LAW·COMMISSION
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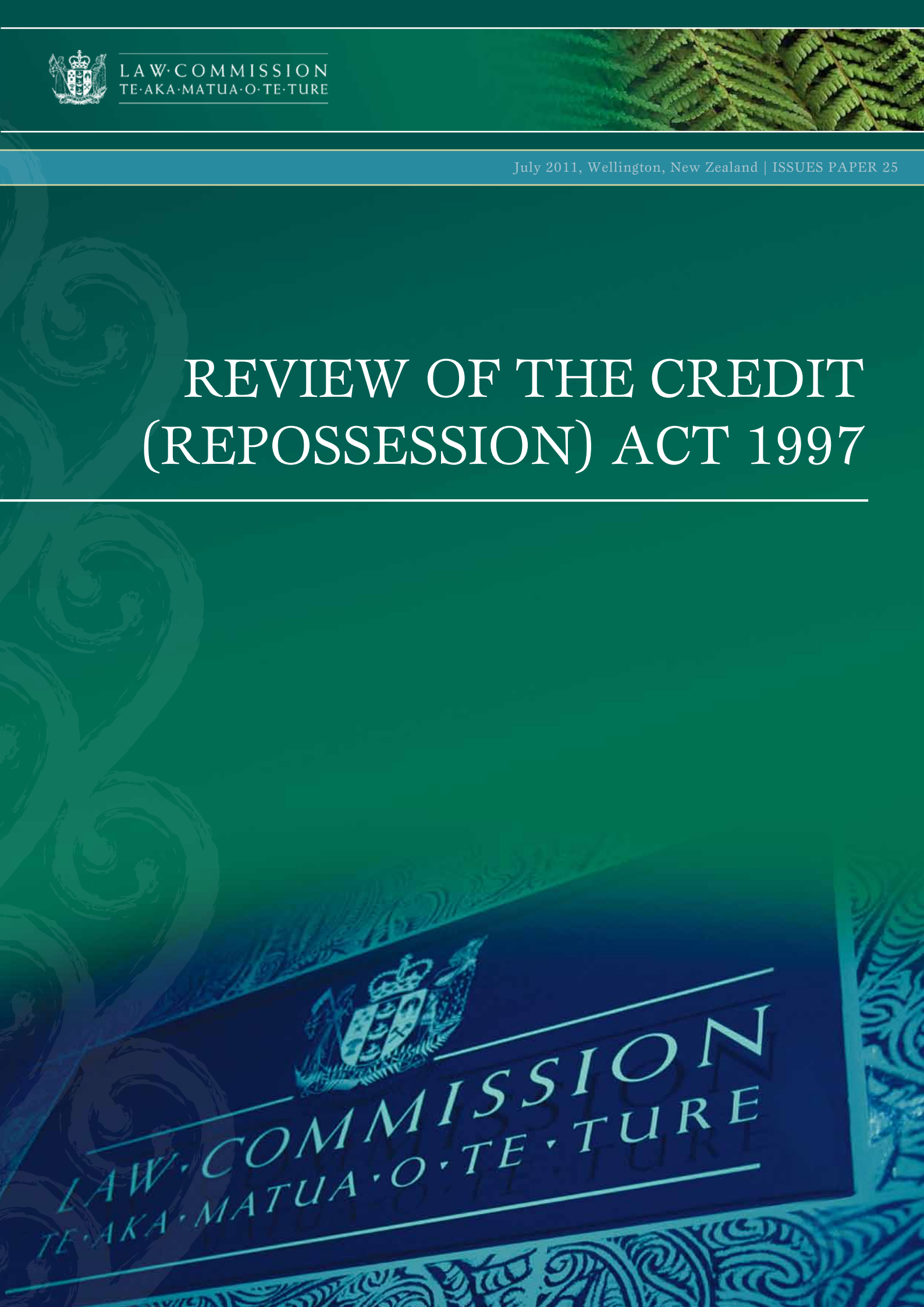
July 2011, Wellington, New Zealand | ISSUES PAPER 25

REVIEW OF THE CREDIT (REPOSSESSION) ACT 1997



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REVIEW OF THE CREDIT (REPOSSESSION) ACT 1997

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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FOREWORD

New Zealand is currently reviewing its consumer credit laws. The Ministry of Consumer Affairs is reviewing the Credit Contracts and Consumer Finance Act 2003, and we have been asked to consider, in consultation with that Ministry, the operation of the Credit (Repossession) Act 1997. There seem to be a number of problems with it.

It is important to get repossession law right. It affects both parties' rights: the lender's in the debt; and the consumer's in the purchased item and their home.

The law needs to clearly set out for consumers both their rights, and their obligations. Equally, it needs to make lenders' rights and powers clear. Both parties need workable mechanisms, through which those rules can be enforced. Where the law fails to do any or all of these things, it exposes the vulnerable to exploitation.

It is difficult to quantify the size of any such problem, because repossession is a civil matter, administered without central oversight. There are simply no statistics or collated information upon which to rely. However, others are aware of, and we have been told about, a number of examples of cases of alleged exploitation and oppression, particularly in South Auckland, and amongst Pacific communities. These are enough to raise concern, and warrant further consideration.

In this Issues Paper, we are therefore seeking views about the nature of the problems being experienced with the current Act, and ways in which it might be reformed, to offer everyone a law that is more certain, and more effective.

Hon Sir Grant Hammond KNZM
President of the Law Commission

Call for submissions

Submissions or comments (formal or informal) on this Issues Paper should be sent to Geoff McLay, Commissioner, by **19 August 2011.**

Law Commission
PO Box 2590
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or by email to creditrepo@lawcom.govt.nz

The Law Commission asks for any submissions or comments on this Issues Paper. The submission can be set out in any format but it is helpful to specify which of the numbered questions (listed in each chapter, and also at the end of the paper) you are discussing.

Submitters may like to make a comment that is not in response to a direct issue raised in the paper, and this is also welcomed.

Official Information Act 1982

The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus copies of submissions made to the Law Commission will normally be made available on request, and the Commission may refer to submissions in its reports. Any requests for withholding of information on grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act 1982.

Review of the Credit (Repossession) Act 1997

CONTENTS

Chapter 1
Background

SUMMARY

This chapter briefly summarises consumer credit law and, in particular, the Credit (Repossession) Act 1997. It explains why that Act was referred to us for review. It also addresses some background matters, including Responsible Lending Guidelines and recent Member's Bills that have been promoted.

THE NETWORK OF CREDIT LEGISLATION

1.1 The Credit (Repossession) Act 1997 is part of a network of credit legislation. In particular, it sits alongside the Credit Contracts and Consumer Finance Act 2003 (CCCFA), and the Personal Property Securities Act 1999 (PPSA).

1.2 The CCCFA protects consumers entering credit contracts, by providing rules around disclosure, fees and interest, and other matters.

1.3 The PPSA determines whether there are valid security interests over particular assets, and prioritises different security interests over the same asset.

1.4 Depending on the circumstances, other legislation such as the Property Law Act 2007, which applies to mortgaged goods other than consumer goods, may also govern creditor-lender interactions.

1.5 The Financial Service Providers (Registration and Dispute Resolution) Act 2008 requires financial service providers, including those in the business of offering credit contracts, to be registered and to fund a disputes resolution service.

THE CREDIT (REPOSSESSION) ACT

1.6 The Credit (Repossession) Act 1997 applies when there is a "security agreement", such as a hire purchase agreement, creating a security interest in consumer goods; in layperson's terms, an agreement that provides for the goods to be uplifted by the creditor, in the event of a payment or other default.[1] "Consumer goods" are defined as follows, in section 2 of the Act:[2]

> **consumer goods** means goods that are used or acquired for use primarily for personal, domestic, or household purposes.

1.7 The Act sets out the repossession and resale procedures that must be followed. Essentially, it regulates the back end of the lending process.

1.8 Along with the Credit Contracts and Consumer Finance Act 2003, it replaced outdated, confusing, unsatisfactory enforcement procedures under former legislation (the Hire Purchase Act 1971). There are, however, residual questions about whether the right balance has been struck, between the rights of creditors and consumers.

Key features of the Act

1.9 Key aspects of the Credit (Repossession) Act are:

Pre-possession and repossession

- The Act does not, itself, confer rights of entry or to take possession of the goods. Any such right must be in the original loan contract.
- A creditor must not take possession of secured goods unless the debtor is in default under the security agreement, or the consumer goods are at risk. "At risk" is defined: it requires the creditor to have had reasonable grounds to believe that the goods have been or will be destroyed, damaged, endangered, disassembled, removed, or concealed, with the onus of proving the existence of this on the creditor.
- A pre-possession notice must be given to the debtor, in the specified form.
- Time must be allowed for the debtor to remedy the default.

---

1 Under the Personal Property Securities Act 1999, s 16 "security agreement" is defined as follows:

> **security agreement**—
>
> (a) means an agreement that creates or provides for a security interest; and
>
> (b) includes a writing that evidences a security agreement (if the context permits)

"Security interest" is defined in s 17:

> **17 Meaning of security interest**
>
> (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).

2 Under section 2(2), this determination is to be made by the debtor, on attachment of the security interest (ie, at the time of signing the finance agreement).

- Contraventions of these provisions are an offence, and the debtor may apply to court for relief.
- The creditor must not enter premises in an unreasonable manner, or at a prohibited time, that is, outside the hours of 6 am to 9 pm Mondays to Saturdays, or on a Sunday or a public holiday.
- Certain persons are disqualified from acting as repossession agents: those convicted within the preceding 5 years of dishonesty or violence offences; or sentenced at any time to a sentence of imprisonment of 10 years or more, or life; or released from prison in the preceding year. It is an offence for such a person to enter or attempt entry or take possession of goods.
- The pre-possession notice must be produced on entry.
- There is provision for entry if the occupier is not present, subject to satisfying certain conditions (leaving a notice in writing in a prominent place, taking such steps as are reasonably practicable to ensure that the premises are not left obviously open).

Post-possession

- A post-possession notice must be served on the debtor, within 21 days, in the specified form set out in Schedule 2 of the Act. The consequences of not doing so are that the costs of taking possession must be borne by the creditor, instead of being recovered from the debtor.
- Other creditors (if any) must be notified of the intended sale of repossessed consumer goods.
- Consumer goods must not be sold within 15 days of possession. They must be offered for sale after the expiration of that time, unless, for example, the debtor has taken action to reinstate the agreement (by paying the arrears), or settle it in full, or has themselves found a cash buyer.
- The creditor must ensure that every aspect of the sale is commercially reasonable.
- The debtor may obtain a pre-sale valuation.
- The debtor has a right to force sale, if the consumer goods have not been sold within 3 months.
- Where goods have been sold, a statement of account must be given to the debtor.
- District Courts and Disputes Tribunals have jurisdiction to exercise the powers conferred on a court under the Act, such as the grant of relief to a debtor, or an order for the forced sale of repossessed consumer goods, or extension of prescribed timeframes.

MINISTRY OF CONSUMER AFFAIRS' DISCUSSION PAPER

1.10 In 2009, the Ministry of Consumer Affairs put out a discussion paper: *Review of the Operation of the Credit Contracts and Consumer Finance Act 2003* (September 2009). It mainly focused on the Credit Contracts and Consumer Finance Act 2003, but included a chapter on the Credit (Repossession) Act.

1.11 The thrust of the chapter was that:

> The effectiveness of the Credit (Repossession) Act 1997 has been called into question by consumer groups, the Insolvency and Trustee Service and the Commerce Commission. … A number of general issues with the Act have also been identified by community consumer organisations such as the Community Law Centres, Citizens Advice Bureaux, Ministry of Consumer Affairs.

1.12 Feedback was sought on a number of options in the paper.

1.13 Comments received on the discussion paper indicated some strong feeling amongst lenders that the Credit (Repossession) Act already gets the balance about right; they were, on the whole, opposed to ideas for reform, with the possible exception of some more robust enforcement.

1.14 However, consumer advisers, consumer advocates and social service providers have argued equally strongly that, in spite of the protections in place in the Act, repossession rights risk being used in an unduly exploitative and intrusive way, and that the Act fails to effectively regulate the exercise of those powers.

1.15 There was some doubt about whether the operation of the Act had been adequately investigated by the Ministry of Consumer Affairs before issuing their discussion paper. However, it should also be noted that some very substantial policy review work and qualitative research had been undertaken by the Ministry in the years leading up to 2009.[3]

1.16 Nonetheless, in the views of some submitters, a wider range of feedback needed to be sought, from the lending and debt collection industry, police, Disputes Tribunal, and so on. A more detailed assessment of the operation of the Act was called for.

1.17 Overall, the discussion paper process did not identify a clear consensus on the matters that it raised; in fact, it uncovered substantial disagreement about what, if any, reform ought to be undertaken.

1.18 The Act was therefore referred to us to consider, with the following terms of reference:[4]

> 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.

3 See, in particular, 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); and work undertaken by the Ministry in 1999-2001, for its Consumer Credit Law Review.

4 Law Commission, http://www.lawcom.govt.nz/project/review-credit-repossession-act-1997 (last accessed 25 May 2011).

1.19 The reference to the Ministry of Economic Development was an error. It should have been the Ministry of Consumer Affairs, which is within the other Ministry.

1.20 The purpose of this Issues Paper is, therefore, to support a fresh consultation exercise, exploring what (if anything) ought to be done by way of reform of the Act. Our terms of reference refer to a "rewriting" of the Act. One of the key questions for consideration is about the scope of the reform that is in fact required.

THE FINANCIAL SERVICES FEDERATION'S "RESPONSIBLE LENDING GUIDELINES"

1.21 The Financial Services Federation has developed "Responsible Lending Guidelines" for the non-bank financial sector (finance companies, and other lenders). The Federation's remit is "to encourage the creation of an environment in which members can advance their own interests in markets which have a minimum of regulation".[5]

1.22 Developed "with the assistance of a variety of stakeholders including the NZ Federation of Budgeting Services, Consumer NZ, the Families Commission Debt Working Group, the Retirement Commissioner, and officials from the Ministry of Consumer Affairs, and the Ministry of Social Development", the Guidelines are a laudable initiative on the part of the industry. However, they are no substitute for regulation, particularly in our area of concern, the Credit (Repossession) Act. They offer only very brief, high level guidance about default on a security agreement and credit repossession, as follows:[6]

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

5 Financial Services Federation, http://www.fsf.org.nz/ (last accessed 8 June 2011).

6 Financial Services Federation, http://www.fsf.org.nz/Site/Resources/Responsible_Lending_Guidelines.aspx (last accessed 8 June 2011); http://www.scoop.co.nz/stories/BU1104/S00778/fsd-launches-responsible-lending-guidelines.htm (last accessed 8 June 2011).

MEMBER'S BILLS

1.23 Members of Parliament from both major parties have been concerned about whether irresponsible lending and oppressive credit practices are occurring, and the social damage potentially caused by such activity.

Labour Members' Credit Reforms (Responsible Lending) Bills

1.24 Member's Bills have been introduced by Labour MPs Charles Chauvel (the Credit Reforms (Responsible Lending) Bill 2009) and Carol Beaumont (the Credit Reforms (Responsible Lending) Bill 2010), both of which were defeated at first reading.[7]

1.25 Both Bills, which were similar, would have:

- Amended the Credit Contracts and Consumer Finance Act, to require lenders to consider the actual means of a borrower, and their ability to service debt, before lending; and to provide for regulations, by which a maximum annual interest rate payable on consumer credit contracts could be set.
- Amended the Credit (Repossession) Act, to substitute a new section 35, that currently freezes debt levels at the date of sale (thus allowing interest and charges to accrue in the meantime). The proposed new provision would have been as follows:

  35 Limit on creditor's right to recover from debtor

  Where goods are sold subject to a security agreement, or where an agreement to enable the sale of the goods is entered at the time of the sale of the goods, the creditor's right to recover any amount from the debtor in relation to the sale of those goods is limited to the value of the goods at the time of enforcement, or the net proceeds of sale of those goods.

Moneylenders (Licensing and Regulation) Bill 2011

1.26 National MP Peseta Sam Lotu-Iiga's Moneylenders (Licensing and Regulation) Bill 2011 proposes, in Mr Lotu-Iiga's words, a "complete overhaul" of money lending. "Money-lenders largely go unregulated and are free to do their own thing. You don't have an over-riding regime and that's what this Bill does".[8]

1.27 It provides that "money lending means the giving of a loan of money under a consumer credit contract", as defined in the Credit Contracts and Consumer Finance Act 2003. In this, it has close similarities to the Financial Service Providers (Registration and Disputes Resolution) Act 2008, in which a "financial service provider" means a person who provides or offers to provide a financial service. "Financial service" includes providing credit under a credit contract. The Act requires registration and provides for de-registration, disqualifies certain persons from registration, and requires financial service providers to be a member of a dispute resolution scheme.

7 Carol Beaumont recently announced that two further Member's Bills will again be put in the ballot, by Labour members: Carol Beaumont MP, http://blog.labour.org.nz/index.php/2011/05/08/loan-sharks-youve-got-to-be-joking/ (last accessed 25 May 2011).

8 *East & Bays Courier,* http://www.stuff.co.nz/auckland/local-news/east-bays-courier/5019301/MP-to-curb-loan-sharks (last accessed 8 June 2011); Peseta Sam Lotu-Iiga MP, http://www.lotu-iiga.com/uploads/MoneylendersLicensingandRegulationBillFinal05162012.pdf (last accessed 8 June 2011).

1.28 Mr Lotu-Iiga says that his Bill aims to target car finance companies, cash lenders, pay day lenders and money lending vans. However, its drafting is not in fact specific to those kinds of lenders.

1.29 As well as being more comprehensive, his Bill takes a different approach from the Labour Members' Bills: it sets out factors relevant to determining when a contract is oppressive, including a presumption that an interest rate exceeding 48 per cent per annum is oppressive, rather than providing for the capping of rates by regulation.

1.30 This paper addresses, in particular, the provisions of Mr Lotu-Iiga's Bill which would:

- establish a moneylenders' licensing requirement, and a requirement for certification of their employees, including repossession agents;[9]
- provide for revocation of a moneylender's licence or certificate, or suspension for improper lending behaviour;[10]
- limit what types of property may be taken as security;[11]
- protect borrowers from various forms of harassment;[12]
- give an enforcement function to the Financial Markets Authority, established under the Financial Markets Authority Act 2011.[13]

NEXT STEPS

1.31 This issues paper will be consulted upon for one month, with a submission date of 19 August 2011. We will issue a final report with our recommendations in 2012.

9 See further para 6.10.
10 See further para 5.34.
11 See further para 4.9.
12 See further para 4.23.
13 See further para 6.36.

Chapter 2
Principles and scope

SUMMARY

The chapter sums up the scope of the project, in particular explaining why a more comprehensive review of the whole legislative scheme will not be undertaken; and describes general principles of the current legislation, to be carried forward in this review. It notes that a gap in empirical evidence has made it difficult to assess the problems being experienced with the Credit (Repossession) Act.

GENERAL PRINCIPLES

2.1 Credit repossession law needs to strike, and the current Act seeks to strike, a reasonable balance between protection of the interests and rights of consumers and private property holders, and those of commercial lenders. There is a clear case for effective principled regulation at the back end of the lending process, to ensure that when things go wrong, the process runs smoothly and fairly, and neither party can be exploited or unfairly disadvantaged.

2.2 The lending industry, in all its guises, offers a service that supports consumers' interests. Beyond the banking front line, research undertaken on behalf of, and published by, the Ministry of Consumer Affairs revealed a legitimate cultural preference, by Pacific consumers in particular, for taking out personal loans from the non-bank financial sector (described, in that research, as "fringe lenders", and by others as "loan sharks"). Reasons for that included a preference for quick no-questions-asked cash. Sometimes this was because of desperate circumstances, including the immediate need to meet cultural obligations such as church donations and family support. There was also cultural reticence about engaging in the formality of big banks' lending procedures, and an expressed preference for the more relaxed environment of the lenders' premises. It would be wrong to conclude that there is not a social need being met by these lending services.

2.3 However, the public interest in facilitating that business ought not to be achieved at the expense of vulnerable consumers. Regulation thus needs to be robust enough to prevent their exploitation. The non-bank financial sector, particularly, is more likely to attract customers who have low levels of financial literacy, and high levels of financial hardship. The Act needs to protect people from exploitation in those circumstances. It needs to ensure that when repossession rights are exercised, adequate safeguards are placed around them.

2.4 As the Minister for Commerce and Consumer Affairs recently commented, in the end, the consumer must take responsibility, because the government cannot legislate or regulate against all possible risk; nor has the government any interest in stifling innovation in the lending market. Nevertheless, according to the Minister, predatory or oppressive behaviour by lenders is simply unacceptable, and the current arrangements are not effectively preventing it.[14] There are "gaps in the system that [allow] unscrupulous lenders to take advantage of consumers seeking to access finance in tough economic times", and "loan sharks" are the target, but the government is "wanting to send a message that all lenders – big or small – must practice responsible lending and responsible consumer debt management programmes".[15]

2.5 In setting out the reform options that follow, we have taken the view that it would be more principled, more practical, and generally preferable to regulate in a way that ensures currently compliant lenders do not suffer additional burden, whilst the parts of the legislation relating to non-compliance are strengthened, so that they can be enforced against those who are breaching the law, or unfairly taking advantage.

A NOTE ON OTHER CREDIT LEGISLATION, AND SCOPE

2.6 In the process leading up to the passage of the Credit (Repossession) Act in 1997, there was some criticism about the exercise being undertaken in isolation. The Credit (Repossession) Act predated the Personal Property Securities Act 1999 by two years, and the Credit Contracts and Consumer Finance Act 2003 by six. It would, arguably, have been more coherent, and may have better supported the goal of streamlining the law in this complex area, to progress all related pieces of legislation as a package.

2.7 As noted above, the Credit Contracts and Consumer Finance Act is being reviewed by the Ministry for Consumer Affairs, with the Credit (Repossession) Act separately referred to us, albeit with a brief to work closely with the Ministry. The Personal Property Securities Act 1999 and the Property Law Act 2007 are not under review, although both have connections with the other legislation.

2.8 Although we think that a comprehensive single review may well be desirable, it is simply beyond the scope of our current terms of reference to deal with the whole package of credit legislation, except insofar as consequential amendment arising from the other reforms is required; nor would it be a good use of resources, given the parallel work that is being undertaken. We will, however, be working closely with the Ministry for Consumer Affairs.

14 Interview with Hon Simon Power, Minister for Commerce and Consumer Affairs (Kathryn Ryan, Nine to Noon, National Radio, 21 June 2011).

15 "Government targets loan sharks" http://www.stuff.co.nz/business/money/5170355/Government-targets-loan-sharks (last accessed 21 June 2011).

2.9 One question considered in the paper is whether, given that the Credit Contracts and Consumer Finance Act is concurrently being reviewed, the Credit (Repossession) Act ought to be merged with it. This would result in an Act more similar to the Australian and United Kingdom models. Both jurisdictions have single Acts addressing both front end and back end lending matters (albeit dealing less comprehensively with repossession than our legislation).

2.10 However, beyond that, we have taken a narrow view of what is within our scope, notwithstanding the wide-ranging nature of the lending issues identified. For example, as well as concerns about oppressive practice in the context of credit repossessions, there are issues about what may be secured, what procedures lenders should be required to observe to ensure they are lending responsibly, and issues around interest and charges.

2.11 In the end, we have focused on repossession because that is what our terms of reference tell us to do. However, repossession is only a part of the wider credit contract process, and it is a little artificial to distinguish between what goes into the original credit contract and how and under what conditions repossession can occur. For there to be successful regulation of this area, the policy surrounding that wider credit process must be got right, work with which the Ministry of Consumer Affairs is currently proceeding.

THE SIZE OF THE PROBLEM

2.12 Whether industry freedoms should be curtailed, or the cost-benefit of some of the proposed interventions is worthwhile, will depend upon the size of the problem. Sizing the problem quantitatively is, however, a difficult task.

2.13 The Disputes Tribunal decisions database reveals only a handful of decisions addressing the Credit (Repossession) Act, astonishing for an Act that has been in force for nearly 15 years.[16]

2.14 Proceedings are frequently filed by creditors in District Court for summary judgment on unpaid debts. The Disputes Tribunal is, however, a more likely forum for debtors to be looking to enforce *their* rights; and it seems this is simply not happening.

2.15 This does not, in itself, indicate whether the Act is operating flawlessly, or is simply not being enforced. It is evident from the self-enforcing terms of the Act that there is no systematic oversight, exacerbated, in all likelihood, by some credit consumers' lack of knowledge of their rights, and reluctance to assert them.

2.16 Nor is there any central or comprehensive source of statistics or information; there appears, in fact, to be very little information at all. Nobody is keeping a record of what happens under the Act, perhaps a natural consequence of a civil self-enforcement system.

16 The Financial Service Providers (Registration and Disputes Resolution) Act 2008 provides for dispute resolution, and information-gathering about those disputes, but for our purposes does not assist, because the relevant provisions have been in force for less than a year. Under the Credit (Repossession) Act, the Disputes Tribunal only has jurisdiction where the order sought is less than $3,000, which may perhaps explain the small number of cases: section 40. Larger disputes are dealt with through the District Court.

2.17 The OECD has commented that it can be hard for policy makers to identify and analyse consumer problems in a market situation. This does not, however, absolve government from the need to attempt it: "Although quantification is oftentimes difficult, it is essential that detriment is assessed, even when it is only possible to do so in a qualitative manner".[17]

2.18 Qualitatively, there is a growing body of information to suggest that some intervention (which may or may not be legislative intervention) is required.

2.19 Some of this is "anecdotal" accounts, from Ministry of Consumer Affairs' consumer advisers, who deal with and support credit consumers. This reveals that significant problems are occurring in some cases, but not their extent across the industry as a whole. The types of problems being experienced are said to include harassment of vulnerable debtors, and oppressive seizures of low value property with high sentimental attachment; the Act, it seems, is not adequately regulating these types of unethical practices.

2.20 These accounts are backed by a sizeable piece of independent research into Pacific consumers' credit behaviour and experience, undertaken for the Ministry in 2007.[18] South Auckland barrister Catriona McLennan writes, "[That] paper recounts examples I have seen over and over," and "Over the past 14 years of my work in South Auckland I have seen the heartbreaking toll exacted by [loan sharks] on poor families in dire financial straits".[19]

2.21 Furthermore, Parliament has seen three Member's Bills in as many years, from both Labour and National Members with interest in Pacific and South Auckland communities. And, as noted above, tackling debt and credit reform is now the Minister for Commerce and Consumer Affairs' top priority.

2.22 There seems, in short, substantial and growing concern about the operation of parts of the industry, and its effect on parts of the community. The fear is that what we are seeing is the tip of the iceberg, with no idea of the size of it underneath.

2.23 This is the context for our work. This Issues Paper therefore seeks views on the nature and extent of the problems, as well as what should be done about them.

Q1 What are your views on the nature and extent of the problems occurring with the Credit (Repossession) Act? Have you suffered, or do you know of people who have suffered, harassment or oppression in the context of a repossession? Describe and give examples of the problems.

17 OECD *Consumer Policy Toolkit* (2010).

18 Ministry of Consumer Affairs, above n 3.

19 Catriona McLennan "Ten steps to save New Zealand's poor from loan sharks" *Dominion Post* (New Zealand, 22 June 2011) at B5.

Chapter 3
The Act generally

SUMMARY

The following chapters consider possible problems with the Act, and ask for feedback on them; and also feedback about whether there are any other, as yet unidentified, problems. This chapter focuses on the Act as a whole, comparing it with others overseas.

COMPARING NEW ZEALAND'S ACT WITH OTHERS OVERSEAS

3.1 We carried out a review of similar laws in comparative jurisdictions: Australia, the United Kingdom, and Canada.

3.2 Both Australia and the United Kingdom have comprehensive stand-alone consumer credit legislation. In Australia, federal legislation was passed in 2009, which now governs all states, replacing any pre-existing legislation.

3.3 Amended in 2006, the Consumer Credit Act 1974 (UK) provides for:

- licensing of credit providers;
- types of consumer credit agreements;
- entry into credit or hire agreements (rules about disclosure, etc);
- powers for the court to intervene in unfair relationships;
- credit advertising;
- procedures governing default and termination (in Part VII of the Act).

3.4 In Australia, the National Consumer Credit Protection Act 2009 (Cth) contains:

- a requirement for credit providers to be licensed (plus a power to ban/disqualify from engaging in credit activities);
- financial record-keeping obligations;
- responsible lending provisions (plus an obligation to assess the suitability of the credit contract before entering the contract or increasing credit limits);
- remedies (civil penalty provisions, and powers for the court to grant other remedies);
- compliance and enforcement provisions (for investigations, examinations, etc);

- a Schedule containing the National Credit Code;
- procedures for ending and enforcing credit contracts, mortgages and guarantees (in Part 5 of that Schedule).

3.5 In large part, therefore, both of these Acts deal with matters in our Credit Contracts and Consumer Finance Act 2003, plus, in relatively minor part, provisions relating to default and termination (or in Australia's case, ending and enforcement).

3.6 In Canada, most of the jurisdictions have Consumer Protection Acts, that all deal with aspects of credit, although the content of each of them differs; and Personal Property Security Acts, much like our own, dealing with perfection and priority of security interests, with a Part setting out rights and remedies on default.

3.7 Overall, our review showed that statutes in different jurisdictions vary considerably, in the scope and nature of their provisions.

3.8 While it is a little difficult to take quite different-looking Acts, and assess which of them is more robust, we found no jurisdiction that sets everything out as comprehensively, all in one place, as our Credit (Repossession) Act, which addresses the whole repossession process from start to finish.

3.9 Furthermore, in particular, the collection of safeguards New Zealand has implemented around rights of entry, while imperfect, does not feature as significantly in other legislation and not at all in some jurisdictions, such as the United Kingdom.

3.10 A number of the Canadian jurisdictions – British Columbia, Ontario, Saskatchewan and Manitoba are examples – simply provide that on default, the secured party has the right to take possession of collateral or otherwise enforce the security agreement, and dispose of collateral, according to law.

3.11 However, it is also true that the absence of some safeguards in those jurisdictions may be compensated for by other types of safeguards, for example, requirements for court-authorised entry to residential premises, or a need for leave to be obtained when the debtor has accrued a certain amount of equity in the goods, or prohibitions on what chattels may be taken.

3.12 A number of jurisdictions do have additional aspects that might be added to our Act, to make its operation more robust or more effective, and these are discussed further in chapters 4 to 6.

3.13 Although quite a number of examples are canvassed in this Issues Paper, of things that other jurisdictions do differently, there is no one jurisdiction that features all of these. We are not, therefore, necessarily suggesting that all of them should be implemented. Rather, we hope that this paper can assist in teasing out the most pressing problems with the current Act, and targeting effective solutions to them.

DOES THE ACT STRIKE THE RIGHT BALANCE?

3.14 On the broad question of whether the right balance has been struck in the Act to date, responses in submissions made previously to the Ministry of Consumer Affairs were mixed.[20]

3.15 Consumer advisers, consumer advocates and social services tended to think there was a substantial imbalance in creditors' favour, under the Credit (Repossession) Act.

3.16 The lending industry (banks, finance companies, and others) thought that the balance was fine, and were opposed to some of the measures that the Ministry had put forward for discussion. Their general objection was that recommendations made in the discussion paper were overly sensitive and responsive to calls from consumer advocacy groups, and that when enforced, the legislation provides ample protection; the problem, more often, is that it is not being enforced. Much of that, they thought, had less to do with the regulatory scheme than the nature of the non-bank financial market, and the skills and preferences of its customers.

3.17 One submitter noted that a climate in which it was unduly difficult for lenders would not be in consumers' interests either, because the service would become unavailable. Furthermore, so-called "fringe" lending is by definition also high risk lending: not all borrowing and credit may be conducted in good faith, and the Act needs to support lenders in cases where it is not.

3.18 However, consumer advisers doubted the veracity of this, arguing that rich profits are made in that market, and lenders have demonstrated their ability to adjust their credit practices around constraints.

3.19 It is worth noting here that some aspects of the present arrangements may not be in the public interest, either, to the extent that it is the state picking up the tab. Participants in the earlier research described how shortfalls on consumer debt, arising out of default, and accumulated charges and interest, are being paid by attachment orders on welfare.[21]

3.20 Lender-creditor interactions are governed by multiple Acts. Sometimes more than one Act may apply in the individual case, for example, where some of the secured goods are consumer goods, and others are not. The Acts to some extent have different approaches. For example, there are different, less rigorous repossession procedures under Part 9 of the Personal Property Securities Act (no pre-possession notice required, no constraints on time of entry, ability to contract out of some of the requirements).[22] In relation to entry powers, it is only for consumer goods that the power stems from the loan contract, and must be included in the contract: the Credit (Repossession) Act does not address this.

3.21 Based on our comparative review, it is not unusual to find greater safeguards around repossessions from residential premises. In other words, New Zealand's decision to separate out those circumstances and legislate for them a little differently is not out of line with what happens overseas.

20 Ministry of Consumer Affairs *Review of the Operation of the Credit Contracts and Consumer Finance Act 2003* (September 2009).

21 Above n 3 at 18.

22 Personal Property Securities Act 1999, ss 107, 109.

Q2 What are your views, on whether the Credit (Repossession) Act currently strikes the right balance between the interests of consumers and lenders? Why?

NON-PRESCRIPTIVE NATURE OF THE ACT

3.22 The Act has a number of provisions based on an exercise of evaluative judgment, for example:

- entry that is "not … unreasonable";[23]
- sale that is "commercially reasonable";[24]
- steps that are "reasonably practicable";[25]
- "reasonable costs and expenses".[26]

3.23 This makes it hard for consumers to assess whether their rights have been breached, or to understand whether they might be entitled to relief. And, while reasonableness should at least in theory operate as a meaningful restraint on those conducting repossessions (for fear of breaching the standard), the trouble is that the Act's oversight and enforcement mechanisms are of limited efficacy.

3.24 This is compounded by the risk run by an applicant for relief. Under section 13, where the court determines that any application is "vexatious", it must order 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 other rights under the Act (eg, the 15-day post-possession period) do not apply.

3.25 "Vexatious" is not the same as mistaken. In other words, such an order would not be made whenever an application for relief fails. However, that is unlikely to be clear to the average person.

3.26 This issue was not addressed in the Ministry of Consumer Affairs' discussion paper,[27] perhaps because it is a little doubtful whether the redrafting of these parts of the Act, to something more prescriptive, could be achieved in a workable way. It is not really the proper role of the statute to be drafted for public information purposes. Legislation is unlikely to be the best vehicle for informing debtors about all the possible types of conduct that may amount to unreasonable entry, for example; and if that was attempted, the Act would be unlikely to serve its legal purposes particularly well.

3.27 That is not to say that there are no solutions; simply that there may be better solutions than removing the evaluative element from all provisions, such as more emphasis on independent oversight and enforcement to support consumers in the exercise of their rights under the Act. We discuss the options for this in chapter 6.

23 Credit (Repossession) Act 1997, s 14.

24 Credit (Repossession) Act 1997, s 26.

25 Credit (Repossession) Act 1997, s 18.

26 Credit (Repossession) Act 1997, s 31.

27 Ministry of Consumer Affairs, above n 20.

3.28 Nonetheless, legislative language needs to be fit for purpose, and there may well be a feeling that the Act is drafted more like lawyers' law than consumer law – that it is, in other words, less user-friendly and more opaque to the layperson than would ideally be helpful in this context.

3.29 We therefore ask, below, whether there are such fundamental problems with the Credit (Repossession) Act that a total redraft of it is required.[28] The user-friendliness, or otherwise, of the drafting may be one relevant factor.

THE LEGISLATIVE VEHICLE

Merging the Credit (Repossession) and Credit Contracts and Consumer Finance Acts?

3.30 One option previously considered by the Ministry of Consumer Affairs was incorporating the Credit (Repossession) Act into the Credit Contracts and Consumer Finance Act 2003.[29] One effect of this would be that the Commerce Commission would as a corollary take over the enforcement function (as it does for other Credit Contracts and Consumer Finance Act matters).

3.31 Alternatively, the Credit (Repossession) Act could continue as a standalone piece of legislation.

3.32 Section 111 of the Credit Contracts and Consumer Finance Act sets out the role and functions of the Commerce Commission under that Act. There seems no reason why a similar provision could not be inserted in the Credit (Repossession) Act, without need to amalgamate the two Acts. It provides:

> **111 Role and functions of Commission under this Act**
>
> (1) The role of the Commission under this Act is to promote compliance with this Act.
>
> (2) The functions of the Commission, in relation to this Act, are to—
>
> (a) monitor trade practices in credit markets, consumer lease markets, and buy-back transaction markets; and
>
> (b) take prosecutions in relation to breaches of this Act; and
>
> (c) take civil proceedings under this Act (including proceedings under Part 5); and
>
> (d) make available appropriate information for the guidance of consumers, creditors, lessors, transferees, and other interested persons in relation to promoting compliance with this Act.
>
> (3) Nothing in this Act imposes on the Commission any duty or obligation to take any proceedings under this Act or to exercise any power conferred by this Act in respect of any particular person.

28 See paras 3.34 ff.

29 Ministry of Consumer Affairs, above n 20.

3.33 However, in our view, credit reform should be holistically approached. Credit repossession is part of the same process that commences with a credit contract, and it makes sense for this all to be dealt with in a single piece of legislation. One process should be regulated by one statute. We therefore suggest that the Credit (Repossession) Act should be incorporated into the Credit Contracts and Consumer Finance Act, as part of the wider reform of the latter Act.

> Q3 Do you agree that the Credit (Repossession) Act should be incorporated into the Credit Contracts and Consumer Finance Act?

Do we need a whole new Act?

3.34 Our terms of reference, as drafted to date, propose a "rewrite" of the Act. We would, therefore, like to address the question of whether what is required in the way of reform is minor improvement of the existing legislation; or whether the whole Act is either so badly drafted, or so fundamentally flawed in some other way, that we need to start again.

3.35 We would be cautious about undertaking a "rewrite", in the absence of a lot more fact-finding about the nature and size of the problems and perceived problems (assisted by responses to this Issues Paper). If it is, as we suspect, more a question of building on and improving what was done in 1997, redrafting the whole Act is unlikely to be the most helpful way of approaching it. It may have the advantage of recasting the Act in a slightly clearer, better structured form. It could also risk re-litigating gains already made for consumers.[30]

3.36 There are two types of problems that might warrant a "rewrite" of the Act: policy problems, and drafting problems.

3.37 The major policy issue is about the balance struck by the Act. Some may well take the view that much more robust regulation is required in this context, in the overall public interest, and that there would be benefits in a more interventionist approach. However, that would be quite new.[31]

3.38 From a drafting point of view, a more likely problem may be that so many amendments would be required, to correct various issues with the Act, that it should simply, as a matter of good legislative practice, be redone from scratch.

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30 For example, the Credit (Repossession) Act is more prescriptive about rights of entry than was the Hire Purchase Act 1971: compare Credit (Repossession) Act 1997, ss 14-19, and the Hire Purchase Act 1971, s 27. The latter section provides:

> Where the purchaser confers on the vendor or the agent or servant of the vendor the right to enter any premises, whether for the purpose of taking possession of the goods comprised in the agreement or for any other purpose in connection with those goods, the vendor commits an offence against this Act if the manner or time of the exercise of the right is unreasonable, irrespective of the words used to confer the right.

There were also some provisions imported, modelled on a Canadian statute: see, for example, Credit (Repossession) Act 1997, Part 3A, relating to accessions.

31 The Credit (Repossession) Act does not (except in minor ways) significantly depart from the kind of overall balance struck previously in 1971. To do so would, therefore, institute quite a novel approach, that is neither a feature overseas, nor has been in New Zealand legislation for at least the last 40 years.

3.39 The Act has already been quite heavily amended. Furthermore, as discussed above, the language and structure of the Act could perhaps be simplified, with a view to making it more accessible for its users.

> Q4 Is the Credit (Repossession) Act, in your view, so fundamentally flawed that it requires total replacement? If so, what are the policy issues (if any) that lead you to this view? What are the drafting issues?

MISCELLANEOUS MATTERS

3.40 The remaining chapters of this paper address particular issues and options, relating to better protection of the parties to a credit contract, remedies, and independent oversight and enforcement.

3.41 However, there may also be other things, not identified in this paper, that require consideration and possible reform. If so, we would like to hear about them.

> Q5 Are there other issues with the operation of the Credit (Repossession) Act, that our review of the Act should address?

Chapter 4

Better protecting the parties

SUMMARY

The chapter reviews options for better protecting the parties to a security agreement. Many of the options identified, from overseas, focus on protections for debtors. We also ask how the Act is operating, from creditors' perspective.

WHAT ITEMS MAY BE REPOSSESSED?

4.1 The standard form pre-possession notice in Schedule 1 of the Credit (Repossession) Act already requires a description of the goods of which the creditor intends to take possession. However, there is nothing in the body of the Act about it, and nothing regulating how specific the description needs to be. The Schedule simply says, "describe goods".

4.2 The Ministry of Consumer Affairs therefore proposed a supplementary provision in the Credit (Repossession) Act, providing that personal property cannot be seized unless it has been itemised or otherwise sufficiently described in the security agreement, and on any pre-possession notice. One possible suggestion by a submitter (who did not necessarily support the idea) was to import wording from section 36 of the Personal Property Securities Act: "an adequate description of the collateral by item or kind that enables the collateral to be identified".

4.3 It is doubtful, we think, that either suggestion adds a great deal to what ought to be happening already; or, to the extent that it is not happening already, that either suggestion would result in much better practice.

4.4 An alternative, and we think likely to be more effective and efficient approach, may be to follow Canadian examples, in Nova Scotia and New Brunswick,[32] by simply prohibiting certain basic chattels from being taken:[33]

32 Personal Property Security Act SNS 1995-96 c 13, s 59(1); Personal Property Security Act SNB 1993 c P-71, s 58(3).

33 Personal Property Security Act SNS 1995–96 c 13, s 59(1).

Rights and duties of secured party on default

…

(3) Subject to subsection (7), a debtor may claim the following items of collateral to be exempt from seizure by a secured party:

(a) furniture, household furnishings and appliances used by the debtor or a dependent to a realizable value of five thousand dollars or to any greater amount that may be prescribed;

(b) one motor vehicle having a realizable value of not more than six thousand five hundred dollars at the time the claim for exemption is made, or not more than any greater amount that may be prescribed, if the motor vehicle is required by the debtor in the course of or to retain employment or in the course of and necessary to the debtor's trade, profession or occupation or for transportation to a place of employment where public transportation facilities are not reasonably available;

(c) medical or health aids necessary to enable the debtor or a dependent to work or to sustain health;

(d) consumer goods in the possession and use of the debtor or a dependent if, on application, the Court determines that

(i) the loss of the consumer goods would cause serious hardship to the debtor or dependent, or

(ii) the costs of seizing and selling the goods would be disproportionate to the value that would be realized.

(4) A dependant may claim an item of collateral within clause (3)(a), (c) or (d) to be exempt from seizure but a claim may not be made by both a debtor and a dependant with respect to an item of the same kind.

…

4.5 New Zealand already takes a similar approach, in a different context, under section 158 of the Insolvency Act 2006. That section provides that a person declared bankrupt may retain certain assets: necessary tools of trade (to a maximum value set at the discretion of the Official Assignee); necessary household furniture and effects, including clothing, for the bankrupt and his or her relatives and dependants (to a maximum value set at the discretion of the Official Assignee); and a motor vehicle, up to the value of $5,000.

4.6 To facilitate the operation of this type of clause, it may be necessary to put in place some kind of disputes resolution mechanism (eg, recourse to a court or other arbitrator), to address disputed value, if a maximum value is prescribed in the Act, or to prescribe a discretionary value, if the Insolvency Act approach was taken.

4.7 A possible wrinkle in this approach is the problem of what to do when what would otherwise be a protected or prohibited item is the very item that has been financed. In the Nova Scotia example reproduced above, the reference to "furniture, household furnishings and appliances" is all-inclusive, up to the specified value, and the same for a motor vehicle. It would, we think, be necessary to exclude from such a clause the financed item, since the alternative may be expected to inhibit the provision of finance for the very types of goods for which it is most often used.

4.8 We think that this would not be inconsistent with the nature of the problem being targeted by such a clause, which we understand to be not the seizure of financed items, to recover costs on a failed contract, but the taking of personal items of low monetary but high sentimental or personal value, such as children's items, to oppressively motivate credit contract compliance.

4.9 National MP Peseta Sam Lotu-Iiga's Moneylenders (Licensing and Regulation) Bill 2011, which is currently in the members' ballot, proposes to limit what may be taken as security, as opposed to repossessed. However, it lists a number of items that may be useful in drafting a clause of this kind, based on his understanding of what is happening in practice in his electorate:

(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.

Q6 Do you support adopting the Canadian approach in New Zealand, which prohibits certain items from being taken? Why?

Q7 Would the proposed prohibited items from the Moneylenders (Licensing and Regulation) Member's Bill be useful inclusions in a new clause of this kind?

Variable or revolving credit

4.10 The Hire Purchase Act 1971 had a provision relating to variable credit agreements, which constrained the taking of possession of goods in some circumstances, without leave of the court:

> **25 Successive agreements and agreements financed through variable credit accounts**
>
> (1) Where goods have been disposed of under a hire purchase agreement, and, at any time before the total amount payable under that agreement has been paid the vendor makes a further hire purchase agreement with the purchaser which relates to the whole or part of the goods comprised in the earlier agreement, with or without additional goods, then the vendor shall not, without the leave of the Court, exercise any power of taking possession of goods comprised in either agreement.
>
> (2) Where goods are disposed of under a hire purchase agreement and credit is extended through a variable credit account then, unless that account relates for the time being only to that agreement, the vendor shall not, without the leave of the Court, exercise any power of taking possession of the goods comprised in the agreement.
>
> (3) On hearing any application for the leave of the Court under subsection (1) or subsection (2) of this section, the Court may make such order as it thinks fit, including an order for the specific delivery of some of the goods to the vendor and for the transfer to the purchaser of the vendor's title to the remainder of the goods, and any order under this subsection may be made subject to the fulfilment by the purchaser or a guarantor of such conditions as the Court thinks just.
>
> (4) The Court may postpone the operation of any such order on condition that the purchaser or any guarantor pays the unpaid balance of the total amount payable at such times and in such amounts as the Court, having regard to the means of the purchaser and of any guarantor, thinks just.
>
> (5) Every vendor who acts in contravention of subsection (1) or subsection (2) of this section commits an offence against this Act.

4.11 This has not been reproduced in either the Credit (Repossession) Act, or the Credit Contracts and Consumer Finance Act 2003, which repealed the above provision. We are not sure why this is the case, and wonder whether a redrafted provision of this kind may offer some benefit, in the context of the escalating use of variable or revolving credit arrangements, by way of store finance cards.

4.12 Prior to 2005, we understand that it was not worthwhile for finance companies to offer revolving credit, because of the above provision. However, this is now a real feature of consumer finance, with store finance cards being issued in the guise of conventional hire purchase, that are in fact revolving credit facilities. Under the contractual terms and conditions, any items purchased with the card may be repossessed in some cases, even once that portion of the debt has been repaid.

Q8 Should a provision similar to section 25 of the Hire Purchase Act 1971, relating to variable credit, be reintroduced?

PROTECTING DEBTORS: GAPS IN OUR ACT?

Default interest, and voluntary return of goods

4.13 Default interest is one of the many issues that straddle the original credit contract process, and the repossession process. Some of the difficulties with the way in which default interest is currently assessed may be dealt with by strengthening the provisions that relate to the ability of the debtor to return goods.

4.14 Under section 39 of the Credit Contracts and Consumer Finance Act 2003, there is a limit on interest charges of one year's annual interest. However, that does not prevent the accrual of default interest charges in accordance with the consumer credit contract and section 40, "in the event of a default in payment and while that default continues".

4.15 Remedies available to a debtor in such circumstances are quite limited, the principal one being to seek reopening of an oppressive contract under the Credit Contracts and Consumer Finance Act 2003,[34] on the grounds that a party has exercised a power in an oppressive manner. That would require them to go to court.

4.16 We therefore invite submissions on what remedies ought to be available to a debtor in these circumstances.

4.17 First, provisions for voluntary return of goods in sections 36A and 36B of the Credit (Repossession) Act might perhaps be strengthened. Under section 36A(1), voluntary return is provided for, but a debtor's right of return either must be provided for under the terms of their finance agreement, or requires the creditor's agreement. This is, potentially, another way in which, in the event of default and accrual of substantial charges, debtors could themselves take the initiative to bring proceedings to a halt. Does there need to be provision *requiring* creditors to accept the return of goods, thus triggering the operation of Part 4 of the Act, in the same way as if goods had been repossessed?

4.18 Another suggestion was to provide that if there is any break in the statutory sequence of a repossession – in other words, breaches of the prescribed timeframes – a portion (for example, all interest, or default interest) would be wiped off the debt. This would be a much more robust remedy for breach than the current remedies, that would not require recourse to court, and it might be expected to act as a substantial disincentive. It would be consistent with the approach already taken in the limited context of section 24 of the Act, which addresses the opposite problem: selling repossessed consumer goods too quickly.[35]

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

35 Section 24 of the Credit (Repossession) Act provides that if a creditor sells consumer goods within 15 days of issuing a post-possession notice, the liability of the debtor for anything other than the advance under the security agreement is extinguished.

Q9 Should provisions for the voluntary return of goods, in sections 36A and 36B of the Act, be strengthened, by requiring creditors to accept the return of goods for resale?

Q10 Is there support for a provision modelled on section 24, wiping a portion off the debt, if prescribed timeframes have been breached? Why?

More robust protection from harassment

4.19 Some jurisdictions have provisions that set out and prohibit particular forms of harassment of debtors. For example, section 114 of the Business Practices and Consumer Protection Act (British Columbia) provides:[36]

> **Harassment**
>
> 114
>
> (1) A collector must not communicate or attempt to communicate with a debtor, a member of the debtor's family or household, a relative, neighbour, friend or acquaintance of the debtor, or the debtor's employer in a manner or with a frequency as to constitute harassment.
>
> (2) Without limiting subsection (1), one or more of the following constitutes harassment:
>
> (a) using threatening, profane, intimidating or coercive language;
>
> (b) exerting undue, excessive or unreasonable pressure;
>
> (c) publishing or threatening to publish a debtor's failure to pay.

4.20 This is supplemented by a provision about permissible times of communication, and provisions making communication with persons other than the debtor, or the debtor's employer, subject to conditions: sections 116 to 118.

4.21 Section 4 of the Consumer Creditors' Conduct Act (Nova Scotia) has rules of conduct that also prohibit certain specific forms of harassment (emphasis added):[37]

> **Rules of conduct**
>
> 4 No creditor shall
>
> (a) collect or attempt to collect money without first being satisfied that the money is owed by the borrower to the creditor;
>
> (b) make any charge against a borrower in addition to those contained in the agreement with that borrower or in a cost of borrowing statement furnished to the borrower;

36 Business Practices and Consumer Protection Act SBC 2004 c 2.

37 Consumer Creditors' Conduct Act RSNS 1989 c 91.

(c) send any telegram or make any telephone call for the purpose of demanding payment, if the charges are payable by the addressee or the person to whom the call is made;

(d) communicate with a borrower after the borrower has notified him in writing to communicate with the designated legal adviser of the borrower;

(e) use, without lawful authority, any summons, notice or demand, or other document, expressed in language of the general style or purport of any form used in any court in the Province, or printed or written or in the general appearance or format of any such form;

(f) *in any way abuse or intimidate a borrower either orally or in writing to induce the borrower to pay money or to deliver up possession of property;*

(g) *make telephone calls or personal calls or written communications of such nature or with such frequency as to constitute harassment of the borrower, his spouse or a member of his family;*

(h) *make telephone calls or personal calls (i) on a Sunday or (ii) on any other day except between the hours of eight o'clock in the forenoon and nine o'clock in the afternoon, for the purpose of demanding payment of money or possession of property;*

(i) give by statement, expressly or impliedly, directly or indirectly, any false or misleading information to any person that may be detrimental to a borrower, his spouse or a member of his family;

(j) contact or threaten to contact the employer of a borrower, his spouse or any member of his family, and give information that may adversely affect the employment or employment opportunities of the borrower, his spouse or any member of his family;

(k) while attempting to collect money or get possession of property, falsely hold himself out as a police officer, sheriff or deputy sheriff.

4.22 At present, the Credit (Repossession) Act provides that a creditor must not enter premises in an unreasonable manner, or at a prohibited time.[38] People with certain types of convictions are disqualified from repossession.[39] There is nothing in the Act about harassment (in the context of repossession, or more generally), and no penalty for non-compliance with entry requirements, other than provision for discretionary relief if they have been breached.

4.23 National MP Peseta Sam Lotu-Iiga's Moneylenders (Licensing and Regulation) Member's Bill, in a part headed "prohibited dealings", proposes to address the harassment of borrowers, with some similarities to the overseas examples set out above. Clause 35(1) provides that it is an offence if any moneylender:

(a) displays or uses any threatening, abusive or insulting words, behaviour, writing, sign or visible representation, or causes damage to property; or

(b) commits any act likely to cause fear of physical harm to, or to disturb the sleep of his or her borrower or surety, any member of the family of the borrower or surety, or any other person, in connection with the loan of money to the borrower, whether or not the moneylender does the act personally or by any person acting on his behalf; or

38 Credit (Repossession) Act 1997, ss 14, 15.

39 Credit (Repossession) Act 1997, s 16.

(c) commits or omits any act with the purpose of preventing or deterring a borrower from seeking legal advice in connection with their indebtedness; or

…

(4) For the purposes of paragraph (a) of subsection (1), a person who—

(a) uses any threatening, abusive or insulting words in any telephone call made by him or her; or

(b) by any means sends anything which contains any threatening, abusive or insulting words, writing, sign or visible representation, whether from a place in New Zealand or outside New Zealand, to any person or place in New Zealand—

shall be taken to have committed an act referred to in that paragraph.

4.24 Clause 36, prohibited communications, provides:

(1) Any person who attempts to communicate with a borrower or guarantor by telephone, including leaving messages on any electronic recording device and any text messaging service, in connection with a request for repayment of a loan of money under a consumer credit contract, must—

(a) only do so within the hours of 7.00 am and 9.00 pm; and

(b) state their full name and the correct business name of the moneylender; and

(c) provide the telephone number used to place the call; and

(d) not discuss matters relating to the loan with any person other than the borrower or surety.

(2) No person shall place, in any publication or print or on the internet any notice or advertisement with the predominant purpose of disclosing to the public any details of a loan of money under a consumer credit contract, any default in repayment of the loan, or the identiry of any borrower or guarantor.

The Harassment Act 1997

4.25 The Harassment Act 1997 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 to the other person on at least two separate occasions within a period of 12 months. "Specified act" is defined in section 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.

4.26 There may be some overlap between this existing provision, and the proposal being explored here. However, this existing legislation does not prevent isolated incidents of abuse or intimidation, or put a blanket prohibition on communication outside specified hours, in the same way as would the models discussed above. It requires a pattern of behaviour. "Criminal harassment" as defined in section 8 of the Harassment Act, also requires an intention to cause the person to fear for their safety; whereas in the credit repossession context, the intention is likely to be focused on eliciting payment. ("Civil harassment" does not have this requirement, but would require application to court for a restraining order, to be enforced.)

4.27 We think that there may also be an advantage in defining harassment in the Credit (Repossession) Act, rather than requiring reference to the Harassment Act, so that all relevant provisions about the scope of permissible behaviour are co-located. However, the more important point is the substantive differences between the two types of approaches. In short, if there are concerns about harassment in the credit repossession context, we doubt that the Harassment Act provides a full answer to them.

Q11 Should New Zealand have 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? If so, what particular kinds of harassment should be prohibited (eg, might sexual harassment be an issue, as well as intimidation)?

Protection for equity in consumer goods

4.28 Almost all the jurisdictions we reviewed 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. New Zealand lacks such a provision.

4.29 The amount of equity varies. The most common approach seems to be when the amount owing is less than 25% of the amount of credit provided – ie, three-quarters of the debt has been paid.[40]

4.30 For example, under section 91 of the National Consumer Credit Protection Act 2009 (Aus), a credit provider must not, without the consent of the court, take possession of mortgaged goods if the amount currently owing under the credit contract is less than 25% of the amount of credit provided under the contract, or $10,000, whichever is the lesser. However, the restriction does not apply if the credit provider believes on reasonable grounds that the debtor has removed

40 Yukon Consumer Protection Act RSY 2002 c 40, ss 49, 57; Northwest Territories Consumer Protection Act RSNWT 1988 c C-17, ss 60, 67; Manitoba Consumer Protection Act CCSM c C200, s 44.

or disposed of the mortgaged goods, or intends to do so, or that urgent action is necessary to protect the goods. If this provision is breached, the regulated agreement shall terminate, and the debtor shall be released from all liability and shall be entitled to recover from the creditor all sums already paid: section 91.

4.31 Section 90 of the Consumer Credit Act 1974 (UK) applies when the debtor has paid to the creditor one-third or more of the total price of the goods:

> **90 Re-taking of protected hire-purchase, etc goods**
>
> (1) At any time when —
>
> (a) the debtor is in breach of a regulated hire-purchase or a regulated conditional sale agreement relating to goods, and
>
> (b) the debtor has paid to the creditor one-third or more of the total price of the goods, and
>
> (c) the property in the good remains in the creditor,
>
> the creditor is not entitled to recover possession of the goods from the debtor except on an order of the court.

4.32 Quebec and Ontario have the same kind of provision when, respectively, one-half, or two-thirds, has been paid.[41]

Q12 Should New Zealand consider a provision, requiring consent of a court or other enforcement agency for repossession, when the amount of the debt owing has been reduced? If so, which of the Australian and United Kingdom models (the United Kingdom one being slightly simpler, with no proviso) is preferred, and what should the threshold be (eg, less than 25% owing, or a larger amount)?

A good faith requirement?

4.33 The Act already, in a number of ways, gives some indications of what amounts to unethical or oppressive conduct, which it then regulates (for example, by prohibiting entry of a residence outside certain hours).

4.34 One of the requirements for creditors, on repossession and sale of goods, is to act in a "commercially reasonable" manner: section 26.

4.35 Alberta, in addition, has a good faith requirement. Section 66(1) of the Personal Property Security Act provides for the proper exercise of rights, duties and obligations under a security agreement, as follows:[42]

> All rights, duties or obligations arising under a security agreement under this Act or any other applicable law shall be exercised or discharged in good faith and in a commercially reasonable manner.

41 Quebec Consumer Protection Act RSQ c P-40.1, s 142; Ontario Consumer Protection Act SO2002 c 30, s 25.

42 Personal Property Security Act RSA 2000, c P-7.

4.36 "In good faith" is undefined. One of the problems of leaving it undefined is that what constitutes a lack of good faith, thus breaching the requirement, is a matter for interpretation.

4.37 One possible way of fleshing out a good faith requirement would be to provide, in legislation, for the development of an industry code of ethics. As noted earlier in this paper, the Financial Services Federation has issued guidelines for responsible lending, which is a brief code, of a kind.

4.38 However, other industries have established more rigorous examples, provided for in legislation, developed by an industry body, and formally promulgated: see, for example, the Building Amendment Bill (No 3) currently before the House, that would introduce a code of ethics for licensed building practitioners; the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009; and the Private Security Personnel and Private Investigators Act 2010, section 115 of which provides that the Governor-General may, from time to time, by Order in Council made on the recommendation of the Minister, make regulations prescribing codes of conduct for licensees or certificate holders.

Q13 Should a good faith requirement be introduced in New Zealand? If so, would a broadly drafted provision suffice, like Alberta's, that simply requires lenders to act in good faith, or would more detail be required to make it work?

Q14 What are your views on a code of ethics for the lending industry, analogous to the real estate agents', builders', and private investigators' examples?

MORE PROTECTION FOR CREDITORS?

4.39 If the Act was to be further amended, to better protect debtors' rights, should there be any sort of quid pro quo (with a view to balance) for creditors? If so, what are the gaps?

4.40 One possible example from overseas is the Consumer Protection Act (North Western Territories), which provides for cases in which the debtor has acted in bad faith by persistent default, or evading repossession:[43]

> 62(1) Where a buyer has persistently defaulted on his or her obligations under the time sale agreement or master agreement in question, or has deliberately evaded repossession of the goods, the Supreme Court, on the application of the seller, may deprive the buyer in whole or part of the protection of sections 44, 57 [rights of buyer on seizure for non-payment, including redemption period and seizure notice], 58 [similar to 57, for seizures for reasons other than default in payment] and 60 [leave requirement when less than 25% owing].

43 Consumer Protection Act RSNWT 1988, c C-17.

4.41 Better protection for lenders, in cases of bad faith, may also assist in protecting debtors as a class, by removing any perceived justification for operating oppressively in general, as a safeguard against whatever proportion of cases do demonstrate deliberate evasion or persistent default by a consumer.

Q15 Are there gaps or problems with the Credit (Repossession) Act, from creditors' point of view?

Q16 What are your views on the North Western Territories provision, under which a debtor may be penalised for acting in bad faith? Should New Zealand introduce a provision of this kind?

Chapter 5
Remedies

SUMMARY

The chapter considers remedies for breaches of the Credit (Repossession) Act. The coverage of these is less than complete, and the chapter addresses options for amending and strengthening them.

5.1 Some strengthening of the remedies available for breaches of the Act was an idea generally supported in submissions on the Ministry of Consumer Affairs' discussion paper, with some patchy opposition.[44] The Act provides for a range of remedies, from offences and penalties in some circumstances, to the discretionary grant of relief, or forfeiture of interest. However, their coverage is less than complete, and as such, they are unlikely to be fully effective.

CURRENT LAW Breaching pre-possession and repossession requirements

5.2 Breaching pre-possession requirements is an offence with a maximum penalty of a $3,000 fine.[45] If a creditor has served a pre-possession notice on the debtor or taken possession of consumer goods in contravention of the Act, the debtor may apply to court for relief.[46]

5.3 Under section 13 of the Credit (Repossession) Act:

> **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.

44 Ministry of Consumer Affairs, above n 20.

45 Credit (Repossession) Act 1997, s 11.

46 Credit (Repossession) Act 1997, s 12.

(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.

5.4 Rules around the exercise of entry powers for the purposes of repossession are set out in Part 3 of the Act.

5.5 There is no offence for non-compliance with the requirements of sections 14 (must not enter premises in an unreasonable manner), 15 (must not enter at a prohibited time), 17 (documents to be produced on entry) and 18 (entry if occupier not present). However, a debtor may apply for discretionary relief, if the creditor has taken possession in breach of the Act (one example of which would presumably be unreasonable exercise of entry powers).

5.6 The discretion conferred on a Court under section 13 is broad: such relief as is reasonable, on such terms as it thinks fit.[47] Depending how it is used, it could be a powerful sanction; potentially, it could be used to void the credit contract, for example.

5.7 However, it is not clear why an offence exists for breach of a pre-possession requirement, but not a repossession one. The effect of this is that repossession agents are relatively protected, with liability for breach focused on the creditor. This may or may not be the right policy response.

5.8 By contrast, it is an offence for debtors to obstruct the lawful taking of possession. However, because they are not always in the best position to understand what is or is not lawful, they may be at some disadvantage.

Post-possession procedure

5.9 Post-possession procedures are provided for in Part 4 of the Act. It is a process intended to support the rights of debtors, by putting them on alert as to the likely sale price of the goods, so they can make decisions about whether to try to reinstate the agreement or allow the sale to proceed, try to find a cash buyer on their own initiative, or obtain their own valuation as a basis for assessing whether sale has been conducted according to the "commercially reasonable" requirement.

47 See also Credit (Repossession) Act 1997, s 40, which provides that a Disputes Tribunal has jurisdiction to exercise the powers conferred on a court by any of the provisions of this Act if the amount of the order sought is not more than $3,000.

5.10 The only penalty at present for an incomplete or non-completed post-possession procedure is some relatively minor changes to the liability of the debtor. For example, if a post-possession notice is not issued, the costs of taking possession fall on the creditor, or if goods are sold too early, the debtor's liability for anything other than the advance under the security agreement is extinguished (ie, interest and fees are wiped).[48]

5.11 There is no penalty for failure to issue a statement of account: section 33. If no statement is received and there is no ability to force the creditor to provide this information, then the consumer has no way of knowing whether any surplus (to which he or she would be entitled) exists.

5.12 We consider that in the context of post-possession breaches in particular, there seem to be significant gaps in the Act.

Q17 Do you have any comments on the adequacy of post-possession remedies? Do you agree with our preliminary view, that there seem to be some gaps in this part of the Act?

POSSIBLE NEW REMEDIES

5.13 One option for an additional remedy has already been discussed in chapter 4: a proposal to wipe interest and charges, for delays in the repossession process.

5.14 If it was agreed that further changes to the remedies are required, there are several possible approaches:

- changes to the existing provision for relief, in section 13;
- amendments to offence provisions, to make existing offences more robust, and establish new ones;
- make breaches of the Act a factor that may be considered, in deciding to deregister a financial services provider.

Changes to the relief provision

5.15 At present, relief under section 13 of the Credit (Repossession) Act is available only when the Act has been breached, and only for breaches of pre-possession and repossession requirements.

5.16 One amendment suggested in the earlier discussion paper was provision 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.

5.17 Another option would be expansion of the scope of the relief provision, to post-possession.

48 Credit (Repossession) Act 1997, ss 22, 24.

5.18 A third might be to remove the discretionary element of it for unlawful action, so that a court must grant relief in those circumstances. Relief for lawful actions could remain discretionary.

> Q18 What are your views on the three options set out, for possible changes to the relief provision? If you consider that change is required, can you give examples of ways in which the current provision is less than ineffective?

Australia

5.19 Our relief provision, as set out above in section 13, is wholly discretionary: a court may "grant such relief … as is reasonable … 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".

5.20 Australia, by contrast, makes provision for two specific types of relief. Under section 108 of the National Consumer Credit Protection Act 2009, the mortgagor may apply to regain possession of mortgaged goods, if possession has been taken in breach of the Act, even though their default on the credit contract has not been remedied. Under section 110, the court may then make ancillary or consequential orders it considers appropriate, for example, orders to restore the parties to the position they were in before the wrongful taking of possession, or an order that the mortgagor be paid compensation for any damage to the goods because of the taking of possession.

5.21 There is a further penalty-focused provision in section 111, which (depending on the circumstances) allows for a substantial fine. It contains a list of key disclosure and other requirements, and provision for a party to a credit contract or a guarantor or the Australian Securities and Investment Commission to apply to the court for a declaration as to whether a key requirement has been contravened, and an order for payment of "an amount" as a penalty (the amount is discretionary, and determined by reference to a list of considerations). If application is made by a debtor or guarantor, a ceiling is set on the amount of the penalty of all interest charges payable under the contract, although the court may impose a greater penalty if satisfied that the debtor suffered a loss. On application made by a credit provider or the Australian Securities and Investment Commission, the maximum penalty is $500,000.

5.22 We think that a key difference between the Australian approach and New Zealand's is that it is more specific about types of relief, whereas our own section 13 is completely open-ended.

> Q19 Do you think that the Australian approach is likely to be more, or less, effective than New Zealand's, in being more specific about the types of remedy?

Invalidation

5.23 Another option mentioned in passing in the Ministry of Consumer Affairs' paper for breaching the Act's requirements was invalidation, presumably of the part of the process that had been incorrectly conducted.[49]

5.24 If invalidity was to be provided for, depending on the timing of when the invalidity was discovered, the practical consequences of that would presumably differ, and might not be straightforward. For example, could an invalid pre-possession be corrected simply by redoing the process, properly? In the event of an invalid repossession, would the goods be returned to the debtor, and would that just then reinstate the security agreement? What would then happen about correcting the default? What if the goods had been sold? How would the debtor be compensated? Would they be entitled to a full refund of all monies paid (restoring them to their position pre-purchase), or the amount recovered on resale (as an estimate of the lost item's worth)? Who would enforce all of this?

5.25 Invalidation, at least superficially, sounds as if it would be an option with real meaning for creditors, with good potential to act as a disincentive. The Australian section 108 has some similarities, and might be used as a model, under which the kind of matters outlined above are simply left to the discretion of the court.

5.26 On the other hand, to make such an approach work, it would require recourse to the court (or other tribunal) to enforce. Although the existing provision for relief in section 13 is silent, it is also sufficiently broad to already encompass an invalidation power, if the court thought fit. It might, therefore, be doubtful whether there is any real advantage in making it more explicit.

Q20 Do you think that there is any merit in separate provision for invalidation, given the current scope of the existing relief provision? If so, why?

Offences

5.27 Non-compliance with the Act's pre-possession requirements is currently an offence for the creditor.[50] There are no offences relating to breaches of repossession or post-possession requirements, for reasons that are unclear. One effect of this is that repossession agents will not be held personally liable, for breaches of repossession requirements.

5.28 It may be doubtful whether, for creditors, proliferating offence provisions in this Act is really likely to operate as an effective deterrent. Other types of measures may be more likely to do so.

5.29 However, if that were the case, the same is surely true in the pre-possession context, which might suggest that the current section 11 offence, for breaching pre-possession procedural requirements, with a maximum penalty of a $3,000 fine, should simply be removed.

49 Ministry of Consumer Affairs, above n 20.

50 Credit (Repossession) Act 1997, s 11.

Q21 Is the pre-possession offence in section 11 effective? Should anything be done to make it more effective? Should there be similar offences for repossession and post-possession breaches?

Q22 Alternatively, should offences targeted at creditors be abandoned, and (perhaps amended) provision for relief relied upon instead, as a more effective deterrent?

Q23 Should repossession agents be personally liable, for breaches of the Act? Or is the status quo appropriate, where liability rests on the creditor?

Financial service providers' registration

5.30 Another option, perhaps in addition to strengthened or altered relief provision in any or all of the ways suggested above, may be to make breaches of the Credit (Repossession) Act an aspect of the licensing of creditors, for which their registration under the Financial Service Providers (Registration and Disputes Resolution) Act 2008 could be removed.

5.31 This would not be a matter with which a court could deal under the existing relief provision. Under section 18 of the Financial Service Providers' Act, deregistration is a matter for the Registrar of Financial Service Providers (appointed under section 35 of the Act).

5.32 Under this option, a finding of 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. The exercise of the discretion might be dependent on factors such as the significance and frequency of the breach.

5.33 It 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.

5.34 Under clause 22 of National MP Peseta Sam Lotu-Iiga's Moneylenders (Licensing and Regulation) Bill, which proposes a Registrar of moneylenders, responsible for licensing them, and certifying their employees, the Registrar may revoke a licence or certificate, or suspend it for such period as he or she considers appropriate, if the lender among other reasons:

> (ii) has entered into a consumer credit contract for the loan of money, which has subsequently been reopened by the District Court
>
> …
>
> (iv) is conducting or has conducted his or her business of money lending in an improper or unsatisfactory manner.

5.35 As discussed earlier in the paper, Mr Lotu-Iiga's Bill provides that "money lending means the giving of a loan of money under a consumer credit contract", as defined in the Credit Contracts and Consumer Finance Act 2003. It therefore has some overlap with the existing Financial Service Providers (Registration and Disputes Resolution) Act 2008 requirement for registration of a "financial service provider", meaning a person who provides or offers to provide a "financial service", which includes providing credit under a credit contract.

5.36 However, that existing requirement does not currently involve any sort of qualitative assessment of the fitness of a provider, or provision for registration to be revoked on the kinds of grounds discussed above. It could be amended to achieve this.

Q24 Do you agree 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 2008? Why?

Chapter 6

Independent regulatory oversight

SUMMARY

The chapter considers different methods of independently scrutinising the lending industry, and overseeing their repossession activities.

LICENSING LENDERS AND THEIR REPOSSESSION AGENTS

Licensing lenders

6.1 As discussed in the close of the previous chapter, the existing Financial Service Providers (Registration and Disputes Resolution) Act 2008 requires registration of a "financial service provider", meaning a person who provides or offers to provide a "financial service". This includes providing credit under a credit contract. However, that existing requirement does not currently involve any sort of qualitative assessment of the fitness of a provider.

6.2 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).

Q25 Should the Financial Service Providers (Registration and Disputes Resolution) Act 2008 require any sort of qualitative assessment of the fitness of a financial service provider? Should such a requirement address only consumer credit providers (who offer one particular type of financial service), or all financial service providers?

Licensing repossession agents

6.3 There is currently no liability on a creditor or their agent, if an employee carrying out repossessions is disqualified under section 16 of the Credit (Repossession) Act (for example, because they have certain types of criminal convictions). Persons disqualified under section 16 may not be aware of the restriction and unwittingly commit an offence, which is unfair on them too.

6.4 One possible option to address this is a licensing requirement. This would be additional to the option discussed above for lenders, and would be compulsory for all those who carry out repossessions under the Act. (So-called 'police vetting' of repossession agents is another option, but would normally in any event go hand in hand with a separate licensing requirement.)

6.5 There are two existing models for this.

6.6 First, the Private Security Personnel and Private Investigators Act 2010 requires a range of persons to whom the Act applies to hold licences (including a private investigator, a confidential document destruction agent, a property guard, and a security consultant). The Act establishes a Licensing Authority to administer this requirement. Rather than a 'police vetting' requirement, there is provision for the police to object, having been served with notice of an application.

6.7 Part of the rationale seems to be about ensuring the veracity of persons whose occupation habitually takes them into premises owned by others. From that perspective, it would arguably have similarities to credit repossession. Indeed, such a requirement having been established in the commercial context, it may seem anomalous not to require the same, for entry to private residences.

6.8 The other model is the Secondhand Dealers' and Pawnbrokers' Act 2004. It requires secondhand dealers and pawnbrokers to be licensed in accordance with a statutory process. Part 4 establishes a Licensing Authority. The police certify the record of the applicant, then a licence is separately issued (presumably because police did not want to be the licensing agent, as opposed to just doing the vetting).

6.9 Another option is simply to treat 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 license). De facto, that would put an onus on the creditor to get it right, without need for further provision, and reduce the administrative burden involved in such a scheme.

6.10 Alberta, which licenses both civil enforcement agencies and their bailiffs, is discussed below. We also note that Mr Lotu-Iiga's Member's Bill, as well as a registration requirement for money lenders, would require certification of "persons engaged by" them, including persons acting as repossession agents.[51]

Alberta

6.11 In Alberta, both civil enforcement agencies, which are tasked with carrying out repossessions, and bailiffs employed by those agencies, must be authorised by the sheriff, on behalf of the Crown.

6.12 Seizures are conducted by the civil enforcement agency, not the secured party; property may then be surrendered to the secured party, or their agent.[52]

6.13 The authorisation provisions are as follows:[53]

> **9(1)** The sheriff, on behalf of the Crown, may enter into an agreement with a person under which that person is authorized to operate a civil enforcement agency for the purpose of performing the following functions:
>
> (a) the carrying out of seizures of property pursuant to writ proceedings or the right of distress;
>
> (b) the carrying out of evictions;
>
> (c) the selling of property that has been seized pursuant to writ proceedings or the right of distress;
>
> (d) the distribution of the proceeds of sales referred to in clause (c) to persons who are lawfully entitled to those proceeds;
>
> (e) the carrying out of any other functions or duties provided for or permitted under this or any other enactment or an order of the Court.
>
> (2) In addition to authorizing a person to operate an agency, an agreement entered into under subsection (1) may contain provisions
>
> (a) setting out the terms and conditions under which an agency operates,
>
> (b) governing the suspension or cancellation of the agreement or any of the agency's operations,

51 Clause 6 of the Moneylenders (Licensing and Regulation) Bill 2011 would provide:

> **6 Certifying persons engaged by moneylenders**
>
> (1) Every person … must hold a certificate, if he or she—
>
> (a) with the authority of the moneylender, negotiates or concludes a loan of money under a consumer credit contract on behalf of the moneylender; or
>
> (b) with the authority of the moneylender, acts as a repossession agent of the moneylender to enforce a loan of money under a consumer credit contract; or
>
> (c) manages, supervises or controls any person, who, with the authority of the moneylender, negotiates or concludes a loan of money under a consumer credit contract on behalf of the moneylender or acts as a repossession agent for the moneylender exercising rights under a consumer credit contract for the loan of money.

52 Personal Property Security Act RSA 2000 c P-7, s 58(1). Court-sanctioned entry is a further requirement in Alberta, in the case of a residence of a debtor or other person. A bailiff shall not enter except in the presence of an adult who lives in the residence, enter after entry has been refused, or enter using force to gain access, unless authorised by court order: Civil Enforcement Act RSA 2000 c C-15, s 13(2).

53 Civil Enforcement Act RSA 2000 c C-15.

(c) governing the rights and powers of the sheriff respecting access to and the search of any locations and premises of the agency and the removal of any property from that location or those premises, and

(d) governing any other matter respecting the authorization to operate the agency or the operations of the agency.

10(1) The sheriff may appoint an individual as a civil enforcement bailiff to carry out, subject to any restrictions or conditions contained in the appointment,

(a) the seizure of personal property,

(b) the removal of seized personal property,

(c) evictions, and

(d) any other functions or duties provided for or permitted under this or any other enactment.

(2) The Court shall not authorize any person who is not a bailiff to carry out the functions of a bailiff referred to in subsection (1)(a), (b) and (c).

Under section 12, a bailiff shall only carry out the duties or functions of a bailiff if the bailiff is employed by an agency or is otherwise under contract to an agency to provide bailiff services on behalf of the agency

6.14 These are backed by an offence provision, for purporting to act under non-existent authority.[54]

6.15 The Alberta requirement for repossessions to be conducted by an authorised civil enforcement agency adds a further layer, over and above the idea of licensing or authorising bailiffs.

6.16 We did not find any other examples of such an approach in any other jurisdiction.

Q26 Do you think that repossession agents need to be licensed? If yes, are your views on this affected by whether licensing of lenders is also introduced (ie, might the latter approach offer an acceptable substitute, if the conduct of agents used by those lenders was a relevant factor)?

OVERSIGHT OF ENTRY

6.17 Both Australia and the United Kingdom require independent authorisation, before entry of a residence to repossess consumer goods can occur. In the United Kingdom, under the Consumer Credit Act 1974 (UK), section 92 provides that a creditor or owner shall not be entitled to enter any premises to take possession of goods subject to a regulated hire-purchase agreement, regulated conditional sale agreement or regulated consumer hire agreement except under an order of the court.

54 Civil Enforcement Act RSA 2000 c C-15, s 15(1).

6.18 Under section 99 of the National Consumer Credit Protection Act 2009 (Aus) a credit provider, or an agent of a credit provider, must not enter any part of premises used for residential purposes for the purpose of taking possession of mortgaged goods under a goods mortgage unless the court has authorised the entry; or the occupier of premises has, after being informed in writing about section 99, consented in writing to the entry. Regulations may provide procedures for obtaining and giving consent.

6.19 One aspect of real value in such an approach is that it could better support the police in their oversight of credit repossession. Potentially, legislation might provide that in the absence of such authorisation, entry onto property is deemed a trespass, allowing police to intervene. Court-authorised entry could offer an extra layer of surety for all parties – albeit one that would come at some cost.

6.20 If such a requirement was to be introduced in New Zealand, it was suggested that a Justice of the Peace or other judicial officer could be used; establishment of a new formal authority, or the involvement of a "court" would not necessarily be required, although the latter is the practice in both Australia and the UK.

6.21 The number of repossessions would need to be considered, and resource implications assessed, before this could be finally determined.

6.22 When proposed in 2009 by the Ministry of Consumer Affairs, this kind of safeguard was supported by spokespeople on behalf of consumers, but opposed by banks, finance companies and other lending industry spokespeople, who thought it would not be feasible. They said that quick action could be required, especially where the repossession ground relied upon is that consumer goods are 'at risk'.

6.23 In response to that particular objection, one option, if a warrant requirement was introduced, may be to provide for an exception when the goods are at risk, as there is currently for the pre-possession notice procedure: section 8(2) of the Act.

Q27 What are your views on the pros and cons of a court-ordered entry requirement? If you do not support such a requirement, why not? Why is the New Zealand context different from those in Australia and the United Kingdom?

Q28 Should a court take this role, or some other authority? If another authority, who would you suggest?

Contractual entry right

6.24 We note that, if a requirement for court-ordered entry was to be introduced, this would necessitate further consideration of the current right of entry, which is not conferred by the Credit (Repossession) Act, but is a private contractual matter, under the security agreement.

6.25 The Credit (Repossession) Act is unusual in this regard. In other credit legislation, right to enter is conferred by the Act, and this may be an issue that should, in any event, be addressed.

6.26 However, it would certainly need to be addressed, if the entry right was to be subject to some sort of leave requirement.

Q29 Should the right of entry to residential premises remain contractual, or be conferred by the Credit (Repossession) Act?

OVERSIGHT AND DISPUTES RESOLUTION GENERALLY

6.27 The Ministry of Consumer Affairs already provides some advisory facility, to assist debtors in oppressive circumstances, by advising them of their rights and remedies, and facilitating the smoother resolution of some disputes, or the intervention of others such as the Commerce Commission.

6.28 That facility is triggered by a free-phone hotline, which community support services (such as Community Law Centres, for example) can use when confronted with difficult lending problems, which include credit repossession issues. That obtains access to the Ministry's five consumer advisers, based in Auckland, Wellington and Christchurch. However, the only public access is via those community support services. Consumer advisers are also not empowered to oversee and intervene in particular cases; their role is primarily reactive and facilitative.

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

6.29 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 District Court; or perhaps, going forward, by utilising the newly commenced dispute resolution procedures in the Financial Service Providers (Registration and Disputes Resolution) Act 2008. There is, however, no systemic oversight.

6.30 The Financial Service Providers (Registration and Disputes Resolution) Act requires financial service providers to be registered. In order to be registered, they are generally required to be members of a dispute resolution scheme (including an industry-funded "reserve scheme"), if they provide financial services to retail clients.[55] As such, they may be the subject of a complaint; and this disputes resolution scheme is offered free of charge.[56] "Financial service" includes providing credit under a credit contract.[57]

6.31 Information will be collated about complaints. However, it is a little early to be able to draw on this information, or to otherwise assess how the new legislation is operating. The relevant parts of it commenced on 16 August 2010,[58] and awareness of this new service is not high.

Q30 What are your views on the likely efficacy of the Financial Service Providers (Registration and Dispute Resolution) Act 2008? Do you think it will make a difference, to any problems currently being experienced?

Commerce Commission role?

6.32 Another option previously proposed by the Ministry of Consumer Affairs was that the Commerce Commission could be given responsibility for enforcement of the Act and oversight of its operation.[59] This was generally supported, with a fraction less support for the Commerce Commission as the responsible authority.

6.33 In Australia, the analogous Act is enforced by the Australian Securities and Investments Commission.[60] The United Kingdom has monitoring and enforcement of their legislation by the Office of Fair Trading.[61] The New Zealand Commerce Commission proposal would be, therefore, similar to the models adopted in these jurisdictions, the United Kingdom in particular.

6.34 At present, the Commerce Commission has a very limited function in relation to credit providers. Its role is limited to ensuring their compliance with the Fair Trading Act (ie, ensuring their representations are not false or misleading), and enforcing 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

6.35 We note that, if the Credit (Repossession) and Credit Contracts and Consumer Finance Acts were to be merged, as discussed in chapter 3, one corollary is that the Commerce Commission would take on the function of enforcing the whole (former) Credit (Repossession) Act, by virtue of other existing provisions in the Credit Contracts and Consumer Finance Act.

55 Financial Service Providers (Registration and Disputes Resolution) Act 2008, ss 3, 48.

56 Ministry of Consumer Affairs, http://www.consumeraffairs.govt.nz/for-consumers/how-to-complain/financial-service-providers-disputes-resolution (last accessed 22 June 2011).

57 Financial Service Providers (Registration and Disputes Resolution) Act 2008, s 5.

58 Financial Service Providers (Registration and Disputes Resolution) Act 2008, s 2.

59 Ministry of Consumer Affairs, above n 20.

60 National Consumer Credit Protection Act 2009 (Aus).

61 Consumer Credit Act 1974 (UK).

6.36 National MP Peseta Sam Lotu-Iiga's Moneylenders (Licensing and Regulation) Bill 2011 would provide for the Financial Markets Authority, established under the Financial Markets Authority Act 2011, to "promote compliance with" his proposed new Act. However, given that the brief of that Authority is financial investment markets, rather than lending markets, we think that there may be more appropriate options for enforcing Credit (Repossession) Act compliance, even if an existing authority (rather than establishing a new one) was preferred.

Q31 Do you support the Commerce Commission taking on the Credit (Repossession) Act enforcement role?

Q32 If not the Commission, who else? An existing agency, and if so, which? Or perhaps, a new industry-funded body?

Appendix

Appendix 1
Questions

CHAPTER 2 – PRINCIPLES AND SCOPE	Q1	What are your views on the nature and extent of the problems occurring with the Credit (Repossession) Act? Have you suffered, or do you know of people who have suffered, harassment or oppression in the context of a repossession? Describe and give examples of the problems.
CHAPTER 3 – THE ACT GENERALLY	Q2	What are your views, on whether the Credit (Repossession) Act currently strikes the right balance between the interests of consumers and lenders? Why?
	Q3	Do you agree that the Credit (Repossession) Act should be incorporated into the Credit Contracts and Consumer Finance Act?
	Q4	Is the Credit (Repossession) Act, in your view, so fundamentally flawed that it requires total replacement? If so, what are the policy issues (if any) that lead you to this view? What are the drafting issues?
	Q5	Are there other issues with the operation of the Credit (Repossession) Act, that our review of the Act should address?
CHAPTER 4 – BETTER PROTECTING THE PARTIES	Q6	Do you support adopting the Canadian approach in New Zealand, which prohibits certain items from being taken? Why?
	Q7	Would the proposed prohibited items from the Moneylenders (Licensing and Regulation) Member's Bill be useful inclusions in a new clause of this kind?
	Q8	Should a provision similar to section 25 of the Hire Purchase Act 1971, relating to variable credit, be reintroduced?
	Q9	Should provisions for the voluntary return of goods, in sections 36A and 36B of the Act, be strengthened, by requiring creditors to accept the return of goods for resale?
	Q10	Is there support for a provision modelled on section 24, wiping all interest and default charges off the debt, if prescribed timeframes have been breached? Why?
	Q11	Should New Zealand have 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? If so, what particular kinds of harassment should be prohibited (eg, might sexual harassment be an issue, as well as intimidation)?

Q12 Should New Zealand consider a provision, requiring consent of a court or other enforcement agency for repossession, when the amount of the debt owing has been reduced? If so, which of the Australian and United Kingdom models (the United Kingdom one being slightly simpler, with no proviso) is preferred, and what should the threshold be (eg, less than 25 % owing, or a larger amount)?

Q13 Should a good faith requirement be introduced in New Zealand? If so, would a generically drafted provision suffice, like Alberta's, that simply requires lenders to act in good faith, or would more detail be required to make it work?

Q14 What are your views on a code of ethics for the lending industry, analogous to the real estate agents', builders', and private investigators' examples?

Q15 Are there gaps or problems with the Credit (Repossession) Act, from creditors' point of view?

Q16 What are your views on the North Western Territories provision, under which a debtor may be penalised for acting in bad faith? Should New Zealand introduce a provision of this kind?

CHAPTER 5 – REMEDIES

Q17 Do you have any comments on the adequacy of post-possession remedies? Do you agree with our preliminary view, that there seem to be some gaps in this part of the Act?

Q18 What are your views on the three options set out, for possible changes to the relief provision? If you consider that change is required, can you give examples of ways in which the current provision is less than effective?

Q19 Do you think that the Australian approach is likely to be more, or less, effective than New Zealand's, in being more specific about the types of remedy?

Q20 Do you think that there is any merit in separate provision for invalidation, given the current scope of the existing relief provision? If so, why?

Q21 Is the pre-possession offence in section 11 effective? Should anything be done to make it more effective? Should there be similar offences for repossession and post-possession breaches?

Q22 Alternatively, should offences targeted at creditors be abandoned, and (perhaps amended) provision for relief relied upon instead, as a more effective deterrent?

Q23 Should repossession agents be personally liable, for breaches of the Act? Or is the status quo appropriate, where liability rests on the creditor?

Q24 Do you agree 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 2008? Why?

CHAPTER 6 – INDEPENDENT REGULATORY OVERSIGHT

Q25 Should the Financial Service Providers (Registration and Disputes Resolution) Act 2008 require any sort of qualitative assessment of the fitness of a financial service provider? Should such a requirement address only consumer credit providers (who offer one particular type of financial service), or all financial service providers?

Q26 Do you think that repossession agents need to be licensed? If yes, are your views on this affected by whether licensing of lenders is also introduced (ie, might the latter approach offer an acceptable substitute, if the conduct of agents used by those lenders was a relevant factor)?

Q27 What are your views on the pros and cons of court-ordered entry requirement? If you do not support such a requirement, why not? Why is the New Zealand context different from those in Australia and the United Kingdom?

Q28 Should a court take this role, or some other authority? If another authority, who would you suggest?

Q29 Should the right of entry to residential premises remain contractual, or be conferred by the Credit (Repossession) Act?

Q30 What are your views on the likely efficacy of the Financial Service Providers (Registration and Dispute Resolution) Act 2008? Do you think it will make a difference, to any problems currently being experienced?

Q31 Do you support the Commerce Commission taking on the Credit (Repossession) Act enforcement role?

Q32 If not the Commission, who else? An existing agency, and if so, which? Or perhaps, a new industry-funded body?