel paper; or

(ii) A lease for a term of more than 1 year that does not secure payment or performance of an obligation; or

(iii) A commercial consignment that does not secure payment or performance of an obligation.

40 Above n 39.

41 Bevan, above n 39, at 140.

42 See Fenton, above n 39, at [21.1.1] and Linda Widdup and Laurie Mayne *Personal Property Securities Act: A Conceptual Approach* (Rev ed, Lexisnexis Butterworths, Wellington, 2002) at [33.3]–[33.6].

43 Cabinet Office Minute, above n 4, at 17.3.

44 See the discussion of APAAP clauses in Chapter 2.

45 Ronald CC Cuming, Catherine Walsh, and Roderick J Wood *Essentials of Canadian Law: Personal Property Security Law* (Irwin Law, Toronto, 2005) at 171. See for example, Personal Property Security Act RSBC 1996 c 359, s 13(2)(b) and Personal Property Security Act 1993 CCSM cP35, s 13(2)(b).

46 Geyde, Cuming and Wood, above n 39, at [44.2]. A similar commentary appears in Canadian textbooks written by Cumming and Wood, see for instance, Ronald CC Cuming and Roderick *Wood Alberta Personal Property Security Act Handbook* (4th ed, Carswell, Toronto, 1998) at 157.

47 Cuming, Walsh, and Wood, above n 39, at [171].

48 National Consumer Credit Protection Act 2009 (Cth), s 45. This provision modifies the general ability in the Personal Property Securities Act 2009 (Cth) to grant security interests in after acquired property, see s 18.

49 *Laws of New Zealand* Powers of Attorney at [160]; *Powell v Thompson* [1991] 1 NZLR 597 at 605; FMB Reynolds (ed) *Bowstead and Reynolds on Agency* (18th ed, Sweet & Maxwell, London, 2006) at [6-036].

50 *Equiticorp Finance Group Ltd v Smart* HC Auckland M No 2025/88, 17 February 1989.

51 See for instance, the recent consideration of such a power by the Supreme Court in *Totara Investments Ltd* v Crismac Ltd [2010] NZSC 36; [2010] 3 NZLR 285.

52 Moneylenders (Licensing and Regulation) Bill 2011, as discussed in Law Commission, above n 2, at 29.

53 Cabinet Office Minute, above n 4, at [17.3]

54 Financial Services Federation, above n 21.

55 Cabinet Office Minute, above n 4, at [17.3].

56 Social Security (Temporary Additional Support) Regulations 2005, sch 2, cl 3(b). The regulations are made under the Social Security Act 1964, s 61G.

57 See generally the Personal Property Securities Act 1999, s 36, which governs priorities with third parties. Note that the Insolvency Act 2006 does contain some provisions that relate to the enforcement of hire purchase agreements, see ss 129-133.

58 Passports Act 1992, s 33:

33 Passports, etc, are property of New Zealand Government

(1) All New Zealand … travel documents issued by or on behalf of the Government of New Zealand, whether before or after the commencement of this Act, shall be the property of the Government of New Zealand.

(2) The right in a [New Zealand] travel document conferred on the Government of New Zealand by subsection (1) of this section shall not be defeated or affected by any security, pledge, deposit, or encumbrance given, made or accepted in respect of the [New Zealand] travel document by the holder or by any other person.

(3) No holder or any other person shall give, make, or accept as a security, pledge, or deposit, or otherwise encumber, a New Zealand … travel document issued by or on behalf of the Government of New Zealand, and any term of an agreement which would otherwise have that effect shall be void.

59 Passports Act 2008 (Samoa), s 32:

32 Travel documents are property of Samoan Government

(1) All Samoan travel documents issued by or on behalf of the Government under this Act, whether before or after the commencement of this Act, shall be the property of the Government.

(2) The right in a travel document conferred on the Government by subsection (1) shall not be defeated or affected by any security, pledge, deposit, or encumbrance given, made or accepted in respect of the travel document by the holder or by any other person.

(3) No holder or any other person shall give, make, or accept as a security, pledge, or deposit, or otherwise encumber, a Samoan travel document issued by or on behalf of the Government, and any term of an agreement which would otherwise have that effect shall be void.

60 See New Zealand Bill of Rights Act, s 18:

18 Freedom of movement

(1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.

(2) Every New Zealand citizen has the right to enter New Zealand.

(3) Everyone has the right to leave New Zealand.

61 Personal Property Security Act 1996 RSBC c 359, s 67.

62 Law of Property Act, RSA 2600, CL–7 s 53(3).

63 As discussed in chapter 2, we were told that this fact often comes as an unpleasant surprise to defaulting debtors.

64 See Hire Purchase Act 1971, s 34; Hire Purchase Agreements Act 1939, s 4.

65 E*xpansionary Holdings Ltd v Cambridge Discounts* (2001) 7 NZBLC 103,364 at [41], dealing with s 34 of the Hire Purchase Act 1974.

66 *Expansionary Holdings Ltd* at [49], dealing with s 34 of the Hire Purchase Act 1974.

67 See *Gault on Commercial Law* (online looseleaf ed, Brookers), which points out that this is consistent with the Credit Contracts and Consumer Finance Act 2003.

68 See Alan Liddell "Section 35 of the Credit (Repossession) Act – time for a change? " [2007] NZ Lawyer 14.

69 See the commentary by Fenton, above n 39, at [22.11] n 8.

70 Submission of Bill Bevan to the Law Commission (15 August 2011).

71 *Budget Loans Ltd v Robinson* DC Porirua CIV-2010-091-535, 4 November 2011.

72 At [36]-[37].

Chapter 4
Informing the consumer

SUMMARY

In this chapter, we consider the place of information disclosure as a consumer protection mechanism in the consumer credit market. We go on to consider the specific information disclosures required by the Credit (Repossession) Act 1997, how these fit with disclosures under the Credit Contracts and Consumer Finance Act 2003, and whether they can be improved.

IMPORTANCE OF DISCLOSURE

4.1 While our Issues Paper did not ask any questions or specifically address the issue of information disclosures, issues concerning the information given to debtors throughout the repossession process were raised with us on a number of occasions during our consultations.

4.2 Certainly, disclosure is a key consumer protection mechanism in the consumer credit market, with disclosures being required at various points throughout the life of the credit contract, including that period governed by the Credit (Repossession) Act. Accordingly, we have spent some time considering the issues raised and how these might be addressed.

Justifications and history

4.3 In chapter 2, we discussed the justifications for intervention in financial markets based on consumers not having the knowledge, aptitude and skills in financial management matters to make informed decisions. Mandatory and standardised information disclosure is one approach to dealing with consumer lack of knowledge or sophistication when borrowing, so that consumers are able to make informed decisions.

4.4 Since the 1960s and 1970s, mandatory information disclosure has been at the heart of consumer credit statutes in most jurisdictions. The Truth in Lending Act 1968 (US), which is often regarded as the "grandfather" of consumer credit disclosure regimes, sets out the objective of information disclosure as follows:[73]

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

4.5 In short, the theory underlying disclosure requirements is that credit cost disclosure will lead to information in the hands of the consumers, which in turn will lead to informed consumer behaviour and choices in the credit market. In other words, disclosure will "perfect imperfect markets by addressing information asymmetries".[74]

4.6 Information disclosure regimes can regulate the provision of information to the consumer at various stages of the credit contract, including in advertising, pre-contractual disclosures, the terms of the contract, during the performance of the contract and upon default. However, the central aspect of most information disclosure regimes is usually the pre-contractual disclosure of the costs of borrowing.[75]

Limitations of disclosure requirements

4.7 The so-called "truth in lending" model is often criticised for a number of reasons. Whether or not mandatory disclosure of key terms of the contract actually impacts on consumer behaviour is questioned for various reasons, including the following:[76]

- disclosure occurs too late in the contracting process to have any real impact on the behaviour of the consumer as he or she is often psychologically, if not legally, committed to the deal by the point of disclosure;
- the transaction costs involved for a consumer in gathering and then comparing the terms that are disclosed to them by multiple lenders are so high as to make the exercise both unlikely and not worthwhile (this is particularly so where the amount of money to be borrowed is relatively low); and
- some items that are required to be disclosed are too complex for consumers to understand, or disclosures are made in terms that are not useful for consumers when assessing the merits and affordability of a deal.

4.8 However, the major criticism of the truth in lending disclosure model is that it is based on an "unrealistic rational actor model of borrower behaviour".[77] Research seems to suggest that consumers do not always act in a "rational" manner in the credit market.

4.9 Research conducted on behalf of the Ministry of Consumer Affairs targeting Pacific consumers found that for many participants in the research, issues such as ease of access to finance, instant financial reward, and non-judgemental attitudes were more important than the cost. Many could not state how much they had borrowed and how much they were actually going to end up repaying with administration costs and interest included.[78]

4.10 Other research has demonstrated that despite being informed through disclosure, consumers' choices are affected by preconceived notions, biases, impulse and compulsion.[79] For example, the Australian research referred to above found that consumers do not always consider the possibility of a crisis when borrowing and may be overly confident of their ability to repay.[80]

4.11 Many of the participants in the Pacific consumers research also admitted to signing contracts without reading them.[81] This was something that many of the people we met with, consumer advisers and creditors included, admitted to doing themselves also. Research has shown that even where appropriate information is provided, consumers often sign without reading any of it.[82]

4.12 For some communities, language is also a barrier. This came through strongly in both the written submissions we received, but also in most of the meetings we conducted during our review.

4.13 As well as language barriers, lack of financial literacy may also impact negatively on consumers' ability to utilise the information that is disclosed to them. As we have noted earlier in this report, levels of financial literacy in our communities are an on-going concern.

4.14 Australian research with low income and vulnerable consumers found that:[83]

> …emotions were often more important than the economics of the transaction or the notion of an economically rational decision. These emotions included desperation for the money or the humiliation of admitting an inability to understand …. There was also the pragmatic realisation that for a person on a low-income, options in the credit market were limited and therefore it was pointless to try to understand the contract. They realised that the choice to go elsewhere or negotiate did not exist for them. They simply needed to take what they could get.

4.15 Another factor that is recognised as limiting the efficacy of disclosure requirements is what is termed "information overload". There is a limit on the amount of information that consumers can process effectively.[84] As the amount of information given to consumers increases, they are more likely to resort to decision-making strategies that are prone to error.[85]

4.16 We tend to agree with the view that many of these criticisms of the truth in lending disclosure model have overstated what it can realistically achieve.[86] At the end of the day, it is not realistic to expect disclosure to deter all consumers from entering into unwise transactions; however, it can be useful to provoke them to reflect on their choices and their position.[87]

4.17 We also think that the limitations of disclosure that have been demonstrated in research are worth bearing in mind when considering options in the present review.

Lessons that can be learned in relation to disclosure in the consumer credit market

4.18 The limitations of the efficacy of disclosure in credit markets that have been uncovered in research do provide some pointers as to how disclosure might be made more useful to consumers.

4.19 It has been proposed by some commentators that there is a need for ongoing disclosures at key points during the life of the contract. The difficulties of countering over-optimism and under-estimation of risk at the point of the consumer entering the contract, suggest that disclosures at later points of the contract process will be important.

4.20 It is suggested that information overload may be less of a problem at later points in time since the information provided then is more likely to be directly relevant to the parties' respective positions at that time, and the consumer is not going to be distracted by matters such as point of sale marketing.[88] Also, while the consumer's ability to absorb information at the point of entering into the contract may be limited, they may be more attentive to information about the contract, their rights and sources of advice, if and when trouble arises.[89]

4.21 Some research on the problem of information overload has suggested that a short summary in plain language covering key terms of the contract is necessary.[90]

4.22 There is also a need for experimentation and adaptation in disclosure requirements, including testing on consumers.[91]

CURRENT POSITION AND GOVERNMENT POLICY DECISIONS

4.23 While the focus of this Report is clearly on the Credit (Repossession) Act and therefore the later part of the credit contract process, we do think it is useful to briefly traverse the disclosure regime under the Credit Contracts and Consumer Finance Act. In our view, given that repossession is part of the same process that commences with the making of a credit contract, it is worth considering the disclosure requirements applying throughout the credit contract process in a holistic way. This should be done in view of what we know about how and when consumers process information.

The disclosure requirements in the Credit Contracts and Consumer Finance Act 2003

4.24 The importance of disclosure as a form of consumer protection in the consumer credit market has been long accepted in New Zealand. Indeed, the Moneylenders Act 1908 required disclosure of various aspects of the cost of credit so that the borrower could identify his or her financial commitment at the outset of the transaction.[92]

4.25 As noted above, the key argument advanced in support of disclosure requirements is that the supply of certain information to consumers at the right time will enable rational behaviour, including "comparison shopping" for the best deal. This objective was expressed in the 1977 report of the New Zealand Contracts and Commercial Law Reform Committee, which formed the basis of the Credit Contracts Act 1981.[93]

4.26 The disclosure regime in the Credit Contracts and Consumer Finance Act, which replaced the Credit Contracts Act, has been described as aiming for "transparency", rather than "truth in lending", with the Ministry of Consumer Affairs taking a "realistic" approach to what can be achieved.[94] Section 3 of the Act states that amongst the Act's objectives, it aims:

> to provide for the disclosure of adequate information to consumers under consumer credit contracts and consumer leases—
>
> (i) to enable consumers to distinguish between competing credit arrangements or competing lease arrangements; and
>
> (ii) to enable consumers to become informed of the terms of consumer credit contracts or consumer leases before they become irrevocably committed to them; and
>
> (iii) to enable consumers to monitor the performance of consumer credit contracts or consumer leases….

4.27 In particular, the Act requires "initial disclosure" (before the contract is made or within five working days of the making of the contract),[95] "continuing disclosure" (periodically with the maximum period for a continuing disclosure being 45 working days for a revolving credit contract and six months for any other credit contract),[96] and "variation disclosure" (in the event of the parties agreeing to change the contract).[97] The Act also requires disclosure of certain matters to guarantors,[98] and there is further provision for a debtor or a guarantor to request disclosure of certain matters.[99]

4.28 The precise information that is required to be disclosed in initial disclosure is listed in sch 1 to the Act. It is a fairly lengthy list covering most of the key terms to the contract, and, of particular relevance to this review, includes a requirement for disclosure of:[100]

> a description of any security interest that is or may be taken in connection with the contract (including a description of any property that is subject to, or proposed to be subject to, any security interest) and the extent to which the debtor's obligations to the creditor are secured:
> ...
>
> [and] particulars that describe any default interest charges and default fees that may be payable under the contract including how and when default interest charges and default fees would become payable:

4.29 Failure to comply with any of the disclosure requirements in Part 2 of the Credit Contracts Act and Consumer Finance Act is an offence and is subject to a maximum sentence of a fine not exceeding $30,000.[101]

Disclosure and the Credit (Repossession) Act 1997

4.30 While the disclosure regime under the Credit Contracts and Consumer Finance Act may be regarded as the main mechanism by which consumers are informed about their circumstances, the Credit (Repossession) Act also requires important disclosures to debtors at certain points in the process. Specifically, the Act requires disclosure in the form of:

- Service of a pre-possession notice before goods are repossessed, unless the goods are at risk;[102]
- Service of a post-possession notice within 21 days of the goods being repossessed;[103]
- Provision of a statement of account within 10 days of the sale of the goods;[104] and
- The contents of the pre-possession notice and the post-possession notice are prescribed in schs 1 and 2 to the Act respectively.

Recent Government policy work and decisions in relation to disclosure

4.31 As part of its review of the Credit Contracts and Consumer Finance Act, the Government considered the adequacy and efficacy of the disclosure requirements in that Act. It took the view that, for many consumer credit arrangements, the objectives of disclosure set out in the Act are not being met. In particular, the Ministry of Consumer Affairs has expressed concern that the disclosure requirements are not enabling the comparison of credit contracts or enabling consumers to make informed decisions about what they are committing to.[105]

4.32 To address the concerns it has around disclosure, the Government has decided to:[106]

- amend the Credit Contracts and Consumer Finance Act so that the form and content of disclosure requirements may be prescribed by regulation;

- require that the full contract, key information, and terms of any credit-related insurance products or extended warranty arranged by the lender are disclosed before the contract is signed;
- require that the key information include information about access to dispute resolution and the hardship provisions of the Act;
- require a lender to put the standard terms and conditions of a lender's credit contracts to be available on their website, or on request by a consumer;
- require the particulars of all credit arrangement variations to be provided to the debtor in writing; and
- repeal the "statement of the right to cancel" in Schedule 1, so that it may be replaced by a plain English statement to be prescribed in regulations.

ISSUES RAISED AND PROPOSALS

4.33 A number of issues relating to the provision of information to debtors were raised with us during our consultation. These include:

- the complexity and formality of the contractual and financial information that is provided by way of initial disclosures and in ongoing disclosures throughout the life of the credit contract leading to limited understanding of the deal being entered into or debtors not bothering to read the disclosed material at all;
- the particular difficulties faced by those people for whom English is a second language in understanding the written information that is presented to them;
- the sparseness of the information provided on the pre-possession notice (and to a lesser extent, the post-possession notice), and, in particular, the lack of details about the right to apply for relief and where to access advice;
- the fact that a pre-possession notice does not lapse if repossession is not carried out after service of the notice;
- issues relating to service of notices and proof of service.

Initial disclosures and debtors' understanding of the consequences of default

4.34 We were told by organisations working with consumers that many debtors fail to appreciate all of the potential consequences of the arrangements into which they are entering. While this obviously varies, depending on the previous experience of the individual consumer, we were told that the level of understanding is often basic. In some cases, there is an appreciation that money is being borrowed and must be repaid, but not necessarily that security is being given over property and that the giving of that security may result in that property being repossessed in the event of default.

4.35 This is consistent with the research discussed above which shows consumers are prone to underestimating risks and may not be able to absorb all of the information that is provided to them at the point of entering the contract. It is also possibly a result of the nature of the information that is given to consumers.

4.36 Where instruments such as APAAP clauses[107] are being used, the particular property that may be liable to repossession is not necessarily identified, and therefore the consequences of default may be even less obvious to the consumer. The Government's recent decision to require that all property over which security is to be taken be specified in the original security agreement with sufficient detail for it to be identified (also discussed in Chapter 3) should address this problem.

4.37 However, there is still an issue with the initial disclosure requirements as they stand at present in terms of the ability of the average consumer to understand fully the nature of the security arrangement being entered into. As noted above, sch 1 to the Credit Contracts and Consumer Finance Act requires that the initial disclosure include a description of any security interest taken. In our view, terms such as "security interest" and "collateral", which we have seen used in various credit contracts, are terms with a specific legal meaning and do not necessarily convey to the consumer the possibility of someone entering their house and repossessing the property in question. Importantly, the critical right to enter the consumer's property is often expressed in the "fine print" of the agreement.

4.38 One credit management company we spoke to even suggested that a picture of a car being towed by a tow truck might better convey the nature of the arrangement being entered into than a written formulation. While we are not advocating such a measure, we do think that it is possible to improve the information that is given at the point of initial disclosure to make clearer to consumers the nature of the arrangement into which they are entering.

4.39 As we discussed above, the Government's decisions on changes to the disclosure requirements in the Credit Contracts and Consumer Finance Act include a decision to repeal the "statement of the right to cancel" in sch 1 and replace it with a plain English statement to be included in the standard forms to be used for disclosure of the key information of consumer credit contracts, which are to be prescribed under amendments to the Credit Contracts and Consumer Finance Regulations.

4.40 We recommend a similar amendment to remove the current requirement for a description of the "security interest" from sch 1 and to include a plain English explanation of the nature of the security interest in the standard forms to be prescribed in the Regulations. This plain English explanation should convey in lay terms the meaning and consequences of giving security.

4.41 In addition, we recommend that consideration be given in the development of the Code of Responsible Lending to requiring creditors to ensure that information is given to consumers in a clear and transparent manner with a view to ensuring the consumer understands the nature of the arrangement into which they are entering.

R17 Schedule 1 to the Credit Contracts and Consumer Finance Act 2003 should be amended to remove the description of the "security interest" from the information required for initial disclosure and develop a plain English explanation of the nature of the security interest which conveys in lay terms the meaning and consequences of giving security to be included in the standard forms that are to be prescribed in an amendment to the Credit Contracts and Consumer Finance Regulations 2004.

English as a second language

4.42 A common problem that was raised with us in consultation is the barrier that language may present to understanding information that is provided about the credit contract process. A lack of confidence in English language may compound the difficulties involved in understanding long, complex and legalistic documents, which are often presented in small print.[108] Furthermore, embarrassment about their lack of proficiency in English may prevent some from asking questions about the contract before signing up to it or from challenging actions of the lender at a later point.[109]

4.43 One of the community law centres we spoke to acknowledged the problems caused by language for their clients, but noted that in the area it serviced there were a great many different languages being spoken. It considered that to require credit contract terms to be provided in the language of the consumer would not be practicable for creditors operating in that area.

4.44 Further, a number of lenders to whom we spoke noted that there would be additional costs involved in providing information to consumers in their own language. Any such costs would ultimately be borne by the consumer.

4.45 There is also some debate about the extent to which providing information in a person's preferred language will be enough to ameliorate issues of comprehension. If the information that is provided is formal and legalistic or the person lacks the financial literacy necessary to analyse what is provided, then a translation is unlikely to assist. This is confirmed by the conclusions of researchers responsible for the Pacific consumers research referred to above, who felt that simply providing information "no matter how Pacific-friendly" will not be sufficient to address the problems identified in the research.[110] If consumers do not have the time or inclination to read the contract before signing it, or the financial literacy skills to critically assess the deal, translation of information is unlikely in or of itself to address the situation.

4.46 Accordingly, we have formed the view that the priority is providing information in simple and accessible terms. We note in this regard that the Government's recent decisions include proposed amendments to the Credit Contracts and Consumer Finance Act, a number of which are aimed at improving the extent to which disclosures under the Act meet their objective of enabling consumers to make more informed decisions and to allow the comparison of deals. As well as amendments to the content of disclosures themselves, we think that the decision to enable the making of regulations that prescribe the form and content of disclosure regulations is a positive one. This will provide flexibility and the ability to respond more quickly to feedback from consumers about the degree to which disclosures are meeting their needs.

4.47 The Government's recent decisions that focus on responsible lending are also relevant in this area. The Credit Contracts and Consumer Finance Act is to be amended to entrench the principle of responsible lending, including provision for the issue of a Code of Responsible Lending that will set out the types of practices that are accepted as meeting the principles of responsible lending. One of the things that the Code should address is the provision of information to a consumer in a clear and transparent manner with the aim of ensuring the consumer understands the nature of the arrangement and the key terms.[111]

4.48 We see considerable potential for the finance industry itself to be involved in this process. While we acknowledge the linguistic and cultural diversity of New Zealand society, that does not mean that the industry should not be considering ways of ensuring that consumers understand the obligations they are assuming when entering into a credit contract, including those that involve the giving of security. Nor should that diversity prevent the development, at some point in the future, of information explaining the complicated legal concepts arising in the credit contract area in languages that are commonly spoken in New Zealand.

R18 The Code of Responsible Lending should include a requirement for creditors to ensure that information is given to consumers in a clear and transparent manner with a view to ensuring the consumer understands the nature of the arrangement into which they are entering. This should include, where feasible, information in languages that the consumer readily understands.

Pre-possession notices

Purpose of pre-possession notices

4.49 The pre-possession notice is a hugely important point in the repossession process. At the point that it is issued, the debtor is in default but the arrangement may still be amenable to being "put back on track", albeit under new arrangements for repayment. This is the debtor's opportunity to remedy the default before the lender exercises his or her right to repossess and the post-repossession process is put into action.

4.50 We were told by a number of creditors that actual repossession of the goods for the purpose of selling them was a "last resort" for them. They told us that repossession was seldom the best outcome and that it was better to be receiving some form of repayment from the debter, albeit at a lesser level than originally agreed. For most, the number of actual repossessions was considerably lower than the number of pre-possession notices they issued, with the pre-possession notice intended to get the parties talking.

4.51 For the debtor, the pre-possession notice is also a signal that they are in real danger of losing the secured property and that they need to remedy the situation. It is therefore important that they do something to address the problem. If they are unable to make good on the full extent of the default, there may be room for negotiation with the creditor. An application for relief or dispute resolution services may also be appropriate, depending on the circumstances.

Content of the pre-possession notice

4.52 For this reason we think that as well as setting out the nature and extent of the default and what the debtor needs to do in order to remedy the default and by when, the pre-possession notice should:

- state that doing nothing is not an option;
- provide information about where the debtor may go to access help;
- encourage the debtor to contact the creditor;
- provide details about the right to seek relief in circumstances of hardship; and
- provide details about dispute resolution processes[112] and what the debtor needs to do if he or she disputes some aspect of the situation.
- These requirements should be specified in legislation.

4.53 The pre-possession notice that is currently prescribed by sch 1 to the Credit (Repossession) Act falls somewhat short on several of these matters. That form is rather sparse in terms of the information it provides to the consumer and the language used is formal. It sets out the fact of the security agreement in relation to the particular goods, the nature of the default, and what the debtor must to do to remedy the breaches of the agreement and when. It concludes by stating that if the breaches are not remedied within the stated period (being not less than 15 days after service of the notice), the creditor intends to take possession of the goods.

4.54 We recommend that a revised pre-possession notice should be developed covering the matters we have set out above. Consistent with the Government's decisions in relation to disclosure under the Credit Contracts and Consumer Finance Act, the revised pre-possession notice that includes the matters set out above as required in the statute should be tested on consumers to ensure it is effective and in clear, plain English.

R19 The pre-possession notice should be required by statute to:

- set out the nature and extent of the default and what the debtor needs to do in order to remedy the default and by when;
- state that doing nothing is not an option;
- provide information about where the debtor may go to access help;
- encourage the debtor to contact the creditor;
- provide details about the right to seek relief in circumstances of hardship; and
- provide details about dispute resolution processes and what the debtor needs to do if he or she disputes some aspect of the situation.

Prescription of the pre-possession notice

4.55 As we noted above, research has suggested a need for flexibility and adaptation in relation to disclosure requirements. We note that the Government has recently decided to amend the Credit Contracts and Consumer Finance Act to provide for the prescription of the form and content of disclosure requirements by regulation, which will obviously provide greater flexibility. We think that the pre-possession notice should also be prescribed by regulation, rather than in primary legislation, to ensure there is an ability to respond to any deficiencies or problems that may be identified in the future.

R20 The form of the pre-possession notice should be prescribed by way of regulations rather than in primary legislation.

R21 The form in which that information is required should be redesigned and the pre-possession notice should be consumer tested to ensure the notice is effective and in clear, plain English.

Expiry of pre-possession notices

4.56 A further issue related to the pre-possession notice that was raised with us by a number of submitters, is the lack of an expiry date on the pre-possession notice. While the prescribed form does require the creditor to insert a time period of not less than 15 days for the debtor to remedy their breaches, there is no requirement for the creditor to carry out the repossession at that time or within a certain timeframe.

4.57 We were told on a number of occasions of situations where a pre-possession notice had been served on a debtor but the repossession has not actually taken place until some months later. It seems that how this usually unfolds is that after service of the pre-possession notice, the parties negotiate a new arrangement for repayment of the loan but the debtor subsequently fails to meet his or her renegotiated obligations and the creditor acts on the original pre-possession notice rather than issuing a further notice in response to the second default.

4.58 Given that one of the key objectives of the pre-possession notice is to bring the parties together to see if the default can be remedied and repayment of the loan can be put "back on track", it seems undesirable for pre-possession notices to be used in this way. In such circumstances, the original pre-possession notice relates to the original default and will not contain the details of the subsequent default and the state of affairs between the parties at that point.

4.59 We think that, if a repossession is to occur, it should take place within a reasonable period of the debtor receiving the pre-possession notice and having been given notice of the current status of the loan and their obligations under it, together with information about their rights and potential remedies. The time period should be sufficiently long to give the parties time to renegotiate matters if that is possible but short enough for the information in the notice to be relevant. We think 28 days is appropriate for these purposes. This period, however, ought to be extended if the creditor is prevented from carrying out the repossession while resolving a complaint made by the consumer or while a complaint is being dealt with by a dispute resolution scheme.

R22 If a repossession is to be carried out, it must occur within 28 days of a pre-possession notice being served or in the event that a complaint has been made, within 28 days of the creditor having made a decision with respect to the complaint or of a dispute resolution scheme having reached a determination with respect to the complaint. If a repossession is to be carried out after 28 days, a new pre-possession notice must be served.

Post-possession notices

Form and content of post-possession notices

4.60 The creditor must serve a post-possession notice on the debtor (and any guarantors) within 21 days of taking possession of the secured goods.[113] The form of the notice is prescribed in sch 2 to the Credit (Repossession) Act. Interestingly, the notice in the schedule is considerably more fulsome than the pre-possession notice, both in terms of content and in the messages it attempts to send to the debtor. It is, however, like the pre-possession notice in its use of rather formal language.

4.61 The post-possession notice must set out:

- the fact of the security agreement;
- that the secured goods were repossessed and when this occurred;
- that the debtor will be entitled to get the goods back if he or she reinstates or settles the agreement within 15 days;
- what reinstatement and settlement mean and what must be done to achieve these things in the context of this security agreement;
- what will happen if the agreement is not reinstated or settled;
- the creditor's estimate of the value of the goods.

4.62 The notes at the bottom of the prescribed notice also set out the debtors rights:

- to apply to court for relief;
- to reinstate or settle the agreement, or to introduce a cash buyer, at any time before the creditor sells the goods;
- in relation to sale of the goods by public auction;
- to obtain a valuation
- to bid or tender for the goods if they are offered for sale by public auction or public tender;
- in the event the goods are not sold within 3 months of them being repossessed;
- to be provided with a statement of account within 10 days of the sale of the good; and
- to sue to recover any unpaid refund.

4.63 The notice also includes the following note:

> Do not delay
>
> Action to enforce your rights should be taken at once. At the end of **15 days** after the service of this notice, the creditor is free to sell the goods, if you have not reinstated or settled the agreement or introduced a cash buyer who will pay not less than the creditor's estimate of the value of the goods.
>
> If you are in doubt about what you should do, you should seek advice at once.

4.64 We think that, unlike the current pre-possession notice, the post-possession notice contains all the necessary information. However, as with the pre-possession notice, we think it would benefit from redesign aimed at presenting the information in clear, plain English. It should also be prescribed by way of regulation rather than in primary legislation to ensure it can be changed more quickly, if necessary.

R23 The post-possession notice should be redesigned and consumer tested to ensure the notice is effective and in clear, plain English.

Statement of account

4.65 When repossessed goods are sold, the Credit (Repossession) Act requires the creditor to the give the debtor a statement of account within 10 days after the sale, which shows:[114]

- the amount of the gross proceeds of the sale;
- the amount of the costs and expenses of and incidental to the sale;
- the amount required to settle the agreement under s 31 as at the date of the sale; and
- the balance owing by the creditor to the debtor, or by the debtor to the creditor, as the case may be.

4.66 One submitter recommended that the Act prescribe a form for a statement of account and provided a suggested format. After considering this issue, we are not convinced that it is necessary to prescribe the form of the statement of account in the same way as the pre-possession and post-possession notices. Those notices set out to some extent the substantive content of the parties' rights in relation to the agreement, while the statement of account is simply a setting out of the current status of the agreement. Furthermore, we did not receive feedback indicating any problem with the way in which statements of account are currently being provided.

Service of notices and proof of service

4.67 A further issue that was raised with us a number of times during our consultation was that of service of notices. Disputes as to whether pre-possession notices in particular have been served appear to be common.[115]

4.68 The Credit (Repossession) Act contains certain rules in relation to the service of notices. A notice or other document that is required under the Act must be in writing and is considered to be served for the purposes of the Act if:[116]

- it is delivered to the person;
- it is left at the person's usual or last known place of abode or business specified for that purpose in the credit contract; or
- it is posted in a letter addressed to the person at the last known place of abode or business.

4.69 If a notice is sent to the person by registered letter, it is deemed to have been delivered to the person on the fourth day after it was posted.[117]

Should a mode of delivery for service of notices be prescribed?

4.70 One submitter suggested that pre-possession notices should be sent by DX Mail or personally delivered by an agent. The question of whether notices should be required to be sent by registered mail was also discussed at one of the public meetings we attended. Creditors expressed concern about the costs associated with registered post and the difficulties of serving notices on debtors who did not want to be found.

4.71 However, we see no need or advantage to altering the current rules regarding mode of service. Ultimately, it is in a creditor's interest to ensure that notices are served as required by the Act and that a debtor in default receives the notices. A creditor who wishes to take advantage of the deeming provision in s 38(5) of the Act will use registered post. However, in other situations, the creditor may find it more convenient or reliable to have notices hand delivered and served in person.

Electronic service of notices

4.72 The Electronic Transactions Act 2002 sets out new rules to facilitate the use of email and other electronic technology. One of its stated aims is to allow "certain paper-based legal requirements to be met by using electronic technology that is functionally equivalent to those legal requirements."[118] The Act allows businesses to use electronic technology, if they wish, to comply with various legal requirements for producing, giving or storing information in writing, provided that any person who is to be given or receives the information consents to this. However, there are some Acts which are exempted from the rules about satisfying legal requirements through electronic communications, including the Credit (Repossession) Act, meaning that pre-possession and post-possession notices and statements of account may not be delivered by an electronic communication.[119]

4.73 In comparison, the Credit Contracts and Consumer Finance Act is not exempted from the Electronic Transactions Act. Indeed, that Act specifically contemplates the possibility of disclosures being made by way of an electronic communication.[120] This means that the parties to a credit contract may communicate by email until the point that the creditor wishes to exercise their remedy of repossession.

4.74 While this issue was not raised with us during consultation, we have considered whether this exemption should be removed. We see no reason to prevent parties who wish to communicate in this way from doing so. There would be no disadvantage to any debtor who did not have access to electronic technology, as the Electronic Transactions Act only applies where the person receiving the information consents to receiving it in electronic form. Furthermore, there is an advantage to the use of electronic communications in that there will always be proof whether or not a notice was actually sent or received.

R24 The reference to ss 8, 9, 17, 20, 21, 29(2)(a), 33 and 38 of the Credit (Repossession) Act 1997 in Part 2 of the Schedule to the Electronic Transactions Act 2002 should be removed so that the notice requirements under the consumer credit repossession legislation may be fulfilled by electronic communications if the parties agree.

Proof of service

4.75 As noted above, we were told that disputes about whether or not notices had been sent or received are common. Some of the consumer advocates we spoke to recounted experiences they had had following up with creditors on behalf of debtors seeking proof of service of notices or further copies of notices. There were concerns about the quality of record keeping because some creditors do not always keep copies of the notices they serve.

4.76 From a practical perspective, it is to the advantage of a creditor to keep records about notices and service, including copies of notices so that these may be produced in the event of a dispute. Obviously, many creditors do, as they were able to provide us with detailed information about the numbers of notices they had served and acted upon.

4.77 However, to the extent that there are shortcomings in the industry in this regard, we think that the greater regulation we recommend in this Report will act as a strong incentive for creditors to improve their records. This should enable disputes about service of notices to be resolved more easily in the future.

73 Consumer Protection Act 15 USC § 1601.

74 Wilson, Howell and Sheehan, above n 32, at 120.

75 Iain Ramsay "From Truth in Lending to Responsible Lending" in Geraint Howells, André Janssen and Reiner Schulze (eds) *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Ashgate Publications, Aldershot, 2005) 47 at 48.

76 McBride and Bowie, above n 16, at 331-332.

77 Wilson, Howell and Sheehan, above n 32, at 121.

78 Ministry of Consumer Affairs *Pacific Consumers' Behaviour and Experience in Credit Markets, with Particular Reference to the 'Fringe Lender' Market: Research Findings and Government's Response Strategy* (August 2007) at 68.

79 Catherine Garcia and Willem H Van Boom "Information Disclosure in the EU Consumer Credit Directive: Opportunities and Limitations" (18 December 2009) Social Science Research Network www.ssrn.com at 21-2; Iain Ramsay, above n 25, at 8-12; Michael G Faure and Hanneke A Luth "Behavioural Economics in Unfair Contract Terms: Cautions and Considerations" (2011) 34 Journal of Consumer Policy 337 at 338.

80 Ministry of Consumer Affairs, above n 78, at 134.

81 Ministry of Consumer Affairs, above n 78, at 68.

82 Faure and Luth, above n 79, at 338.

83 Wilson, Howell and Sheehan, above n 32, at 138.

84 Simangaliso Biza-Khupe "Information Regulation in Consumer Credit Markets – Determinants of Financial Information Oversupply" (2011) 71 International Research Journal of Finance and Economics 19 at 21; Oren Bar-Gill and Franco Ferrari "Informing Consumers About Themselves" (2010) 3 Erasmus Law Review 93 at 116.

85 Ramsay, above n 75 at 52-3; Biza-Khupe at 21.

86 McBride and Bowie, above n 16, at 332.

87 Ramsay, above n 25, at 16-17.

88 Ramsay, above n 75, at 55.

89 Ramsay, above n 25, at 15-16.

90 Wilson, Howell and Sheehan, above n 32, at 140; Bhuza-Kupe, above n 84, at 29.

91 Ramsay, above n 25, at 15; Wilson, Howell and Sheehan, above n 32, at 140.

92 McBride and Bowie, above n 76, at 333.

93 McBride and Bowie, above n 76, at 331.

94 McBride and Bowie, above n 76, at 335.

95 Credit Contracts and Consumer Finance Act 2003, s 17.

96 Credit Contracts and Consumer Finance Act 2003, s 18.

97 Credit Contracts and Consumer Finance Act 2003, s 22.

98 Credit Contracts and Consumer Finance Act 2003, ss 25 and 26.

99 Credit Contracts and Consumer Finance Act 2003, s 24.

100 Credit Contracts and Consumer Finance Act 2003, sch 1, paras (q) and (r).

101 Credit Contracts and Consumer Finance Act 2003, s 103.

102 Credit (Repossession) Act 1997, s 8.

103 Credit (Repossession) Act 1997, s 20.

104 Credit (Repossession) Act 1997, s 32.

105 Ministry of Consumer Affairs *Regulatory Impact Statement: Responsible Lending Requirements for Consumer Credit Providers* (October 2011) at 13.

106 Cabinet Office Minute, above n, at [16] and [17].

107 See the discussion in Chapter 3.

108 Ministry of Consumer Affairs, above n 78, at 68.

109 Ministry of Consumer Affairs, above n 78, at 70.

110 Ministry of Consumer Affairs, above n 78, at 70.

111 We acknowledge here that a creditor may make all reasonable efforts but if the debtor is not prepared to read and consider what is provided then there is little that the creditor can do about that.

112 This should include the details of the particular dispute resolution scheme that the creditor belongs to under the Financial Service Providers (Registration and Dispute Resolution) Act 2008. The details of the dispute resolution schemes are discussed in more detail in chapter 6.

113 Credit (Repossession) Act 1997, s 20.

114 Credit (Repossession) Act 1997, s 33.

115 It is hard to get a sense of how real or widespread this problem is. While several groups working with debtors said in the submissions that failure to serve pre-possession notices was a common problem, a number of consumer advocates we spoke to also acknowledged that some of their clients simply failed to open or read communications from the creditor.

116 Credit (Repossession) Act 1997, s 38(1).

117 Credit (Repossession) Act 1997, s 38(5).

118 Credit (Repossession) Act 1997, s 3(b).

119 Section 14 and pt 2 of sch to the Electronic Transactions Act 2002 exempt ss 8, 9, 17, 20, 21, 29(2)(a), 33 and 38 of the Credit (Repossession) Act 1997 from the application of pt 3 of the Electronic Transactions Act 2002, which contains the rules about the application of legal requirements to electronic transactions.

120 Credit Contracts and Consumer Finance Act 2003, s 35.

Chapter 5
The Repossession Process

SUMMARY

This chapter considers the pre-possession, repossession and post-possession stages of the repossession process. The chapter recommends a number of amendments to the consumer credit repossession legislation that will make it clear what obligations creditors have during the repossession process, assist the Police to enforce the law, inform debtors of repossession requirements, improve provisions that have created problems for debtors and creditors, and address inconsistencies in the various statutory timeframes.

PRE-POSSESSION STAGE

Official/Court approval for repossessions

Court-ordered entry requirement

5.1 The Credit (Repossession) Act 1997 does not require creditors or their agents to obtain approval from a court or a regulator to repossess goods. They are only required to satisfy the pre-possession requirements set out in pt 2 of the Act.

5.2 In the Issues Paper, we noted that both Australia and the United Kingdom require independent authorisation by a court before entry of a residence to repossess consumer goods can occur.[121] We also noted that requiring such independent authorisation might provide greater support to Police officers when they are called to disputes over credit repossessions and could offer additional surety for all parties.[122] Consequently, we asked for submitters' views on the pros and cons of a court-ordered entry requirement.

5.3 The majority of submitters were opposed to introducing a court-ordered entry requirement due to the likely costs and delays involved and the probability that the costs of obtaining authorisation would be passed onto debtors. A few submitters, on the other hand, considered that independent authorisation would assist the Police and ensure appropriate repossession conduct and deal with the issue of private repossessions taking place.

5.4 Although imposing a court-ordered entry requirement has some benefits, as outlined above, and would possibly improve compliance with the credit contract and pre-possession requirements, we have reached the conclusion that the costs and delays involved in the proposal would outweigh the benefits. We agree with the majority of submitters that the proposal would likely result in creditors imposing additional costs on debtors to recover the costs incurred in obtaining approval to repossess goods and delays to the repossession process. We also consider that the delays in the process would mean that debtors would be liable for increased default charges.

5.5 For these reasons, we are not recommending the introduction of a court-ordered entry requirement.

Equity protection provision

5.6 In addition to the question of whether court authorisation should be required for entry, we asked in the Issues Paper whether there should be a provision requiring consent of a court or other enforcement agency for repossession, when the amount of the debt owing has been reduced below a certain point. In the Issues Paper, we noted that other jurisdictions "have provisions protecting goods from repossession, except by leave of the court, when the debtor has built up a certain amount of equity in them."[123] We noted that the amount of equity varies across jurisdictions, but that the most common approach appeared to be when the amount owing was less than 25 per cent of the amount of credit provided.[124]

5.7 We note that the Issues Paper focused on a potential equity protection provision to protect debtors who have entered into purchase money security contracts. The Issues Paper should also have made clear that such a provision would apply to general credit contracts secured by collateral, which do not result in the debtor gaining equity in the secured goods. This is because the Credit (Repossession) Act governs both purchase money security contracts as well as general credit contracts secured by collateral. The type of provision that was discussed in the Issues Paper, which is a provision requiring consent of a court or other enforcement agency for repossession, when the amount of the debt has been reduced, would also have to be appropriate for general credit contracts secured by collateral. This is because such a provision does not, in fact, require the debtor to have built up any equity in the goods, it simply refers to the reduction of the debt owing.

5.8 A few submitters supported the introduction of an equity protection provision. They considered that it would:

- provide some protection to debtors who have repaid most of the debt owing on the consumer goods but have suffered financial hardship and defaulted on their loan; and
- prevent creditors and repossession agents who have a greater financial interest in repossession than in having a loan repaid in full, due to the fees they charge, from repossessing goods in situations where debtors have repaid most of their loan.

5.9 However, the majority of submitters were opposed to the proposal. Some of the reasons that submitters gave for rejecting the proposal were as follows:

- the cost of obtaining a court order would ultimately be borne by the debtor either through increased borrowing or repossession fees;
- the repossession process would be delayed;
- the majority of defaults occur before the debtor has built up a significant amount of equity in the consumer goods;
- that many collateral goods lose substantial value and therefore any provision would be needed to be satisfied with certainty. In meetings, the concern was sometimes put as “which equity?"
- the provision may provide an incentive for lenders to more readily repossess goods from debtors when the loan balance is just above the threshold; and
- the Credit Contracts and Consumer Finance Act 2003 already provides protections to debtors through the provisions that allow for changes to a credit contract due to unforeseen hardship and the provisions that allow a contract to be reopened where the creditor has exercised or intends to exercise a right or power conferred by the contract in an oppressive manner.

5.10 We have reached the view, in light of the submissions we have received, that introducing the proposed provision would not be an effective way of protecting debtors who have repaid a significant portion of their debt from repossession after they have defaulted on their loan repayments. As with the proposed court-ordered entry requirement, we consider that the provision would likely result in creditors imposing additional costs on debtors in order to recover the costs incurred in obtaining approval to repossess goods. We also consider that the provision may result in delays to the repossession process, which would in turn mean that debtors would be liable for increased default charges.

5.11 We have therefore concluded that the best option would be to amend the financial hardship and oppression provisions in the Credit Contracts and Consumer Finance Act. We consider, as proposed by the Government, that the financial hardship provisions in subpt 8 of the Credit Contracts and Consumer Finance Act should be amended to enable debtors who have suffered unforeseen hardship and have been in default of their loan contract for less than two months to apply for changes to the credit contract that would make it more affordable for them to repay their debt. We also consider that s 120 of the Credit Contracts and Consumer Finance Act, which provides for a court to reopen a credit contract in the event that "a party has exercised, or intends to exercise, a right or power conferred by the contract . . . in an oppressive manner,"[125] could be used by debtors who have repaid most of their debt but are facing the prospect of repossession of their goods by the creditor.

Amendments to the financial hardship provisions in the Credit Contracts and Consumer Finance Act 2003

5.12 Sections 55 and 56 of the Credit Contract and Consumer Finance Act set out the circumstances under which a debtor could apply for a change to a credit contract on the grounds of financial hardship and the changes that can be made to a contract. They read:

> **55 Changes on grounds of unforeseen hardship**
>
> (1) A debtor who is unable reasonably, because of illness, injury, loss of employment, the end of a relationship, or other reasonable cause, to meet the debtor's obligations under a consumer credit contract and who reasonably expects to be able to discharge the debtor's obligations if the terms of the contract were changed in a manner set out in section 56 may apply to the creditor to agree to that change.
>
> (2) For the purposes of this section,—
>
> de facto partner, civil union partner, and spouse have the same meanings as in the Property (Relationships) Act 1976
>
> end of a relationship means—
>
> (a) a situation described in section 25(2)(a) to (d) of the Property (Relationships) Act 1976; or
>
> (b) the death of the spouse, civil union partner, or de facto partner of the debtor.
>
> **56 Changes that can be made**
>
> (1) An application by a debtor under section 55 must seek to change the terms of the consumer credit contract in one of the following ways:
>
> (a) extending the term of the contract and reducing the amount of each payment due under the contract accordingly (without a consequential change being made to the annual interest rate or annual interest rates):

(b) postponing, during a specified period, the dates on which payments are due under the contract (without a consequential change being made to the annual interest rate or annual interest rates):

(c) extending the term of the contract and postponing, during a specified period, the dates on which payments are due under the contract (without a consequential change being made to the annual interest rate or annual interest rates).

(2) The change that the debtor seeks—

(a) must not be more extensive than is necessary to enable the debtor to reasonably expect to be able to discharge the debtor's obligations; and

(b) must be fair and reasonable to both the debtor and the creditor in all the circumstances.

(3) A change is not unfair or unreasonable merely because it involves a change to the agreed terms of the consumer credit contract.

5.13 Although a debtor can currently apply for changes to a credit contract on the grounds of financial hardship under the provisions set out above, s 57(1)(a) of the Credit Contracts and Consumer Finance Act prevents a debtor who has defaulted in a payment from applying for a change to the credit contract due to unforeseen hardship, unless he or she has remedied the default. Therefore, debtors who are facing the prospect of repossession due to a default on their loan repayments are not currently able to apply for a change to their credit contract so that they can avoid the repossession of their goods. A number of consumer adviser groups made the comment to us that the requirement to remedy the default was often a significant barrier to the unforeseen hardship provisions being an effective aid to consumers in financial distress.

5.14 We note that the Government has decided to amend the financial hardship provisions in subpt 8 of the Credit Contracts and Consumer Finance Act when it reforms that Act. The Cabinet minute on the Government's intended reform states that the Government will "amend the Credit Contracts and Consumer Finance Act to:[126]

(a) provide that debtors can make an application under the hardship provisions if they have been in default for less than two months;

(b) require the written acknowledgement of receipt of hardship applications within five working days that outlines any further information needed to process the application;

(c) require lenders to make a decision on a hardship application within 20 working days of receiving the application, or from when the lender received any further information requested from the debtor;

(d) provide that if a lender does not make a decision on a hardship application within 20 working days, the debtor may apply to the Disputes Tribunal or court to vary the credit contract as it see fit;

(e) preclude the charging of application fees or imposing other obstacles for hardship applications;

(f) preclude the charging of penalty fees and/or penalty interest while hardship applications are being considered;

(g) require lenders to advise applicants of the reason their hardship application was declined, and of their right of review.

5.15 We consider that the Government's proposed law reforms have the potential to provide the protection that debtors facing unforeseen hardship need when confronted with the likely repossession of their goods, without the potential unintended consequences raised by submitters and the increased costs and delays that would likely result from the proposed equity protection provision. The reforms will also provide protection to a greater number of debtors than the equity protection type of provision would, as debtors will not be required to have repaid most of their loan in order to be eligible to apply for a change to their credit contract.

Amendments to the oppression provision in the Credit Contracts and Consumer Finance Act 2003

5.16 Section 120 of the Credit Contracts and Consumer Finance Act sets out the circumstances in which a court may reopen a credit contract:

> **120 Reopening of credit contracts, consumer leases, and buy-back transactions**
>
> The court may reopen a credit contract, a consumer lease, or a buy-back transaction if, in any proceedings (whether or not brought under this Act), it considers that—
>
> (a) the contract, lease, or transaction is oppressive; or
>
> (b) a party has exercised, or intends to exercise, a right or power conferred by the contract, lease, or transaction in an oppressive manner; or
>
> (c) a party has induced another party to enter into the contract, lease, or transaction by oppressive means.

5.17 We note that the Government intends to make the following reforms to s 120 of the Credit Contracts and Consumer Finance Act:[127]

(a) amend the test for oppressive credit contracts in the Credit Contracts and Consumer Finance Act to provide that the courts must have regard to specific consumer protection factors when considering whether a consumer credit contract is oppressive, including the lender's responsible lending obligations;

(b) disproportionate enforcement and recovery actions by creditors against consumers is one of the factors that the courts must have regard to in deciding whether the exercise of a right or a power under a consumer credit contract is oppressive;"

(c) the regulator has the ability to apply to the court for an order re-opening all of any class of a creditor's consumer credit contracts that are found to be oppressive.

5.18 We think that the Government's proposed reform set out under (b) above will significantly improve the operation of the oppressive conduct provision in the Credit Contracts and Consumer Finance Act,[128] as it will mean that creditors who decide to repossess goods from debtors that have repaid most of their loans and thereby take disproportionate enforcement action, may be held to have exercised their right to repossess under the contract oppressively.

Voluntary return of goods

5.19 Sections 36A and 36B of the Credit (Repossession) Act provide for the voluntary return of goods subject to a secured credit sale agreement in certain circumstances. Section 36A(1) provides that such goods may be returned if the finance agreement permits the debtor to return the goods and terminate the agreement or if the creditor agrees to the return of the goods and termination of the agreement.[129]

5.20 In the Issues Paper, we sought views on whether ss 36A and 36B ought to be strengthened to require creditors to accept the voluntary return of goods and termination of the finance agreement by debtors.[130] We queried whether this might address the problem of the accrual of substantial default interest charges in the event that the debtor defaults on his or her payments.[131] Current avenues for debt relief available to a debtor are fairly limited. We noted that the main remedy available is an application under s 120 of the Credit Contracts and Consumer Finance Act to reopen an oppressive contract on the grounds that the creditor has exercised a power in an oppressive manner, which would require a debtor to go to court.[132]

5.21 A number of submitters supported our proposal to require creditors to accept the voluntary return of goods by debtors. One submitter commented that if creditors were required to accept the return of goods, they may be more careful about lending money to high risk consumers. However, other submitters raised several concerns with the proposal. Those concerns are set out below:

- debtors may abuse the right to return goods;
- sections 36A and 36B are outdated provisions from the repealed Hire Purchase Act 1971 when finance agreements with the vendor of the consumer goods were more common. Consumers often obtain finance from lenders who are not associated with the vendor of the goods and are not retailers or second-hand dealers. Therefore, the proposal would interfere with their business; and
- section 35 of the Credit (Repossession) Act prevents the creditor from charging any interest on the balance owing after the sale of the goods. Therefore, creditors would be disadvantaged by the proposed reform.

5.22 A few submitters also suggested an alternative proposal, which would involve debtors selling the goods themselves and using the proceeds of the sale to repay the debt owed to the creditor. However, they thought that interest should still be payable on any outstanding balance following the sale of the goods. They considered that this proposal would be preferable to the voluntary return of goods because debtors would be able to avoid the fees that the creditor would charge for selling the goods, ensure that the goods were sold for a reasonable value and automatically receive any surplus following the sale.

5.23 We acknowledge that the right to voluntarily return goods might assist debtors who are subject to a secured credit sale agreement and are unable to make repayments on their loan. However, we have reached the conclusion that it is not the role of the consumer credit repossession legislation to provide people with relief from contracts that they cannot afford. It is really the role of the broader provisions of the Credit Contracts and Consumer Finance Act or of consumer law more generally to provide such relief, as the issue concerns the nature of the original contract.

5.24 In addition, as a result of the submissions we received, we no longer consider that the voluntary return of goods proposal would provide the best solution to the financial problems that some debtors face as a consequence of their default in loan repayments. This is because ss 36A and 36B of the Credit (Repossession) Act only relate to secured credit sale agreements and not finance agreements from lenders who have not sold the goods in question to the debtor. Therefore, the proposal would only apply to a certain group of debtors who require relief.

5.25 It would also be a significant intervention in the lending market that would mean that lenders would not be able to charge interest on any outstanding debt following the sale of the goods. Further, a debtor would be liable for the costs incurred by the creditor in selling the goods, and the debtor would likely still have a debt to pay after the goods have been returned, but would no longer have the utility of the goods. Sections 36A and 36B, however, ought to be retained in some form to leave open the option of the parties agreeing to the option of voluntary return.

5.26 In our view, the Government's proposed amendments to the financial hardship provisions in the Credit Contracts and Consumer Finance Act outlined earlier in this chapter could provide the relief that debtors who have defaulted on their loan repayments need to alleviate their financial difficulties. Under those provisions, if debtors find that they are suffering from financial hardship and have been in default of their loan repayments for less than two months, they will be able to apply for changes to their credit contract.

5.27 This option would mean that debtors may be able to come to an arrangement that would allow them to retain the goods, which may have a high utility to them, and repay the debt in a manageable way. In contrast, if debtors were able to voluntarily return the goods, they would likely suffer a financial loss as they would lose the goods, after having paid interest on a loan to cover their cost, and have to pay the outstanding balance following the sale of the goods.

REPOSESSION STAGE

Requirement for creditors and agents to act in a responsible manner

5.28 Section 14 of the Credit (Repossession) Act provides that "[a] creditor or a creditor's agent must not exercise a right to enter premises in a manner that is unreasonable."

5.29 We recommend that s 14 be repealed and replaced with a provision that requires a creditor or a creditor's agent to act in accordance with the Government's proposed Code of Responsible Lending when dealing with a debtor in a credit repossession matter. As part of this recommendation, we suggest that the Code of Responsible Lending apply to persons who repossess goods, not just lenders, as some lenders will use repossession agents to repossess goods on their behalf and those agents will not be covered by the Government's proposed Code of Responsible Lending.

5.30 We think that the Code should require persons who repossess goods to act responsibly when dealing with a debtor in a credit repossession matter. It should also set out the type of conduct that would not be considered to be responsible. This will mean that our recommended replacement for s 14 could be broader than the current provision and encompass any irresponsible conduct that occurs during the entire repossession process, which may not be covered by other provisions in the legislation. A breach of the new s 14 would not give rise to prosecution, but could potentially give rise to some form of relief either through the dispute resolution schemes or courts, and might be a matter that affects the creditor's or the repossession agent's ability to remain in the industry.

5.31 We also recommend that the regulator for credit repossession matters, in consultation with the credit industry and consumers, determine what type of conduct should be set out in the Code of Responsible Lending as being irresponsible. We consider that the Code should make it clear what would be considered to be irresponsible conduct because "irresponsible" is a concept like "reasonableness," which requires guidance as to its interpretation. We note that it is clear from our consultation that some consumer groups and some creditors have different views as to what might be reasonable and what is not, and there were significant differences between individuals within those groups. Further, we believe that the industry and consumers will be able to provide good examples of the type of conduct that is irresponsible.

R25 Section 14 should be repealed and replaced with a provision that requires a creditor or a creditor's agent to act in accordance with the Government's proposed Code of Responsible Lending when dealing with a debtor in a credit repossession matter.

R26 The Code of Responsible Lending should apply to persons who repossess goods.

R27 The Code of Responsible Lending should require persons who repossess goods to act responsibly when dealing with a debtor in a credit repossession matter and set out the type of conduct that would not be considered to be responsible.

R28 The Code should be prepared in consultation with the credit industry and consumers and should determine what type of conduct is considered to be irresponsible.

Times when a repossession may occur

5.32 Section 15(2) of the Credit (Repossession) Act provides that a "creditor or a creditor's agent must not exercise a right to enter residential premises at a prohibited time unless the debtor consents in writing to the entry of those premises at a prohibited time." Section 15(1) provides that the prohibited times are any time outside the hours of 6 am and 9 pm on Mondays to Saturdays and any time on a Sunday or a holiday.

Repossessions on Sundays

5.33 In response to our Issues Paper, a few submitters from the credit industry commented that the prohibited hours of repossession in s 15 of the Act should be amended. In particular, they argued that repossessions should be able to occur on Sundays, given the modern seven day economy and the fact that Sunday is often the only day that debtors are at home and that many creditors prefer to repossess goods when debtors are present. In addition, one submitter noted that vehicles are more likely to be at a debtor's home on Sunday and that debtors typically prefer to have their goods repossessed at home than at work or elsewhere.

5.34 In light of the arguments set out above, we have concluded that s 15 should be amended to enable creditors to repossess goods on a Sunday. We acknowledge that some debtors may attend church on Sundays and that changing the prohibited times may interfere with their religious day of rest. We are particularly conscious of the importance of attending church among Pacific Island groups. We also accept that it is possible to justify protections on one particular day of the week in pursuance of the policy of a secular day of rest. But we think that it is important, where possible, for debtors to be at home when goods are repossessed, as we were informed during our consultations on the Issues Paper that problems often occur when the debtor is not at home.

5.35 Consequently, on balance and recognising the sensitivities involved, we recommend that repossession on Sundays not be restricted. However, if a creditor or repossession agent does not responsibly exercise the right to repossess on Sundays, he or she may breach the requirement to act in accordance with the Code of Responsible Lending.

R29 Repossessions should be allowed on Sundays.

Commencement of a repossession

5.36 One submitter noted that s 15 does not make it clear whether or not a repossession that commences but does not finish before 9 pm is prohibited and suggested that the law on this issue be clarified. The submitter commented that the lack of clarity in the law is a problem for creditors as some debtors deliberately cause delays so that a repossession cannot be completed before 9 pm and the creditor or repossession agent has to leave.

5.37 We agree that the law is unclear on this point and recommend that s 15 be amended to state clearly that a repossession that commences but does not finish before 9 pm does not breach the Act. However, if a repossession that commences but does not finish before 9 pm is not carried out with reasonable dispatch, it may breach the requirement in our proposed new s 14 to act in accordance with the Code of Responsible Lending, which we would expect would deal with such situations in its definition of irresponsible conduct in credit repossession matters.

5.38 Our recommended amendment is consistent with the apparent policy of s 15, which we assume is to prevent creditors or repossession agents from causing disruption when arriving to repossess goods during the hours when the majority of people are likely to be asleep.

R30 Section 15 should be amended to clearly state that a repossession that commences but does not finish before 9 pm does not breach the consumer credit repossession legislation.

Documents to be produced on entry of premises for purpose of repossession

5.39 Section 17 of the Credit Repossession Act requires every creditor or repossession agent who exercises a right of entry of premises to produce certain documents on first entering the premises if anyone is present and if later requested. The following documents must be produced:[133]

(a) a copy of the pre-possession notice (unless one was not required under section 8(2)); and

(b) in the case of a creditor's agent, evidence reasonably capable of establishing the person's authority to take possession of the consumer goods on behalf of the creditor; and

(c) in the case of an entry outside the hours specified in section 15, the debtor's written consent to the exercise of the right of entry.

5.40 Having considered the submissions we received on the Issues Paper, we think that s 17 should be strengthened by requiring creditors and repossession agents to produce additional documents that will assist debtors, and the Police if they are called as a result of a dispute, to determine whether or not the creditor or agent has the right to repossess particular goods owned by the debtor.

5.41 We recommend that the creditor or repossession agent be required to produce the following documents:

- a copy of the credit contract so that it is clear to the debtor and any Police Officer what secured items may be repossessed, and the power under which the repossession is undertaken;
- a document setting out the debtor's name and property address, the repossession agent's licence number and the reason why the goods are being repossessed;
- a document outlining the requirements that a creditor or repossession agent must fulfil in order to repossess goods and the debtor's rights if he or she believes that the creditor or agent has not met those requirements; and
- information about the debtor's right to make a complaint to the creditor about any aspect of the whole repossession process and a dispute resolution scheme if the creditor fails to resolve the complaint, and the details of the creditor's dispute resolution scheme and the service it provides.

5.42 If all of these documents are required to be produced on entry, the risk of illegal repossessions will be reduced, and debtors and Police officers, if they are called, will be better informed of the consumer credit repossession law and process. Debtors will be able to act on their rights and Police officers will be able to charge creditors or repossession agents with an offence of unlawful entry for the purpose of repossession if they do not produce the required documents on entry.[134]

5.43 We note that s 18 of the Credit (Repossession) Act also requires a creditor or a creditor's agent who "enters premises for the purpose of taking possession of consumer goods, or for any other purpose in connection with consumer goods, when the occupier of the premises is not present" to leave a written notice at the premises. The notice must:[135]

(a) specify that the premises have been entered and the date of entry;

(b) contain an inventory of any consumer goods of which possession has been taken;

(c) be accompanied by a copy of the documents referred to in s 17(a) to (c).

5.44 We recommend that s 18 be amended to require a creditor or a creditor's agent to provide the debtor or person present at the time of the repossession with the same written notice that is required to be left on the premises if no one is present. We also recommend that the notice state why the goods have been repossessed, where the goods will be stored, the creditor's contact details and the debtor's rights under the Credit (Repossession) Act following the repossession of goods, including the right to make a complaint about the creditor's or agent's conduct.

5.45 In our view, it is important that debtors receive a notice as soon as the creditor or repossession agent has taken possession of their goods so that they have all the necessary information relating to the repossession and are sufficiently informed to exercise their rights under the Credit (Repossession) Act before they receive a post-possession notice.

R31 The creditor or repossession agent should be required to produce the following documents:

- a copy of the credit contract;
- a document setting out the debtor's name and property address, the repossession agent's licence number and the reason why the goods are being repossessed; and
- a document outlining the requirements that a creditor or repossession agent must fulfil in order to repossess goods and the debtor's rights if he or she believes that the creditor or agent has not met those requirements.

R32 Section 18 should be amended to require a creditor or a creditor's agent to provide the debtor or person present at the time of the repossession with the same written notice that is required to be left on the premises if no one is present.

R33 The notice that is required by our recommended new s 18 should state why the goods have been repossessed, where the goods will be stored, the creditor's contact details and the debtor's rights under the consumer credit repossession legislation following the repossession of goods, including the right to make a complaint about the creditor's or agent's conduct.

POST-REPOSSESSION STAGE

Definition of the term "auction" in the Credit (Repossession) Act

5.46 Section 32(1)(b) of the Credit (Repossession) Act enables the debtor to require the creditor to put the consumer goods up for sale by "public auction" if they have not been sold within three months. Section 32, which sets out certain rules relating to a sale by public auction, reads:

> **32 Debtor's right to force sale**
>
> (1) If the consumer goods have not been sold within 3 months, the debtor may either—
>
> (a) apply to the court for an order directing the sale of the consumer goods, within such time and upon such conditions as the court thinks fit; or
>
> (b) require the creditor to put the consumer goods up for sale by public auction.
>
> (2) The period of 3 months commences with the date on which the creditor takes possession of the consumer goods.
>
> (3) Upon application under this section, the court may make such order as it thinks fit.
>
> (4) The following rules apply to a sale required under subsection (1)(b):
>
> (a) the debtor must require the sale by notice in writing to the creditor, signed by the debtor or the debtor's agent; and
>
> (b) the auction must be held within 2 months after the date that notice is given; and
>
> (c) the auction must be in such manner as may be agreed between the creditor and the debtor, and, failing agreement, in such manner as may be approved by a Registrar of the District Court; and
>
> (d) the creditor must give the debtor reasonable notice of the time and place of the auction; and
>
> (e) the creditor and the debtor are each entitled to bid at the auction; and
>
> (f) there must be no reserve price.

5.47 The Act does not define the term "auction," so it is unclear whether or not the term includes online auctions such as 'Trade Me.' A few submitters raised this concern and noted that, in spite of s 26 of the (Credit Repossession) Act, repossessed goods are sometimes listed on 'Trade Me' for very short periods of time and then sold for amounts that are well below the value of the goods.

5.48 Although it could be argued that the term "auction" can be interpreted as including online auctions, we consider that the legislation should define the term so that people know what the law is. We recommend that the term "auction" be defined as including online auctions, given that they are becoming the most common form of auctions, and that legislation should keep pace with modern society and technological progress.[136]

5.49 In addition, given that online auction sites often draw large numbers of buyers from all over New Zealand and in some cases other countries, repossessed goods may be more likely to sell through an online auction than they would at an ordinary public auction. Online auctions of goods can also be organised quite quickly, which means that repossessed goods could potentially be sold at an earlier date than would be possible with a traditional auction. Consequently, debtors may derive significant financial benefits from the availability of online auctions, as they may not have to pay default charges on their debt for as long as they might have to if a slower, traditional auction process was used to sell the goods.

5.50 In our view, in order to provide for online auctions, it would be necessary to amend s 32 of the Act as that section currently provides that "the creditor must give the debtor reasonable notice of the time and place of the auction."[137] Given that an online auction is not held at a particular place and time, but rather on the internet over a period of time, such as a week, s 32 would need to be redrafted. We therefore recommend that s 32 be amended to provide for online auctions.

5.51 We note that s 26(1) provides that a creditor who is selling repossessed goods, including by auction, "must ensure that every aspect of the sale, including the manner, time, place, and terms, is commercially reasonable and, in particular, must use all reasonable efforts to obtain the best price." In our view, it is not clear what the terms "commercially reasonable" and "reasonable efforts" mean in different situations, particularly in the context of an online auction. We therefore recommend that the Code of Responsible Lending, which we have recommended earlier in this chapter apply to persons who repossess goods, set out what "commercially reasonable" and "reasonable efforts to obtain the best price" mean in different situations, for example when a collectible, particularly valuable or unusual item is being sold. We also recommend that the Code set out what does not constitute an online auction, for example an auction on 'Trade Me' that has a "buy now" price.

5.52 We think that the Code of Responsible Lending would be the appropriate place in which to define the terms. This is because the Ministry of Consumer Affairs would be able to work with the consumer credit industry and consumers to establish the specific content of the part of the Code that relates to persons who repossess goods, in light of their valuable practical experience.

R34 The consumer credit repossession legislation should be amended to provide for online auctions.

R35 The Code of Responsible Lending should set out what the terms "commercially reasonable" and "reasonable efforts to obtain the best price" in s 26(1) of the Credit (Repossession) Act 1997 mean in different situations.

R36 The Code of Responsible Lending should set out what does not constitute an online auction.

TIMEFRAMES IN THE CREDIT (REPOSSESSION) ACT 1997

5.53 In response to the Issues Paper, a few submitters commented on the timeframes in the Credit (Repossession) Act. The Act contains a range of different timeframes for creditors and debtors to meet the various pre-possession, repossession and post-possession requirements in the Act. The various timeframes are set out below:

- section 9 provides that a pre-possession notice must give the debtor not less than 15 days after service of the notice on the debtor to remedy the default;
- section 19F provides that the creditor who is entitled to remove an accession from the whole must give notice of the creditor's intention to remove the accession to certain specified persons not less than 10 working days before the removal of the accession;
- section 20 requires a creditor to serve a post-possession notice on the debtor and on every guarantor of the debtor within 21 days of taking possession of consumer goods;
- section 21A provides that a creditor who intends to sell consumer goods must give notice to other creditors within 21 days of taking possession of consumer goods;
- section 23 provides that where a creditor has taken possession of any consumer goods, the creditor must not sell or dispose of the goods or part with possession of the goods until 15 days from the date of service of the post-possession notice on the debtor has passed (without the post-possession written consent of the debtor);
- section 25 provides that the creditor must offer the consumer goods for sale after 15 days from the date of service of the post-possession notice on the debtor has passed;
- section 29(2)(b) provides that where the consumer goods are returned to the debtor and a default has not been remedied, the creditor cannot take possession of the goods unless the debtor fails to remedy the default within a period specified in the notice of not less than 14 days after the service of the notice on the debtor; and

- section 33 requires the creditor to give the debtor and the persons referred to in s 21A(1) a written statement of account within 10 days after the sale of goods.

5.54 One submitter noted that the pre-possession period should be extended, while another thought that the timeframes for the various notices that the Act requires should be the same. However, no submitters indicated what an appropriate timeframe would be for each of the provisions outlined above.

5.55 It is not clear why the timeframes in the Act differ so greatly. However, we reflected on the submissions that raised the timeframes as an issue and reached the conclusion that some of the timeframes should be changed so that there is a level of consistency between the timeframes, where possible.

5.56 First we consider, as one submitter suggested, that the debtor should be able to waive his or her right to the 15 day period between the date of service of the post-possession notice and the sale of the consumer goods. We take this view because, as one submitter commented, some debtors may not want to exercise the rights noted above and may prefer that the creditor sells the consumer goods as soon as possible so that they do not have to pay further default charges on their outstanding debts during that 15 day period. We therefore recommend that s 23 be amended to allow creditors to sell consumer goods after a post-possession notice has been served but before the 15 day period has expired if the debtor consents to them doing so.

5.57 Second, we recommend that the timeframe of 14 days in s 29(2)(b) of the Credit (Repossession) Act be amended to 15 days, given that it is a similar notice to the pre-possession notice in s 9 of the Act and there should be consistency in the required timeframes for similar notices.

5.58 Third, we recommend that s 33 of the Act be amended so that a creditor is required to give the debtor and the other persons referred to in s 21A(1) of the Act a written statement of account within five working days after the sale of goods, rather than within the current requirement of 10 days. We consider that it is important for the debtor to receive notice of any surplus following the sale of the repossessed goods through a statement of account as soon as possible and we believe that five working days is a reasonable timeframe for the creditor to prepare and serve a statement of account.

5.59 We note that we considered whether the timeframe of 21 days for sending a post-possession notice in s 20 should be reduced. This was because the creditor is not entitled to sell the consumer goods until 15 days after the date of service of the post-possession notice.[138] This means that the debtor may be required to pay default interest on the repossessed goods for 36 days. However, we decided that a reduction in the timeframe is not necessary if the creditor is required to leave a possession notice with the debtor at the time the goods are repossessed and the debtor is able to waive his or her right to the 15 day period between the date of service of the post-possession notice and the sale of the consumer goods, in accordance with our recommendations.

5.60 Finally, we do not think it is necessary to amend the timeframe in s 19F, as creditors of accessions to goods require adequate notice of the removal of an accession and in our view 10 working days is a reasonable notice period.

R37 Section 23 of the Credit (Repossession) Act 1997 should be amended to allow creditors to sell consumer goods after a post-possession notice has been served but before the 15 day period has expired if the debtor consents to them doing so.

R38 The timeframe of 14 days in s 29(2)(b) of the Credit (Repossession) Act 1997 should be amended to 15 days.

R39 Section 33 of the Credit (Repossession) Act 1997 should be amended so that a creditor is required to give the debtor and the other persons referred to in s 21A(1) of the Act a written statement of account within five working days after the sale of goods.

121 Law Commission, above n 2, at [6.17].

122 Law Commission, above n 2, at [6.19].

123 Law Commission, above n 2, at [4.28].

124 Law Commission, above n 2, at [4.29].

125 Credit Contracts and Consumer Finance Act 2003, s 120(b).

126 Cabinet Office Minute, above n 4, at [24].

127 Cabinet Office Minute, above n 4, at [24]-[26].

128 We use the term "oppressive conduct provision" in this Report to refer to s 120(b) of the Credit Contracts and Consumer Finance Act 2003.

129 Credit (Repossession) Act 1997, ss 36A and 36B:

36A Voluntary return of goods

(1) A secured credit sale agreement is terminated by the return of the consumer goods comprised in the agreement if they are returned—

(a) in accordance with any term of the agreement that permits the debtor to return the goods and terminate the agreement; or

(b) by the debtor for the purpose of terminating the agreement and the creditor agrees to the termination of the agreement.

(2) Subject to section 36B, if a secured credit sale agreement is terminated under subsection (1), the rights and liabilities of the creditor and the debtor are to be determined as if the consumer goods had been repossessed by the creditor on the date that they were returned by the debtor.

(3) Nothing in this section or section 36B limits or affects any right that the debtor has apart from this section to terminate a secured credit sale agreement.

36B Various effects of voluntary return of goods

(1) If a secured credit sale agreement fixes or provides for the fixing of the amount (if any) to be paid by the debtor in the case of the voluntary termination of the agreement by the debtor, the amount (if any) that the creditor is entitled to recover from the debtor must not exceed that amount.

(2) The creditor must, unless the creditor elects to regard the goods as still having a value that is not less than 80% of the cash price, sell the consumer goods in accordance with section 26, and sections 33 to 35 apply accordingly with any modifications that are necessary.

(3) If the creditor elects to regard the goods as having a value that is not less than 80% of the cash price, the creditor must, within 14 days of the termination of the agreement, serve on the debtor a statement in accordance with section 33, which must set out, instead of the items mentioned in section 33(a) and (b), the value which the creditor attributes to the consumer goods.

(4) Except to the extent that sections 7 to 36 are specifically applied by this section or need to be applied in order to determine whether, following the termination of a secured credit sale agreement as provided in section 36A, there is a balance owing by the creditor to the debtor or by the debtor to the creditor, nothing in those sections (other than section 34(2)), applies to the voluntary return to the creditor by the debtor of the consumer goods comprised in a secured credit sale agreement if that return results in the termination of the agreement as provided in section 36A.

(5) The provisions of this section and of sections 7 to 36 do not apply to the consumer goods comprised in any secured credit sale agreement if the parties to that agreement subsequently enter into a written agreement for the voluntary return of those goods which excludes those provisions, and the debtor has had, before making the agreement for the voluntary return of the goods, professional and independent advice as to the legal implications of that agreement.

130 Law Commission, above n 2, at [4.17].

131 Law Commission, above n 2, at [4.17].

132 Law Commission, above n 2, at [4.15].

133 Credit (Repossession) Act 1997, s 17.

134 Our recommendations with respect to illegal entry are discussed in chapter 7.

135 Credit (Repossession) Act 1997, s 18(2).

136 We note that the definition of "auction" in clause 36V of the Consumer Law Reform Bill 2011 includes online auctions so that goods sold by traders through an internet auction will be covered by the Consumer Guarantees Act 1993.

137 Credit (Repossession) Act 1997, s 32(4)(d).

138 Credit (Repossession) Act 1997, s 23.

Chapter 6
Disputes, Remedies and Penalties

SUMMARY

This chapter addresses the remedies and penalties that we consider should apply to credit repossessions and assesses the ability of the dispute resolution schemes available to credit contract consumers to resolve credit repossession issues and the changes that are required to make the schemes more effective in credit repossession matters.

INTRODUCTION

6.1 As noted in the Issues Paper, the Credit (Repossession) Act is "self-enforced." That means that debtors adversely affected by a breach of the Act, who wish to challenge it, must do so in the Disputes Tribunal or a District Court, or by utilising the relatively new dispute resolution procedures set up under the Financial Service Providers (Registration and Dispute Resolution) Act.

6.2 The Credit (Repossession) Act provides for a range of remedies. However, their coverage is less than complete and, in our view, in need of reform.

6.3 This chapter addresses the remedies and penalties that we consider should apply to credit repossessions and the dispute resolution schemes available to credit contract consumers. We recommend a range of different remedies/penalties for breaches of different provisions. In particular, we consider that there is a role for criminal penalties where there is an interference with property, such as through the entry of premises without having met the pre-possession and repossession requirements and the illegal repossession of consumer goods. Such breaches will generally be clear cut and therefore it is appropriate for the Police to take enforcement action. We believe that introducing criminal penalties for breaches of repossession requirements will address the current lack of enforcement of the Credit (Repossession) Act against irresponsible creditors and agents. For breaches of other provisions, such as post-possession requirements, we think that civil remedies are more appropriate. Those remedies should include compensation and remedial actions that may be ordered for the harm or loss suffered as a result of a breach. These civil remedies would be triggered by:

- making a complaint to the dispute resolution scheme of which the particular creditor is a member; or
- seeking a court order for relief.

6.4 There should also be the possibility of the removal of a creditor or repossession agent from the industry for persistent breaches of the consumer credit repossession legislation.

6.5 However, civil remedies will be available for breaches of all provisions so that debtors will be able to seek a remedy, even where the Police have prosecuted a creditor or agent.

OFFENCES

Breaching pre-possession and repossession requirements

6.6 Under s 11 of the Credit (Repossession Act), it is an offence punishable by a fine not exceeding $3,000 to breach the pre-possession requirements set out in ss 7 to 10 of the Act.

6.7 The Credit (Repossession) Act does not contain any offences for non-compliance with any of the repossession or post-repossession requirements in the Act. The repossession requirements are set out in the following sections: s 14 (must not enter premises in an unreasonable manner), s 15 (must not enter at a prohibited time), s 17 (documents to be produced on entry), s 18 (entry if occupier not present) and s 19F (secured party must give notice of removal of accession). The post-repossession requirements are set out in pt 4 of the Act. As noted in the Issues Paper, it is not clear why an offence exists for breach of a pre-possession requirement, but not for a repossession or post-repossession requirement.[139] One effect of the current lack of repossession and post-possession offences is that repossession agents are not able to be held personally liable for breaches of the requirements in the Act,[140] unless their actions constitute an offence in terms of the general criminal law, such as trespass or assault.

6.8 In the Issues Paper, we asked the following questions:

- whether submitters agreed with our preliminary view that there seem to be some gaps in the Act with respect to post-possession remedies;
- whether the pre-possession offence in s 11 is effective and whether there should be similar offences for repossession and post-repossession breaches;
- whether offences targeted at creditors should be abandoned and (perhaps amended) provision for relief relied upon instead, as a more effective deterrent; and
- whether repossession agents should be personally liable, for breaches of the Act or whether liability should continue to rest on the creditor.

6.9 Most submitters agreed with the Commission's initial view that, in the context of post-repossession remedies, there are significant gaps in the Act and that the Act should contain similar offences for breaches of repossession and post-repossession requirements to the current offence for breaches of pre-possession requirements. A few submitters commented that the penalty of $3,000 for a breach of pre-possession requirements is too low and others noted that in order for offences to be effective deterrents, there needs to be effective enforcement. One submitter commented that the risk of deregistration as a financial service provider might provide a greater incentive for compliance than offences.

6.10 Most submitters did not support abandoning offences targeted at creditors. Comments in support of retaining offences targeted at creditors focused on the fact that consumers often face financial, educational and knowledge barriers to seeking relief for breaches of the Act and that offence provisions act as a more effective deterrent to creditors breaching the law than relief provisions, provided the offence provisions are enforced.

6.11 Finally, most submitters considered that repossession agents should be liable for breaches of the Act and many commented that both creditors and repossession agents should be jointly liable for breaches or that there should be "mixed" liability. One submitter noted that a benefit of making repossession agents liable for any breaches is that creditors will be able to choose agents based on their track record. However, a few submitters considered that the creditor should be liable for the actions of repossession agents, as the debtor's contract is with the creditor and the agent is employed or contracted by the creditor. One submitter commented that repossession agents that are employed by creditors should not be personally liable to the debtor for breaches, as creditors will be liable for the actions of their agents. One repossession agent noted that most reputable credit providers require repossession agents to provide an indemnity to them for any civil penalties imposed on the provider because of the agent's act. Another submitter noted that repossession agents should be personally liable for any threatening behaviour or other forms of misconduct against the debtor and that creditors should bear some liability for the agents' actions, as well as liability for procedural breaches. Similarly, another submitter supported repossession agents being liable for breaches related to the physical act of repossession and creditors being liable for the requirements in pts 2 and 4 of the Act.

6.12 We consider that it is important that the Credit (Repossession) Act contains criminal offences for breaches of pre-possession and repossession requirements. The repossession requirements provide protections to debtors that are just as important as the pre-possession requirements and should therefore be enforceable by the Police. The provisions that govern the entry of a property for the purpose of repossession are designed to ensure that the debtor is not subjected to an unreasonable or illegal repossession. Therefore, including offences in the Act for breaches of the requirements will ensure that the Police have the ability to enforce them against creditors and repossession agents who are acting illegally and better protect debtors from illegal repossessions. Breaches are interferences with property rights and in some cases are akin to trespass or other property-based offences.

6.13 The only repossession requirements that do not in our opinion require criminal offences are s 14, as amended according to recommendation 27 in chapter 5, and s 19F of the Credit (Repossession) Act. Our recommended new s 14, which would prohibit the irresponsible exercise of the right to repossess, would be difficult for the Police to enforce, given the difficulties in interpreting the concept of "irresponsibility," even taking into account the potential for definition in the Code. We consider that a complaint to a dispute resolution scheme or the regulator about a breach will result in a more effective remedy, such as compensation or the loss of the creditor's or repossession agent's licence, under our recommended licensing regime. We also consider that s 19F, which requires a secured party to give notice of the removal of an accession, is more appropriately dealt with through civil remedies, particularly given that the party who has an interest in the affected goods is likely to be another creditor who can easily seek relief through the court.

6.14 We have also reached the conclusion that criminal offences should not be introduced for breaches of post-possession requirements. We consider that civil remedies are an appropriate way of dealing with breaches of such requirements, as they are not the type of requirements that can be easily enforced by the Police, given that they relate to the issuing of notices within particular timeframes, the sale and valuation of consumer goods and the reinstatement of agreements. Further, breaches of the requirements do not impact on property rights in same manner as the illegal entry of premises and an interference with a person's goods. In our view, debtors will have a range of avenues in which to seek relief for breaches of post-possession requirements. They will be able to make a complaint to a dispute resolution scheme after raising the issues with the creditor, seek relief through the court system or make a complaint about the creditor or repossession agent to the regulator.

6.15 We consider that it is appropriate for repossession agents to be held personally liable for any breaches of the repossession requirements in the Act that they commit. While creditors can ensure that they contract or employ reputable repossession agents, they cannot control what the agents do during the repossession process. Holding repossession agents criminally and civilly accountable for any illegal acts that they commit during the repossession process will likely ensure that any irresponsible agents take a greater responsibility for complying with the Act than they currently do.

6.16 In our view, creditors should be held criminally liable for any breaches of the pre-possession and repossession requirements that they commit, but not those that repossession agents commit, unless they have been complicit in the commission of the offence, as they do not have direct control over the agents' actions. However, debtors will be entitled to seek relief from creditors through dispute resolution mechanisms or the court for any breaches that their agents commit. Therefore, creditors will still have an incentive to choose reputable agents.

6.17 In our view, creditors and repossession agents will likely be deterred from breaching the Act if they know that the Police are able and willing to charge them with offences for their illegal actions.

6.18 We therefore recommend that criminal offences be included in the Act for breaches of the repossession requirements set out in ss 15, 17, and 18 of the Credit Repossession Act by either creditors or repossession agents.

6.19 We also recommend that the consumer credit repossession legislation be amended to ensure that:

- repossession agents can receive criminal penalties and be liable for civil remedies for illegal acts that they commit during the repossession process; and
- creditors are not criminally liable for the actions of their repossession agents, unless they have been complicit in the commission of the offence and that debtors can seek relief from creditors for any breaches that their agents commit.

R40 Criminal offences should be included in the consumer credit repossession legislation for breaches of the repossession requirements currently set out in ss 15, 17, and 18 of the Credit (Repossession) Act 1997 by either creditors or repossession agents.

R41 The consumer credit repossession legislation should be amended to ensure that:

- repossession agents can receive criminal penalties and be liable for civil remedies for illegal acts that they commit during the repossession process; and
- creditors are not criminally liable for the actions of their repossession agents, unless they have been complicit in the commission of the offence; and
- debtors can seek relief from creditors for any breaches that their agents commit.

Penalties for credit repossession offences

6.20 We note that the maximum penalty in s 11 of the Credit (Repossession) Act for breaching a pre-possession requirement is a fine of $3,000. In contrast, s 19 of the Act, which provides that it is an offence for any person to obstruct a creditor or creditor's agent who is lawfully exercising any power to take possession of consumer goods, carries a maximum penalty of a fine of $10,000.

6.21 There is no compelling reason for credit repossession offences to carry a different penalty to the consumer credit contract offences contained in the Credit Contracts and Consumer Finance Act. The type of offences in the Credit (Repossession) Act are similar to those in the Credit Contracts and Consumer Finance Act and if the Credit (Repossession) Act is incorporated into the Credit Contracts and Consumer Finance Act, as we recommend in this Report, the offences should carry the same penalty. Further, we consider that the maximum penalty of a fine of $30,000 for breaches of any of the provisions in the Credit Contracts and Consumer Finance Act would act as a significant deterrent to creditors and repossession agents acting illegally.

6.22 We do, however, take the view that a maximum penalty of a fine of $10,000 is appropriate for the offence of obstructing a creditor or agent taking possession of consumer goods. We believe that $10,000 is a significant penalty for debtors that clearly do not have many financial resources and that a higher penalty is not necessary in the circumstances.

6.23 We therefore recommend that all of the offences under the consumer credit repossession legislation should carry the same maximum penalty as offences under the Credit Contracts and Consumer Finance Act, except the offence of obstructing a creditor or agent, which should carry the current penalty.

R42 All of the offences under the consumer credit repossession legislation should carry the same maximum penalty as offences under the Credit Contracts and Consumer Finance Act 2003, except the offence of obstructing a creditor or agent, which should carry the current penalty.

More robust protection from harassment

6.24 In the Issues Paper, we discussed the fact that the Credit (Repossession) Act does not contain any provisions that deal with harassment (in the context of repossession, or more generally).[141] We noted that other jurisdictions, such as British Columbia and Nova Scotia, and the Moneylender's (Licensing and Regulation) Bill 2011 have provisions that set out and prohibit particular forms of harassment of debtors.[142] We also discussed the protections in the Harassment Act 1997.[143] That Act provides that a person harasses another person if he or she engages in a pattern of behaviour that is directed against that other person, being a pattern of behaviour that includes doing any specified act[144] to the other person on at least two occasions within a period of 12 months. We commented in the Issues Paper that the Harassment Act "does not prevent isolated incidents of abuse or intimidation, or put a blanket prohibition on communication outside specified hours. It requires a pattern of behaviour."[145]

6.25 In the Issues Paper, we asked whether New Zealand should have a more explicit anti-harassment provision in the Credit (Repossession) Act, governing the conduct of the repossession itself, and/or other contact between debtors and creditors, and if so, what kinds of harassment should be prohibited.

6.26 Most submitters supported the inclusion of specific harassment provisions in the Credit (Repossession) Act. A number of those submitters considered that the Moneylender's (Licensing and Regulation) Bill 2011 would be a useful model. The submitters that were opposed to the inclusion of a provision considered that the issue of harassment is already addressed by the general law. Others thought that the oppressive conduct provision in the Credit Contracts and Consumer Finance Act, along with offences in the Crimes Act, are sufficient to deal with any problems, or that s 23 of the Fair Trading Act 1986,[146] which prohibits the use of physical force, harassment or coercion in connection with the payment for goods or services, might be sufficient. Two submitters commented that repossession agents should be protected against harassment and violence. Finally, one submitter commented that creditors should not be prevented from taking reasonable actions to contact or locate debtors. The submitter considered that cl 36(2) of the Moneylender's (Licensing and Regulation) Bill 2011 extends too far and that the publication of default and the sale of a debt to a third party should be excluded from any definition of harassment.

6.27 In light of the submissions we received on the Issues Paper and our own analysis, we have formed the view that the Credit (Repossession) Act should not contain a provision that deals with harassment. We have concluded that it is very difficult to set out in law what would constitute harassment in the context of credit repossessions at a threshold less than that already provided for by the law. It very much depends on the particular circumstances of the case and prescribing in law what would amount to harassment may mean that legitimate behaviour is included and certain harmful behaviour is excluded. We also consider that the general law already deals with many acts that may constitute harassment and we do not want to encourage the proliferation of criminal offences across the statute book.

6.28 Rather than a harassment provision, it is our recommendation that the Code of Responsible Lending sets out the type of conduct that would be considered to be irresponsible. If creditors or agents breach the provisions of the Code, debtors will be able to seek relief through the courts or by making a complaint to a dispute resolution scheme or the regulator.

6.29 As discussed in chapter 7, we consider that the regulator of the consumer credit industry should establish the type of conduct that would be considered to be irresponsible in the Code in consultation with the industry and consumers. We believe that the industry and consumers are better placed than us, given their practical experience of credit repossessions, to consider what behaviour would be "irresponsible".

Penalty for debtors who act in bad faith

6.30 In the Issues Paper, we asked whether New Zealand should introduce a provision similar to one in the Consumer Protection Act in the North Western Territories, under which a debtor may be penalised for acting in bad faith.[147] Most of the submitters who responded to this question were opposed to the introduction of such a provision. The reasons these submitters gave for their opposition were that there is an adequate balance between the rights of creditors and debtors, the costs of enforcement are likely to deter creditors from seeking a penalty for a debtor that has acted in bad faith, and the risk of creditors using the provision to threaten debtors.

6.31 We have reached the view that it is not necessary to introduce a penalty for debtors who act in bad faith. A great deal of the inappropriate behaviour that we were told of is already a criminal offence or is dealt with under other laws. For example, if the debtor gives the creditor false names or deliberately does not give accurate information about the location of the goods, the debtor could be charged with an offence of obtaining by deception or causing loss by deception.[148] However, we do think that the problem of debtors offering goods for sale that are subject to a security agreement, which creditors told us about, could be addressed by an amendment to s 7(2) of the Credit (Repossession) Act. Section 8(2) allows creditors to repossess goods that are at risk without a prepossession notice. Section 7(2) provides that consumer goods are at risk "if the creditor has reasonable grounds to believe that the consumer goods have been or will be destroyed, damaged, endangered, disassembled, removed, or concealed contrary to the provisions of the agreement, but the onus of proving the existence of those grounds is on the creditor."

6.32 We recommend that s 7(2) be amended to include offering to sell the consumer goods, so long as that is prohibited by the original security agreement. We note that this amendment is not intended to alter the rights of third parties once goods have actually been sold, and ought not to allow the repossession of goods in the hands of third parties who have purchased without notice of the security interest in circumstances that they currently cannot be repossessed.[149]

R43 Section 7(2) of the Credit (Repossession) Act 1997 should be amended to include offering to sell the consumer goods.

Timeframe for laying information in respect of an offence

6.33 Section 41(2) of the Credit (Repossession) Act provides that proceedings for any offence under the Act may be laid at any time within two years after the time when the matter arose. Since we are recommending the incorporation of credit repossession matters in the Credit Contracts and Consumer Finance Act, it is important to note that s 105 of that Act provides that proceedings may be commenced within three years of the matter giving rise to the breach. In effect, these provisions constitute exceptions to the usual six month limitation period for summary offences that is contained in the Summary Proceedings Act.[150]

6.34 Section 25 of the Criminal Procedure Act 2011, which is not yet in force, removes the summary and indictable offence categories. The offences in the Credit (Repossession) Act and Credit Contracts and Consumer Finance Act will be category 1 offences. The limitation periods for such offences are as follows:[151]

- six months where the maximum penalty is a term of imprisonment not exceeding three months or a fine of $7,500;
- 12 months where the maximum penalty is a term of imprisonment greater than three months but not exceeding six months or a fine greater than $7,500 but not exceeding $20,000; and

- five years for any other category 1 offences, unless the Solicitor-General consents to a charging document being filed after that period.

6.35 However, the Criminal Procedure Act 2011 consequentially amended the Credit (Repossession) Act and the Credit Contracts and Consumer Finance Act to provide that the respective limitation periods of two and three years will continue to apply despite anything in the Criminal Procedure Act.[152] This creates something of an anomaly in the sense that offences that currently enjoy an extended limitation period, in comparison to the standard period in the Summary Proceedings Act, will now have a truncated one. The offences under the Credit Contracts and Consumer Finance Act, which have a maximum penalty of $30,000 will continue to have a three year limitation period, while other category 1 offences with the same penalty level will have a five year limitation period. There does not seem to be any good reason for this.

6.36 Accordingly, we recommend that s 105 of the Credit Contracts and Consumer Finance Act be repealed. This will mean that the offences currently under that Act and the Credit (Repossession) Act offences for which we are recommending higher penalties will be subject to a five year limitation period.

6.37 For the one offence for which we are not recommending an increase in penalty, namely that of obstructing a creditor or repossession agent, the limitation period will be 12 months. We acknowledge that this represents a halving of the limitation period for this offence from the current two year period in the Credit (Repossession) Act. However, in our view there is no justification for an extended limitation period for such an offence as it does not involve fraud or other such activity that is difficult to detect, or a serious risk to health and safety.[153]

R44 Section 105 of the Credit Contracts and Consumer Finance Act 2003 should be repealed and the limitation periods in s 25 of the Criminal Procedure Act 2011 should apply to both the current offences in the Credit Contracts and Consumer Finance Act 2003 and the credit repossession offences that we are recommending be included in the consumer credit repossession legislation.

REMEDIES

Relief provision

6.38 Section 12 of the Credit (Repossession) Act enables a debtor to apply to the court for relief if a creditor has served a pre-possession notice on the debtor or taken possession of consumer goods and this is in contravention of the Act. Section 12 is set out below:

> **12 Debtor may apply to court for relief**
>
> A debtor may apply to a court for relief if—

(a) a creditor serves a pre-possession notice on the debtor; or

(b) a creditor has taken possession of the consumer goods,—

in contravention of this Act.

6.39 Section 13 sets out the relief that the court may order if a debtor makes an application under s 12. Section 13 is set out below:

13 Court may grant relief

(1) The court may, having regard to—

(a) the conduct of the parties; and

(b) the nature of the default; and

(c) such other matters as it thinks proper,—

grant such relief to a debtor who applies under section 12 as is reasonable, whether or not the granting of the relief involves a variation in the terms of the security agreement.

(2) The court may grant relief on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise as the court, in the circumstances of each case, thinks fit.

(3) However, where the court determines that any application is vexatious, it must order —

(a) that the debtor pay to the creditor the full costs (including reasonable costs incurred between solicitor and client), fees, and other reasonable expenses incurred by the creditor in connection with the application; and

(b) that section 23(1) and section 30 do not apply in respect of the goods.

6.40 Therefore, as noted in the Issues Paper, relief is only available when the pre-possession and repossession requirements in the Act have been breached.[154] Further, s 13 is wholly discretionary and does not make provision for specific types of relief.[155]

6.41 In the Issues Paper, we presented three possible options for reforming the relief provision. Those options are set out below:

(a) Amending the legislation to provide for "debtors to seek relief when repossession is commenced *either lawfully or unlawfully* where:

- the debtor suffers hardship; or
- the debtor has built up a substantial equity in the goods; or
- there are extraordinary circumstances; or
- security leverage is disproportionate; or
- it is equitable and just to give the debtor time to pay.[156]

(b) Expanding the scope of the relief provision to post-possession.[157]

(c) Removing the discretionary element of the relief provision for unlawful action, so that a court must grant relief in those circumstances. Relief for lawful actions could remain discretionary.[158]

6.42 We also asked for examples of ways in which the current provision is less than effective.

6.43 A number of submitters consider that the current relief provisions are satisfactory. However, a greater number support expansion of the scope of the relief provision to cover post-possession. One submitter commented that if the Credit (Repossession) Act is incorporated into the Credit Contracts and Consumer Finance Act, ss 55 to 59 of the Credit Contracts and Consumer Finance Act (changes on unforeseen hardship grounds) would be available to debtors prior to any pre-possession action, which would mean that repossession would only occur as a last resort. However, we note that those provisions are already available to debtors. The problem is that they currently do not apply to debtors who are already in default of their loans, which is why we think they should be reformed in the way that the Government proposes.

6.44 One submitter did not support relief being granted to a debtor who is in default when the creditor has complied with the law. However, it had no objection to the unforeseen hardship provision in the Credit Contracts and Consumer Finance Act being available to a debtor who is in default of a credit contract. But if an arrangement that was made to take account of unforeseen hardship was broken, the submitter considered that the creditor should be able to repossess goods on a "security at risk" basis.

6.45 In the Issues Paper, we also asked whether the Australian approach of providing more specific types of relief would be likely to be more or less effective than the approach in s 13 of the Act.

6.46 Most submitters did not support the Australian approach, and either preferred the flexibility of the broad discretion contained in s 13 of the Act or considered that criminal offences or the deregistration of creditors as financial service providers would be more effective.

6.47 Finally, our Issues Paper also canvassed the option of invalidating the part of the process that was incorrectly conducted due to a breach of the Act's requirements. We noted that "[i]f invalidity was to be provided for, depending on the timing of when invalidity was discovered, the practical consequences of that would presumably differ, and might not be straightforward."[159] We commented that "[i]nvalidation, at least superficially, sounds as if it would be an option with real meaning for creditors, with good potential to act as a disincentive."[160] We noted that the practical consequences of invalidation could be left to the discretion of the court, which is the approach taken in the Australian legislation.[161] However, "to make such an approach work, it would require recourse to the court (or other tribunal) to enforce."[162] Further, "section 13 of the Act is sufficiently broad to already encompass an invalidation power, if the court thought fit."[163] Consequently, we asked in the Issues Paper whether there is any merit in having a separate provision for invalidation, given the current scope of the existing relief provision.

6.48 Most submitters did not support including a separate provision for invalidation in the Act. The main reason that submitters gave was that s 13 would already likely enable a court to invalidate a part of the process that has been incorrectly conducted. One submitter also noted that the risk of deregistration as a financial service provider would be more effective than invalidation. Some of the submitters in favour of a separate provision for invalidation thought that it would act as an effective disincentive to creditors breaching the Act or favoured it because of the difficulties vulnerable consumers face in using the current relief provision. One of the submitters in favour commented that there would need to be real penalties for creditors, such as a requirement to return the unlawfully repossessed goods, a fine or the loss of a security interest in an item.

6.49 In our view, relief should be available to debtors who suffer breaches of post-possession requirements, as well as pre-possession and repossession requirements. Firstly, we consider that it is important that all breaches of the Act are treated consistently. Secondly, breaches of post-possession requirements could have a significant impact on debtors by preventing them from exercising their rights under the Credit (Repossession) Act. As noted in the Issues Paper, the post-possession procedures are intended to support the rights of debtors, for example, to reinstate the credit agreement, allow a sale of the repossessed goods to proceed, find a cash buyer, obtain a valuation of the goods,[164] or find out whether any surplus following the sale of repossessed goods exists.

6.50 We do not believe it is necessary to amend the legislation to provide for debtors to seek relief when the circumstances in option (a) above apply. This is because the Government has announced that it intends to amend the financial hardship provisions in subpt 8 of the Credit Contracts and Consumer Finance Act so that debtors who have defaulted in their repayments for less than two months can apply to have the terms of their credit contract changed. The Government's proposed amendments to the financial hardship provisions would provide the relief that debtors facing hardship or extraordinary circumstances require, and would be a sufficient remedy for those who have built up a substantial equity in the goods but cannot make their repayments.

6.51 Further, as noted in chapter 5, the Government has also decided to amend the provisions in the Credit Contracts and Consumer Finance Act that enable a court to reopen and modify a credit contract in the event that "a party has exercised, or intends to exercise, a right or power conferred by the contract . . . in an oppressive manner."[165] In particular, the Government has decided to amend the provisions so that "disproportionate enforcement and recovery actions by creditors against consumers is one of the factors that the courts must have regard to in deciding whether the exercise of a right or a power under a consumer credit contract is oppressive."[166]

6.52 This proposed amendment would address the issue with creditors or agents repossessing goods with a value that is disproportionate to the amount of the debt or default. However, the amended provision would need to be broad enough to deal with the repossession of goods that have no economic value, which is a problem that many submitters have raised with us. Section 120 will also enable debtors who have suffered other oppressive conduct by creditors to seek a remedy.

6.53 We agree with the majority of submitters that it is preferable to have a relief provision that grants the court a broad discretion to decide on the type of relief that would be the most suitable in a particular situation. This option offers the most flexibility and is able to better accommodate different circumstances. We do not think that it is necessary to include a separate provision for invalidation of a part of the repossession process, as the court will have the ability to do this under the relief provision.

6.54 Given that we have recommended that the Credit (Repossession) Act be incorporated into the Credit Contracts and Consumer Finance Act, we recommend that the relief provision for breaches of credit repossession requirements match the relief provisions in the Credit Contracts and Consumer Finance Act, to the extent that is possible. However, even if the Credit (Repossession) Act is not incorporated into the Credit Contracts and Consumer Finance Act, we recommend that similar relief provisions be drafted.

6.55 Sections 93 and 94 of the Credit Contracts and Consumer Finance Act set out the type of relief that a court may order for breaches of the Credit Contracts and Consumer Finance Act. They are set out below.

> **93 Court's general power to make orders**
>
> The court may make all or any of the orders referred to in section 94 if the court finds that a person (whether or not that person is a party to any proceedings) has suffered loss or damage by conduct of any creditor, lessor, transferee, buy-back promoter, paid adviser, or broker that constitutes, or would constitute,—
>
> (a) a breach of any of the provisions of sections 17 to 82:
>
> (b) aiding, abetting, counselling, or procuring any other person to breach any of those provisions:

(c) inducing, or attempting to induce, any other person, whether by threats, promises or otherwise, to breach any of those provisions:

(d) being in any way, directly or indirectly, knowingly concerned in, or party to, the breach by any other person of any of those provisions:

(e) conspiring with any other person to breach any of those provisions.

94 Court orders

(1) The types of orders that the court may make against the person who engaged in the conduct referred to in section 93 are as follows:

(a) an order directing the person to refund or credit a payment in accordance with section 48:

(b) an order directing the person to pay to any person who has suffered loss or damage by that conduct an amount not exceeding the amount of the loss or damage (to the extent that any statutory damages that are to be paid do not adequately compensate the person for the loss or damage):

(c) an order directing the person to pay exemplary damages to any person who has suffered loss or damage by that conduct:

(d) an order for any consequential relief that the court thinks fit.

(2) The court must not make an order under subsection (1)(c) if a penalty has been imposed against the person in relation to the same conduct under section 103.

6.56 We note that ss 93 and 94 refer to relief orders for "loss or damage" that a person has suffered as a result of breaches of the Credit Contracts and Consumer Finance Act. It is not clear whether or not the provisions were intended to empower the court to make an order for relief where a person has suffered non-financial loss or damage. However, we consider that, in the consumer credit repossession context, it is imperative that compensation is available to debtors who have suffered non-financial loss or damage, humiliation or stress as a result of the actions of a creditor or a creditor's agent. This is because, as noted in the section on the dispute resolution schemes, debtors may not have suffered significant financial loss as repossessed goods often have a low monetary value. Debtors are more likely to have suffered the loss of the utility of their repossessed goods and in some cases stress and humiliation in having their goods illegally repossessed or in experiencing unreasonable conduct.

6.57 We therefore recommend that the credit repossession relief provision empowers the courts to make an order for compensation where a person has suffered non-financial loss or damage, humiliation or stress as a result of the actions of a creditor or a creditor's agent.

6.58 Finally, we note that s 88 of the Credit Contracts and Consumer Finance Act[167] provides that the debtor under a consumer credit contract is entitled to recover from the creditor statutory damages set out in s 89 of the Act[168] if the creditor breaches one of a range of disclosure provisions in the Act. Given that we have recommended that pre-possession notices disclose a range of information to the debtor, we recommend that debtors should be entitled to recover statutory damages for breaches of the new pre-possession notice disclosure requirements, just as they are entitled to for breaches of the disclosure requirements in the Credit Contracts and Consumer Finance Act. We also recommend that the amount of the statutory damages should mirror those available for similar disclosure requirements in the Credit Contracts and Consumer Finance Act.

R45 The relief provision for breaches of consumer credit repossession requirements should match the relief provisions in the Credit Contracts and Consumer Finance Act 2003, to the extent that is possible.

R46 The consumer credit repossession relief provision should empower the court to make an order for compensation where a person has suffered non-financial loss or damage, humiliation or stress as a result of the actions of a creditor or a creditor's agent.

R47 Debtors should be entitled to recover statutory damages for breaches of our recommended new pre-possession notice disclosure requirements, just as they are entitled to such damages for breaches of the disclosure requirements in the Credit Contracts and Consumer Finance Act 2003.

R48 The amount of the statutory damages for breaches of our recommended new pre-possession notice disclosure requirements should mirror those available for similar disclosure requirements in the Credit Contracts and Consumer Finance Act 2003.

Extinguishment of interest and default charges for breaches of prescribed timeframes

6.59 Section 24 of the Credit (Repossession) Act penalises a creditor for selling repossessed goods within 15 days of sending a post-possession notice. In particular, it extinguishes the liability of the debtor for anything other than the advance under the security agreement or the performance of an obligation where the agreement provides for such an obligation.

6.60 In the Issues Paper, we discussed the possibility of including a provision similar to s 24 in the Act to deal with breaches of prescribed repossession timeframes.[169] Such a provision would wipe a portion (for example, all interest or default interest) off the debt.[170] We noted that such a provision would be "a much more robust remedy for breach than the current remedies that would not require recourse to court and ... might be expected to act as a substantial disincentive."[171]

6.61 The submissions on this issue were divided. A number of submitters did not support the proposal. The reasons they gave were as follows:

- the sanction is disproportionate to the nature of the harm done;
- there is no evidence of abuse of timeframes by creditors;
- a similar penalty to the one in s 24 is not justified as the sale of repossessed goods within 15 days of post-possession has irreversible consequences for the debtor, while breaches of other prescribed timeframes do not have such consequences;
- the provision would be open to abuse by consumers who could cause timeframes to be exceeded and creditors who exercise their rights too early are in breach of s 13(i) of the Fair Trading Act.

6.62 One submitter suggested that the penalty for the creditor could be a reduction in interest for the time period of the breach or a reasonable financial penalty.

6.63 The submitters that supported the proposal noted that it would provide an incentive for creditors to comply with the statutory timeframes. There were mixed views on whether some or all interest charges or merely default charges should be wiped off the debt. One submitter considered that the proposed provision would deter creditors from delaying the sale of the repossessed goods in order to accrue more default interest charges. However, it notes that the provision would need to allow for genuine, unsuccessful attempts to sell goods within the statutory timeframe.

6.64 We have reached the view that it is not necessary to include a provision in the Act that permits the extinguishment of interest and default charges for breaches of prescribed timeframes in the Act, other than that already contained in s 24. The broad discretion in the proposed relief provision will be able to provide a remedy that is specifically tailored to the harm that the breach has caused. Further, if debtors do not want to seek a remedy through the court, they will be able to make a complaint to the dispute resolution scheme of which the creditor is a member and potentially obtain a remedy for the harm they have suffered. Finally, under the reforms we have recommended in this Report, creditors and agents that breach the prescribed timeframes may be prosecuted and penalised.

DISPUTE RESOLUTION

Dispute Resolution under the Financial Service Providers (Registration and Dispute Resolution) Act 2008

6.65 As noted in our Issues Paper, s 11 of the Financial Service Providers (Registration and Disputes Resolution) Act 2008 requires financial service providers to be registered. "Financial service" is defined in s 5 of the Act as including the provision of credit under a credit contract. In order to be registered, financial service providers are required to be members of a dispute resolution scheme (including a "Reserve Scheme" that is funded by the Government and its members), if they provide financial services to retail clients.[172] As such, they may be the subject of a complaint by retail clients.[173]

6.66 There are currently four dispute resolution schemes. They are the Financial Services Complaints Limited Scheme (FSCL scheme), the Insurance and Savings Ombudsman Scheme Inc, the Banking Ombudsmen Scheme Limited and the Financial Dispute Resolution Scheme (the Reserve Scheme). The purpose of the schemes is to give consumers access to redress from financial service providers.[174] According to s 47 of the Act, "the schemes are intended to be accessible, independent, fair, accountable, efficient, and effective."

6.67 Financial service providers may choose to join any of the four dispute resolution schemes, provided the Rules of the scheme permit it to be a member. Any financial service provider may join the Reserve Scheme. The Rules for the Reserve Scheme are set out in the Financial Service Providers (Dispute Resolution – Reserve Scheme) Rules 2010.

6.68 Although each of the schemes has its own rules for resolving disputes between providers and consumers, they share some common features due to the requirements set out in s 63 of the Financial Service Providers (Registration and Dispute Resolution) Act. However, it is noteworthy that the requirements in s 63 are set at a high level of generality and therefore allow the scheme providers to develop quite different rules.

6.69 Section 63 of the Financial Service Providers (Registration and Dispute Resolution) Act provides:

> **63 Rules about approved dispute resolution scheme**
>
> The person responsible for an approved dispute resolution scheme must issue rules about that scheme, and those rules must provide for, or set out, the following:
>
> (a) which types of financial service providers may be members of the scheme (all providers of that type must be eligible):
>
> (b) how financial service providers become members of the scheme and how membership is terminated:

(c) that consumers and businesses that have no more than 19 full-time equivalent employees may make complaints for resolution by the scheme:

(d) how complaints about a member may be made for resolution by the scheme:

(e) a period after which the scheme, if asked by a complainant, must investigate a complaint that has been made directly to a member:

(f) that complaints about members must be investigated in a way that is consistent with the rules of natural justice:

(g) that the scheme has jurisdiction in respect of a breach of contract, statutory obligation, or industry code, or any other matter provided for in the rules:

(h) that any information may be considered in relation to a complaint and any inquiry made that is fair and reasonable in the circumstances:

(i) the remedial action that the scheme can impose on a member to resolve a complaint (for example, a requirement to change systems or to compensate a complainant up to a certain amount stated in the rules):

(j) how remedial action may be enforced against the scheme's members, including after members have left the scheme:

(k) that a financial service provider who has not taken remedial action imposed on that provider by another approved dispute resolution scheme or the reserve scheme cannot join the scheme:

(l) that the scheme will not charge a fee to any complainant to investigate or resolve a complaint:

(m) that a resolution of a complaint about a member of the scheme is binding on the member concerned:

(n) that a resolution of a complaint about a member of the scheme is binding on the complainant concerned, if the complainant accepts the resolution:

(o) that the complainant may take alternative court action against the member at any time, including if the complainant rejects the resolution:

(p) that the scheme may cease investigating and resolving a complaint if the complainant takes alternative court action against the member:

(q) that an independent review of the scheme must occur at least once every 5 years after the date of the scheme's approval and must be supplied to the Minister within 3 months of completion:

(r) that the person responsible for the scheme and the scheme's members must inform the people referred to in paragraph (c) about the scheme.

6.70 In essence, consumers who have a problem with a financial service provider are able to make a complaint to the dispute resolution scheme of which the provider is a member, but only after they have tried to resolve their dispute through the provider's own dispute resolution procedures and if the scheme provider considers that there is not a more appropriate body to consider the complaint. All of the schemes require members to have their own dispute resolution procedures and two of the schemes require members to inform consumers of their procedures and the fact that consumers may make a complaint to the dispute resolution scheme of which they are a member. However, in general, members do not have to inform consumers of their right to make a complaint to a scheme until they receive a complaint.[175]

6.71 Further, all of the schemes, to a certain extent, prevent financial service providers from taking legal proceedings, which would include debt recovery, that relate to the subject matter of the complaint against the complainant, although there are some exceptions.[176]

6.72 Financial Service providers are also required to comply with the Rules of the scheme of which they are a member.[177] If they do not comply with the Rules of the scheme, their membership may be terminated.

6.73 Finally, in general, the dispute resolution schemes encourage the parties to the dispute to agree on a resolution. However, all of the schemes have their own processes for resolving a dispute, if the parties cannot agree on a resolution themselves. The scheme provider's resolution will be binding on the financial service provider, but not the complainant. However, if the complainant chooses to accept the scheme provider's resolution, he or she will be bound by it and the resolution will not be able to be appealed to any other person or body, such as a court or tribunal.

Remedies that the schemes can award

6.74 While there are a number of similarities between the various dispute resolution schemes, there are some significant differences between them. The most important difference is the remedies that the schemes can award complainants. These remedies are discussed below.

6.75 The Banking Ombudsman and the Insurance and Savings Ombudsman are able to award compensation up to $200,000 to complainants for any direct loss or damage suffered because of an act or omission of the member.[178] Both schemes are also able to award an additional amount to the complainant to reimburse the complainant for any incidental expenses incurred by the complainant in making and pursuing the complaint.[179] However, the Banking Ombudsman is able to award an amount that it considers appropriate,[180] whereas the Insurance and Savings Ombudsman is only able to award an amount not exceeding $3,000.[181]

6.76 Further, the Banking Ombudsman and the Insurance and Savings Ombudsman schemes provide for some additional remedies. The Banking Ombudsman may recommend that the member "not pursue payment of all or part of a debt up to $200,000.[182] In addition to the payment of a sum of money, the Insurance and Savings Ombudsman may award the following remedies: "the forgiveness or variation of an amount owing to the Participant;" "the release of security for debt;" "the reinstatement, rectification, variation or termination of a contract;" and "the meeting of a claim under an insurance contract by, for example, repairing, reinstating or replacing items of property."[183]

6.77 The Financial Services Complaints Limited Scheme (FSCL scheme) is able to award compensation for any financial or economic loss that is a direct result of any act or omission of the member and direct a refund of fees or commission up to $100,000.[184] The FSCL scheme is also able to direct the member to carry out specific actions or refrain from specific actions to the extent that it is appropriate to provide redress for any matter in respect of which a complaint has been upheld.[185]

6.78 The Banking Ombudsman and the FSCL scheme also have the discretion to award compensation for any inconvenience that the complainant has suffered because of an act or omission of the member.[186] However, the amounts that they may award are significantly different. The Banking Ombudsman is able to award compensation up to $9000,[187] whereas the FSCL Scheme is only able to award an amount that does not exceed $500.[188] The Insurance and Savings Ombudsman also has a discretion to award an amount not exceeding $3,000 where the complainant has incurred special inconvenience or expense in making and pursuing the complaint.[189]

6.79 In contrast, the Reserve Scheme may:[190]

- require a member to pay compensation up to $200,000 to any person;
- direct a member to take any other action to do either or both of the following: remedy the matter complained about and provide redress for any loss or damage suffered;
- direct a member to cease or not continue or repeat the conduct that has caused the matter complained about or conduct of the same or similar kind; and
- direct the member to make a private or public apology.

Submitters' views on the Financial Service Providers (Registration and Dispute Resolution) Act 2008

6.80 In our Issues Paper, we asked submitters what their views were on the likely efficacy of the Financial Service Providers (Registration and Dispute Resolution) Act and whether they thought it would make a difference to any problems currently being experienced.

6.81 A number of submitters noted that the dispute resolution schemes had not been in operation long enough to make an assessment of the success of the schemes in addressing the credit repossession issues that consumers often face. Others considered that the schemes were a more accessible form of redress for consumers who cannot afford to take their disputes to court or face other barriers to doing so. However, concerns were raised that the schemes would not make much of a difference to the problems currently being experienced, due to the lack of regulation in the credit repossession area and the large number of unregistered lenders. Submitters also felt that the schemes would not be a solution to the lack of enforcement of the Credit (Repossession) Act. Furthermore, some submitters considered that the registration requirements for financial service providers need to be properly enforced.

6.82 Consumer New Zealand questioned whether the schemes would be accessible to vulnerable consumers facing repossession and suggested that lenders be required to inform consumers of their right to complain to a dispute resolution scheme at the time that credit is provided to the consumer and when pre-possession and post-possession notices are issued. Another submitter noted that a consumer awareness campaign about consumer rights might result in complaints being made to the schemes.

6.83 A group of finance companies argued that the schemes will result in lenders deciding not to lend to certain groups or raising their interest rates as the risk of lending increases. Further, the group noted that, in the absence of an industry code or a breach of statutory or contractual law, the schemes will have to determine what good industry practice is when they have no experience of the high risk lending industry. Consequently, it considered that the scheme providers should make their decisions in accordance with standards used by other providers.

6.84 The Citizens Advice Bureau noted that the schemes are limited by their lack of jurisdiction to consider matters of "commercial judgment" and consumers have to use the service provider's internal dispute resolution mechanism before they can make a complaint to the provider's scheme, which will be a problem where the dispute relates to the repossession agent or the lender who is acting illegally. The Bureau also noted that many of the problems it sees relate to repossession agents who do not fall within the ambit of the dispute resolution schemes.

6.85 Further, the Salvation Army commented that the dispute resolution schemes cannot consider a service provider's "general policies and practices," although they can consider how such policies and practices are applied or administered.

6.86 It is therefore clear from the submissions we received that the dispute resolution schemes have significant potential, but are not a substitute for proper regulation of the credit repossession industry or ensuring that the primary legislation underpinning the credit repossession process is effective.

The ability of the dispute resolution schemes to resolve common credit repossession issues

6.87 In our view, the dispute resolution schemes offer an independent, accessible, confidential and informal form of redress to credit consumers who face a number of barriers to pursuing legal action through the Disputes Tribunal or a District Court, such as a lack of financial resources, knowledge of their legal rights, education and confidence. It is not necessary for consumers who make a complaint to a scheme to have legal assistance and scheme providers are able to give general advice to complainants on how to make a complaint. The schemes follow an inquisitorial approach to dispute resolution that complies with the principles of natural justice. They can consider complaints involving claims for amounts up to $200,000 (although one scheme can only make binding awards of compensation up to $100,000) and have the jurisdiction to consider breaches of contract, statutory obligations and industry codes or any other matter provided for in the particular Rules. When making recommendations or awards, they are also required to be fair in all the circumstances, observe the law and take into account the general industry practice and any relevant codes of practice. Further, a scheme's resolution is binding on the financial service provider and enforceable through the courts, but only binds the complainant once he or she accepts the resolution. If the complainant is not satisfied with the scheme's resolution, he or she may pursue legal action against the financial service provider through the courts.

6.88 For these reasons, we consider that the dispute resolution schemes provide a valuable alternative to traditional dispute resolution in the credit repossession context, and, with some modifications, will be able to address many of the credit repossession problems that credit consumers are currently experiencing.

6.89 According to the submissions we received in response to the Issues Paper, the disputes that commonly arise in the credit repossession context involve the following allegations:

- seizure of property that does not belong to the debtor by repossession agents who require the owner to prove that the property belongs to them before returning the property;
- harassment of debtors by repossession agents;
- "oppressive conduct" by creditors who repossess items that have a low monetary value but a high personal value to the debtor in order to enforce payment rather than to recover the debt owed;
- repossession of property that the lender knows is likely to have a lower realisable value than the cost of seizing and selling the property. This type of behaviour has a significant negative impact on the debtor, depriving them of property that may have utility to them while leaving them with a debt to the lender;

- loan contracts that list security that exceeds the value of the loan and repossessing an excessive amount of secured property or threatening to do so in order to force the debtor pay his or her debt;
- the failure by lenders to send debtors pre-possession notices, which means that debtors do not have the usual 15 days in which to make a payment on the loan or to voluntarily surrender the goods and do not have a good record of the amount that they owe;
- some creditors may use s 7(1)(b) of the Credit (Repossession) Act, which enables them to repossess goods if they are 'at risk' without having to send a pre-possession notice in advance. Although the onus is on the creditor to prove that the goods are at risk, it is argued that some creditors and repossession agents know that debtors are unlikely to challenge the creditor through the court;
- failure by creditors to send a post-possession notice, which means that debtors are unable to seek a valuation of the goods or find a cash buyer for the goods and cannot be sure that the creditor has made reasonable efforts to obtain a fair value for the goods;
- repossessed goods not being sold at a commercially reasonable price and excessive fees being charged for the sale of repossessed goods;
- the failure by creditors to send debtors statements of account after the sale of repossessed goods, which means that the debtors cannot assess whether or not the goods were sold at a reasonable price, the fees associated with the sale were fair and there was any surplus following the sale to which they were entitled;
- multiple repossessions: where the sale of repossessed goods does not cover the debt owed by the debtor, the creditor threatens the repossession of further property soon after the first repossession. As a result, the debtor is faced with repossession and sales fees for two or more repossessions.
- the charging of illegal penalty fees after a post-possession notice has been served on the debtor.

6.90 Some of the issues noted above will be addressed by other reforms that the Commission has recommended in this Report. For example, the repossession of goods that have a high personal value to the debtor but a low monetary value. This problem will be addressed by the prohibition of "essential household goods" from being listed as security for a loan. The issue of seizure of property that does not belong to the debtor will be addressed by the requirement for items to be specified as security in the loan contract. Further, the harassment of debtors by repossession agents will be dealt with by the licensing of repossession agents and the prohibition on irresponsibly exercising the right to repossess.

6.91 In our view, the dispute resolution schemes will be able to consider many of the remaining issues noted above. In particular, they will be able to consider complaints that relate to breaches of requirements in the Credit (Repossession) Act, such as the failure of creditors to send pre-possession and post-possession notices and statements of account, the repossession of goods that are claimed to be "at risk" but do not in fact have that status and the charging of illegal penalties after a post-repossession notice has been issued. The dispute resolution schemes will also be able to consider contractual disputes, such as the calculation of penalties and the debt that the debtor still owes to a creditor, given their ability to award financial compensation and in some cases to direct the creditor to take action to remedy the matter complained about.

6.92 However, not all of the schemes currently have the jurisdiction to consider issues that constitute the oppressive exercise of a right or power conferred by the contract by creditors, for which the court has a power under s 120 of the Credit Contracts and Consumer Finance Act to reopen the contract.[191] For example, the repossession of goods that have a lower realisable value than the cost of seizing and selling them; the repossession of property that is disproportionate to the value of the loan, or the threat to do so; and multiple repossessions. While the Rules of all of the schemes provide that they can consider breaches of contract, statutory obligations and industry codes, only the Rules of the Reserve Scheme and the FSCL scheme would currently be able to consider issues of oppressive conduct. The Rules of the two schemes are as follows:

- rule 6(3) of the Financial Service Providers (Dispute Resolution – Reserve Scheme) Rules 2010 provides that "[a] complaint may relate to an alleged breach of a contract, a statutory obligation, an industry code, or any other legal obligation or to an unfair practice" (Emphasis added);
- paragraph 7.1 of the FSCL scheme Terms of Reference provides that "FSCL has the power to conciliate and determine Complaints about *any act or omission* by a Participant, in relation to a financial service *including:*

  (a) breaches of contract by the Participant;

  (b) breaches of statutory obligations;

  (c) breaches of industry codes by the Participant;

  (d) any other matters provided for by FSCL. (Emphasis added)

6.93 It is arguable that the Insurance and Savings Ombudsman scheme's jurisdiction to consider complaints relating to non-compliance with relevant industry practice could include issues of oppressive conduct.[192] However, there would need to be an established relevant industry practice for the scheme to measure the conduct against.

6.94 We note that the Banking Ombudsman scheme also has the jurisdiction to consider complaints relating to any other matters provided for in its Terms of Reference.[193] Therefore, it would be possible for that scheme to amend its Terms of Reference to provide for the consideration of complaints relating to the oppressive exercise of powers or rights conferred by a contract in relation to repossession. We not only recommend that the Banking Ombudsman scheme makes such an amendment, but that all of the schemes amend their Rules or Terms of Reference to specifically provide that they will consider complaints relating to such oppressive conduct in relation to repossession. In part, this recommendation will be implemented through the Government's proposed Code of Responsible Lending, which will describe practices that may be undertaken, so long as that Code, as we have recommended elsewhere, covers repossession issues.

6.95 In addition to the above recommendation, we also consider that the four schemes should be required to provide for the same remedies or awards in their Rules or Terms of Reference and to specifically provide for awards of compensation for non-financial loss, humiliation and stress suffered as a result of breaches or particular conduct in the repossession process. This is because the remedies that the various schemes may be able to award debtors differ and may be insufficient to compensate debtors for the types of losses they may have suffered as a result of creditors' breaches or conduct. The extent to which the different schemes would be able to resolve the common credit repossession issues is discussed below.

6.96 All of the schemes will be able to award debtors compensation for direct financial or economic loss or damages suffered as a result of the creditor's acts or omissions. While such a remedy is useful to compensate debtors for the financial losses they have suffered, given the low monetary value of the repossessed goods debtors may not have suffered significant financial loss. It is more likely that debtors will have suffered the loss of the utility of the repossessed goods and in some cases humiliation in having their goods illegally repossessed or in experiencing oppressive conduct.

6.97 It is possible that three of the schemes would be able to provide debtors with compensation for non-financial losses or damage suffered as a result of the creditor's acts or omissions. Two of the schemes do not expressly limit the compensation they may award to "financial" or "economic" loss and the Reserve Scheme does not limit what compensation can be awarded for. However, it is unclear whether or not the schemes' Rules were only intended to cover "financial" loss or damage.

6.98 We note from our consultation that the schemes have tended to focus on providing compensation for "financial" loss or damage. Further, it is possible that the schemes would rule that without an express reference to "non-financial" loss, their Rules do not allow for compensation for such losses. This seems to be the approach of the Reserve Scheme, which does not appear to have rules that limit what compensation can be awarded for but does not see itself as being empowered to award compensation for non-financial loss. This is what happened in *Hartley v Balemi*, in which it was held that there was "no basis under the [Weathertight Homes Resolution Services Act 2006] to award general damages as compensation for any mental anxiety or stress in the context of a claim brought before the [Weathertight Homes Resolution Service] concerning a leaky building."[194] The Court took this view because general damages were not mentioned anywhere in the statutory provisions that created jurisdiction. Stevens J stated that "it is unlikely that such head of damage would be brought in as a sidewind without express reference being made in the statute."[195]

6.99 Some debtors may also be able to obtain some redress for the loss of utility of their repossessed goods and any inconvenience suffered as a result of the creditor's wrongful acts or omissions, which could include stress and humiliation. This is because two of the schemes have the discretion to award compensation for any inconvenience that the complainant has suffered as a result of the member's acts or omissions. However, such compensation is limited to $500 in one scheme and $9,000 in the other, which seems to be a far more reasonable limit than $500.

6.100 Debtors may also be able to obtain suitable remedies for certain breaches from the Reserve Scheme and the FSCL scheme. The Rules of the Reserve Scheme allow it to direct a member to take any action to remedy the matter complained about and/or provide redress for any loss or damage suffered. The Rules of the FSCL scheme allow it to direct a member to carry out specific actions or refrain from specific actions to the extent that it is appropriate to provide redress for any matter in respect of which a complaint is upheld.

6.101 We therefore recommend that s 63 of the Financial Service Providers (Registration and Dispute Resolution) Act be amended to require the schemes to issue rules that provide for adequate compensation to be awarded to complainants for non-financial loss, humiliation, stress, and inconvenience suffered as a result of the financial service provider's actions, as well as financial loss or damage, where the complaint relates to a consumer credit repossession matter. Such an amendment is important as consumer credit repossession complaints involve creditors or their agents entering a debtor's home and potentially casting shame on the debtor. It is not intended that the dispute resolution schemes award damages to complainants for the purpose of punishing financial service providers.

6.102 Finally, as noted above, all of the schemes to a certain extent prevent financial service providers from taking legal action while they are considering a complaint. The FSCL and the Insurance and Savings Ombudsman schemes provide some additional protection to complainants. The FSCL scheme prohibits a provider from taking any action to recover a debt that is the subject of a complaint, to protect any assets securing that debt, or to assign any right to recover that debt while the FSCL scheme is dealing with the complaint. The Insurance and Savings Ombudsman scheme prohibits a provider from taking any action to recover a debt that is the subject of a complaint, to seize any assets securing that debt or to assign any right to recover that debt, while the scheme is considering the complaint.[196] However, none of the schemes specifically prohibits creditors from repossessing or selling goods while a complaint is being considered and the schemes do not have the jurisdiction to prevent such enforcement action before a complaint is made to them. We think that it is important that creditors are not able to repossess goods from a debtor, enforce payment of a debt owed by a debtor or dispose of repossessed goods while a complaint by the debtor about the creditor's actions or omissions is being considered by the creditor or a scheme. This is because such action would have a negative impact on the debtor and interfere with the resolution of the complaint.

6.103 We therefore recommend that the consumer credit repossession legislation be amended to prevent creditors from repossessing goods, enforcing payment of a debt owed by a debtor or disposing of repossessed goods from the time that a debtor makes a complaint to the creditor until the complaint has been resolved by the creditor, to the satisfaction of the debtor, or been dealt with by a dispute resolution scheme.

6.104 We note that one possible objection to our recommended amendment is that valid repossessions may be delayed by vexatious complainants. We acknowledge that the amendment could result in vexatious debtors making complaints to prevent creditors from repossessing their goods, enforcing their debts or disposing of their repossessed goods. However, we do not think that the amendment poses a significant problem, as it provides creditors with an incentive to deal with complaints as quickly as possible and the dispute resolution schemes will simply need to deal with complaints that appear to be vexatious in an expeditious manner.[197] We do note, however, that a creditor could be affected by a debtor's delay in making a complaint to a dispute resolution scheme after the creditor has failed to resolve the complaint. We therefore recommend that the consumer credit repossession legislation provide that, if a debtor fails to make a complaint to the dispute resolution scheme of which the creditor is a member within 14 days of the debtor being advised of the creditor's decision with respect to the complaint, the creditor may take enforcement action against the debtor.

6.105 Given that it may take some time for dispute resolution schemes to consider a complaint that is not vexatious and during that time creditors will not be able to repossess goods, enforce a debt or dispose of repossessed goods, the dispute resolution schemes may need to amend their Terms of Reference or Rules and the Government may need to amend the Reserve Scheme's Rules to allow them to deal with such complaints in a timely manner. Finally, we note that some creditors currently choose to sell debts, or more accurately credit contracts, to debt collection companies. This practice could pose a problem if the company to whom a creditor sells a credit contract is not a financial service provider, as defined in the Financial Service Providers (Registration and Dispute Resolution) Act. This is because the person to whom or the organisation to which the credit contract has been sold would not be eligible to be a member of a dispute resolution scheme, which would mean that the debtor would not be able to access one of the dispute resolution schemes in the event of a dispute with the new party to the credit contract. In order to avoid this problem occurring, we recommend that the consumer credit repossession legislation provide that, in the event that a credit contract has been sold and the original contract was with a financial service provider, only financial service providers, as defined in the Financial Service Providers (Registration and Dispute Resolution) Act, be permitted to repossess goods.

R49 All of the dispute resolution schemes should amend their Terms of Reference or Rules to provide for the consideration of complaints relating to the oppressive exercise of powers or rights conferred by a contract in relation to repossession.

R50 Section 63 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 should be amended to require scheme providers to issue rules that provide for adequate compensation to be awarded to complainants for non-financial loss, humiliation, stress, and inconvenience suffered as a result of the financial service provider's actions, as well as financial loss or damage, where the complaint relates to a credit repossession matter.

R51 The consumer credit repossession legislation should be amended to prevent creditors from repossessing goods, enforcing payment of a debt owed by a debtor or disposing of repossessed goods from the time that a debtor makes a complaint to the creditor until the complaint has been resolved by the creditor, to the satisfaction of the debtor, or been dealt with by a dispute resolution scheme.

R52 The amendment in R51 should provide that, if a debtor fails to make a complaint to the dispute resolution scheme of which the creditor is a member within 14 days of the debtor being advised of the creditor's decision with respect to the complaint, the creditor may take enforcement action against the debtor.

R53 The consumer credit repossession legislation should provide that, in the event that a credit contract has been sold and the original contract was with a financial service provider, only financial service providers, as defined in the Financial Service Providers (Registration and Dispute Resolution) Act 2008, should be permitted to repossess goods.

139 Law Commission, above n 2, at [5.7].

140 Law Commission, above n 2, at [5.7].

141 Law Commission, above n 2, at [4.22].

142 Law Commission, above n 2, at[26-28].

143 Law Commission, above n 2, at [28-29].

144 Harassment Act 1997, s 4:

4 Meaning of specified act

(1) For the purposes of this Act, a specified act, in relation to a person, means any of the following acts:

(a) watching, loitering near, or preventing or hindering access to or from, that person's place of residence, business, employment, or any other place that the person frequents for any purpose:

(b) following, stopping, or accosting that person:

(c) entering, or interfering with, property in that person's possession:

(d) making contact with that person (whether by telephone, correspondence, or in any other way):

(e) giving offensive material to that person, or leaving it where it will be found by, given to, or brought to the attention of, that person:

(f) acting in any other way—

(i) that causes that person (person A) to fear for his or her safety; and

(ii) that would cause a reasonable person in person A's particular circumstances to fear for his or her safety.

(2) To avoid any doubt, subsection (1)(f) includes the situation where—

(a) a person acts in a particular way; and

(b) the act is done in relation to a person (person B) in circumstances in which the act is to be regarded, in accordance with section 5(b), as done to another person (person A); and

(c) acting in that way—

(i) causes person A to fear for his or her safety; and

(ii) would cause a reasonable person in person A's particular circumstances to fear for his or her safety,—

whether or not acting in that way causes or is likely to cause person B to fear for person B's safety.

(3) Subsection (2) does not limit the generality of subsection (1)(f).

145 Law Commission, above n 2, at para 4.26.

146 Fair Trading Act 1986, s 23:

23 Harassment and coercion

No person shall use physical force or harassment or coercion in connection with the supply or possible supply of goods or services or the payment for goods or services.

147 See Consumer Protection Act RSNWT 1988 c17, s 62.

148 Crimes Act 1961, s 240.

149 See for instance Personal Property Security Act 1999, s 54. We note that s 109(2) of the Personal Property Securities Act, which does not apply to consumer goods, provides that "collateral is at risk if, amongst other things, the secured party has reasonable grounds to believe that the collateral has been or will be sold contrary to the provisions of the security agreement."

150 Summary Proceedings Act 1957, s 14.

151 Criminal Procedure Act 2011, s 25(3).

152 Criminal Procedure Act 2011, pt 1 to sch 3.

153 Legislation Advisory Committee *Guidelines on Process and Content of Legislation 2001 edition and amendments* (May 2001) at [12.7.2].

154 Law Commission, above n 2 at [5.15].

155 Law Commission, above n 2, at paras [5.19] and [5.22].

156 Law Commission, above n 2, at [5.16].

157 Law Commission, above n 2, at [5.17].

158 Law Commission, above n 2, at [5.18].

159 Law Commission, above n 2, at [5.24].

160 Law Commission, above n 2, at [5.25].

161 National Consumer Credit Protection Act 2009 (Cth), s 108, as discussed in Law Commission, above n 2, at [5.25].

162 Law Commission, above n 2, at [5.26].

163 Law Commission, above n 2, at [5.26].

164 Law Commission, above n 2, at [5.9].

165 Credit Contracts and Consumer Finance Act 2003, s 120.

166 Cabinet Office Minute, above n 4, at [18].

167 Credit Contracts and Consumer Finance Act 2003, s 88:

88 Creditors, lessors, transferees, and buy-back promoters liable for statutory damages

(1) The debtor under a consumer credit contract is entitled to recover from the creditor under the contract the amount of the statutory damages set out in section 89 if the creditor breaches, in connection with the contract, any of the provisions of sections 17 to 24, 32 to 40, and 70.

(2) The guarantor under a guarantee is entitled to recover from the creditor under a consumer credit contract to which the guarantee applies the amount of the statutory damages set out in section 89 if the creditor breaches, in connection with the guarantee, any of the provisions of sections 24 to 26 and 32 to 35.

(3) The lessee under a consumer lease is entitled to recover from the lessor under the lease the amount of the statutory damages set out in section 89 if the lessor breaches, in connection with the lease, any of the provisions of sections 32 to 35, 64 to 67, and 70.

(4) The occupier under a buy-back transaction is entitled to recover from the transferee under the transaction the amount of the statutory damages set out in section 89 if the transferee breaches, in connection with the transaction, any of the provisions of sections 32 to 35, 72, and 77 to 79.

(5) If section 74 applies, the occupier under a buy-back transaction is entitled to recover from the buy-back promoter the amount of the statutory damages set out in section 89 if the buy-back promoter breaches, in connection with the transaction, any of the provisions of sections 32 to 35, and 72.

(6) The statutory damages that are to be paid in relation to a consumer credit contract, guarantee, consumer lease, or buy-back transaction must be divided equally between all of the debtors under the contract, the guarantors under the guarantee, the lessees under the lease, or the occupiers under the buy-back transaction, as the case may be.

168 Credit Contracts and Consumer Finance Act 2003, s 89:

89 Amount of statutory damages

(1) The amount of the statutory damages is,—

(a) in the case of a breach of section 18, an amount equal to the interest charges and credit fees payable under the consumer credit contract during the period to which the breach relates; and

(b) in the case of a breach of section 24, an amount equal to the interest charges and credit fees payable under the consumer credit contract during the period commencing on the date that the request for disclosure was received and ending on the earlier of the following:

(i) the day on which disclosure was made in accordance with section 24:

(ii) the date on which the contract comes to an end; and

(c) in the case of a breach of section 25(1)(a), the lesser of $3,000 or 5% of the total of all advances made and agreed to be made under the consumer credit contracts to which the guarantee applies at the time the guarantee is given; and

(d) in the case of any other breach, the lesser of $3,000 or 5% of,—

(i) in the case of a revolving credit contract, the credit limit at the time of the breach; or

(ii) in the case of a consumer lease, the cash price of the goods; or

(iii) in the case of any other consumer credit contract, the total of all advances made and agreed to be made under the contract; or

(iv) in the case of a buy-back transaction, the rateable value of the land at the time the transaction was made.

(2) Subject to subsection (1)(a) and (b), if a revolving credit contract does not have a credit limit, the amount of the statutory damages is $3,000.

(3) If the amount of the statutory damages under subsection (1)(d) is less than $100, the amount of the statutory damages must be rounded up to $100.

(4) If a person has breached 2 or more provisions referred to in section 88 in connection with the same consumer credit contract, consumer lease, or buy-back transaction and the breaches occur at or about the same time, the total statutory damages payable for those breaches is equal to the highest statutory damages payable for 1 of those breaches.

169 Law Commission, above n 2, at [4.18].

170 Law Commission, above n 2, at [4.18].

171 Law Commission, above n 2, at [4.18].

172 Financial Service Providers (Registration and Dispute Resolution) Act 2008, ss 13 and 48.

173 Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 48.

174 Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 47.

175 However, we note that, under clause 6.1 of the Banking Ombudsman Scheme's Participation Agreement, each member of the Banking Ombudsman Scheme undertakes to inform customers of the details of the scheme, in accordance with the Code of Banking Practice. The Code provides that the brochures relating to the Banking Ombudsman Scheme will be on display in all bank branches: New Zealand Bankers' Association *Code of Banking Practice* (4th ed, 2007) at [1.3].

176 See, for example, paragraph 14 of the Banking Ombudsman Scheme Terms of Reference, which provides that a member must not take legal proceedings unless it has obtained the consent of its Chief Executive and notified the Banking Ombudsman of that intention.

177 Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 49F.

178 Terms of Reference of the Insurance and Savings Ombudsman Scheme Incorporated, March 2012, at [14.2(b)]; Terms of Reference Relating to Banking Ombudsman Scheme Limited, April 2011, at [14.1] and [1.1].

179 Banking Ombudsman Scheme Terms of Reference, at [2]; Insurance and Savings Ombudsman Scheme Terms of Reference, at [14.3].

180 At 20.

181 At 14.3(b)(ii).

182 At [18].

183 At [14.1].

184 Terms of Reference of the Financial Services Complaints Limited Scheme, August 2010, at [18.1].

185 At [18.4].

186 Banking Ombudsman Scheme Terms of Reference, at [21]; Financial Services Complaints Limited Scheme Terms of Reference, at [18.2].

187 At [21].

188 Financial Services Complaints Limited Scheme Terms of Reference, at [18.2].

189 At [14.3(b)(i)].

190 Financial Service Providers (Dispute Resolution-Reserve Scheme) Rules 2010, r 26.

191 Note that oppressive conduct does not constitute a breach of the Credit Contracts and Consumer Finance Act, but is merely a reason for reopening a contract. Consequently, such conduct is not automatically covered by all of the schemes.

192 Insurance and Savings Ombudsman Scheme Terms of Reference, at [5.1(d)].

193 Banking Ombudsman Scheme Terms of Reference, at [1.2].

194 *Hartley v Balemi* HC Auckland CIV 2006-404-002589, 29 March 2007, at [177].

195 At [173].

196 Insurance and Savings Ombudsman Scheme Terms of Reference, at [15.2].

197 Some dispute resolution schemes may also have rules for dealing with vexatious complaints. For example, the FSCL scheme Terms of Reference at [8.2(d)] provides that FSCL has the jurisdiction to decline to consider a complaint that is "frivolous or vexatious or not being pursued in a reasonable manner."

Chapter 7
Regulation

SUMMARY

This chapter addresses the regulation of lenders and repossession agents. It endorses the Government's proposed responsible lending reforms and recommends amendments that will strengthen those reforms, as well as the licensing of repossession agents. It also considers the need for the notification of repossession information and regulatory oversight of the credit repossession area.

WHY REGULATE

7.1 At present, the Credit (Repossession) Act is essentially privately enforced. Consumers can, of course, seek remedies through a District Court or the Disputes Tribunal, but there is no agency that is charged with regulating the repossession process or to whom consumers can complain, beyond calling the Police if they consider that an offence has been committed. The Commerce Commission in its submission considers that a self-enforcement model is not sufficient to promote compliance and that the low level of Credit (Repossession) Act litigation may reflect that fact.

7.2 Private enforcement essentially requires debtors to have sufficient resources and incentives to bring their cases to the Tribunal or a court. This may sometimes be the case, but during our consultations we gained the sense that often this is not the case, and that some consumers might lack both the necessary resources and resilience.

7.3 Moreover, for private enforcement to be effective, creditors and repossession agents would need to be convinced that penalties were likely to be imposed in order to create a deterrent effect. Even if that were the case, there is nothing currently in the Credit (Repossession) Act that means those who persistently breach the Act or commit serious breaches are prevented from lending in the future or carrying out repossessions.

7.4 Regulation is not just about removing the persistent offenders, but also about informing creditors what they can do and informing consumers what cannot be done. We have made a number of recommendations in previous chapters that establish mandatory requirements (for example, the provision of certain information to consumers and the entry of premises at particular times), but there are other matters that cannot be so decisively set down in statute (entering premises on a day that the creditor knows is the debtor's religious day of rest or at a time that the creditor knows the debtor is likely to be asleep due to shift work). At present, the Credit (Repossession) Act accomplishes this by employing the phrase "reasonable" in a number of places, leaving such standards to be developed on a case by case basis. Where there is a dispute as to what is reasonable, the parties need someone to guide their behaviour. Over time, decisions of tribunals or courts might develop such guidance, but as we noted in the Issues Paper, there are relatively few publicly available decisions of either Courts or the Disputes Tribunal concerning consumer credit repossession matters. It is likely that many Disputes Tribunal cases have been resolved on the facts, but the way in which the Tribunal's records have been kept means that overall statistics are unavailable, and decisions are not available as a resource to creditors or debtors. Expecting such standards to develop through the court process would be inconsistent with experience, especially given the lack of resources of many consumers.

7.5 Finally, we note that many of the issues considered in this chapter will in our view be resolved by the Government's proposed responsible lending reforms. As a result, in a number of sections of this chapter, we have decided to endorse the Government's proposed reforms and only make recommendations about issues that those reforms will not address.

REGULATION OF LENDERS

Good faith requirement for lenders

7.6 In the Issues Paper, we discussed the option of introducing a good faith requirement for creditors, such as the one in s 66(1) of the Alberta Personal Property Security Act.[198] We noted that the Credit (Repossession) Act already provides some indications of what behaviour amounts to unethical or oppressive conduct, which it then regulates (for example, by prohibiting entry of a residence outside certain hours in s 15).[199] We also noted that s 26 imposes a requirement on creditors to act in a "commercially reasonable" manner when selling repossessed goods.[200]

7.7 In the Issues Paper, we commented that the provision in legislation for the development of an industry code of ethics would be one option for introducing a well-defined good faith requirement.[201] An example of a brief code is the Financial Services Federation's responsible lending guidelines, however, there are more detailed codes, which have been provided for in legislation, developed by an industry body and then officially promulgated, such as the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009.[202]

7.8 Consequently, we asked submitters whether a good faith requirement should be introduced in New Zealand and if so, whether a broadly drafted provision that simply requires lenders to act in good faith, such as that which exists in Alberta, would suffice.

7.9 The majority of submitters who responded to the first question did not support the introduction of a good faith requirement. The main reasons that they gave for rejecting the proposal were:

- the provision is unnecessary because of the oppression provisions in the Credit Contracts and Consumer Finance Act and s 25 of the Personal Property Securities Act;[203]
- the interpretation of a "good faith" provision might be difficult;
- the provision would be inconsistent with the strict liability approach of the Fair Trading Act 1986 and should only be introduced if credit providers and consumers have a clear idea of what it means in practice; and
- lenders already have responsibilities under the Financial Service Providers (Registration and Dispute Resolution) Act and it is likely that a good faith requirement will be imposed by dispute resolution providers anyway.

7.10 A few submitters thought that if a good faith requirement were introduced, it should be defined and apply to the lender and the borrower, and any guarantors. However, they noted the difficulties in interpreting the concept of good faith and that it was unlikely to make much difference to borrowers or that very clear guidance as to the meaning of the term would be required for both lenders and borrowers in order for it to be beneficial. Several submitters commented that the Financial Services Federation's responsible lending guidelines should form the basis of any guidance and one group of finance companies commented that a code of conduct would serve the same purpose as a good faith requirement. Another submitter commented that it would prefer the legislation to set out the rights and responsibilities rather than rely on non-specific good faith obligations.

7.11 Those submitters in support of the proposal had mixed views about whether a good faith provision would require more detail than the Alberta provision.

7.12 In addition to the question about a good faith requirement, we also asked for submitters' views on a code of ethics for the lending industry.

7.13 A slight majority of submitters who responded to this question supported the introduction of a code of ethics for lenders. The main reasons that these submitters gave for supporting a code were that codes set out standards of conduct and guidelines would be useful when assessing whether there has been unfair or unconscionable behaviour. However, one submitter pointed out that there would need to be a mechanism for ensuring that all lenders are brought under the code of ethics, and suggested that the Financial Services Federation's Responsible Lending Guidelines would be a good model. Other submitters commented that a code of ethics would only be beneficial if it were mandatory, there were mechanisms to enforce it, and penalties for breaches. Further, they noted that a Code may be effective for some lenders but may not be useful for "high risk" lenders.

7.14 One bank only supported a voluntary code of ethics, while another submitter preferred mandating a code of ethics and allowing the industry to come up with their own standards first. Finally, a group of finance companies submitted that it would support a code of conduct for the lending industry that allows for the special circumstances of high risk lenders, as long as the industry was meaningfully consulted and allowed sufficient input into the development of the code.

7.15 The main reasons that submitters who were opposed to the introduction of a code of ethics gave for their opposition are set out below:

- self-regulation is preferable;
- a code is unnecessary as the Financial Services Federation members are already subject to the Responsible Lending Guidelines and legislation will provide very clear guidelines for lenders;
- the code may not make any difference;
- the diversity of lenders in the market would make it difficult to develop a code;
- responsible financial service providers are registered under the Financial Service Providers Act and are members of dispute resolution schemes.

7.16 Since the publication of the Issues Paper, the Government has decided to make a number of amendments to the Credit Contracts and Consumer Finance Act to "address irresponsible lending and to promote the responsible provision and management of consumer credit arrangements."[204]

7.17 We believe that the Government's proposed reforms have the potential to largely achieve the same objective as our proposed code of ethics and good faith requirement aimed to achieve. The proposed Code of Responsible Lending will apply to lenders throughout the duration of the credit contract so that if a lender is not lending responsibly in accordance with the consumer credit repossession legislation, the regulator will be able to seek an order under s 108 of the Credit Contracts and Consumer Finance Act or impose conditions on the renewal of the registration of a credit provider under the Financial Service Providers (Registration and Dispute Resolution) Act if a lender refuses to comply with the Code after receiving a formal warning. This means that there will be serious repercussions for lenders who conduct credit repossessions irresponsibly and debtors will be better protected against such lenders.

7.18 We also consider that the proposed Code will likely better serve the industry and consumers than a good faith requirement, as the types of practices that are accepted as meeting the principles of responsible lending will be clearly set out in the Code. It will therefore address the concerns of some submitters about the interpretation of the vague concept of "good faith." Debtors who experience irresponsible lending practices will be able to make a complaint to the regulator about a lender's conduct

7.19 It is also noteworthy that the Government's proposed Code will be developed in consultation with the lending industry and consumers, which will hopefully address some submitters' concerns about adopting a code.

Licensing lenders

7.20 In the Issues Paper, we noted that the requirement for people who provide financial services, such as credit providers, to register as a "financial service provider," in the Financial Service Providers (Registration and Disputes Resolution) Act does not involve any kind of qualitative assessment of the fitness of a provider.[205] We commented that:[206]

> Introducing such a requirement, as a further gloss on registration, may assist in quality-controlling financial services, and acting as a safeguard for consumers, by setting in place a substantial disincentive for improper behaviour, and minimum requirements for establishing oneself in the lending business (such as basic knowledge of lending law, for example).

7.21 Accordingly, we asked submitters whether the Financial Service Providers (Registration and Disputes Resolution) Act should require any kind of qualitative assessment of the fitness of a financial service provider and whether such a requirement should address only consumer credit providers or all financial service providers.

7.22 The majority of submitters who responded to these questions were opposed to the introduction of a qualitative assessment. Three submitters commented that the Financial Service Providers (Registration and Disputes Resolution) Act was related to the Financial Action Taskforce's recommendations, which did not mention any need for qualitative assessments. One submitter noted that ss 13 and 14 disqualify certain people and require providers to have particular qualifications to be registered as financial service providers, and that the Act does not need to be amended so soon after it was enacted. Others made the following comments:

- an assessment of lenders would be unnecessary;
- an assessment of lenders would be problematic and it would be better to focus on the conduct of lenders instead;
- the objective behind the assessment is already achieved by s 108 of the Credit Contracts and Consumer Finance Act; and
- the current requirements under the Financial Service Providers (Registration and Disputes Resolution) Act would suffice but that qualitative assessment and oversight of lenders should be included under the Financial Advisers Act 2008.

7.23 The few submitters who responded to the question about whether the proposal should apply to all financial service providers thought that it should, although two submitters considered that those providers who are already subject to a robust licensing regime, namely banks and non-bank deposit takers, should be exempt from the requirements.

7.24 Two other submitters also noted that the registration requirements in the Financial Service Providers (Registration and Disputes Resolution) Act should be enforced properly.

7.25 Given the Government's proposed responsible lending reforms discussed in the section above, we have reached the conclusion that a qualitative assessment of lenders prior to registration as a financial service provider is unnecessary. The Government's proposed reforms have the potential to address the current problems with irresponsible and poor quality lenders and protect consumers, as they aim to ensure that such lenders face serious consequences for their illegal actions and can be excluded from the lending business, if necessary.

7.26 In particular, as discussed above, under the Government's proposed reforms, lenders could be prohibited from providing credit contracts and have their registration cancelled under the Financial Service Providers (Registration and Disputes Resolution) Act as a result of an order under s 108 of the Credit Contracts and Consumer Finance Act. Further, the regulator could impose conditions on the renewal of a lender's registration as a financial service provider, if after a formal warning the lender has not complied with the Code of Responsible Lending. We consider that these repercussions have the potential to provide a substantial disincentive for irresponsible behaviour and will improve the quality of credit providers.

IMPLICATIONS OF BREACHES FOR FINANCIAL SERVICE PROVIDER REGISTRATION

7.27 In the Issues Paper, we proposed removing the registration of lenders under the Financial Service Providers (Registration and Disputes Resolution) Act for breaches of the Credit (Repossession) Act.[207] We noted that the deregistration of lenders is not a matter that the Court can deal with under the existing relief provision in s 13 of the Credit (Repossession) Act.[208] Further, under s 18 of the Financial Service Providers (Registration and Disputes Resolution) Act, only the Registrar of Financial Service Providers has the power to deregister a financial service provider.[209] Therefore, we noted in the Issues Paper that, under the proposed reform, "a finding of a breach of the Act by a court, or the Commerce Commission or other enforcement agent, could be a trigger for discretionary referral to the Registrar."[210] We thought that "the exercise of the discretion might be dependent on factors such as the significance and frequency of the breach."[211] Finally, we pointed out that the proposed reform "would be a signal to lenders that improper behaviour, in the context of a credit repossession, could have serious repercussions on their future ability to do business, and therefore might be expected to operate as a significant deterrent."[212]

7.28 Consequently, we asked in the Issues Paper whether breaches of the Credit (Repossession) Act should have possible repercussions for the licensing of lenders under the Financial Service Providers (Registration and Disputes Resolution) Act.

7.29 The majority of submitters who responded to this question thought that breaches of the Credit (Repossession) Act should affect the registration of lenders under the Financial Service Providers (Registration and Disputes Resolution) Act.

7.30 The submitters who were not in favour of the proposal gave the following reasons for their opposition:

- a creditor's registration as a financial service provider should not be at risk unless he or she has committed a criminal offence;
- the Financial Service Providers (Registration and Disputes Resolution) Act was intended to put minimum standards in place for financial service providers and was not designed as a regulatory regime. Therefore, if penalties are considered necessary, serious penalties should be included in the Credit (Repossession) Act;
- singling out compliance with the Credit (Repossession) Act, as opposed to other legislation, such as the Credit Contracts and Consumer Finance Act, for consideration in the registration process is inappropriate;

- if non-compliance with the Credit (Repossession) Act were to affect licensing it might have the effect of denying consumers a dispute resolution mechanism, as membership of a dispute resolution scheme and registration under the FSP Act are linked;
- if the objective of the proposal is to prevent lenders who repeatedly breach the Credit (Repossession) Act from carrying on business as lenders, it would be preferable to amend the Credit (Repossession) Act to enable courts to make orders banning a lender from acting as one or to extend the disqualification provision in s 16 of the Act to include an offence created by s 16(2).

7.31 One group of finance companies did not think it was necessary to reform the law because of the existence of s 67 of the Financial Service Providers (Registration and Disputes Resolution) Act.[213]

7.32 The Government's proposed reforms noted in the section above, which we support, will mean that lenders who have breached the consumer credit repossession legislation will be able to be deregistered under the Financial Service Providers (Registration and Disputes Resolution) Act. This is because, under the proposed reforms, if a lender is not lending responsibly in accordance with the Code of Responsible Lending or the consumer credit repossession legislation, the regulator may seek a court order under s 108 of the Credit Contracts and Consumer Finance Act so that the lender may be prohibited from providing credit contracts. Under s 14 of the Financial Service Providers (Registration and Disputes Resolution) Act, a person who is subject to an order under s 108 of the Credit Contracts and Consumer Finance Act is disqualified from registering as a financial service provider. Therefore, if a lender does not comply with the consumer credit repossession legislation, it could lose its registration as a financial service provider.

7.33 We note that even though the deregistration of a lender will mean that the lender will no longer be eligible to be a member of a dispute resolution scheme and any future debtors of that lender will not be able to access a dispute resolution scheme, the Government has decided to reform the Credit Contracts and Consumer Finance Act so that debtors will continue to be protected to a certain extent. In particular, the Government has decided to:[214]

> … amend the Credit Contracts and Consumer Finance Act to provide that borrowers will not be liable for the costs of borrowing (interest, fees, and penalties) that would otherwise be owed to a credit provider, that are incurred while that credit provider is not registered as a financial service provider as required by the Financial Service Providers (Registration and Disputes Resolution) Act.

7.34 We acknowledge that the Government's proposed reforms will not protect debtors of a deregistered lender who wish to make a complaint to a dispute resolution scheme about actions that the lender carried out before he or she was deregistered. In those cases, debtors will either need to make a complaint to the regulator so that the regulator can take action on the debtor's behalf or seek relief through the court themselves.

7.35 In addition to the Government's proposed reform to s 108 of the Credit Contracts and Consumer Finance Act, we consider that s 108 should be amended to ensure that an application could be made by any person for a court order to prohibit or restrict a person from acting as a creditor if the creditor has been convicted of one or more serious offences under the Credit (Repossession) Act or has persistently failed to comply with the provisions of that Act. This amendment would be similar to the provisions in s 108(1)(a)(i) and (iv), which enable the same court order to be sought if a creditor has been convicted of an offence under the Credit Contracts and Consumer Finance Act or has failed more than once to comply with the provisions of the Credit Contracts and Consumer Finance Act. The only difference between our proposed provision and ss 108(a)(i) and (iv) is that a creditor would not be able to be prohibited or restricted from acting as a creditor if he or she has only committed a minor breach of the Credit (Repossession) Act and has not persistently breached the Act. We recommend that ss 108(a)(i) and (iv) be amended so that they also do not target creditors who have committed a single, minor breach.

R54 Section 108 should be amended to ensure that an application can be made by any person for a court order to prohibit or restrict a person from acting as a creditor if the creditor has been convicted of one or more serious offences under the consumer credit repossession legislation or has persistently failed to comply with the provisions of that legislation.

R55 Sections 108(a)(i) and (iv) of the Credit Contracts and Consumer Finance Act 2003 should be amended to ensure that they do not target creditors who have committed a single, minor breach.

REGULATION OF REPOSSESSION AGENTS

7.36 As noted in the Issues Paper, repossession agents are not currently licensed. Section 16 of the Credit (Repossession) Act is the only provision in the Act that restricts who can take possession of goods by disqualifying certain persons who have certain types of criminal convictions and making them criminally liable if they enter premises for the purpose of taking possession of consumer goods. Section 16 is set out below:

16 Certain persons disqualified from taking possession of consumer goods

(1) The following are disqualified persons for the purposes of this section:

(a) any person who has been convicted within the preceding 5 years of any offence involving violence against the person, or of any crime involving dishonesty within the meaning of section 2 of the Crimes Act 1961:

(b) any person on whom there has been imposed, at any time, a sentence of imprisonment for a term of 10 years or more or a sentence of imprisonment for life:

(c) any person who has been released from a prison within the preceding year.

(2) Every disqualified person commits an offence, and is liable on summary conviction to a fine not exceeding $10,000, who, being a creditor or a creditor's agent,—

(a) enters, or attempts to enter, any premises for the purpose of taking possession of any consumer goods or for any other purpose in connection with any consumer goods; or

(b) takes, or attempts to take, possession of any consumer goods.

(3) Any creditor or creditor's agent who enters, or attempts to enter premises, is, for the purpose of this section, presumed, in the absence of evidence to the contrary, to be entering for the purpose of taking possession of consumer goods or for another purpose in connection with consumer goods.

7.37 We commented in the Issues Paper that "[t]here is currently no liability on a creditor or their agent, if an employee carrying out repossessions is disqualified under s 16 of the Credit (Repossession) Act."[215] Further, persons who are disqualified under s 16 may not know about the restriction and unwittingly commit an offence.[216] Consequently, we raised in the Issues Paper the possibility of licensing persons who enter premises for the purpose of repossessing consumer goods.[217]

7.38 We discussed two existing models for occupational licensing. Those models were the Private Security Personnel and Private Investigators Act 2010 and the Secondhand Dealers' and Pawnbrokers' Act 2004.[218] We also discussed the licensing regime in Alberta for civil enforcement agencies and bailiffs and the requirement for certification of persons engaged by money lenders, including persons acting as repossession agents, in the Moneylenders (Licensing and Regulation) Bill.[219] Finally, we noted the alternative option of:[220]

> …treating section 16 breaches as another aspect of procedural irregularity that would trigger one of the Act's other remedies (such as the relief provision), or be a factor relevant to the lender's fitness (affecting their own registration or licence).

7.39 Following the discussion of the above options, we asked submitters whether they thought that repossession agents needed to be licensed and whether their views on that question were affected by whether licensing of lenders is also introduced.

7.40 The majority of submitters, including most repossession agents, supported the introduction of a licensing regime for repossession agents. Some of the reasons that submitters gave for supporting the licensing of repossession agents are set out below:

- licensing would assist a creditor's due diligence process when selecting a repossession agent;
- people in similar occupations, such as towing operators, are required to be vetted and licensed to ensure that they are "fit and proper" people;

- the current restrictions under s 16 are not enforced;
- licensing would provide an incentive to repossession agents to learn about and fulfil their obligations;
- licensing of agents would make enforcement of the law easier, as agents who repeatedly fail to comply with the law could be deregistered. However, the licensing regime would need to be rigorously enforced and there would need to be significant penalties for operating without a licence; and
- a requirement to use a licensed repossession agent might solve the problems that arise when people conduct the private repossession of goods.

7.41 One submitter thought that only repossession companies that employ repossession agents, as opposed to individual repossession agents, should be licensed or registered, while a finance company commented that it would support the licensing of agents if agents were in favour of it and as long as the regime was not too onerous or expensive. The Commerce Commission took the view in its submission that if the Credit (Repossession) Act is to be reformed, it may be worthwhile considering licensing arrangements for creditors and repossession agents. It also noted that the Credit Contracts and Consumer Finance Act provides for the court to issue an order preventing a creditor from operating as one, but not from playing a major role in repossessing consumer goods.

7.42 A few submitters considered that the licensing regime should be similar to the Private Security Personnel and Private Investigators Act or could be included in that Act and administered by the same licensing authority.

7.43 The reasons that submitters who were opposed to introducing a licensing regime gave for rejecting the proposal were that the regime is unnecessary, would be expensive, and creditors would still engage unlicensed repossession agents. Further, lenders will ensure that agents comply with the law if they are held responsible for the actions of the agents they have engaged. One submitter commented that it would support the licensing of agents if the creditor's registration as a financial service provider were affected in the event that he or she engaged an unlicensed agent. Finally, the Financial Services Federation thought that an alternative to the licensing regime would be to amend s 16(2) to include an offence for non-compliance with the Credit (Repossession) Act as a matter that disqualifies a person conducting repossessions and ensure that the Act is effectively enforced.

7.44 Finally, a number of submitters commented that repossession agents should be licensed regardless of whether lenders are licensed as well.

7.45 We have reached the view that repossession agents should be licensed. We believe that a licensing regime would provide greater protection to debtors and creditors from repossession agents who act illegally and unreasonably, as they could be excluded from the repossession industry or prevented from carrying out repossessions, and allow creditors to choose reputable repossession agents and avoid irresponsible ones. Further, it would help prevent people from conducting private repossessions. We also consider that the licensing of repossession agents would assist the Police and a future regulator of the consumer credit repossession legislation to enforce the requirements of the statute. It would also assist debtors to identify a repossession agent for the purposes of pursuing a complaint about his or her actions if the repossession was in any way problematic.

7.46 There is a question of who ought to do this regulation or licensing. We are aware that many in the industry will be concerned about the added cost of such a scheme. But there must be some level of oversight of repossession agents. If there is not to be such licensing, some other far more costly method of oversight, such as prior court approval, would be necessary. As we have discussed in chapter 5, lenders and repossession agents consistently told us during our consultation that such approvals would be overly onerous and impose unnecessary costs on all repossessions. The preferred industry approach was that those who persistently breach the law should suffer the consequences. Without a regulator, it is unclear to us that there will be such enforcement, and persistent breaches should be punished.

7.47 In our view, repossession agents perform a similar role to private security personnel, who are licensed under the Private Security Personnel and Private Investigators Act. As noted in the Issues Paper, "[p]art of the rationale [behind the Act] seems to be about ensuring the veracity of persons whose occupation habitually takes them into premises owned by others."[221] It is true that repossession agents do not interact with third parties in the way that security guards do, but they do enter people's homes in tense situations and on occasion when no one else is there. We also note that there are limited extra requirements for tow truck drivers who carry out a similar function, but who obviously do not enter private dwellings to do so.[222]

7.48 We are conscious of concerns over costs of setting up yet another occupational regulator. There are perhaps two options. One is to link the licensing with an existing occupational regulator. Given the similarities, we think that repossession agents could possibly be included in the licensing regime in the Private Security Personnel and Private Investigators Act. Including repossession agents in that Act would mean that the necessary protections could be provided to debtors and creditors in a cost-effective way. Obviously, that would involve further consideration of viability, which we are not in a position to determine at this stage.

7.49 Another option would be to make use of the current dispute resolution structure for lenders, and require repossession agents to be a member of a dispute resolution scheme. However, we are sceptical about whether this would be appropriate, given that it is difficult to describe repossession agents as 'financial service providers'.

7.50 Finally, we note that in the absence of a licensing regime, s 108 of the Credit Contracts and Consumer Finance Act could be amended to enable a court to prohibit repossession agents from acting as such agents if they commit a serious breach of the Credit (Repossession) Act or persistently fail to comply with the provisions of the Act. This amendment would match the Government's proposed reform with respect to lenders in credit repossession matters. However, we consider that a licensing regime would offer the benefits outlined above as well as the additional protection that the amendment to s 108 would offer to debtors through the exclusion of irresponsible agents from the repossession industry.

R56 Repossession agents should be licensed by an appropriate body.

REGULATORY OVERSIGHT OF CONSUMER CREDIT REPOSSESSION

7.51 In the Issues Paper, we discussed the possibility of the Commerce Commission being given responsibility for enforcement of the Credit (Repossession) Act and oversight of its operation.[223]

7.52 As noted in the Issues Paper, the Commerce Commission currently has a limited role in regulating credit providers in relation to repossession.[224] It is only required to ensure that credit providers comply with the Fair Trading Act (that is ensuring their representations are not false or misleading), and to enforce:[225]

> provisions of the Credit Contracts and Consumer Finance Act about the oppressive exercise of rights or powers, or the attempted enforcement of contracts in circumstances where that is deemed to be prohibited.

7.53 We pointed out in the Issues Paper that if the Credit (Repossession) Act is incorporated into the Credit Contracts and Consumer Finance Act, the Commerce Commission would take on the function of enforcing the whole (former) Credit (Repossession) Act as a result of the existing provisions in the Credit Contracts and Consumer Finance Act.[226] We noted in the Issues paper that the Moneylenders (Licensing and Regulation) Bill 2011 provided for the Financial Markets Authority (FMA) to enforce the proposed new Act.[227] However, we took the view that there may be more appropriate options for a regulatory body than the FMA, given that its brief is financial investment markets rather than lending markets.[228]

7.54 We asked submitters in the Issues Paper whether they would support the Commerce Commission taking on the Credit (Repossession) Act enforcement role or whether they would favour another body, whether it be an existing one or a new industry-funded one.

7.55 The majority of submitters supported the Commerce Commission taking on the role of enforcing the Credit (Repossession) Act, although a few noted that it would require additional resources in order to carry out the role. Several submitters thought that either the Commerce Commission or the FMA could perform the role. Some submitters noted that it would be beneficial for there to be one regulatory body with the responsibility for enforcing the consumer credit legislation, while one submitter thought that one body should be responsible for all the financial service provider legislation. Another submitter commented that its support for the Commerce Commission taking on the Credit (Repossession) Act enforcement role was conditional on there not being significant additional compliance costs. One submitter thought that oversight of the Act by the Commerce Commission might help address some of the problems that arise with private repossessions. The submitters who were opposed to the Commerce Commission taking on the enforcement role were concerned about the Commission's ability to strike an appropriate balance between creditors and debtors.

7.56 One submitter commented that the parts of the Credit (Repossession) Act dealing with non-compliance should be strengthened before the introduction of an enforcement body.

7.57 The Citizens Advice Bureau did not have a fixed view on which body would be the most suitable to enforce the Credit (Repossession) Act. However, it considered that the Commerce Commission would be the best agency if the Credit (Repossession) Act is incorporated into the Credit Contracts and Consumer Finance Act. It also noted that the Commerce Commission would need specific funding to monitor lenders and repossession agents, take action on individual complaints rather than systemic breaches, and educate consumers on their legal rights.

7.58 The Commerce Commission submitted:[229]

> If a single regulator was responsible for all of the law covering the consumer credit contracts this would mean that:
>
> - The agency could take action to address egregious conduct affecting an entire class of consumers;
> - Compliance activity could deploy a range of tools tailored to address the harms resulting from specific non-compliance (i.e. education, administrative and legal action);
> - The agency could work with creditors, repossession agents and debtors to ensure compliance. This may be easier for the involved parties and prevent inconsistent enforcement approaches.

7.59 A few submitters supported a separate section of the Disputes Tribunal acting as the enforcement and dispute resolution body with respect to credit and repossession matters, while a couple of submitters considered that a new body should be established. One group of finance companies supported an independent government funded body taking on the role of enforcing the Credit (Repossession) Act and the Credit Contracts and Consumer Finance Act, if the industry had input into the membership decisions. The group also thought that the independent body should be responsible for dealing with complaints under the Financial Service Providers (Registration and Disputes Resolution) Act.

7.60 Since the publication of the Issues Paper, the Government has decided, as part of its work on the reform of the Credit Contracts and Consumer Finance Act, to investigate the possibility of the FMA being the regulator responsible for the monitoring and enforcement of the Credit Contracts and Consumer Finance Act and the Credit (Repossession) Act.[230] The Cabinet paper on the proposed reforms states that "[t]he proposal to add responsible lending requirements to the Credit Contracts and Consumer Finance Act and to align its consumer protections with other financial sector reforms, lends support to the FMA being the Credit Contracts and Consumer Finance Act regulator." Further, the Cabinet paper notes that "[t]his aligns with the 'twin peaks' model that consolidates financial sector market regulation in one place."[231]

7.61 We take the view that it is imperative for a regulatory body to monitor and enforce the consumer credit repossession legislation. We agree with the Commerce Commission that the self-enforcement model of regulation is not effective in promoting legal compliance. Currently, there is nothing to prevent irresponsible lenders engaging in oppressive conduct and breaching the law without facing any consequences, as debtors have not had the knowledge or financial resources to enforce the law against them.

7.62 We believe that either the Commerce Commission or the FMA could perform the Credit Repossession enforcement role, but consider, like many submitters, that there should be only one body that is responsible for performing the regulatory role under the Credit Contracts and Consumer Finance Act and the consumer credit repossession legislation. This would also be necessary if the Credit (Repossession) Act is incorporated into the Credit Contracts and Consumer Finance Act. We agree with the Commerce Commission's comments above about the benefits of giving one regulator responsibility for all the consumer credit contract law. We also agree with submitters that the regulatory body would need to have sufficient resources to adequately perform a monitoring and enforcement role.

7.63 We note that in the material that accompanied the release of the exposure draft of the Credit Contracts and Consumer Finance Amendment Bill, the Ministry of Consumer Affairs wrote that "No changes to the regulator responsible for enforcing the CCCFA have been included in the Exposure Draft. At this time, it is not intended that any change be made."

7.64 Another issue that we discussed in our Issues Paper, and in the first chapter of this Report, is the comparative lack of comprehensive information about repossession practice in New Zealand.

7.65 In response to the Issues Paper, a few submitters commented that repossession notices and repossessed consumer goods should be registered. One submitter also thought that creditors should have to apply to repossess goods from debtors. That submitter considered that a register would enable more robust enforcement of the law and provide reliable statistics on the repossessions that have occurred. A finance company also suggested that finance companies be required to register the number of clients they have had in a year and the number of repossessions that they or their agents have carried out each month.

7.66 We agree with these submitters that there should be a requirement that lenders have to provide certain basic information about repossessions that they have undertaken. We do not think that creditors need to apply to repossess goods or register the number of clients they have had in a year, as such requirements would introduce additional compliance costs and delays into the repossession process, which would negatively affect debtors. We also consider that a requirement for creditors to report a repossession they have carried out as soon as practicable after goods have been repossessed may impose too many compliance costs on creditors. However, we recommend, subject to feasibility, that a requirement for creditors to report the number of repossessions they have carried out and the location of those repossessions to the consumer credit repossession regulator every 6 months. As noted by one of the submitters, having a record of repossessions would mean that anonymised statistics could be produced to assist the regulator to identify any systemic issues that would warrant investigation and to provide evidence for any future reform of the legislation. Such anonymised statistics would also enable the government to assess whether there were particular problems with credit in certain areas or amongst particular communities.

7.67 Creditors should be required to report the number of repossessions they have carried out and the location of those repossessions to the consumer credit repossession regulator every 6 months.

R57 There should be one body responsible for performing the regulatory role under the Credit Contracts and Consumer Finance Act 2003 and the consumer credit repossession legislation.

R58 Creditors should be required to report the number of repossessions they have carried out and the location of those repossessions to the consumer credit repossession regulator every 6 months.

198 Law Commission, above n 2, at [4.35].

199 Law Commission, above n 2, at [4.33].

200 Law Commission, above n 2, at [4.34].

201 Law Commission, above n 2, at [4.37].

202 Law Commission, above n 2, at [4.37]-[4.38].

203 Personal Property Securities Act 1999, s 25:

> **25 Rights or duties that apply to be exercised in good faith and in accordance with reasonable standards of commercial practice**
>
> (1) All rights, duties, or obligations that arise under a security agreement or this Act must be exercised or discharged in good faith and in accordance with reasonable standards of commercial practice.
>
> (2) A person does not act in bad faith merely because the person acts with knowledge of the interest of some other person.

204 Cabinet Office Minute, above n 4, at [7].

205 Law Commission, above n 4, at [6.1].

206 Law Commission, above n 4, at [6.2].

207 Law Commission, above n 2, at [5.30].

208 Law Commission, above n 2, at [5.31].

209 Law Commission, above n 2, at [5.31].

210 Law Commission, above n 2, at [5.32].

211 Law Commission, above n 2, at [5.32].

212 Law Commission, above n 2, at [5.33].

213 Financial Service Providers (Registration and Disputes Resolution) Act 2008, s 67:

> **67 Duty to co-operate and communicate information in certain circumstances**
>
> The person responsible for an approved dispute resolution scheme must—
>
> (a) co-operate with other approved dispute resolution schemes and with the reserve scheme if a complaint involves members of those other schemes (disclosing personal information in accordance with the Privacy Act 1993 and protecting information that is subject to an obligation of confidence); and
>
> (b) co-operate with the Registrar, including by communicating information to the Registrar in accordance with sections 17 and 34; and
>
> (c) if there is a series of material complaints about a particular licensed provider or class of licensed provider, communicate that fact to the relevant licensing authority:
>
> (d) if there is a series of material complaints about a particular broker or class of broker, communicate that fact to the Financial Markets Authority.

214 Cabinet Office Minute, above n 4, at [10].

215 At [6.3].

216 At [6.3].

217 At [6.4].

218 At [6.6-6.8].

219 At [6.10-6.15]; Moneylenders (Licensing and Regulation) Bill 2011, cl 6.

220 Law Commission, above n 2, at [6.9].

221 Law Commission, above n 2, at[6.7].

222 See Land Transport (Driver Licensing) Rule 1999, cl 34, which imposes extra requirements on a person who drives a vehicle recovery service:

34 Obtaining vehicle recovery endorsement

(1) A person is entitled to obtain a vehicle recovery endorsement on that person's driver licence if—

(a) The person has made an application in accordance with clause 9 and complied with the requirements of clauses 10, 11, 13, and 14; and

(b) The person holds, and has held for at least 2 years, a full licence of a class other than Class 6; and

(c) The person passes a full licence test under … clause 48 unless, in the 5 years immediately preceding the date of application, the person has passed a full licence test required for a Class 1 licence … and

(d) The person provides evidence of successful completion by the person of an approved course of a type specified in clause 93(b) (ii); and

(e) The person produces a medical certificate in accordance with clause 44; and

(f) The person consents to the carrying out of checks as to whether or not the person is a fit and proper person to be the holder of a vehicle recovery endorsement, and consents to the carrying out of those checks from time to time [during the period of validity of the endorsement]; and

(g) The [Agency] is satisfied in accordance with clause 35(1) that the person is a fit and proper person to be the holder of a vehicle recovery endorsement

223 At [6.32].

224 At [6.34].

225 At [6.34].

226 At [6.35].

227 At [6.36].

228 At [6.36].

229 Submission of Commerce Commission to the Law Commission (19 September 2011).

230 Cabinet Office minute, above n 4, at [29].

231 Office of the Minister of Consumer Affairs "Responsible Lending Requirements for Consumer Credit Providers" (October 2011) at [55].

Recommendations

CHAPTER 1 — INTRODUCTION

R1 The provisions of the Credit (Repossession) Act 1997 that are discussed in this Report should be redrafted and included in the Credit Contracts and Consumer Finance Act 2003, as part of the amendments to the latter Act that the Government is currently preparing. The provisions that are not discussed in this Report should simply be included in the Credit Contracts and Consumer Finance Act 2003.

CHAPTER 3 — REPOSSESSION AND THE RIGHT TO REPOSSESS

R2 The legislation should provide a 'checklist' that is both obvious and instructive as to when repossession can occur.

R3 The definition of security interest in s 2 should be modified to more completely parallel that in s 17 of the Personal Property Securities Act 1999.

R4 The consumer credit repossession legislation should make clear that, in situations where a contract creates security interests in both consumer and non-consumer goods, it applies to the consumer goods only.

R5 The consumer credit repossession legislation should require that for goods to be repossessed they must be sufficiently identified in the original security agreement so they may be individually identified at the time of repossession.

R6 The consumer credit repossession legislation should contain a provision similar to the effect of s 44 of the Personal Property Securities Act 1999, which would prevent the repossession of after-acquired goods unless they represent a purchase money security, are bought in substitution of an item that is subject to security, or are added as security through the express agreement of the consumer.

R7 Powers of attorney should not be able to be used to add consumer goods to security that can be repossessed.

R8 The list of goods or classes of goods that are deemed to be exempted from repossession should be prescribed by regulation.

R9 Purchase money securities should be excluded from any list of goods or classes of goods that are deemed to be exempted from repossession.

R10 The following goods should not be subject to repossession (except when financed through a purchase money security): medical equipment, bedding, portable heaters, stoves, washing machines and cooking equipment.

R11 When computers and other equipment containing a debtor's data are repossessed, the debtor must be given a reasonable opportunity to retrieve that data, and the creditor must take reasonable steps to preserve the consumer's privacy.

R12 The Code of Responsible Lending should explicitly deal with the issue of the granting of security and the repossession of goods, such as children's toys, that may have high sentimental value but little or no economic value.

R13 The consumer credit repossession legislation should include an express restriction on the granting of security and the subsequent repossession of passports, identity documents and credit and cash cards.

R14 Taking possession of the keys that open or provide access to secured property should be deemed to be repossession of the secured property for the purposes of the consumer credit repossession legislation.

R15 Section 35 should be redrafted in the new consumer credit repossession legislation to more clearly reflect the policy underlying it, namely that a debtor's obligations are frozen at the time of the sale of the secured property.

R16 Pre-possession notices should include a statement of the amount needed to reinstate the agreement and payment of that amount should forestall repossession.

CHAPTER 4 — INFORMING THE CONSUMER

R17 Schedule 1 to the Credit Contracts and Consumer Finance Act 2003 should be amended to remove the description of the "security interest" from the information required for initial disclosure and develop a plain English explanation of the nature of the security interest which conveys in lay terms the meaning and consequences of giving security to be included in the standard forms that are to be prescribed in an amendment to the Credit Contracts and Consumer Finance Regulations 2004.

R18 The Code of Responsible Lending should include a requirement for creditors to ensure that information is given to consumers in a clear and transparent manner with a view to ensuring the consumer understands the nature of the arrangement into which they are entering. This should include, where feasible, information in languages that the consumer readily understands.

R19 The pre-possession notice should be required by statute to:

- set out the nature and extent of the default and what the debtor needs to do in order to remedy the default and by when;
- state that doing nothing is not an option;
- provide information about where the debtor may go to access help;
- encourage the debtor to contact the creditor;
- provide details about the right to seek relief in circumstances of hardship; and
- provide details about dispute resolution processes and what the debtor needs to do if he or she disputes some aspect of the situation.

R20 The form of the pre-possession notice should be prescribed by way of regulations rather than in primary legislation.

R21 The form in which that information is required should be redesigned and the pre-possession notice should be consumer tested to ensure the notice is effective and in clear, plain English.

R22 If a repossession is to be carried out, it must occur within 28 days of a pre-possession notice being served or in the event that a complaint has been made, within 28 days of the creditor having made a decision with respect to the complaint or of a dispute resolution scheme having reached a determination with respect to the complaint. If a repossession is to be carried out after 28 days, a new pre-possession notice must be served.

R23 The post-possession notice should be redesigned and consumer tested to ensure the notice is effective and in clear, plain English.

R24 The reference to ss 8, 9, 17, 20, 21, 29(2)(a), 33 and 38 of the Credit (Repossession) Act 1997 in Part 2 of the Schedule to the Electronic Transactions Act 2002 should be removed so that the notice requirements under the consumer credit repossession legislation may be fulfilled by electronic communications if the parties agree.

CHAPTER 5 — THE REPOSSESSION PROCESS

R25 Section 14 should be repealed and replaced with a provision that requires a creditor or a creditor's agent to act in accordance with the Government's proposed Code of Responsible Lending when dealing with a debtor in a credit repossession matter.

R26 The Code of Responsible Lending should apply to persons who repossess goods.

R27 The Code of Responsible Lending should require persons who repossess goods to act responsibly when dealing with a debtor in a credit repossession matter and set out the type of conduct that would not be considered to be responsible.

R28 The Code should be prepared in consultation with the credit industry and consumers and should determine what type of conduct is considered to be irresponsible.

R29 Repossessions should be allowed on Sundays.

R30 Section 15 should be amended to clearly state that a repossession that commences but does not finish before 9 pm does not breach the consumer credit repossession legislation.

R31 The creditor or repossession agent should be required to produce the following documents:

- a copy of the credit contract;
- a document setting out the debtor's name and property address, the repossession agent's licence number and the reason why the goods are being repossessed; and
- a document outlining the requirements that a creditor or repossession agent must fulfil in order to repossess goods and the debtor's rights if he or she believes that the creditor or agent has not met those requirements.

R32 Section 18 should be amended to require a creditor or a creditor's agent to provide the debtor or person present at the time of the repossession with the same written notice that is required to be left on the premises if no one is present.

R33 The notice that is required by our recommended new s 18 should state why the goods have been repossessed, where the goods will be stored, the creditor's contact details and the debtor's rights under the consumer credit repossession legislation following the repossession of goods, including the right to make a complaint about the creditor's or agent's conduct.

R34 The consumer credit repossession legislation should be amended to provide for online auctions.

R35 The Code of Responsible Lending should set out what the terms "commercially reasonable" and "reasonable efforts to obtain the best price" in s 26(1) of the Credit (Repossession) Act 1997 mean in different situations.

R36 The Code of Responsible Lending should set out what does not constitute an online auction.

R37 Section 23 of the Credit (Repossession) Act 1997 should be amended to allow creditors to sell consumer goods after a post-possession notice has been served but before the 15 day period has expired if the debtor consents to them doing so.

R38 The timeframe of 14 days in s 29(2)(b) of the Credit (Repossession) Act 1997 should be amended to 15 days.

R39 Section 33 of the Credit (Repossession) Act 1997 should be amended so that a creditor is required to give the debtor and the other persons referred to in s 21A(1) of the Act a written statement of account within five working days after the sale of goods.

CHAPTER 6 — DISPUTES, PENALTIES AND REMEDIES

R40 Criminal offences should be included in the consumer credit repossession legislation for breaches of the repossession requirements currently set out in ss 15, 17, and 18 of the Credit (Repossession) Act 1997 by either creditors or repossession agents.

R41 The consumer credit repossession legislation should be amended to ensure that:

- repossession agents can receive criminal penalties and be liable for civil remedies for illegal acts that they commit during the repossession process; and
- creditors are not criminally liable for the actions of their repossession agents, unless they have been complicit in the commission of the offence; and
- debtors can seek relief from creditors for any breaches that their agents commit.

R42 All of the offences under the consumer credit repossession legislation should carry the same maximum penalty as offences under the Credit Contracts and Consumer Finance Act 2003, except the offence of obstructing a creditor or agent, which should carry the current penalty.

R43 Section 7(2) of the Credit (Repossession) Act 1997 should be amended to include offering to sell the consumer goods.

R44 Section 105 of the Credit Contracts and Consumer Finance Act 2003 should be repealed and the limitation periods in s 25 of the Criminal Procedure Act 2011 should apply to both the current offences in the Credit Contracts and Consumer Finance Act 2003 and the credit repossession offences that we are recommending be included in the consumer credit repossession legislation.

R45 The relief provision for breaches of consumer credit repossession requirements should match the relief provisions in the Credit Contracts and Consumer Finance Act 2003, to the extent that is possible.

R46 The consumer credit repossession relief provision should empower the court to make an order for compensation where a person has suffered non-financial loss or damage, humiliation or stress as a result of the actions of a creditor or a creditor's agent.

R47 Debtors should be entitled to recover statutory damages for breaches of our recommended new pre-possession notice disclosure requirements, just as they are entitled to such damages for breaches of the disclosure requirements in the Credit Contracts and Consumer Finance Act 2003.

R48 The amount of the statutory damages for breaches of our recommended new pre-possession notice disclosure requirements should mirror those available for similar disclosure requirements in the Credit Contracts and Consumer Finance Act 2003.

R49 All of the dispute resolution schemes should amend their Terms of Reference or Rules to provide for the consideration of complaints relating to the oppressive exercise of powers or rights conferred by a contract in relation to repossession.

R50 Section 63 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 should be amended to require scheme providers to issue rules that provide for adequate compensation to be awarded to complainants for non-financial loss, humiliation, stress, and inconvenience suffered as a result of the financial service provider's actions, as well as financial loss or damage, where the complaint relates to a credit repossession matter.

R51 The consumer credit repossession legislation should be amended to prevent creditors from repossessing goods, enforcing payment of a debt owed by a debtor or disposing of repossessed goods from the time that a debtor makes a complaint to the creditor until the complaint has been resolved by the creditor, to the satisfaction of the debtor, or been dealt with by a dispute resolution scheme.

R52 The amendment in R51 should provide that, if a debtor fails to make a complaint to the dispute resolution scheme of which the creditor is a member within 14 days of the debtor being advised of the creditor's decision with respect to the complaint, the creditor may take enforcement action against the debtor.

R53 The consumer credit repossession legislation should provide that, in the event that a credit contract has been sold and the original contract was with a financial service provider, only financial service providers, as defined in the Financial Service Providers (Registration and Dispute Resolution) Act 2008, should be permitted to repossess goods.

CHAPTER 7 — REGULATION

R54 Section 108 should be amended to ensure that an application can be made by any person for a court order to prohibit or restrict a person from acting as a creditor if the creditor has been convicted of one or more serious offences under the consumer credit repossession legislation or has persistently failed to comply with the provisions of that legislation.

R55 Sections 108(a)(i) and (iv) of the Credit Contracts and Consumer Finance Act 2003 should be amended to ensure that they do not target creditors who have committed a single, minor breach.

R56 Repossession agents should be licensed by an appropriate body.

R57 There should be one body responsible for performing the regulatory role under the Credit Contracts and Consumer Finance Act 2003 and the consumer credit repossession legislation.

R58 Creditors should be required to report the number of repossessions they have carried out and the location of those repossessions to the consumer credit repossession regulator every 6 months.

Appendix
List of Submissions

Admiral Finance Limited

Damian Allan, Total Recall Limited

Anderson Lloyd Lawyers

ASB Bank Limited

Bill Bevan, Kapimana Legal Services Limited

Bank of New Zealand

Citizens Advice Bureau New Zealand

Community Law Canterbury

Consumer Credit Management Ltd

Consumer NZ

Anne Darroch, Principal Disputes Referee

Department of Internal Affairs

Kim Dunlop

Families Commission

Finance Now Limited

Financial Services Complaints Limited

Financial Services Federation

GE Money

Human Rights Commission

Brent Hollows, EB Loans

LW Kincaid

Manawatu Community Law Centre

Mangere Budgeting Services Trust

Motor Trade Association

New Zealand Association of Credit Unions

New Zealand Bankers' Association

New Zealand Credit and Finance Institute

New Zealand Federation of Family Budgeting Services Inc

New Zealand Law Society

Kim Rahiri

Social Policy and Parliamentary Unit, The Salvation Army

Lydia Sosene

Thorn Rentals NZ Limited (trading as dtr)

Waivista Collections and Investigations

Westpac New Zealand Limited