



31 August 2011

Geoff McLay
Law Commission
P O Box 2590
WELLINGTON 6011

By email: creditrepo@lawcom.govt.nz

**SUBMISSION on
Review of the Credit (Repossession) Act 1997**

Introduction

Thank you for the opportunity to comment on the Commission's issues paper. This submission is from Consumer NZ, New Zealand's leading consumer organisation. It has an acknowledged and respected reputation for independence and fairness as a provider of impartial, and comprehensive consumer information and advice.

Contact: David Naulls
Consumer NZ
Private Bag 6996
Wellington 6141
Phone: 04 384 7963
Email: david@consumer.org.nz

General comments

Consumer NZ strongly supports a review of the Credit (Repossession) Act 1997. In our view, the Act is currently weighted in favour of the lender. Consumer safeguards need to be strengthened. Oversight and enforcement of the Act also needs to rest with a central agency such as the Commerce Commission or Financial Markets Authority.

Responses to specific questions

Question 1: What are your views on the nature and extent of the problems occurring with the Credit (Repossession) Act?

1.1 The majority of complaints Consumer NZ has received about repossession relate to motor vehicles.¹ The nature of these complaints indicates there are problems with

¹ Survey research commissioned by the Ministry of Consumer Affairs indicates borrowing to finance a car purchase or vehicle repairs is a common reason for seeking finance from a third-tier lender. See *Using a third tier lender: experiences of New Zealand borrowers*, <http://www.consumeraffairs.govt.nz/legislation-policy/policy-reports-and-papers/research/Using-a-third-tier-lender-experiences-of-NZ-borrowers-2011.pdf>

lenders and repossession agents failing to comply with Act. Examples of non-compliant behaviour include:

- Vehicles being repossessed without a pre-possession notice being served. In one case, a consumer was phoned by a repossession agent who threatened to repossess her car if she did not pay the one months' arrears by the end of the week.
- Illegal penalty fees being charged after a post-possession notice was issued. One complainant alleged the lender was continuing to charge penalty fees after the good had been repossessed.

1.2 The majority of those who contact us are unsure of their legal rights and are seeking advice on what they should do. This suggests the lender has not been providing adequate information to the consumer and may not have fulfilled their legal obligations in relation to issuing pre-possession or post-possession notices.

1.3 Consumer NZ's advice service is only available to members and therefore the number of complaints we receive about repossession is not large. However, the nature of the complaints is likely to be indicative of problems in the wider community. We're aware that community law centres deal with complaints of a similar nature.

1.4 Research by the Ministry of Consumer Affairs also suggests legislative compliance is a problem in certain parts of the industry. For example, the ministry has found many "third-tier" lenders have not met legal requirements to be registered on the Financial Service Providers Register.² A low level of compliance places consumers at risk and reinforces the need for regulatory reform.

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

2.1 We believe the Credit (Repossession) Act is weighted in favour of the lender. There are very few penalties for lenders who fail to comply with the Act and no penalties at all for failure to comply with certain provisions (e.g., sections 14-18). In contrast, consumers face a significant penalty in having the goods repossessed.

2.2 A further major problem is that the Act is self-enforcing. However, consumers facing repossession are likely to be in a vulnerable position and unwilling or unable to assert their rights. Lenders may take advantage of this. Legislation needs to recognise the vulnerable position of consumers and provide adequate safeguards to ensure they are not exploited.

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

3.1 We agree it would be sensible to incorporate the Credit (Repossession) Act into the Credit Contracts and Consumer Finance Act (CCCFA).

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

² Ministry of Consumer Affairs (2011). *Third-tier Lender Desk-based Survey 2011*. Wellington, New Zealand. See <http://www.consumeraffairs.govt.nz/legislation-policy/policy-reports-and-papers/research/Third-tier-Lender-Desk-based-Research-July-2011.pdf>

4.1 Given the extent of changes needed and the preference to incorporate the Act into the CCCFA, a rewrite is preferred.

Question 5: Are there other issues with the operation of the Credit (Repossession) Act, that our review of the Act should address?

5.1 Comments on other changes are included in discussion under the relevant question.

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

6.1 We support the Canadian approach which prevents certain items from being repossessed. A list of prohibited items would assist in ensuring lenders do not take essential household goods (e.g., a fridge).

6.2 We would also like to see a clear provision in the Credit (Repossession) Act that provides a good cannot be seized unless it has been sufficiently described in the security agreement. Clauses in these agreements that give the creditor a security interest over "all the present and after-acquired property" should not be allowed. These clauses attempt to give the creditor wide-ranging rights to seize property. They bear no direct relation to the sum advanced and we believe they are unfair and oppressive.

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

7.1 The proposed prohibited items appear to be useful inclusions.

Question 8: Should a provision similar to section 25 of the Hire Purchase Act 1971, relating to variable credit, be reintroduced?

8.1 We support the reintroduction of a provision similar to that of section 25 of the Hire Purchase Act.

8.2 Variable or revolving credit arrangements are heavily promoted, particularly through store finance cards. Our research has found consumers can be given confusing information about the minimum payments required for purchases made on these cards. This is particularly the case for multiple purchases with different interest-free periods.

8.3 Some consumers can quickly get into trouble paying off their cards, with the consequent risk the goods will be repossessed. Reintroducing a provision similar to section 25 would place a greater onus on lenders to ensure they acted responsibly in, first, extending credit and, second, taking any action to repossess the goods.

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

9.1 We support strengthening provisions in sections 36A and 36B to require creditors to accept the return of goods for resale.

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

10.1 We support a provision wiping all interest and default interest if prescribed timeframes have been breached. This would provide an incentive for lenders to ensure they complied with statutory timeframes

Question 11: 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)?

11.1 We support more explicit anti-harassment provisions in the Act. The provisions proposed in the Moneylenders (Licensing and Regulation) Member's Bill appear to be sensible.

Question 12: 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)?

12.1 Provisions protecting the consumer's equity in goods are common in other jurisdictions. We believe similar provisions should be in place in New Zealand. We favour the UK approach that prevents the lender repossessing goods without a court order in situations where the consumer has paid one-third or more of the total price of the goods.

12.2 We have previously had complaints of goods being repossessed when a relatively small amount of money is outstanding. In one case, a couple had their car repossessed because the previous owner owed \$240. Legislation should recognise the equity the consumer has in the good. A requirement for lenders to seek a court order before recovering the good would go some way towards this.

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

13.1 Unless it was clearly defined, a good faith requirement may be of little benefit. "Good faith" has previously proved difficult for legislators to define. Our preference is for legislation that clearly sets out rights and responsibilities rather than relying on non-specific good faith obligations.

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

14.1 We support the development of a code of ethics for the lending industry, provided there are mechanisms for enforcement and penalties when lenders breach the code.

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

15.1 We have no specific comments to make on this question.

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

16.1 We do not support the North Western Territories provision. The Credit (Repossession) Act already contains sufficient penalties for debtors.

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

17.1 We agree that there are significant gaps in the post-possession remedies available to consumers. We support strengthening the provisions.

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

18.1 We support the options for changes to section 13. However, the changes are unlikely to overcome the main barrier to consumers seeking relief; that is, they are often in a vulnerable position and unwilling or unable to assert their rights. We therefore believe compliance and enforcement action needs to be taken by a body such as the Commerce Commission or Financial Markets Authority.

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

19.1 The provisions in Australian law for 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 may have merit. We would like to see further discussion of these options.

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

20.1 There may be merit in a separate provision for invalidation. This would make it clear to lenders that it is an option for the court.

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

21.1 In order to be effective, the offence provisions in section 11 need to be enforced. At present, this does not happen as there is no agency charged with enforcing the Act. Consumers facing repossession, for reasons discussed above, are often unlikely to take court action themselves.

21.2 As discussed, enforcement needs to be the responsibility of the Commerce Commission or the Financial Markets Authority. Fines for breaches in section 11 should be increased, commensurate with those in section 103 of the CCCFA. We also support the introduction of penalties for repossession and post-repossession offences.

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

22.1 We do not support removing the offence provisions. Offence provisions are an important incentive to ensure compliance, provided they are enforced. Removing offence provisions would also be inconsistent with other consumer legislation.

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

23.1 Repossession agents should be liable for breaches of the Act. If they are not, they have little incentive to comply with the law.

Question 24: 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?

24.1 We agree there should be repercussions for lenders under the Financial Service Providers (Registration and Disputes Resolution) Act 2008. We believe giving the Registrar of Financial Service Providers the ability to suspend or deregister lenders would provide an added incentive for them to comply with the law.

Question 25: 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?

25. 1 We support some form of qualitative assessment of the fitness of financial service providers. We agree that such a requirement may assist in "quality-controlling" financial services and act as a safeguard for consumers. For consistency, the requirement should apply to all financial service providers.

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

26.1 We believe repossession agents need to be licensed. Similar occupations (for example, towing operators) are required to be licensed and "vetted" to ensure they are "fit and proper" people. We cannot see any reason why repossession agents should be exempt from licensing requirements. Licensing of lenders would not obviate this need.

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

27.1 We support requiring independent authorisation before entry of a residence to repossess consumer goods. The requirement would act as a additional incentive for lenders to follow due process. We agree it would also provide a better basis for police intervention in cases where authorisation has not been obtained.

27.2 At a minimum, lenders should be required to register the pre-possession notice and copy of the security agreement with a relevant authority. Complaints to Consumer NZ and others indicate lenders can fail to issue a pre-possession notice to the debtor. The only "notice" the consumer may have is the arrival of the repossession agent.

27.3 We also want to see a time set on when a pre-possession notice expires. There is currently no timeframe specified in the Act. This means the lender can rely on a notice to take possession even when considerable time has elapsed since it was first issued. The consumer may have made further payments in this period but still face repossession.

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

28.1 Our preference is for a court to take this role. However, we are open to discussion of other options.

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

29.1 The right of entry should be conferred in the Act.

Question 30: 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?

30.1 The requirement for lenders to belong to a dispute resolution scheme is potentially useful. However, as the Ministry of Consumer Affairs has found there is a significant proportion of third-tier lenders who have not joined a dispute scheme.³

30.2 There are also questions about whether the schemes will be accessible to vulnerable consumers facing repossession. These consumers are generally unlikely to use forums such as the Disputes Tribunal and it is doubtful whether they will be any more likely to access financial dispute resolution schemes.

30.3 Lenders should be required to advise consumers of their right to complain to a disputes body. This information should be provided at the time credit is given, and when pre-possession and post-possession notices are given.

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

See response to question 32.

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

31.1 We strongly believe there needs to be enforcement of the Credit (Repossession) Act by an identified body. This role needs to sit with an agency that has the resources to actively police the behaviour of lenders and repossession agents and educate consumers about their rights.

³ Ministry of Consumer Affairs (2011). *Third-tier Lender Desk-based Survey 2011*. Wellington, New Zealand. See <http://www.consumeraffairs.govt.nz/legislation-policy/policy-reports-and-papers/research/Third-tier-Lender-Desk-based-Research-July-2011.pdf>

31.2 The role could be taken on by the Commerce Commission or the Financial Markets Authority (FMA). The Commerce Commission is responsible for other consumer protection legislation such the CCCFA and Fair Trading Act and there is an argument for it to also enforce the Credit (Repossession) Act.

31.3 We would like to see further discussion of the options. A new industry-funded body may be appropriate provided it is independent from the industry.

Thank you for the opportunity to make a submission on this issues paper. If you require any further information, please do not hesitate to contact me.

Yours sincerely

David Naulls
Deputy Chief Executive